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Legal Obligations and Implementation Challenges

Andrea de Guttry
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Foreword by Jean-Pierre Lacroix

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EXTRAS ONLINE

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Foreword

The global security environment remains unprecedently complex. The incidence of violent intrastate conflict has increased dramatically since 2010 and is often interconnected with transnational organized crime and terrorism. Today's conflicts are increasingly protracted and fatal, with a high proportion of civilian casualties being an all too prominent feature. UN peacekeepers—uniformed personnel as well as civilians—are deployed to more and more conflict zones in which there is little peace to keep, and political solutions are stalled. In many of such contexts, the UN flag no longer serves to prevent our men and women from being a target. In 2017 alone, we lost 132 peacekeepers—military, police, and civilian—in the line of duty, the highest number ever recorded. Of these, 17 were civilians.

Yet we are doing our utmost to improve the protection of all of our peacekeepers—civilian and uniformed—to enable us to continue accompanying countries fraught by conflict to achieve peace. As elaborated upon within the UN Charter, the core purpose of the United Nations is to maintain peace and security, to save succeeding generations from the scourge of war. To resolve conflicts and keep the peace, we must engage and interact with the governments and populations that we are mandated to serve. This does not come without risk, nor do we expect it to, but we are dedicated to doing our utmost to mitigate such risks and protect the men and women who serve the United Nations across the globe.

The concept of "duty of care" dates back to the earliest days of the organization. General Assembly resolution 258/II of 3 December 1948 refers to arrangements to be made by the United Nations with the view of ensuring to its agents the fullest measures of protection. The duty of care is a non-waivable responsibility on the part of the organization to mitigate or otherwise address foreseeable risks that may harm or injure its personnel and eligible family members. The number of direct attacks against United Nations premises increased significantly in 2016, with 56 attacks against UN premises. This was an increase from 35 in 2015 and primarily took place where our peacekeeping missions are deployed—in the Central African Republic, Mali, and South Sudan. However, the number of civilian casualties decreased from 23 to 10, which speaks to the efficacy of the collective efforts made by the UN system to strengthen our security.

As we speak of the duty of care, we must remember that, in accordance with the relevant international legal instruments, the protection of United Nations personnel is the primary responsibility of host governments. As the international community continues to call on us to be present in some of the most dangerous conflict environments across the globe, and with overstretched resources, we ask that all Member States commit to protecting our personnel. This is why we are calling on all Member States who have not yet signed the Convention on the Safety and Security of United Nations and Associated Personnel to do so.

We will continue to do our utmost to protect our staff, which is why over four years ago the United Nations initiated a holistic examination of the programmatic need to stay and deliver against the organizational imperative of duty of care for staff in high-risk environments. The product of this effort, reconciling duty of care for UN personnel while operating in high risk environments, provides the basis for a system-wide effort to strengthen the consistency and impact of our 'duty of care' policies and practices.

This pioneering book is an excellent contribution and resource for all those charged with the 'duty of care'. It combines both a scientific analysis of the relevant international regulatory framework and a policy-oriented assessment of the rules and procedures of selected international organizations, among which the UN presents some of the most complex and interesting best practices. The timeliness and relevance of such research cannot be underestimated. I am sincerely grateful to Prof. Andrea de Guttry and his colleagues for their contribution.

New York

Jean-Pierre Lacroix
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Preface and Acknowledgements

This book is the first comprehensive publication on the Duty of Care of International Organizations towards civilian personnel sent on missions. The idea of a research project on this topic stemmed from the recognition of a vacuum in the international legal literature and on the ensuing need to clarify the exact legal obligations that the duty of care imposes on international organizations deploying their civilian personnel in field missions and assignments.[1] This choice was also driven by a sense of urgency. Indeed, the objective to ensure the security, safety and health of civilian personnel sent on mission has become a key concern for practitioners, international organizations and States. In fact, alleged duty of care breaches often entail costly legal disputes for sending international organizations and undermine their reputation as employers, as testified by the growing number of lawsuits brought in recent years on this basis.

As an example of the growing concern by major international organizations towards the issue, one may refer to the creation by the UN, in 2014, of a Working Group on the Duty of Care (in the framework of the High-Level Committee on Management) that was mandated to better identify the specific challenges in this area and to develop strategies to deal with them. This working group adopted a Final Report in 2016 where a comprehensive definition of the duty of care may be found: 'the duty of care constitutes a non-waivable duty on the part of the organizations to mitigate or otherwise address foreseeable risks that may harm or injure its personnel and their eligible family members'.[2] It is an extensive but rather vague notion and one of the purposes of this book is to shed some light on the legal

[1] The term 'missions' is meant to include the whole spectrum of short-term and long-term assignments that civilian personnel of international organizations, under a variety of contractual arrangements, may carry out outside of the international organization headquarters or of their normal place of activity. Examples of such missions might range from a one-day country visit, to a weeks-long electoral observation mission, to long-term deployment in a peace-keeping operation.

[2] HLCM Working Group on Reconciling Duty of Care for UN personnel while operating in high risk environments (2016) CEB/2016/HLCM/11, para 8.

foundation and to spell out the precise content of the duty of care obligations incumbent on international organizations towards their personnel sent on mission.

The book presents the results of a research project that was carried out by three main research units (Scuola Superiore Sant'Anna, University of Turin and University of Florence) with a few selected contributions by researchers belonging to other academic institutions and by practitioners. Moving into uncharted waters, the research was organized as a collective enterprise and it was carried out through: (i) constant exchange of information amongst the contributors and (ii) periodical workshops in order to share the results of the work in progress, to discuss them and to draw the way forward. A first workshop was held at the Scuola Superiore Sant'Anna in Pisa on 23 March 2017 and gathered together most of the authors in order to better elucidate the aims of the research and to find a common agreement on key aspects to be highlighted in the analysis of the practices and policies of international organizations, in light of interim findings. A two-day workshop was held at Scuola Superiore Sant'Anna in Pisa on 16–17 November 2017: the objective of this meeting was the informal presentation of draft chapters to practitioners, both international organizations' officials and duty of care experts and consultants, in order to discuss with them the main findings, to collect comments and inputs of all participants and to finalize the book. The editors wish to thank the international organizations' officials, experts and consultants who participated in the latter workshop giving their precious comments and remarks of the result of the research: Michael Brzezicki (Duty of Care Consultant), Francesco Caleprico (EEAS), Lisbeth Claus (Willamette University), Laurent Fourier and David Gold (International SOS Foundation), Maarten Merkelbach (Duty of Care Consultant), Martin Molloy (DFID, UK), Sergio Sansotta (Council of Europe), Lisa Tabassi (OSCE).

Taking stock of the results of the research, the book is divided into three parts. Part I is devoted to describe the main features of the duty of care of international organizations under international law and set the theoretical background to better appraise the analysis of practice and jurisprudence in the field. Chapter 1 (Armenes, Arvizu, Aswad, Fanuzzi, Frettoli, Moratto, Strippoli) provides the reader with an overview of ethical, reputational and economic challenges posed by the duty of care to international organizations; many of these challenges, debated with legal experts and practitioners, are addressed in detail in the various sections of the book.

Andrea de Guttry, in Chap. 2, undertakes a comparative analysis of the relevant international practice and jurisprudence with the aim of identifying the precise contours of the duty of care of international organizations towards their personnel sent on mission. On the basis of this thorough study, a few remarkable conclusions were set out: the legal foundation of the duty of care incumbent on international organizations is to be found in international human rights law that imposes on international organizations obligations to respect the rights to life, integrity and healthy working conditions of their employees sent on mission. Chapter 2, building on an unprecedented review of the jurisprudence of the administrative tribunals of international organizations, also clarifies the scope and content of the duty of care of international organizations, identifying ten relevant aspects of the duty. Chapter 2 was a benchmark both for authors that examined the practice of international

organizations in Part II and for those who focused on the main questions connected to the fulfillment of human rights obligations in Part III.

Another crucial preliminary issue is tackled in Chap. 3 (Spagnolo), which deals with issues of attribution of conduct and responsibility between international organizations and their member States. These critical issues are also examined in depth in Chap. 4 (by Gasbarri), through the lenses of the relationship between host States and sending international organizations. The author concludes that the sending organization and the host State share a responsibility in fulfilling duty of care obligations and that specific agreements between international organizations and host States are the most preferred form of implementation. The need for including Chap. 5 (by Buscemi) stemmed from the consideration that member States of international organizations are not relieved from their own obligations under international human rights law when they acquire such membership. The author argues that States are required to act within international organizations in a manner that fosters respect for human rights in general and, more specifically, for duty of care obligations towards the civilian personnel of those organizations. The issue of shared responsibility amongst States and international organizations proved to be one of the crucial issues to be clarified both with respect to the role of host States and to the duties of States in their quality of members of international organizations. In the final article of Part I (Chap. 6), Vania Brino takes into account the role of international organizations as multi-faceted employers and outlines the different characteristics of the duty of care for different types of employment contracts.

Part II is dedicated to the analysis of the legal and practical challenges faced by international organizations in implementing their duty of care obligations. In light of the findings of Part I concerning the constitutive elements of the legal concept of the duty of care, the authors of Part II carefully examine the internal regulations and the practices of a variety of international organizations, as well as the relevant jurisprudence (mainly of internal administrative tribunals), with the main goal of verifying whether and to what extent specific duty of care obligations are discharged with regard to civilian personnel sent on mission. Selected international organizations include: the United Nations (Chap. 7 by Creta), the European Union (Chap. 8 by Saluzzo), the NATO (Chap. 9 by Vierucci and Korotkikh), the OSCE (Chap. 10 by Russo), the Council of Europe (Chap. 11 by Magi), the Organization of American States (Chap. 12 by Soares Nader and Dutra), the African Union (Chap. 13 by Darkwa) and the World Bank (Chap. 14 by Viterbo). The choice was to give this set of chapters a similar structure in order to share a common pattern of analysis and to draw attention to similarities and differences amongst different international organizations. To complete this part of the book, Chap. 15 by David Gold sets out a series of practical tips for the implementation of the duty of care through the policies and procedures of international organizations.

Part III examines the duty of care as a corollary of States' duty to protect human rights and its implications for international organizations. Chapter 16 (Poli) gives an overview of human rights obligations incumbent on international organizations

contending that they include a positive dimension and identifying their content and the extent to which the principle of specialty might affect them. In Chap. 17, Chiara Macchi outlines the principles that ground international organizations' human rights jurisdiction and concludes that the duty of care places on sending international organizations positive obligations towards their civilian personnel wherever they carry out their tasks and whatever the formal nature of the employment relationship between the organization and the individual. The final chapter of Part III (Chap. 18 by Capone) takes into account the issue of redress for civilian personnel who were victims of a breach of duty of care obligations. The author also discusses the residual application of States' diplomatic protection and of international organizations' functional protection, in cases where the injury suffered by the staff member engages the interests of the State of nationality, the international organization, or both.

The final conclusions are drawn by Edoardo Greppi, highlighting the main findings of the research and at the same time indicating the need for a further research agenda on this topic, in light of a rapidly evolving background and of the growing practice and jurisprudence in the field.

On the basis of the analysis conducted in Parts I, II and III, a set of draft Duty of Care Guiding Principles for International Organizations (de Guttry) is included as Annex I in the book with the aim of facilitating the work of international organizations' senior management in bringing relevant regulations, policies and practices in line with their duty of care obligations. Annex II includes a table of cases in order to provide the reader with a comprehensive overview of the relevant jurisprudence.

In conclusion, the Editors wish to express their deep and sincere gratitude to all those who contributed, with their competences, skills and eagerness to this volume, in the first place all the authors who participated in the research project sharing their knowledge and expertise. The Editors and the Authors seize the opportunity to thank the officers of international organizations who furnished invaluable materials and information to carry out this part of the research. The Editors are also very grateful to the publisher, T.M.C. Asser Press, in particular to Frank Bakker and Kiki van Gurp, for their constant support and advice. Finally, the Editors wish to thank Anna Riddell for her precious copy editing work and her constructive suggestions.

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Abbreviations

ACHR	American Convention on Human Rights
ACmHPR	African Commission on Human and Peoples' Rights
ADB	Asian Development Bank
AfrCHR	African Charter on Human and Peoples Rights
AMISOM	African Union Mission in Somalia
AsDBAT	Asian Development Bank Administrative Tribunal
AU	African Union
AUC	African Union Commission
BASE	Basic Awareness in Security Training
CAT	UN Committee Against Torture
CEB	UN System Chief Executives Board for Coordination
CEDAW	UN Committee on the Elimination of Discrimination Against Women
CERD	UN Committee on the Elimination of Racial Discrimination
CESCR	UN Committee on Economic, Social and Cultural Rights
CFSP	Common Foreign and Security Policy
CIVCOM	Committee for Civilian Aspects of Crisis Management (EU)
CoE	Council of Europe
CRC	UN Committee on the Rights of the Child
CSDP	EU Common Security and Defence Policy
DARIO	Draft Article on the Responsibility of International Organizations
DARSIWA	Draft Articles on the Responsibility of States for Internationally Wrongful Act
DPKO	UN Department of Peacekeeping Operations
DRC	Democratic Republic of Congo
DSS	UN Department of Safety and Security
ECDC	European Centre for Disease Prevention and Control
ECHR	European Convention of Human Rights
ECJ	European Court of Justice

ECMWF	European Centre for Medium-Range Weather Forecasts
EComHR	European Commission of Human Rights
ECOSOC	UN Economic and Social Council
ECtHR	European Court of Human Rights
EEAS	European External Action Service
EEC	European Economic Community
ESA	European Space Agency
ESDP	European Security and Defence Policy
ETOs	Extraterritorial Human Rights Obligations
EU	European Union
EUAM	EU Advisory Mission
EUBAM	EU Border Assistance Mission
EUCAP	EU Capacity Building Mission
EULEX	European Union Rule of Law Mission in Kosovo
EUMM	European Union Monitoring Mission in Georgia
EUPOL COPPS	EU Co-ordinating Office for Palestinian Police Support
EUPOL	EU Police Mission
EUTM	EU Training Mission
FAO	UN Food and Agriculture Organization
HLCM	UN High-Level Committee on Management
IACmHR	Inter-American Commission of Human Rights
IACtHR	Inter-American Court of Human Rights
IAEA	International Atomic Energy Agency
IASMN	Inter-Agency Security Management Network
IBRD	International Bank for Reconstruction and Development
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICSC	International Civil Service Commission
ICSID	International Centre for Settlement of Investment Disputes
ICTY	International Criminal Tribunal for the Former Yugoslavia
IDA	International Development Association
IFAD	International Fund for Agricultural Development
IFC	International Finance Corporation
ILA	International Law Association
ILC	International Law Commission
ILO	International Labour Organization
ILOAT	Administrative Tribunal of the International Labour Organization
IMF	International Monetary Fund
MIGA	Multilateral Investment Guarantee Agency
MINUSTAH	UN Stabilization Mission in Haiti
MoU	Memorandum of Understanding

NATO	North Atlantic Treaty Organization
NGO	Non-Governmental Organization
NRC	Norwegian Refugee Council
OAS	Organization of American States
OCHA	UN Office for the Coordination of Humanitarian Affairs
OECD	Organisation for Economic Co-operation and Development
OJEU	Official Journal of the European Union
OSCE	Organization for Security and Co-operation in Europe
PCIJ	Permanent Court of International Justice
SAFE	Security Awareness in Fragile Environments training
SHAPE	Supreme Headquarters Allied Powers Europe (NATO)
SOFA	Status of Forces Agreement
SOMA	Status of Mission Agreement
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UN	United Nations
UNAdminT	UN Administrative Tribunal
UNAMI	UN Assistance Mission for Iraq
UNAT	UN Appeals Tribunal
UNBPG	Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law
UNCLOS	United Nations Convention on the Law of the Sea
UNDT	UN Dispute Tribunal
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNGA	UN General Assembly
UNHCR	United Nations High Commissioner for Refugees
UNMIK	UN Interim Administration Mission in Kosovo
UNMIS	UN Mission in Sudan
UNMISS	UN Mission in South Sudan
UNSC	UN Security Council
UNSMS	UN Security Management System
UNSSSIP	UN Secretariat Safety and Security Project
UNTAES	UN Transitional Administration for Eastern Slavonia, Baranja and Western Sirmium
UNTAET	UN Transitional Administration in East Timor
US	United States
WB	World Bank
WBAT	World Bank Administrative Tribunal
WHO	World Health Organisation
WTO	World Trade Organization

Part I
The Duty of Care of International Organizations: Setting the Scene

Chapter 1
International Organizations and Alleged Duty of Care Breaches: A Growing Ethical, Reputational and Financial Challenge

Gaia Aurora Armenes, Abraham Jesus Arvizu III, Sami Aswad, MariaSole Fanuzzi, Fabio Frettoli, Alessia Moratto and Valentina Strippoli

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Annex II—the Table of Cases—can be accessed online here: http://extras.springer.com/.

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Abstract The interest of the international community in the duty of care of international organizations towards their employees has continually increased over the course of the last decade. As field operations become more complex, the security environment more volatile and the dangers and risks more diversified, greater attention has been paid to duty of care principles. The overall objective of this chapter is to present evidence of the growing ethical, financial and reputational challenges that international organizations face as a consequence of alleged breaches of their duty of care towards their civilian personnel. The chapter gives a quantitative and qualitative account of the rising trend of the international jurisprudence in addressing issues related to breaches of the duty of care obligation, provides a general overview of the literature devoted to the topic and a quantitative analysis of persons injured and/or fatalities. Furthermore, it addresses the reputational impact on the organization in the aftermath of an alleged breach and the financial consequences. It also explores the issues of safety, health, well-being, stress and work/life balance handled by the Office of the UN Ombudsman and Mediation Services. Specific datasets regarding the type of insurance provided by international organizations to their employees working in dangerous areas are, for the most part, not publicly available. Their circulation is therefore a calling to a higher responsibility that would allow international organizations to adopt common

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standards and better understand the main trends regarding the implementation of duty of care practices and guidelines.

Keywords International organizations · duty of care · United Nations · Accountability · Reputational damage · Aid Workers · Safety · Security · Wellbeing

1.1 Quantitative Figures: Jurisprudence

In the course of the last decade, the interest of the international community in the topic of the duty of care of international organizations towards their employees has been consistently increasing. In cases of international organizations managing and delivering field missions in security-wise volatile environments in particular, this issue has been brought even more into the spotlight due to the dangers and the risks that employees have to face in their daily work.

In this light, it is not surprising that the analysis of the international jurisprudence reveals this trend in a clear-cut fashion. Both trials brought before international courts by employees alleging the breach of the duty of care, and the international organizations responsible for the setting and the delivering of field missions, grew in terms of number and frequency.

The following section gives an example of this trend, processing data concerning the cases brought before the UN Dispute Tribunal (UNDT) and UN Appeal Tribunal (UNAT), the NATO Administrative Tribunal, and the Court of Justice of the European Union (CJEU). As to the methodology followed in presenting the information, data searches and collection have been carried out focusing the attention on the use of the phrases 'duty of care' and 'duties of care'. Nevertheless, issues regarding the precision of the wording of 'deployed' in official documents should not be overlooked.

Indeed, International Tribunals and Organizations, as well as the relevant literature, until now do not seem to have adopted a unique wording system for the subject at hand. On the contrary, the terminology used varied across different document types and sources. Additionally, the use of a variety of different languages in several international legal systems, and oftentimes the resort to translations of the very same act, has produced a major amount of uncertainty in this field.

A further warning should be kept in mind. The use of the expression 'duty of care' itself very often does not refer to the same legal area or concept. In fact, this expression can be considered to refer to different aspects of the content of the very same principle. On the one hand, the term can be used to refer to contractual obligations. For instance, the alleged violation of the obligation of the 'duty of care' by a given international organization can be claimed by an individual, should her/his contractual rights have been overturned. Sometimes the so-called 'duty of care' refers to the obligations of international organizations towards their employees in the field of labour law and job contracts. Further, in the case of the Judgment

Haimour and Al Mohammad (Appellants) v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (Respondent), issued on 28 October 2016, the violation of the 'duty of care' referred to a case concerning the Appellant's job contract and its respect by the Respondent, where:

> The Appellants' interpretation of PD No. A/9/Rev. 9 as imposing a 'Duty of Care' on the Agency to offer the affected staff members 'a suitable role which they should not have to apply to […] or which they could be trained to qualify for' cannot be supported. The Agency complied with its obligation by identifying alternative posts, organizing several meetings with the staff members on provisional redundancy and allowing Ms. Haimour to volunteer with the human resources department so she could become familiar with its work.

On the other hand however, a lawsuit alleging the violation of the 'duty of care' could be filed before an international court also in the case of severe damage suffered by an individual, such as in cases of death or kidnapping of an officer deployed in the field to perform her/his mandate. In such a circumstance, the reported violation of the duty of care could be proved by demonstrating the lack of measures adopted by the sending organization to secure and guarantee the safety of the personnel working on the ground. In this instance, the interest that is behind the allegation of violation of the 'duty of care' is a far more sensitive one, which steps out from the labour sector and overflows into criminal law.

Furthermore, the current research resorts extensively to English language sources. In the following pages, the authors of this chapter will go through the analysis of a variety of documents. It must be noted that, although this research has a narrower term of reference, all the concerns highlighted above also apply in the same way to the non-English sources. The main conclusion of this analysis has therefore not altered, also highlighting the growing trend of interest in the duty of care.

That having been said, the last remark leads us to briefly present the outcome of our survey. As far as the UN Justice System (UNJS) is concerned, the cases included in the present data analysis amount to 46 in total. Among them, 39 are judgments, whilst seven are orders. Out of the 39 judgments, 27 come from the UN Dispute Tribunal (UNDT), whereas 12 were issued by the UN Appeal Tribunal (UNAT). The pace at which the UNJS was working during the period 2010–2017 is of great interest. Whilst in the first five-year period the UNDT issued 14 acts in which the duty of care was mentioned, in just the last two years, namely 2016 and 2017, reference to the concept at hand has already amounted to 13 cases as of the end of October 2017.[1] Thus, it is likely the number will be far higher by the end of the second five-year period of the decade. As the line chart below shows, the trend is significantly rising. It is remarkable to note in conclusion that the last judgment issued by the UNDT dates back only to 28 September 2017,[2] which is additional

[1] UN Dispute Tribunal: http://www.un.org/en/oaj/dispute/judgments.shtml. Accessed 14 November 2017.

[2] UNDT, Buckley v. Secretary-General of the United Nations, 28 September 2017, Judgment No. UNDT/2017/078.

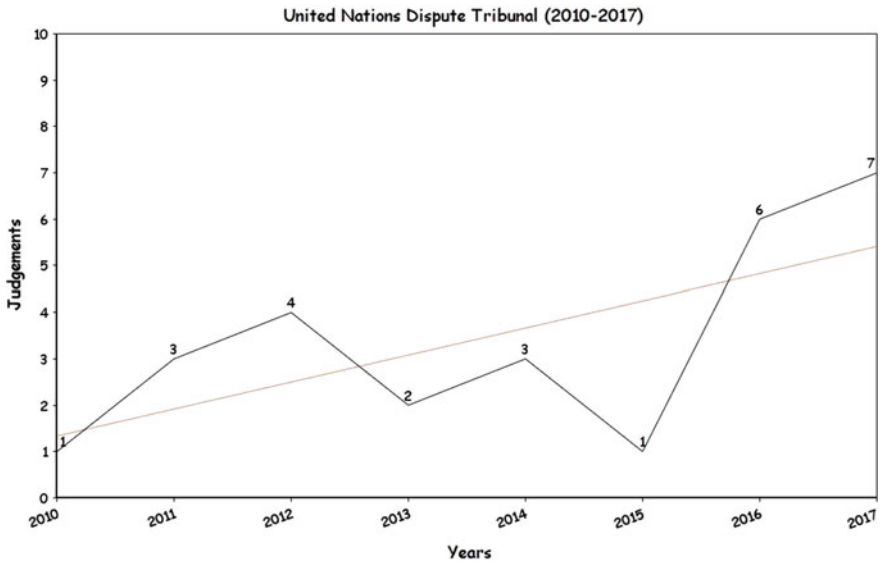

Fig. 1.1 United Nations Dispute Tribunal (2010–2017) [*Source* UNDT, http://www.un.org/en/oaj/dispute/judgments.shtml.], N.B.: X Axis: Years; Y Axis: Judgements. In red, the general trend drawn from the dataset

proof of the concern felt in the international jurisprudence, and beyond, around the importance of the respect of the duty of care (Fig. 1.1).

A slight increase in the mention of the duty of care obligation has also been reported in the jurisprudence of the UN Appeal Tribunal (UNAT), whose activity was examined over the same period 2010–2017, and same applies to the study of the pace followed in issuing instrumental acts, like the orders. In conclusion, a comparative analysis of all the components in the survey shows that the UNDT is responsible for around the 59% of the relevant jurisprudence, while the UNAT covers 26%, leaving the UNDT/Orders section a portion equivalent to 15% of the cases (Fig. 1.2).

As to the NATO Administrative Tribunal, the increasing rate in reporting of issues concerning the obligation of duty of care can also be clearly established based on the survey conducted. In the timeframe 2013–2016, a total of 34 cases were brought.[3] While combining 2013 and 2014 gives us a total of 13 relevant cases, the sum of the jurisprudence produced in the following two years almost doubles, reaching 21 cases. As highlighted in the chart below, the trend is steady, although a major challenge in this survey has been the lack of availability of historical information concerning the NATO Administrative Tribunal jurisprudence (Fig. 1.3).

[3] NATO Administrative Tribunal Judgments. https://www.nato.int/cps/en/natohq/topics_114072.htm. Accessed 14 November 2017.

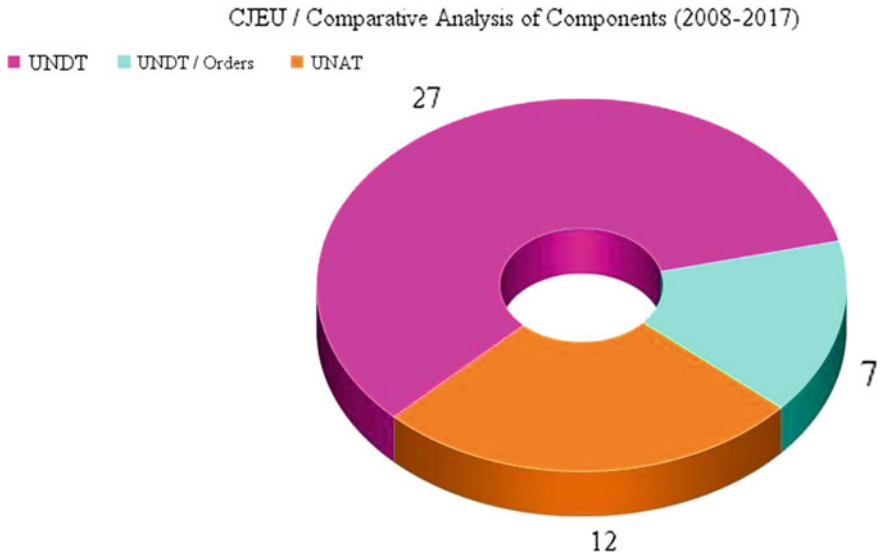

Fig. 1.2 UNJS/Comparative Analysis of Components (2008–2017) [*Source* UNDT, http://www.un.org/en/oaj/dispute/judgments.shtml; UNAT, http://www.un.org/en/oaj/appeals/judgments.shtml.]

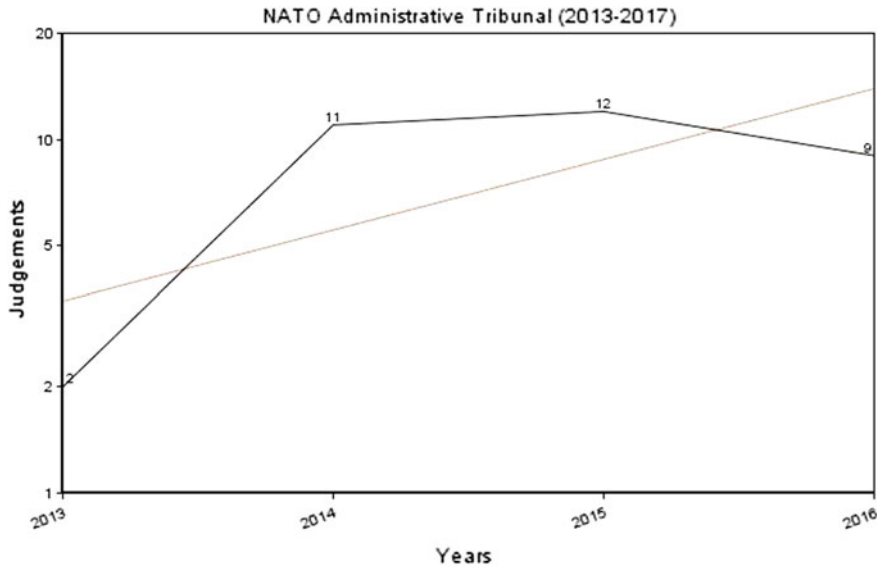

Fig. 1.3 NATO Administrative Tribunal (2013–2017) [*Source* NATO Administrative Tribunal Judgments, https://www.nato.int/cps/en/natohq/topics_114072.htm.], N.B.: X Axis: Years; Y Axis: Judgements. In red, the general trend drawn from the dataset

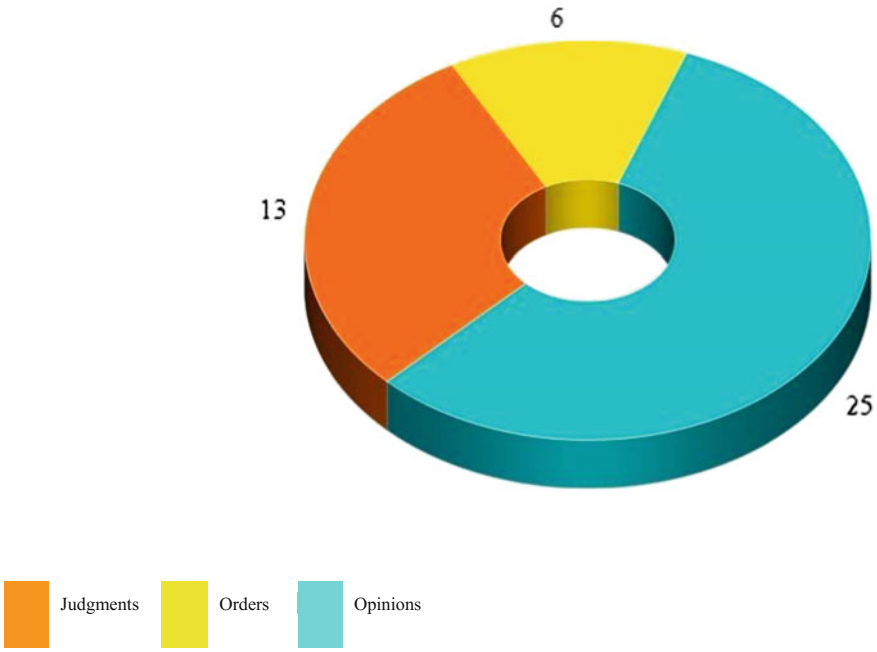

Fig. 1.4 CJEU/Comparative Analysis of Components (2008–2017) [*Source* CURIA, https://curia.europa.eu/jcms/jcms/j_6/en/.]

Finally, the Court of Justice of the European Union (CJEU) is a distinct example of what has been demonstrated so far. Opinions were given in 25 cases, judgments in 13 cases and orders in 6 cases in the analysed period of 2008–2017. As is clear from the chart below, the majority of mentions of the duty of care can be found in documents with no judicial force to settle a case, e.g. opinions. Nevertheless, even in this light, they are an important part of the analysis that show how the sensitivity of the legal world is increasing towards the topic of the duty of care (Fig. 1.4).

In conclusion, the present study has highlighted how the international jurisprudence is becoming increasingly more aware and concerned at protecting the respect of the obligation of the duty of care by international organizations towards their personnel deployed in the field. At a time where instability and new security challenges are fast emerging or existing ones worsening, this deeper sensitivity will most likely soon disclose the need for better and more extensive policies to be adopted in the international arena to secure the safety and wellbeing of humanitarians and peace actors worldwide (Fig. 1.5).

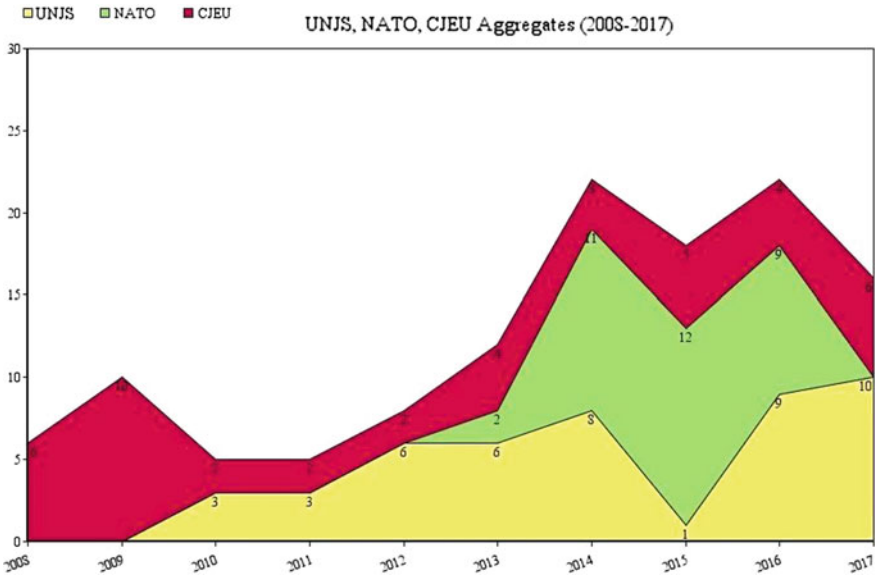

Fig. 1.5 UNJS, NATO, CJEU Aggregates (2008–2017) [*Source* CURIA, https://curia.europa.eu/jcms/jcms/j_6/en/; NATO Administrative Tribunal Judgments, https://www.nato.int/cps/en/natohq/topics_114072.htm; UNDT, http://www.un.org/en/oaj/dispute/judgments.shtml; UNAT, http://www.un.org/en/oaj/appeals/judgments.shtml], N.B.: X Axis: Years; Y Axis: Judgements, Orders and Opinions. In red, the general trend drawn from the dataset

1.2 Overview of the Available Literature

The increase of international missions and personnel being deployed abroad over the last thirty years has created the need for several actors involved in international operations to set up codes of conduct or useful manuals both for employees and for the sending international organization. Two of the first organizations to be concerned with a proper working environment when operating abroad were the International Federation of Red Cross and Red Crescent Societies (IFRC) and the International Committee of the Red Cross (ICRC) who jointly prepared a Code of Conduct in 1994.[4] The last three annexes of the Code contain recommendations to governments of affected States, donor governments and intergovernmental organizations with the aim of ensuring that operators can work in a safe environment, facilitating access to the war zone and seeking and providing information to the humanitarian operators. The NGO People in Aid in 1997 drafted a similar code with 7 key principles. The last and the most important one affirms that 'We have a duty

[4] ICRC (1994) Code of Conduct for the International Red Cross and Red Crescent Movement and Non-Governmental Organisations (NGOs) in Disaster Relief. https://www.icrc.org/eng/assets/files/publications/icrc-002-1067.pdf. Accessed 21 February 2018.

of care to ensure the physical and emotional well-being of our staff before, during and on completion of their period of work with us'.[5]

World Association of Non-Governmental Organizations (WANGO) elaborated the most used Code of Ethics and Conduct for NGOs in 2004.[6] A handbook analysis on the different 'Duty of care' approaches, tools and policies of NGOs is the fruit of the cooperation between a health services company and NGOs[7] with a particular focus on the most successful models adopted by NGOs.

Indeed, NGOs are the main actors interested in developing guidelines on the duty of care.[8] The European Interagency Security Forum, a security network which currently represents 85 Europe-based humanitarian NGOs, recently published a review of the Dennis v Norwegian Refugee Council (NRC) ruling, a case involving the kidnapping of a Norwegian Refugee Council employee. The case was emblematic and the present authors use it as a warning for all international organizations, pointing out that 'It makes sense for an organization to embrace and invest in duty of care rather than expend efforts to avoid it'.[9]

The growth of the interest in the duty of care has been in parallel with the increase of normative value judgements in judicial decision-making. Some scholars used these judgments as an evidence to reinforce their position on the emergence of a customary international law norm that all duty of care obligations extend to international workers.[10]

A growing literature is also available on the comparison of different risk management strategy models.[11] Some authors have felt the need to highlight that a duty of care is not equivalent to a duty to try to avoid harm but it requires instead the capacity to respond in an efficient way to menaces towards international employees.[12] Together with the interest of NGOs in the subject, a vast number of articles on the duty of care have been published in recent years; mostly relating to employees of international enterprises in general, business travellers and international assignees[13] but literature relating specifically to the duty of care of

[5] People in AiD 2003, p. 20.

[6] WANGO 2004.

[7] Global Center for Healthy Workplace 2017.

[8] ENTRi Handbook 2016; Klamp & Associates 2008; Claus 2009; Humanitarian Practice Network 2010; worth to be mentioned is also the contribution of Governmental Organisations like Irish Aid which developed a guide for NGOs, Irish Aid 2013 and ECHO, who published a Generic security Guide for Humanitarian Organisations in 2004; InterAction Security Unit Security Risk Management, NGO Approach. https://www.interaction.org/sites/default/files/2581/NGO_SRM_APPROACH_FINAL_SAG_APPROVED.pdf. Accessed 21 February 2018; EISF 2017.

[9] Merkelbach and Kemp 2016; The legal proceeding against the NRC called the attention of further scholars. See Hoppe and Williamson 2016.

[10] Mathiason 2013.

[11] Gjerdrum and Peter 2011; Fuentes et al. 2011; Williamson 2007; Raz and Hilson 2005.

[12] Herstein 2010.

[13] Mathiason 2013; Pafford and Macpherson 2012; Spamann 2016; Cassel 2016.

international organizations is scant.[14] Some narrow-scope studies do exist,[15] mostly conducted or commissioned by international organizations themselves.[16]

The increase of the literature related to the duty of care is a certain sign of the need to keep open the debate on the best practices to be adopted by international organizations and NGOs in order to improve performance and tools to protect workers deployed abroad.

1.3 Number of People Injured/Fatalities

Against a background of an increased number of incidents suffered by internationally deployed personnel, more statistical data has been accumulated and analysed over the past 20 years by States, international organizations, NGOs and research institutes. The subject has also been a point of attraction for the international media outlets, which have provided broader dissemination of the information as well as wider acknowledgement of the seriousness of the problem.

Although international organizations tend to keep any information related to the injured/killed personnel confidential, other organizations as well as some institutes constantly publish data that contain numbers of casualties, locations of the incidents, situational attribution and other pertinent information.

For instance, the Department for Peacekeeping Operations of the United Nations (UN) has a database on its website where 3,692 fatalities have been logged from its creation in 1948 up to the end of 2017.[17] The underlying causes of those fatalities vary, including accidents, malicious acts, illness and other reasons. The victims are chiefly military personnel, followed by local workers, police officers, international civilian staff and military observers respectively.[18] The sensitive nature of peacekeeping and peacebuilding missions and the locations they operate in, are key factors contributing to the high loss of life.

Another example is the recording of employed humanitarian workers who were subject to major attacks and other incidents in the period between 1997 and 2017 in the Aid Worker Security Database (AWSD).[19] In total, 2,344 incidents were reported to have been committed against humanitarian workers of the UN, ICRC, IFRC, National Societies of the Red Cross/Red Crescent, and international and

[14] de Guttry 2012; de Guttry 2015; Security Management Initiative 2011.

[15] de Guttry 2012; de Guttry 2015; Security Management Initiative 2011.

[16] Chief Executives Board for Coordination (UN) 2014; Chulkov 2011.

[17] UN Peacekeeping, Fatalities. https://peacekeeping.un.org/en/fatalities. Accessed 30 January 2018.

[18] Ibid.

[19] The Aid Worker Security Database (AWSD), Security incident data. https://aidworkersecurity.org/incidents/search. Accessed 30 January 2018.

local NGOs.[20] Of 4,370 victims, 699 were international employees, while the rest were nationals of the countries where the attacks occurred. The other classification of the 4,370 victims is based on the outcome of the attack, whereby 1,671 were killed, 1,494 injured and 1,205 were kidnapped.

It is axiomatic that the highest number of attacks took place in countries with poor security profiles due to armed conflicts, generalised violence, high crime rates and the spread of terrorism, such as Afghanistan, Somalia, Sudan, South Sudan and Syria (these five countries account for more than 30% of incidents against humanitarian workers in the last 20 years worldwide).[21]

The UN Department of Safety and Security (UNDSS),[22] a specialised agency dealing with the safety and security of UN staff, analyses the trends of the security incidents encountered by UN personnel based on types of incidents. According to the UN agency, the five types of incidents chiefly recorded from 2011 to 2016 were robbery, burglary of residence, intimidation, injuries and fatalities from safety and security incidents, and arrest and detention of UN staff members.[23] From 2012 to 2015, the UNDSS estimated an increase of 39% in the number of non-family duty stations, meaning international workers of the UN are not allowed to bring their family members with them to their duty stations due to the absence of conducive security conditions.[24]

Although the above data does not spell out the cases where the duty of care was neglected and the cases where it was respected, they can still be regarded as a way of understanding the magnitude and nature of the perils that international workers may be subject to while they serve their assignments abroad.

1.4 Reputational Issues

Despite the fact that it is difficult to quantify the reputational damage suffered by international organizations in breach of their duty of care towards their civilian personnel, it is evident that reputation plays an important role. This is particularly true in terms of international organizations' legitimacy and credibility. As a matter of fact, actions and omissions of international organizations are under constant scrutiny by NGOs, scholars and academia, governments, media, global public opinion and other actors. Strong allegations that international organizations are

[20] Ibid.

[21] Ibid.

[22] The UNDSS, established on 01/01/2005 by the UNGA Resolution A/RES/59/276 (2004), is responsible for providing leadership, operational support and oversight of the security management system to enable safe and efficient conduct of the programmes and activities of the UN System.

[23] UN Department of Safety and Security, Security Environment. https://www.un.org/undss/content/security-environment. Accessed 20 February 2018.

[24] Ibid.

failing to meet their legal and moral obligations, including those aimed at preserving the security, health and safety of their civilian staff deployed abroad, pose a serious threat to international organizations' reputation and legitimacy. This, as a consequence, can hamper the effectiveness of international organizations action in different ways. The success of the actions of international organizations is heavily dependant on voluntary cooperation and support of their member States,[25] as well as on the expertise and professionalism of their workforce. Reputational loss can have a detrimental effect on the international organization's ability to secure cooperative and supportive behaviour from its member States.[26] Even more so, failure to meet legal obligations can undermine the reputation of the IO as an employer and lead to difficulties in recruiting and retaining highly qualified personnel and contractors, not to mention the increasing legal and economic impact of lawsuits presented on such a basis.[27]

In order for reputation to act as leverage on the behaviour of international organizations, their actions need to be constantly monitored and kept under the spotlight. The case of the cholera outbreak in Haiti is a valuable example of how pressure exerted by external actors (scholars, human rights experts, media, NGOs and governments alike) on international organizations can lead the organization to significantly shift its public discourse in order to minimise the impact on its reputation.[28] The presence of peacekeepers from Nepal (a country endemically affected by cholera) within the UN Stabilisation Mission in Haiti (MINUSTAH), coupled with evidence of mismanagement and disposal of organic waste at the base, created a solid link between the UN mission and the cholera outbreak in the country. Although evidence started to emerge in 2010, the UN has continually refused to acknowledge any kind of responsibility for the cholera epidemic. As asserted by Pavoni,

> that posture has been translated into stone-wall tactics, an absence of transparency and inexplicable silences, refusals to acknowledge responsibility for the deaths and infections despite overwhelming evidence, and […] indefensible legal argumentation purportedly ruling out any duty to provide redress to the victims on the part of the UN.[29]

In September 2014 some UN Human Right Council (HRC) experts addressed a letter of allegation to the Secretary General[30] (SG) raising concerns about, inter alia, the denial of liability and lack of compensation to the victims along with the dismissal of 5,000 cases by the UN Office for Legal Affairs, which were considered

[25] Daugirdas 2016.

[26] Daugirdas 2014, pp. 991–1018.

[27] de Guttry 2012, p. 263; de Guttry 2015, p. 673.

[28] Katz J M (2016) U.N. Admits Role in Cholera Epidemic in Haiti https://www.nytimes.com/2016/08/18/world/americas/united-nations-haiti-cholera.html. Accessed 30 January 2018.

[29] Pavoni 2015, pp. 19–41.

[30] Joint Letter of Allegation from the Special Rapporteur on Adequate Housing, the Independent Expert on Haiti, the Special Rapporteur on Health, and the Special Rapporteur on Water and Sanitation, 25 September 2014, Case No HTI 3/2014.

non-receivable under Section 29 of the General Convention on the Privileges and Immunities of the UN (GC) as they would lead to review of policy and political matters.[31] The long standing judicial battles of Haitian victims and their families before the US courts has also left the UN legal responsibility unblemished. In Georges vs. UN[32] the court held that it lacked jurisdiction as the UN has absolute immunity from suit under Section 1.2 of the GC, unless the UN expressly waives such immunity.[33] In the opinion of Judge Oetken 'immunity must likewise be afforded to the UN in situations characterised by a complete absence of individual remedies'.[34] Although the moral responsibility was eventually acknowledged by the SG in 2016, the organization's legal position did not change, continuing to claim absolute immunity from legal action.[35] Interestingly, the financial impact of redress demanded by families of the people who died and were affected would reach 40 billion dollars.[36]

Along with financial considerations however, the increasingly important role of reputation for international organizations needs to be stressed. As further proof of the weight held by reputation it is worth taking a closer look at the change of UN public discourse after years of institutional denial of responsibility. In December 2016, the UN SG admitted that UN peacekeepers from Nepal brought cholera into the country leaving at least 10,000 people dead and 800,000 affected.[37] With reference to the importance of reputational issues, Ban Ki Moon's remarks to the General Assembly on a New Approach to Address Cholera in Haiti are emblematic in this regard: the UN's handling of the epidemic 'leaves a blemish on the reputation of UN peacekeeping and the organisation worldwide.' Furthermore he urged member States to 'seize this opportunity to address a tragedy that […] has damaged our reputation and global mission'.[38]

The fact that international organizations are placing a growing attention on the duty of care is found in evidence of numerous official statements, speeches and internal documents. An online key-term search on several international organizations' official websites has shown that most surveyed international organizations yield results under the 'duty of care' exact keyword search. Among these, evidence

[31] Letter dated 5 July 2013 from Patricia O'Brien, Under Secretary-General for Legal Affairs, addressed to Brian Concannon, Institute for Justice and Democracy in Haiti. Available at: http://www.ijdh.org/wp-content/uploads/2013/07/20130705164515.pdf. Accessed 31 January 2018.

[32] US District Court for the Southern District of New York, Georges et al. v. United Nations et al., Opinion and Order, 9 January 2015, 13-CV-7146 (JPO).

[33] Pavoni 2015, pp. 19–41.

[34] Pavoni 2015, p. 30.

[35] Daugirdas 2016.

[36] Katz 2016.

[37] The Guardian (2016) UN admits for first time that peacekeepers brought cholera to Haiti. https://goo.gl/vSbUvw. Accessed 27 January 2018.

[38] UN Secretary General (2016) Secretary-General's remarks to the General Assembly on a New Approach to Address Cholera in Haiti. https://goo.gl/tZoyts. Accessed 27 January 2018.

was found within the World Bank Online Search (77,100,000 results),[39] the UN Enterprise Search (935 results),[40] the Organization for Security and Cooperation in Europe (OSCE) website (108 results),[41] the Council of Europe (CoE) (394 results)[42]and the Organization of American States (OAS) (64 results).[43]

However, it is interesting to note that some international organization websites have made no use of the 'duty of care' expression, which may indicate that the concept has not become part of the official lexicon or it might be communicated to the public in a different fashion. Specifically the exact keyword search within the website of the African Union,[44] the European Union,[45] and the North Atlantic Treaty Organization (NATO)[46] returned no results.

Nonetheless, caution must be exerted in analysing the above mentioned data as each website employs different research criteria and time references. This renders difficult any comparability of data. Furthermore, such analysis is of a quantitative nature and it is not possible to assert that all results yielded under the key-term search refer to the same concept of duty of care relevant to the present chapter.

1.4.1 Media Coverage

Although it is more challenging to find media coverage with references to alleged duty of care breaches attributable to international organizations, some cases related to the safety of aid workers make it to mainstream media and put the issue of security in the aid industry under public scrutiny. Thus, in 2015, the Oslo court in a landmark ruling found the Norwegian Refugee Council guilty of gross negligence in its handling of the kidnapping of Steve Dennis and three other staff members in Dadaab, Kenya in 2012. Steve Dennis was kidnapped along with three others as they drove in a convoy through Dadaab camp. After four days of being marched towards the Somali border during which Dennis was shot in the leg, they were freed by a pro-government Somali group. Dennis suffered from post-traumatic stress disorder and could not return to frontline work in the humanitarian sector. The verdict which found that NRC wrongly assessed the extent and nature of the risks to which staff were exposed also rekindled a long debate about mental health in the aid sector. The case brought up significant concern for aid organizations, particularly the financial and reputational implications, and according to the Integrated Regional

[39] The World Bank. https://goo.gl/SntXAz. Accessed 27 January 2018.
[40] UN Enterprise Search. https://goo.gl/mtJaGz. Accessed 27 January 2018.
[41] OSCE. https://goo.gl/7Fuh6n. Accessed 4 February 2018.
[42] CoE. https://goo.gl/nCb8Wj. Accessed 4 February 2018.
[43] OAS. https://goo.gl/TPqE8c. Accessed 27 January 2018.
[44] African Union. https://goo.gl/1PkeqY. Accessed 27 January 2018.
[45] EU. https://goo.gl/mVA3te. Accessed 4 February 2018.
[46] NATO. https://goo.gl/x36TR7. Accessed 4 February 2018.

Information Networks (IRIN) reports, prompted many NGOs to begin reviewing their duty of care procedures with a particular focus on the aftercare offered to staff affected by trauma.[47]

However, since then the situation has not changed much and humanitarian workers continue to remain vulnerable to violence. In July 2016, during an attack on an aid workers' compound in Juba, South Sudan one person was killed and several other NGO staff were assaulted and raped.[48] Although the case received mixed reports from the aid workers on the reliability of the security system in the compound, the attack urged hundreds of aid workers to sign a petition launched on website Change.org calling for the granting of protected legal status to humanitarian workers under international humanitarian law and the appointment of a special UN rapporteur on aid worker wellbeing.[49] It also urged UN agencies, NGOs and the Red Cross movement to adopt a common code of duty of care to aid workers and to end 'a culture of silence and dishonesty'.[50]

In March 2017, the media focused on the murder of two members of the UN Group of Experts on the Democratic Republic of the Congo. Michael Sharp, an American who was coordinator of an independent sanctions monitoring group, and Zaida Catalan, a Swedish citizen, were killed in Kananga, central Congo on 12 March while carrying out investigations of rapes, massacres and the exploitation of Congo's vast natural resources for a report to the UN Security Council.[51] Of particular concern, was the fact that the experts performing their official duties reportedly travelled by hired motorcycle taxis without UN escorts and were not provided with tracking devices.[52] The murders prompted a sharp debate over the UN's responsibility to prepare and protect the people it hires to investigate wrongdoing in some of the most insecure places around the world. Under pressure from the US and Sweden, as well as international human rights organizations, the UN Security Management System Board of Inquiry (BOI) was convened at the initiative of the UN SG Antonio Guterres to establish the facts related to the incident. The BOI report presented to the Security Council on 15 August 2017, more than four months after the tragic incident, found that 'security training was readily available for UN personnel' and that 'the members of Groups of Experts did not believe that the UN Security Management System regulations pertain to

[47] IRIN News (2015) NRC kidnap ruling is 'wake-up' call for aid industry. https://goo.gl/VhmUh1. Accessed 27 January 2018.

[48] Harriet G (2016) Attack on aid workers in South Sudan: There was incredible naivety. https://goo.gl/29hREZ. Accessed 27 January 2018.

[49] Hayden S (2016) Petition urges U.N. to protect aid workers in conflict zones. https://goo.gl/s3K4HK. Accessed 27 January 2018.

[50] Ibid.

[51] de Freytas-Tamura K (2017) For 2 Experts Killed in Congo, U.N. Provided Little Training and No Protection. https://goo.gl/4rGDYp. Accessed 27 January 2018.

[52] de Freytas-Tamura K (2017) U.S. Urges U.N. to Conduct 'Full Investigation' Into Killings of 2 Investigators in Congo. https://goo.gl/CtPvzT. Accessed 27 January 2018.

them'.[53] The board further recommended additional training for experts, and tracking devices on an 'as needed basis'.[54] It also called for better employment conditions 'to attract more experienced candidates for these positions'.[55] While praising the UN security management system as 'fully functional' and 'in-depth',[56] the report did not answer the important question of whose responsibility it was to reinforce implementation of the UN Security Management System in relation to the hired experts.

Over the past few years interest in the security of aid workers has been growing among both NGOs and employees. Media coverage has demonstrated that there is lack of universal standards on duty of care and their consistent application. However, NGOs often refer to the 'moral and legal duty of care' to ensure that risks to staff are identified and managed, and that staff receive support, resources and training.

As a quantitative overview of media coverage, some of the most prominent newspapers and news agencies have been selected for a quantitative key-term search analysis. On the Reuters website, searching for the exact term 'duty of care' yielded 175[57] results on its US edition and 215[58] on its UK edition. On the New York Times, the same search (since 1851) returned 298[59] results and by associating 'United Nations' with the 'duty of care' it yielded ten results.[60] Searching for the same term on the international edition of The Guardian—without providing any specific timeframe for the research—yielded 12,900 results, whereas adding 'United Nations' to the search returned 143 results.[61] Lastly, on Al Jazeera the key-term search of 'duty of care' alone yielded 160[62] results, while in association with 'United Nations' it returned 23.[63] As per the previous quantitative analysis conducted on key-term research, it must be said that the data is difficult to compare and analyse as the search standards and timeframes applied are not the same.

[53] UN Security Management System Board of Inquiry (2017) Executive Summary United Nations Security Management System Board of Inquiry on the critical security incident resulting in the deaths of two members of the Group of Experts in Kananga, Democratic Republic of the Congo. https://goo.gl/6N1ru7. Accessed on 27 January 2018.

[54] Ibid.

[55] Ibid.

[56] Ibid.

[57] Reuters. https://www.reuters.com/search/news?blob=%22Duty+of+Care%22. Accessed 27 January 2018.

[58] Reuters. https://uk.reuters.com/search/news?blob=%22Duty+of+Care%22. Accessed 27 January 2018.

[59] The New York Times. https://goo.gl/mSEv6W. Accessed 27 January 2018.

[60] The New York Times. https://goo.gl/AtPsW7. Accessed 27 January 2018.

[61] The Guardian. https://www.theguardian.com/international. Accessed 27 January 2018.

[62] Al Jazeera. https://www.aljazeera.com/Search/?q=Duty%20of%20Care. Accessed 27 January 2018.

[63] Al Jazeera. https://goo.gl/bthnJo. Accessed 27 January 2018.

Similarly, an in-depth assessment of the content of the results yielded, might shed more light on the nature of the outcome.

Although it would be interesting to understand the trend over time in more detail, it is clear that greater online media diffusion, wider internet access and social media influence have made it easier for issues relating to the 'duty of care' to emerge and potentially have more impact on the reputation of international organizations. Greater awareness of duty of care legal obligations could spark a two-fold change. On the one hand, international organizations personnel themselves and global public opinion would have more leverage in exposing an organization for its alleged breaches. On the other hand, fear of reputational damage and financial loss could prompt international organizations to fill their policy gap and provide sufficient information, training and resources to mitigate risks to the health, safety and security of their civilian personnel. In order to be able to face future challenges and transform them into opportunities, international organizations need to rapidly adapt to a fast-changing environment. This includes being able to foresee the risks, mitigate them and guarantee the highest standards of duty of care to the staff working in volatile and high-risk conditions. To end with an inspiring quote:

> Since the death of Ayrton Senna, the FIA[64] are absolute masters at mitigating for danger and loss of life. There must be lessons here for the United Nations and other organisations struggling in war zones to be at the top of their game, whilst balancing a duty of care to its staff. But one thing, I think that will chime with conflict professionals, is the ever-changing rules of the game. It's what puts the formula into Formula 1. If you are used to working in fast-moving environments, with policy masters who change their minds, budgets and priorities – then a close look at the ability of F1 teams to rapidly adapt to new versions of their game would be a huge advantage.[65]

1.5 Ombudsman

The Office of the UN Ombudsman and Mediation Services[66] has handled issues of safety, health, well-being, stress and work/life brought by UN personnel on field missions for several years. Since 2006, the Office has addressed these issues in

[64] Federation Internationale de l'Automobile.

[65] Jaine C (2011) Extreme Strategists. https://blogs.worldbank.org/publicsphere/extreme-strategists. Accessed 27 January 2018.

[66] The UN Ombudsman and Mediation Services is an informal third party that helps staff to resolve workplace conflicts, by seeking mutually acceptable solutions, with the aim of maintaining a harmonious workplace environment. An important part of Ombudsmen's function is to define systemic malfunctions in the organization and to make recommendations for change in policies and practices to address such malfunctions.

several reports of the Secretary-General,[67] constantly increasing the attention given to the requests and recommendations of the UN staff.

The term 'duty of care' was officially acknowledged for the first time by the UNGA only in 2013, in the Report of the Secretary-General A/68/158 (2013).[68] Since that moment, there has been a gradual but constant increase of the share of attention given to this specific topic by the UN, and an important step forward was made with the report A/69/126 (2014) that included the participation of the Ombudsman in the working group of the SG on support to survivors and affected families.[69]

In 2015, the SG devoted an entire section[70] of the report A/70/15, named 'staff serving in dangerous regions' to the definition in detail of the role and the duties the organization has towards its employees. Moreover, Section A[71] refers to and analyses the cases brought in 2014 to the Ombudsman, showing a visible increase of cases from staff in field missions, reaching up to 40% of all cases, and 5% of the issues brought to the Office concerned safety, health, well-being and physical environment.

The next report, A/71/157 (2016), presented an increase of the cases addressed by the UN Ombudsman about safety, health, well-being and physical environment, and included a specific and very detailed section[72] on the duty of care and its provisions (Fig. 1.6).

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[67] UNGA 2006, para 67 (Caring for the psychological well-being of staff); UNGA 2007, para 53; UNGA 2009, paras 88–91 (Coverage for trauma and post-crisis care); UNGA 2010, paras 94, 96, 97; UNGA 2011, paras 87–92 (Safety, health, well-being, stress and work/life).

[68] UNGA 2013, para 99: 'the Office recognizes the need for staff and management to find mutually acceptable solutions to the ongoing issues of long-serving staff in hardship duty stations and stands ready to facilitate the process'.

[69] UNGA 2014, para 58: 'In particular, the Office drew the organisation's attention to the need to strengthen the institutional support system for staff injured in service and surviving family members'.

[70] UNGA 2015, paras 74–79: 'the Secretary General is to seek to ensure, having regard to the circumstances, that all necessary safety and security arrangements are made for staff carrying out the responsibilities entrusted to them. […] the inclination for the Organization to stay and deliver in the face of escalating violence exposes staff to higher risks than before and raises the question whether staff serving in dangerous regions are adequately protected. […] In addition, staff members may not be fully informed of the risks that are involved before going to serve in dangerous regions. Indeed, even if they are aware, they may not have a realistic assessment of their ability to cope'.

[71] UNGA 2015, paras 15–21.

[72] UNGA 2016, paras 58–65: 'Increasingly, the Organization is deploying staff members to high-risk environments, where they are exposed to a host of tangible threats, such as violent attacks, insecurity, accidents and disease. When such exposure continues over an extended period of time, it also presents a risk to mental health and well-being owing to high stress, lack of social support systems, inadequate medical care and extremely rudimentary living conditions. […] In its most recent report, the Office welcomed the establishment by the High-Level Committee on Management of a working group tasked with making recommendations on the duty of care towards staff in high-risk duty stations'.

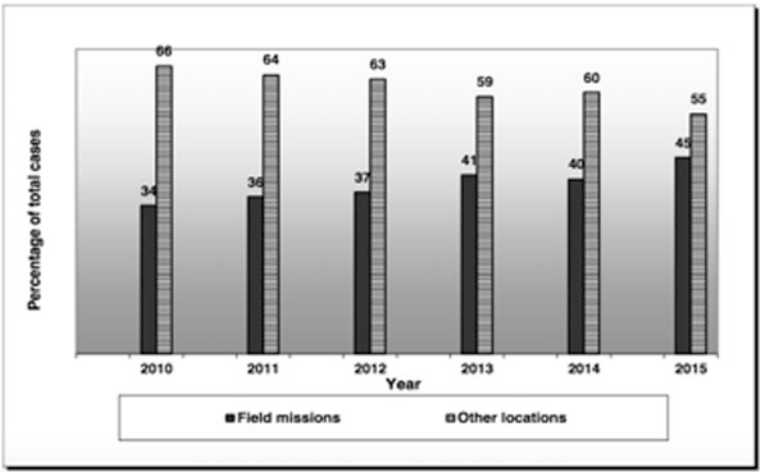

Fig. 1.6 Percentage of cases from staff in field missions and other locations opened by the Office [*Source* UNGA 2016, Figure II, para 13.]

A considerably different trend can be observed from the data on the issues concerning safety, health, well-being and physical environment brought to the Secretariat in the same period of time.

The latest report A/72/138 (2017) shows a continuing trend from previous years with reference to the issues on safety, health, well-being, stress and work/life brought to the Office, while there is no clear reference to these particular issues brought to the Secretariat.

However, besides these official and theoretical provisions, there is no public data on the use and efficiency of the instrument in solving issues between employees and UN institutions regarding the duty of care, which represent only a small percentage of the issues brought to the UN Ombudsman.

On a regional level, one of the institutions dealing with the duty of care is the European Ombudsman (EO), whose area of intervention is limited to the duties and responsibilities of European Union institutions and bodies. However, it has been impossible to find public information on how the European Ombudsman addresses the issues of the duty of care, and it is not clear whether this information is kept confidential for privacy or other unknown reasons.

In conclusion, both at EU and UN level, the Ombudsman appears to be a potentially useful and efficient way to solve disputes between institutions and employees, because of its particular focus on the individuals and use of different tools of informal dispute resolution in order to solve work-related issues, its confidential, off the record and impartial assistance, and, above all, because the process is entirely controlled by the employee, the ombudsman never imposes a solution. However, concerning the duty of care, there is no public information on the results

achieved and on the consequences the Ombudsman has had on improving the basic standards that should be guaranteed to individuals deployed in the field; therefore, it is impossible to verify whether the theoretical provisions are concretely effective.

1.6 Insurance

The financial and monetary dimension covers a central role in the development of duty of care guidelines and best practices. International organizations rely on insurance companies to provide their employees with coverage in case problems arise during their working activities. It is important, in order to conduct studies on the topic, to have access to data related, for instance, to the amount of money necessary to insure employees working in dangerous areas. Another dataset that would be helpful in order to analyse the main trends related to the diffusion of duty of care practices would be the amount of money awarded to employees involved in accidents during their work activity in high-risk areas.

However, these specific datasets are, for the most part, not publicly available. For market reasons insurance companies prefer not to share information on the amount of money requested from international organizations to insure their workers. Also, data concerning the amount of money awarded for on-duty accidents is not available in the quantity necessary, or organized in a way that allows the conduct of statistical analysis that has scientific validity. Often, the agreements between international organizations and their employees regarding monetary compensation following on-duty accidents are made privately; the scarce data publicly available on the issue comes from the judgments of international courts.

If the data were made available to the scientific community and organised in a proper manner, it could be analysed to provide precise answers on several themes relating to the implementation and the proliferation of duty of care practices and guidelines between international organizations. Knowing if the amount of money requested to insure employees working in high-risk areas has increased over the years could help us, for example, understand if insurance companies are developing insurance packages better tailored to the needs of the workers, and, therefore, if international organizations are increasingly more willing to accept the founding principles of the duty of care.

The circulation of data about the cases in which monetary compensation has been awarded to employees of international organizations as a result of a breach of principles of duty of care could help researchers to better understand several trends: first, it could clarify whether employees of international organizations are embracing duty of care principles and realising that safeguarding their wellbeing is a duty of their employers; second, knowing whether the numbers of judgments in favour of employees deployed in high-risk areas has increased over time could also clarify whether among international courts duty of care principles are being increasingly accepted; third, having the chance to analyse the amount of money awarded to employees after an accident could be important to understand whether

international organizations could be encouraged by financial considerations to adopt duty of care guidelines and principles.

An example of how important this data can be to understand the above-mentioned trends can be exemplified through a brief analysis of the data provided to the authors by the European External Action Service on the health and high-risk insurance provided to the civilian staff employed in CSDP operations. Considering the data related to the 5 high-risk missions (EUBAM Libya, EUPOL Afghanistan, EUSR Horn of Africa, EUSR Kabul—Afghanistan, EUCAP Sahel Niger), adding up the sum of incurred reimbursement for medical issues, and the total paid for cases of temporary incapacity and permanent invalidity, a clear trend appears. Between the fiscal years 2013–2014 and 2015–2016 the sum paid for the above-mentioned categories decreased by 22.2%.[73] If this data was compared to that of other international organizations it would be possible to understand if this decrease could be interpreted as a result of less accidents in high-risk missions due to better internal rules on safety and security, or if it is an isolated case or a trend in the international community.

To conclude, the circulation of data could not only be useful for the scientific community to conduct more precise research on this topic thanks to a larger pool of information, but it would also allow international organizations to exchange views and adopt common standards that could be effective in protecting their employees abroad and at the same time being cost-effective.

1.7 Conclusions

Throughout this chapter the authors have presented evidence of ethical, financial and reputational challenges that international organizations face as a consequence of alleged breaches of their duty of care towards their civilian personnel. Such challenges have been progressively growing in the past decade along with higher complexity of field missions and in a context of increasingly volatile environments. International organizations need to be aware of the developing trends and risks associated with loose duty of care standards, and modify their policies accordingly to ensure the safety, health and well-being of their employees.

The international jurisprudence analysed plays a key role in determining whether a growing attention truly exists in the international community or not, particularly when it comes to accountability issues for breaches of duty of care obligations. Across all the three international courts that have been taken into account (UN Justice System, CJEU and NATO Administrative Tribunal) a clear tendency in addressing issues pertaining to duty of care obligations has been shown. Even where there is only a slight increase in mention of duty of care related arguments,

[73] European External Action Service (EEAS)—Directorate General for Budget and Administration (2017).

such as in the example of the CJEU, the trend is still significantly growing in the subsidiary sources of references (e.g. the opinions). Whereas this point might look like a weakness, it should instead be considered as major proof of a deeper sensitivity toward the issue of the respect of the duty of care obligations, and that the time is ripe in the international arena to push for upholding better policies to secure a safer environment for actors deployed in volatile locations.

As for statistical data, it is evident that due to the increased number of incidents as well as the greater role of media, more statistics and analysis was produced. For instance, now the threats that are faced by international staff are better understood, along with defining those who might be most targeted, such as military workers of the UN Peacekeeping operations. We now have incidents and enough data to establish that the more volatile the security situation is in a duty station, the higher the possibility for incidents of a security nature. The available data also showed that even the international organizations that are globally known for neutrality like ICRC and IFRC have recently been subject to heightened and more frequent incidents compared to two decades ago. With all the risks that hover over internationally-deployed persons, organizations like the UN have tended to take measures to mitigate some of those risks such as the classification of high-risk duty stations as non-family ones.

With reference to the reputational aspect, evidence has emerged of the fact that for international organizations, reputation plays an important role particularly in terms of legitimacy and credibility. When strong allegations of misconduct or failure to meet high duty of care standards are directed towards international organizations their legitimacy and credibility is put under risk, undermining the organization's effectiveness. This can result in difficulties in securing cooperative and supportive behaviour from its member States or recruiting and retaining highly qualified personnel, not to mention the increasing legal and economic impact.

Research has shown that international organizations are placing growing attention on their duty of care legal and moral obligations as evidenced by numerous official statements, speeches and internal documents found online. However, in some circumstances the fact that some international organizations have made no use of the expression 'duty of care' in any official online documentation may indicate that the concept has not become part of the official lexicon or it might be communicated differently to the public. Nevertheless, a growing literature is emerging on the duty of care and many NGOs and scholars have begun to use this term in numerous reports, guidelines and commentaries. Overall however, literature on the duty of care specifically related to international organizations is still scarce.

Although it is more challenging to find comprehensive media coverage with reference to alleged duty of care breaches attributable to international organizations, interest in the security of aid workers has been growing. Actions and omissions of international organizations are under constant scrutiny by NGOs, scholars and academia, governments, media, global public opinion and other actors. Several cases relating to the safety of aid workers have reached mainstream media and put the issue of security in the aid industry under public scrutiny. Greater online media diffusion, wider internet access and social media influence have made it easier for

issues related to the 'duty of care' to emerge and potentially have more impact on the reputation of international organizations.

Greater awareness of duty of care legal obligations could provide employees and global public opinion more leverage in exposing an organization for its alleged breaches. On the other hand, fear of reputational damage and financial loss could prompt international organizations to fill their policy gap and provide sufficient information, training and resources to mitigate risks to the health, safety and security of their civilian personnel. In order to be able to face future challenges and transform them into opportunities, international organizations need to rapidly adapt to a fast-changing environment. This includes being able to foresee the risks, mitigate them and guarantee the highest standards of duty of care to the staff working in volatile and high-risk conditions.

For its particular attention to the problems and issues of UN civilian personnel, especially those individuals sent abroad, the UN Ombudsman could be an important tool to verify whether the UN agencies respect and implement the principles of the duty of care. However, there is no public information on the results achieved by the Ombudsman in the improvement of the standards related to the duty of care principles. It is therefore impossible to verify the effectiveness of these theoretical provisions.

For the most part, international organizations do not share the data in their possession about the type of insurance they provide to workers employed in high-risk areas. The circulation of this data would allow the international community to adopt common standards, exchange views and gain a better understanding of the main trends regarding the proliferation and implementation of duty of care practices and guidelines.

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Chapter 2
Comparative Analysis of International Jurisprudence and Relevant International Practice Related to the Duty of Care Obligations Incumbent on International Organizations Towards Their Mobile Workforce

Andrea de Guttry

Contents

Annex II—the Table of Cases—can be accessed online here: http://extras.springer.com/.

This contribution is closely related to two previous articles by the same author: de Guttry 2012 and de Guttry 2015.

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Abstract In recent years almost all international organizations (both global and regional) have increased their field activities and have requested their staff to perform various activities ranging from the mere attendance of short meetings in capital cities, to visiting remote areas for project monitoring and assessment activities, from training and capacity building activities to humanitarian relief, from delivery of cooperation projects to technical assistance. The evolving complexity of the tasks to be performed, the volatile environments in which these persons must perform their assignment and the changed international security situation which has transformed civilians very often into a privileged target for terrorist and/or criminal activities, have all contributed to a rising number of incidents involving these persons. Many cases of physical or brain injuries have been reported and the victims have often accused the sending organization of not having respected the duty of care principle. During the last few years, due to the growing number of disputes relating to assumed violations of this principle, the national and international jurisprudence has contributed to the definition of its precise contours. Facing this situation, international organizations, both at global and at regional level, are requested to rapidly implement a fully-fledged duty of care policy in order to take responsible action and to properly protect their mobile working force. This chapter examines the relevant international practice and jurisprudence with the aim of identifying the more precise contours of the duty of care incumbent on international organizations towards the mobile working force.

Keywords duty of care · international jurisprudence · legal obligations · international organizations · mobile workforce · international law

2.1 Introduction

Natural and man-made disasters have recently increased in terms of frequency, size, number of people affected and material damage caused.[1] In view of the number of people affected by these phenomena—i.e. individuals requiring immediate assistance during a period of emergency, such as protection and provision of food, water, shelter, sanitation, and immediate medical assistance—several international organizations, both at global (*in primis* the UN and its Agencies) and at regional level (the European Union (EU) amongst others as well as the African Union (AU) and other regional organizations) have decided to become major players as providers of security and post-conflict reconstruction assistance, as partners in delivering technical assistance and rescue operations after natural or man-made disasters, and as major donors of humanitarian aid. According to an estimate of the UN General Assembly (UNGA), in 2014 there were about 19,000 civilians deployed in the field working with the UN and its agencies.[2] At the end of 2017, the EU had deployed, in civilian CSDP missions only, more than 700 seconded staff, about 400 internationally contracted staff and more than 350 locally contracted staff.

A recent report prepared by the UN Secretary General in fulfilment of a specific request contained in UNGA Resolution 70/104,[3] highlighted the dramatic trends in the increase of security incidents affecting the UN security management system.[4]

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[1] In 2015, 376 naturally triggered disasters were registered. In that year, natural disasters caused 22,765 deaths and made 110.3 million victims worldwide. The economic damage has been estimated at US$ 70.3 billion. China, the United States, India, the Philippines and Indonesia constitute together the top 5 countries most frequently hit by natural disasters. See more in Guha-Sapir et al. 2016. It has to be mentioned, however, that the statistical data concerning natural and man-made disasters presents significant differences depending on who collected it: for example, according to Swiss Re 2016, p. 11 'There were 353 disaster events […], of which 198 were natural catastrophes, the highest ever recorded in one year. There were 155 man-made events. More than 26000 people lost their lives or went missing in the disasters, double the number of deaths in 2014 but well below the yearly average since 1990 of 66000. The biggest loss of life – close to 9000 people – came in an earthquake in Nepal in April. Total economic losses caused by the disasters in 2015 were USD 92 billion'. Finally, according to The Global Humanitarian Assistance Report 2016, p. 11: 'A number of conflicts continued and intensified in 2015, bringing the number of people displaced by violence and persecution globally to over 65 million and generating severe suffering and humanitarian need. While attention grows on the rising numbers of people reaching Europe, the majority of displaced people are in the Middle East, North of Sahara and South of Sahara regions, and 60% of those forced to flee remain internally displaced'. See more in Chap. 1.

[2] UNGA Resolution A/Res/70/104 (2015) Safety and security of humanitarian personnel and protection of United Nations personnel.

[3] Ibid.

[4] UN Secretary General 2016.

Personnel deployed abroad has been exposed, due to the changing international scenario, to a great variety of incidents with consequences for their health (both physical and mental), for their life, for their property and, more generally, for their well-being.[5]

The security, safety, health and well-being of the personnel deployed on these missions have become key concerns not only for the hosting State, which bears the main responsibility to protect international officers legally deployed on its territory,[6] but also for the organizations deploying the personnel.[7] Increasing attention to these issues can be discerned in the practice of States, international organizations and in academia.[8]

In this regard, proper mission planning sensitive to all potential threats, sharing of information, protection activities, risk minimising measures, and appropriate training, have often been perceived as basic components of the duty of care or of the 'duty of protection and assistance'[9] which international organizations owe to their

[5] For a detailed description of the typology of incidents and consequences thereof suffered by the employees (and especially the UN staff) sent abroad, please refer to Haynes 2008, pp. 178 ff. and to Chap. 1.

[6] The concept that the hosting State has the primary responsibility to protect the members of the international mission deployed in its territory is clearly stated in the Convention on the Safety of United Nations and Associated Personnel (GA Res. 49/59, 9 December 1994). The 2005 Optional Protocol to this Convention further expands the scope of 'operations' and as such it makes it applicable to a larger number of staff. Article II, para 1, of the Optional Protocol expands the scope of the Convention to the following operations: '(a) Delivering humanitarian, political or development assistance in peacebuilding, or (b) Delivering emergency humanitarian assistance'.

[7] Hubbart and Brassard-Boudreau 2010.

[8] See more in Chap. 1. See also, as an example, the joint initiative of The Center for International Peace Operations (ZIF) together with the German Federal Foreign office and the Stabilization Unit of the Foreign and Commonwealth Office, in the framework of which several roundtables took place, from 2013, to discuss issues related to the duty of care for civilian experts in peace operations. In this frame several interesting and relevant recommendations to the recruiting institutions have been discussed and agreed upon. See for example the *Voluntary Guidelines on Duty of Care for Seconded Civilian Personnel* prepared for the Duty of Care Roundtable process which took place in 2006 in London at the Stabilization Unit (Merkelbach 2017). In this vein one has to mention as well the International Organization for Standardization Standards '*Risk management-principles and Guidelines*' (ISO 31000:2009) which has been widely adopted by national standard organizations.

[9] The notion of 'Duty of Protection and assistance' is sometimes used by International Administrative Tribunals as an alternative wording for duty of care: this is the case, for example, of the Administrative Tribunal of the Council of Europe which prefers to use the terms duty of protection and assistance: see, for example, Administrative Tribunal of the Council of Europe, Natalia Kravchenko v. Secretary General, 27 January 2011, Appeal No 466/2010, where the Tribunal concluded stating that 'The Tribunal does not believe that the Secretary General breached any duty of protection and assistance […]' The preference of this Administrative Tribunal for this wording may be explained considering that Article 40 of the Council of Europe Staff Regulations deals with the question of protection for staff members in their official capacity. It reads as follows:

Article 40—Protection of staff members in their official capacity

staff. In other instances, the duty of the sending Organization to properly 'protect and take care of' its employees has been associated with the obligation incumbent on States (and international organizations) to protect life as a basic human right. This duty is spelled out in the main relevant international treaties, such as the 1966 International Covenant on Civil and Political Rights (Article 6) or the 1950 European Convention on Human Rights (Article 2).

This chapter is devoted to analysing the relevant international practice and jurisprudence with the aim of identifying the more precise contours of the duty of care incumbent on international organizations towards their mobile working force.[10] This will then allow a more coherent and structured analysis of the practice of each single international organization which will be carried out in the following Section II. Although this book refers mainly to the mobile working force sent abroad, from time to time reference will also be made to events and cases involving staff at headquarters. This will happen whenever the issues raised in these cases are, *de facto*, very similar to those which happened, or could happen, to the staff deployed abroad.

While the focus of this chapter (as well of the present volume) will be on the duty of care obligations incumbent on international organizations: notwithstanding, it is important to highlight that States and national public institutions (including Universities, just as an example) and even private companies and NGO's are facing identical problems. The case 'Dennis v. Norwegian Refugee Council' which was

1. Staff members may seek the assistance of the Secretary General to protect their material or non-material interests and those of their family where these interests have been harmed without fault or negligence on their part by actions directed against them by reason of their being a staff member of the Council.

2. Where the Secretary General deems that the conditions set forth in the above paragraph are met, he or she shall decide what form such assistance may take and the amount up to which the Council shall pay the costs incurred in the defence of the interests referred to in para 1, including the costs of any legal action taken. If the Secretary General considers that legal action may harm the interests of the Council, he or she may ask the persons concerned not to take such action; in such cases, if they do not take legal action, the Council shall make good the material damage suffered by the persons concerned, provided that they assign their rights to the Council.

On 7 March 2002, the Secretary General of the Council of Europe adopted Instruction No. 44 on the protection of human dignity at the Council of Europe.

[10] Mobile working force has to be understood in the frame of this book as any person, international or local, recruited or seconded, temporary or permanent staff, working for or on behalf of or in any case under the responsibility of an international organization. The specific content of the duty of care may, however, vary depending on the circumstances and the level of risk faced by the different categories of personnel.

recently addressed by the Oslo district Court,[11] is convincing evidence of this new challenge for stakeholders other than international organizations.

2.2 The Notion of 'Duty of Care' in Domestic Law and in International Law: A Few General Remarks

According to a legal dictionary, the duty of care is

> A requirement that a person acts toward others and the public with watchfulness, attention, caution, and prudence that a reasonable person in the circumstances would. If a person's actions do not meet this standard of care, then the acts are considered negligent, and any damages resulting may be claimed in a lawsuit for negligence.[12]

The legal concept of duty of care, which is well known and developed in many national legal systems,[13] presumes therefore that

> individuals and organizations have legal obligations to act towards others and the public in a prudent and cautious manner to avoid the risk of reasonable foreseeable injury to others. This obligation may apply both to acts and omissions.[14]

Making reference to the well-known distinction between 'obligation of results' and 'obligations of means' the duty of care has to be added to the second group as it requires the adoption of a risk minimising attitude and a policy aimed at protecting others against reasonably foreseeable risks and it does not imply the guarantee of a specific final result.[15] National laws and jurisprudence have contributed to clarifying and making this obligation on those acting within the national borders of a given country more specific: making reference to dispute arisen in the UK, the European Court of Human Rights (ECtHR) described the duty of care as the concept which defines the categories of relationships in which the law may impose

[11] In June 2012, Steven Dennis, a staff member of the Norwegian Refugee Council working in Kenya was kidnapped and taken hostage for several days until he was freed by a rescue operation conducted by the Kenyan Special Forces. Sometime later, Mr. Dennis submitted a claim against the Norwegian Refugee Council (NRC) in front of the Oslo District Court asking for compensation for economic and moral losses suffered during and after the kidnapping. The Court ruled that the NRSC violated its duty of care and condemned NRC to pay a substantial amount as compensation to Mr. Dennis. See: Oslo District Court, Steven Patrick Dennis vs. Stiftelsen Flyktninghjelpen [the Norwegian Refugee Council]', 25 November 2015, Case No. 15, 032886TVI OTI R/05. Translation from Norwegian is available at www.hjort.no/documentfile7959?pid=NativeContentFile-File&attach=1. Accessed 20 January 2018. For comments to this case see: Hoppe and Williamson 2016; Merkelbach and Kemp 2016.

[12] The Free Dictionary by Farlex. http://legal-dictionary.thefreedictionary.com/duty+of+care. Accessed 22 February 2018.

[13] See more on this the recent study written by Claus 2010.

[14] Ibid., p. 8.

[15] On this distinction see more Alessi 2005, pp. 657–692.

liability on a defendant in damages if he or she is shown to have acted carelessly.[16] To show a duty of care, the claimant must prove that the situation comes within an existing established category of cases where a duty of care has been held to exist. In novel situations, in order to show a duty of care, the claimant must satisfy a threefold test, establishing:

- that damage to the claimant was foreseeable;
- that the claimant was in an appropriate relationship of proximity to the defendant;
- that it is fair, just and reasonable to impose liability on the defendant.

These criteria apply to claims against private persons as well as claims against public bodies.[17]

Similar rules are codified in several other national legal systems, among which Australia, Belgium, France, Germany, The Netherlands, Spain and the USA.[18] Many of these national legislations have been adopted to implement the 1981 Occupational Safety and Health Convention, the 1981 Occupational Safety and Health Recommendation No. 164, as well as the more recent ILO 2006 Convention 187, Promotional Framework for Occupational Safety and Health Convention. According to this last Convention, States are specifically requested to

> promote continuous improvement of occupational safety and health to prevent occupational injuries, diseases and deaths, by the development, in consultation with the most representative organizations of employers and workers, of a national policy, national system and national programme.

Two additional rules are relevant in this frame: Article 7 of the 1966 UN Covenant on Economic, Social and Cultural Rights, stating that '[t]he States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favorable conditions of work which ensure, in particular: […] (b) Safe and healthy working conditions'; and Article 31(1) of the Charter of Fundamental Rights of the European Union (CFREU), which reaffirms that '[e]very worker has the right to working conditions which respect his or her health, safety and dignity'.

The more precise definition of the duty of care principles has been discussed at length inside the UN and especially in the frame of the High-Level Committee on Management and its High-Level Working Group on 'Reconciling duty of care for UN personnel with the need 'to stay and deliver' in high-risk environments'. This WG adopted a comprehensive definition of the duty of care which, to a large extent, sums up the main findings emerging from recent international practice. According to the WG, 'the duty of care constitutes a non-waivable duty on the part of the organizations to mitigate or otherwise address foreseeable risks that may harm or injure its personnel and their eligible family members. […]'.[19]

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[16] ECtHR, T. P. and K. M. v. The United Kingdom, 10 May 2001, App. No. 28945/95, para 45.
[17] Ibid.
[18] See more in Claus and Giordano 2013; Berkowitz and Congiu 2011.
[19] See more at Chap. 7, Sect. 7.2.3.

2.3 The Legal Foundations of the Duty of Care in the International Legal Framework: An Autonomous Rule or a Part of an Existing Human Rights Rule?

While many (or almost all) international organizations—both at global and regional level have repeatedly declared on several occasions that they are bound by and committed to respect the principles enshrined in the duty of care obligations, confusion and ambiguity persists concerning the legal foundation and precise content of these obligations. In order to contribute as much as possible to clarifying these two aspects, which are at the core of this chapter, a thorough analysis of the relevant international sources will be conducted, as well as a scrutiny of the international jurisprudence and especially of the internal administrative bodies and Tribunals in charge of protecting the rights of international civil servants.[20] The contributions offered by these Tribunals have played a paramount role in a more detailed identification of the content of the duty of care obligation and thus deserve to be carefully analysed. To better understand and appreciate the impact of the international jurisprudence on the shaping of the contours of the duty of care it might be useful to remember that several organizations used the League of Nations model based on two main characteristics: there is only a single level of jurisdiction and judges are appointed by the governing institution/s of the respective Organization. In Europe a few international organizations still maintain the traditional League of Nations approach.[21]

It took a few decades more to introduce a new model of internal administrative tribunals with some degree of independence from the Organization (also thanks to new methods of election of judges) and a wider mandate. This model is reflected in the Administrative Tribunal of the International Labour Organization (ILOAT) and in the newly created UN Disputes Tribunal and the UN Appeals Tribunal (which have replaced the previous UN Administrative Tribunal (UNAT)). Since 2005, EU civil servants can also resort to two levels of jurisdiction (the EU Civil Service Tribunal and the Court of First Instance), both of which have been awarded a significant degree of autonomy from the EU Institutions.

In this chapter special attention will therefore be paid to the relevant jurisprudence of most of the international tribunals, and especially of the internal administrative tribunals created within the IO's, such as the UN Dispute Tribunal and the UN Appeals Tribunal, the ILOAT, the EU Civil Service Tribunal, the NATO Administrative Tribunal, the World Bank Administrative Tribunal, the Administrative Tribunal of the African Development Bank, the IMF Administrative

[20] See more in the following Chaps. 7–14.

[21] The Council of Europe, the Organization for Economic Co-operation and Development (OECD), the North Atlantic Treaty Organization (NATO), the European Space Agency (ESA), and the European Centre for Medium-Range Weather Forecasts (ECMWF).

Tribunal, the Administrative Tribunal of the Council of Europe and the Appeal Board of the Administrative Tribunal of the Council of Europe, the Asian Development Bank Administrative Tribunal (AsDBAT) etc.

The contributions of these Tribunals to the identification of the legal foundations of the duty of care principles will be examined. This question has been tackled, with different conclusions, in several judgments of international administrative Tribunals (UN Administrative Tribunal, ILOAT etc.). Two significantly different approaches, although not necessarily contradictory, can be traced in this jurisprudence: (a) the duty of care is, to a certain extent, an autonomous obligation and (b) the principle under investigation is merely a part of an existing obligation related to the protection of human rights. Both lines of reasoning deserve proper attention and will be examined and commented upon. First analysis will be conducted of the arguments used to justify the existence of an autonomous rule and thereafter attention will be devoted to the alternative thesis. It can be anticipated that the two theses do not contradict each other: on the contrary, they are mutually reinforcing and they need to be evaluated in the framework of the Draft Articles on the Responsibility of International Organizations adopted in 2011 by the International Law Commission.[22]

To begin it must be reported that in many cases the relevant internal Tribunals simply affirmed the existence of the duty of care principles without making any specific reference to the sources of this principle. For example, in its Judgment 3213 of 2013, the ILOAT stated simply that 'International organizations have a duty of care towards their employees […]'[23] avoiding making any specific reference to the legal foundations of this obligation. In a similar manner, the same Tribunal stated in Judgment 3025, that 'an international organization has a duty to provide a safe and adequate environment for its staff, and they in turn have the right to insist on appropriate measures to protect their health and safety'.[24] Again, the Tribunal did not make reference at all to the legal foundations of the obligation.

In a few cases, the international jurisprudence has gone beyond this approach and developed new ideas about the legal foundations of the principle. Four different arguments have been used in the international jurisprudence to identify the source

[22] The Report was Adopted by the International Law Commission at its sixty-third session, in 2011, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/66/10, para 87). See: Draft Articles on the Responsibility of International Organizations (DARIO), with commentaries, in Yearbook of the International Law Commission, 2011, Vol. II.

[23] ILOAT, L. J.-S. against the European Patent Organisation (EPO), 4 July 2013, Judgment No. 3213, para 2 (see Annex II, Case 23).

[24] ILOAT, A. P. against the International Telecommunication Union (ITU), & July 2011, Judgment No. 3025, para 2 (see Annex II, Case 11). In a previous Judgment the Tribunal had already stated that 'it is not in doubt that an international organisation is under an obligation to take proper measures to protect its staff members from physical injury occurring in the course of their employment. The same is true with respect to loss of or damage to their personal property': ILOAT, F. M. against the Organisation for the Prohibition of Chemical Weapons (OPCW), 2 February 2005, Judgment No. 2403, para 16 (see Annex II, Case 14).

of the principle: (i) the Statutes and the internal regulations of the relevant international organizations, (ii) the law of contracts; (iii) the international jurisprudence itself and customary law and, finally, (iv) general principles of law.

As concerns the first argument, in several instances, it can be seen that not only must international organizations comply with the principle of due diligence in conducting their activities,[25] but also that very often their internal Staff Rules provide the legal basis of the duty of care. So, for example, the duty of care of the UN is now codified and incorporated into the UN Staff Regulation 1.2, which states that:

> Staff members are subject to the authority of the Secretary-General and to assignment by him or her to any of the activities or offices of the United Nations. In exercising this authority, the Secretary-General shall seek to ensure, having regard to the circumstances, that all necessary safety and security arrangements are made for staff carrying out the responsibilities entrusted to them.

In similar terms, the OSCE has codified its duty of care towards it personnel in the Staff Regulations and Staff Rules[26] according to which 'OSCE officials shall be entitled to the protection of the OSCE in the performance of their duties within the limits specified in the Staff Rules'. As stated in a document prepared by the OSCE Legal Services

> It is thus incumbent upon the organization to ensure that such protection is afforded and is commensurate with the standards expected for the international civil service, in terms of health, safety and security, and a professional work environment, enabling the independence and loyalty required for the OSCE under the OSCE Code of Conduct.[27]

In the EU, one of the first key acts relating to the duty of care is undoubtedly Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work.[28] Article 6 of

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[25] Clarke 2014, para 6.1.2.1.

[26] OSCE Staff Regulations and Staff Rules, DOC.SEC/3/03 September 2003 Updated: 17 July 2014. http://www.osce.org/employment/108871?download=true. Accessed 22 February 2018.

[27] Tabassi 2015. The OSCE has always taken the duty of care very seriously. It has developed and put in place methods of delivering security information to its officials and programmes in order to mitigate risks. Similarly, plans and procedures have been prepared to manage security incidents should they occur. According to the OSCE Operational Guidelines for Working in a Potentially Hazardous Environment, at the field level, key elements that demonstrate the implementation of duty of care by the OSCE in the operation include: 'Ensuring all OSCE staff knows and understands their security responsibilities; Developing specific contingency plans for each identified threat; Integrating security and safety into all aspects of the operation; Committing appropriate resources to security and health; Training OSCE staff to respond in a proper manner to incidents and keep records of security training conducted; Ensuring OSCE staff has access to relevant and proper protective equipment; Reporting security or near-security incidents; Taking disciplinary action when security procedures have been violated'. See more OSCE Operational Guidelines for Working in a Potentially Hazardous Environment. http://www.osce.org/secretariat/74739?download=true. Accessed 12 February 2018.

[28] The Directive is published in the Official Journal of the European Union (OJEU), L 183, 29.6.198. The Directive was later amended through Regulation (EC) 1882/2003 (OJEU L.

the Directive spells out the general obligation of the employer, stating that he/she shall take the measures necessary for the safety and health protection of workers, provision of information and training, as well as provision of the necessary organisation and means[29] and shall be alert to the need to adjust these measures to take account of changing circumstances. The rules contained in this Directive are pivotal: they provide a general framework which has to be taken into account in all employers/employees relations, including those between the EU Institutions and their employees wherever the work has to be carried out (i.e. both in Brussels and in third countries), as confirmed by relevant jurisprudence and by the practice of the EU institutions.[30] These rules apply not only to the physical premises of the Mission in the hosting country but more generally to the working environment in which the EU officer is requested to perform his/her duties while assigned to a given mission. The precise meaning of this duty of the EU was summarised recently by the EU Civil Service Tribunal in the Missir Mamachi di Lusignano case where the Tribunal expressed the firm opinion that

> […] in the light of the main rules laid down in Directive 89/391, […] the Commission's duty to ensure safety in such a situation implies, first, that the institution must assess the risks to which its staff is exposed and take integrated preventive measures at all levels of the service, secondly that it should inform the staff involved of the risks that have been identified and check that the staff have received appropriate instructions on the risks to their safety, and finally that it should take appropriate protection measures and establish the organization and means it considers necessary.[31]

As concerns the second argument, the legal basis of the duty of care principles has sometimes been traced back to the laws of contract and, more specifically, to employment contracts. In the case 'In re Grasshoff',[32] the ILOAT stated, as an example, that:

> It is a fundamental principle of every *contract of employment* that the employer will not require the employee to work in a place which he knows or ought to know to be unsafe. […] It is sufficient to say that, if [the staff member] accepts the order [to work in an unsafe place] […] and the employer has failed to exercise due skill and care in arriving at his judgment, the [staff member] is, subject to any contrary provision in the contract, entitled to be indemnified in full against the consequences of the misjudgment.

284,31.10.2003), Directive 2007/30/EC (OJEU L 165, 27.6.2007) and Regulation EC 1137/2008 (OJEU L 311, 21.22.2008).

[29] On the specific obligation of risk assessment contained in the Directive, please see European Agency for Safety and Health at Work 2008.

[30] This seems to also be the understanding of the jurisprudence of the EU Civil Service Tribunal. In the recent Misir case, the Tribunal affirmed that it is clear from several EU directives, and in particular from Directive 89/391, 'that the employer is required to ensure the safety and health of its staff in *every aspect related to the work*' (EU Civil Service Tribunal, Livio Missir Mamachi di Lusignano v. European Commission, 12 May 2011, Judgment in Case F-50/09, para 126 (see Annex II, Case 7), emphasis added).

[31] European Union Civil Service Tribunal, Livio Missir Mamachi, para 132.

[32] ILOAT, In re Grasshoff (Nos. 1 and 2), 24 April 1980, Judgment No. 402, para 1 (see Annex II, Case 19) (emphasis added).

A third argument identifies the legal basis of the duty of care principles in the international jurisprudence. So, for example, the UN Appeals Tribunal has affirmed that:

> An authoritative statement reflecting this general principle of the duty to exercise reasonable care to ensure the safety of staff members is also found within the jurisprudence of other international administrative tribunals, including the Administrative Tribunal of the International Labour Organization.[33]

Notwithstanding the well-known uncertainties about the legal sources UNAT has to apply,[34] one can argue that the Tribunal in this case, although in an indirect manner, seems to corroborate that the duty of care is now based on an autonomous customary international law rule.[35] Although this conclusion could be criticised for not being sufficiently substantiated (due to the ambiguous wording of the Tribunal), it should be remembered that according to several authors, the international tribunals, through their decisions on the use of legal sources and their interpretations of particular principles

> are producers of global administrative laws materials. These materials are directly relevant to claimants and to the administration of the Institutions each Tribunal directly regulates; they are also relevant to other institutions and tribunals (indirectly) through the development of a corpus juris among different international organizations; and they have a wider impact in helping shape and refine concepts of general legal importance such as…the duty of care towards their staff […][36]

In this framework it must be observed that very often Tribunals quote each other to reinforce their conclusions or to explain their legal reasoning or even to identify the applicable rules or their contents: in our area of interest, just as an example, the IMF Administrative Tribunal quoted a judgment of the AsDBAT, Decision No. 5 (1995), paras 21–27 to confirm that an 'organization has duty to exercise reasonable care relating to safety, health and security of its staff'.[37]

The fourth line of reasoning, which presents innovative elements, is to be found in the case Mwangy, where the UN Appeals Tribunal elaborated an original thesis about the legal foundations of the duty of care principle. According to the Tribunal

> even were such obligation are not expressly spelled out in the Regulations and Rules, general principles of law would impose such an obligation, as would normally be expected by every employer. The United Nations, as an exemplary employer, should be held to

[33] UNAT, Durand Against The Secretary-General of the United Nations, 19 August 2005, Judgment No. 1204, para XVII (see Annex II, Case 36).

[34] See more on this issue recently Yaraslau 2015, pp. 4 ff.

[35] Mathiason 2013, p. 874 affirms that 'given state practice of many ratifying parties and non-ratifying parties, there is an emerging norm under customary international law that all duty-of-care obligations extend to international business and assignees'.

[36] Kingsbury and Stewart 2012, p. 71.

[37] IMF Administrative Tribunal, 'G', Applicant and 'H', Intervenor v. International Monetary Fund, Respondent, 18 December 2002, Judgment No. 2002-3, para 36.

> higher standards and the Respondent is therefore expected to treat staff members with the respect they deserve, including the respect for their well being.[38]

The same argument seems to be used by the ILOAT, in its Judgment 3688, in which the Tribunal underlined that there is a

> long established *principle* that an international organization owes a duty of care to an employee whose post is abolished to consider that person for other posts for which that person is qualified.[39]

These references to the general principles of law as the source of the duty of care are pretty innovative and interesting. However, considering the peculiar features of the general principles of law and the limits in their application, it could be concluded that any one of the previous theses would be preferable, as they would offer a stronger basis on which to ground the principle.

As an alternative to these attempts, the legal foundations of the duty of care principle have been anchored, on several occasions, to the rules requiring States (and international organizations where applicable) not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within their jurisdiction/control. The applicable rules are Article 6 of the 1966 International Covenant on Civil and Political Rights and, in the European context, Article 2 of the 1950 European Convention on Human Rights and Fundamental Freedoms. International case law, especially the judgments of the ECtHR, has contributed a great deal to clarifying the scope of application of this essential rule, at least as far as the obligations of States is concerned. In the famous case *Osman v. The United Kingdom,*[40] the ECtHR reiterated its previous interpretation according to which

> Article 2 of the Convention may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk. In the opinion of the Court, where there is an allegation that the authorities have violated their positive obligation to protect the right to life in the context of their above-mentioned duty to prevent and suppress offences against the person, it must be established that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual.

For the Court, bearing in mind the nature of the right protected by Article 2, 'it is sufficient for an applicant to show that the authorities did not do all that could be reasonably expected of them to avoid a real and immediate risk to life of which they have or ought to have knowledge'. Both in the *Budayeva*[41] and the *Öneryildiz*[42]

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[38] UNAT, Mwangi against the Secretary-General of the United Nations, 30 September 2003, Judgment No. 1125, para IV (see Annex II, case 38).

[39] ILOAT, P.-M. (No. 2), v.WHO, 6 July 2016 Judgment No. 3688, para 27 (see Annex II, case 24) (emphasis added).

[40] ECtHR, Osman v. The United Kingdom, 28 October 1998, App. No. 23452/94.

[41] ECtHR, Budayeva and Others v. Russia, 20 March 2008 Apps. Nos. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02.

[42] ECtHR, Öneryildiz v. Turkey, 30 November 2004, App. No. 48939/99.

cases, claims of this nature were rejected by national courts, which argued that the causes of death could not have been foreseen or prevented, as they were not directly attributable to the State. However, in both cases the ECtHR found that States which had actions brought against them in the Court were responsible for violations of their duty to protect life, having failed to take appropriate preventive measures. The Court affirmed that the right to life 'does not solely concern deaths resulting from the use of force by agent of the State but also […] lays down a positive obligation on States to take appropriate steps to safeguard the lives of those within their jurisdiction'.[43]

According to the Court, a causal link existed between the national authorities' actions or omissions and the deaths of the victims. In the Court's words, deaths occurred 'because the authorities neglected their duty to take preventive measures when a natural hazard had been clearly identifiable and effective means to mitigate the risk were available to them'. The conclusions of the ECHR are extremely interesting and contribute to a better definition of the content and the scope of the obligation on States to protect the life of the persons under their jurisdiction and have influenced national jurisprudence.[44] The sensitive issue of the applicability of these conclusions to situations involving international organizations will be further examined in Chap. 16.

In any case, it is worth recalling that this obligation applies not only within the territory of a given State party to a given human rights treaty but, under certain circumstances, to State organs acting outside national borders as well. The issue concerns the problem of the so-called extraterritorial application of human rights conventions. In recent times these problems have been addressed both by the International Court of Justice in its Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*[45] and by the ECtHR.

The ICJ considered specifically the question whether the International Covenant on Civil and Political Rights was capable of being applied outside the State's national territory. The Court observed that, while the jurisdiction of States is primarily territorial, it may sometimes be exercised outside the national territory. Considering the object and purpose of the International Covenant on Civil and Political Rights, the Court expressed the opinion that 'it would seem natural that, even when such is the case, States parties to the Covenant should be bound to

[43] ECtHR, Budayeva and Others, paras 128–129. See more in Nicoletti 2012.

[44] The Supreme Court in UK, for example, has ruled that families of soldiers killed in Iraq can make damage claims under human rights legislation and sue for negligence. UK Supreme Court, Smith and others (FC) (Appellants) v. The Ministry of Defence (Respondent) Ellis (FC) (Respondent) v The Ministry of Defence (Appellant) Allbutt and others (FC) (Respondents) v The Ministry of Defence (Appellant) before Lord Hope, Deputy President Lord Walker Lady Hale Lord Mance Lord Kerr Lord Wilson Lord Carnwath, 19 June 2013, Judgment No 41.

[45] ICJ, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 9 July 2004, I.C.J. Rep. 2004, p. 136.

comply with its provisions'.[46] In conclusion, the Court considered that 'the International Covenant on Civil and Political Rights may be applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory'. Similar conclusions were reached by the ECtHR. Making reference to Article 1 of the 1950 Rome Convention according to which 'The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of [the] Convention', the ECtHR stated, at the outset, that 'Jurisdiction' under Article 1 is a threshold criterion and that the exercise of jurisdiction is a necessary condition for a Contracting State to be able to be held responsible for acts or omissions imputable to it which give rise to an allegation of the infringement of rights and freedoms set forth in the Convention'.[47]

The Court, in its judgment, recognised a number of exceptional circumstances capable of giving rise to the exercise of jurisdiction by a Contracting State outside its own territorial boundaries. In each case, the question whether exceptional circumstances exist must be determined with reference to the particular facts.[48] According to the Court one of these circumstances is when, through the consent, invitation or acquiescence of the Government of that territory, a State exercises all or some of the public powers normally to be exercised by that Government.[49] Thus, where, in accordance with custom, treaty or other agreement, authorities of the Contracting State carry out executive or judicial functions in or within the territory of another State, the Contracting State may be responsible for breaches of the Convention thereby incurred, provided that the acts in question are attributable to it rather than to the territorial State.[50] Finally the Court stated that

> it is clear that, whenever the State through its agents exercises control and authority over an individual, and thus jurisdiction, the State is under an obligation under Article 1 to secure to that individual the rights and freedoms under Section 1 of the Convention that are relevant to the situation of that individual. In this sense, therefore, the Convention rights can be 'divided and tailored'.[51]

This conclusion is very important in the present examination, considering that the cases under scrutiny are those involving personnel sent abroad. Given that the

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[46] ICJ, Legal Consequences, para 109. According to the ICJ there is a constant practice of the Human Rights Committee consistent with this. 'Thus, the Committee has found the Covenant applicable where the State exercises its jurisdiction on foreign territory. It has ruled on the legality of acts by Uruguay in cases of arrests carried out by Uruguayan agents in Brazil or Argentina (case No. 52/79, Lopez Burgos v. Uruguay; case No. 56/79, Lilian Celiherti de Cusariego v. Uruguay). It decided to the same effect in the case of the confiscation of a passport by a Uruguayan consulate in Germany (case No. 106181, Montero v. Uruguay)' (ibid., para 110).

[47] ECtHR, Ilaşcu and Others v. Moldova and Russia, 8 July 2003, App. No. 48787/99, para 311.

[48] ECtHR (GC), Al-Skeini and Other v. the United Kingdom, 7 July 2011, App. No. 55721/07, para 132.

[49] See more on this Roxstro et al. 2005, p. 55.

[50] See ECtHR, Drozd and Janousek v. France and Spain, 26 June 1992, App. No. 12747/87; Gentilhomme and Others v. France, 14 May 2002, Apps. Nos. 48205/99, 48207/99 and 48209/.

[51] ECtHR (GC), Al-Skeini and Others, para 75.

judgment refers mainly to the behaviour of States, it remains dubious whether these conclusions are also entirely applicable to international organizations, at least as far as they are not party to the relevant Conventions.[52] In the specific case of the EU, however, it has to be emphasized that with the adoption of the CFREU, the EU formally recognized its obligation to respect the rights, freedoms and principles laid down in the CFREU (including the right to life, the right to the integrity of the person and the right to working conditions which respect his or her health, safety and dignity). Therefore, the obligation to protect life, which was formerly attributed only to States, must now be considered to be applicable also to the EU.[53] The same conclusions also seem applicable to the UN and to other Regional Organizations: this can be easily inferred from several UN documents such as the 2009 Staff Regulations of the United Nations and provisional Staff Rules.[54]

In his Commentary to the UN Staff Regulation Rules,[55] the UN Secretary General clearly indicated that the obligation of the UN to ensure the safety and security of its staff can also be considered a 'basic right of the staff'.[56]

This allows the conclusions to be drawn that, under general international law, international organizations are bound by international human rights law, to respect the rights to life, integrity and healthy working conditions of the employees that they send on mission. This is a strong legal basis on which to ground the duty of care principles.

2.4 Scope and Content of the 'Duty of Care' According to Recent International and National Jurisprudence: The Specific Obligations Incumbent on International Organizations

The question of the specific content of the duty of care of international organizations was addressed as early as the first years of life of the UN: in the Resolution 258/III of December 3, 1948, the UNGA recognized, with great emphasis, the

[52] The ILOAT stated, for example, that the 1950 European Convention is not applicable to international organizations: however, the Tribunal did not explain the legal basis of this statement. ILOAT, A. G. S. against the United Nations Industrial Development Organization (UNIDO), 11 July 2007, Judgment No. 2662, para 12.

[53] In the Missir case (para 126) the EU Civil Service Tribunal clearly stated that EU staff can rely 'on a rights to working conditions that respect their health, safety and dignity as recalled in Article 31(1) of the Charter of Fundamental Rights of the European Union' (EU Civil Service Tribunal, Livio Missir Mamachi, para 126).

[54] Staff Rules Staff Regulations of the United Nations and provisional Staff Rules, ST/SGB/2009/7, 21 October 2009. http://sas.undp.org/documents/ST_SGB_2009_7.pdf. Accessed 20 February 2018.

[55] Ibid.

[56] Ibid., p. 15.

urgency of the question of 'the arrangements to be made by the United Nations with the view of ensuring to its agents the fullest measures of protection'. As early as the Advisory Opinion of 11 April 1949 on Reparation for injuries suffered in the service of the United Nations, the ICJ clearly stated that

> the organization may find it necessary, and has in fact found it necessary, to entrust its agents with important missions to be performed in disturbed part of the world. Many missions, from their very nature, involve the agents in unusual dangers do which ordinary persons are not exposed […] Both to ensure the efficient and independent performance of these missions and to afford effective support to its agent, the Organization must provide them with adequate protection […][57]

Interestingly the (then) emerging obligation incumbent on the UN to protect its own staff was associated in a clear-cut manner with the need to protect the independence of the staff and, as a consequence, of the sending Organization. One can draw from this that the obligations stemming from the duty of care are both a pre-requisite for guaranteeing the effective independence of international organizations and a consequence of this independence. This unique situation is well reflected in a subsequent paragraph of the same Advisory Opinion where the Court stated

> to ensure the independence of the [international civil servant], and, consequently the independent action of the Organization itself, it is essential that in performing his duties he needs not rely on any other protection than that of the organization […] In particular, he should not to have to rely on the protection of his own State. If he had to rely on that State, his independence might as well be compromised […][58]

Given the sensitive nature of the issue and the increasing number of field operations deployed in dangerous areas by the UN and its agencies, several legal disputes have arisen between sending institutions and their personnel for damages suffered while on mission. As already mentioned, many of these disputes have been submitted to the competent Administrative Tribunals of the relevant regional Organizations, of the UN, and to the ILOAT, which since 1947 has been in charge of hearing complaints from serving and former officials of the International Labour Office. This specific Tribunal is also mandated to examine cases against other international organizations that have recognized its jurisdiction: it is available to approximately 46,000 currently serving international civil servants and former officials of some sixty organizations.[59] The jurisprudence of these Tribunals has already been examined and commented upon in Sect. 2.3 in order to identify its legal foundation. In this section the legal analysis of the jurisprudence aims at better defining the precise content and contours of the duty of care obligation incumbent on international organizations towards their mobile working force. Although many of the legal cases and disputes examined in this contribution refer to situations in which staff sent abroad have accused the sending Organization of a violation of the

[57] ICJ, Reparation for Injuries Suffered in the Service of the United Nations, p. 575.

[58] Ibid., p. 183.

[59] See more in Reinisch and Knahr 2008, pp. 447–483.

duty of care, it should be mentioned that in several cases the content of this specific obligation was discussed and will also be examined in cases where the assumed violations took place at headquarters or, in any case, not while on mission in the field. This is due to the fact that the duty of care is always incumbent on international organizations and it is only its content which might differ should the staff be sent to a dangerous area. A full investigation of this principle is required to offer a clear and detailed picture of its content, which may vary depending on the situation in the country of assignment of the staff and on the seniority of the Staff and their public exposure. This has been clearly stated by the Administrative Tribunal of the African Development Bank.[60]

2.4.1 *Provide a Working Environment Conducive to the Health and Safety of Personnel*

A first element identified by the international jurisprudence and practice characterizing the duty of care, is the obligation incumbent on international organizations to provide a working environment conducive to the health and safety of its staff members. According to UN Staff regulation 1.2(c):

> Staff members are subject to the authority of the Secretary-General and to assignment by him or her to any of the activities or offices of the United Nations. In exercising this authority, the Secretary-General shall seek to ensure, having regard to the circumstances, that all necessary safety and security arrangements are made for staff carrying out the responsibilities entrusted to them.

It is worth recalling that there is a general agreement that

> the primary responsibility under international law for the security and protection of humanitarian personnel and United Nations and associated personnel lies within the Government hosting a United Nations operation conducted under the Charter of the United Nations or its agreements with relevant organizations.[61]

This conclusion is not in contradiction with the duty of care which is incumbent on the sending international organizations to which different and additional obligations concerning the protection of its staff are applicable, as will be explained below.[62] However from the previous statement one may well reach the conclusion that the sending organization, especially if involved in a field operation, has to carry out all possible efforts to convince the hosting State to ratify the relevant Convention on the Safety of United Nations and Associated Personnel, which entered into force on 15 January 1999 and to the Optional Protocol to the above

[60] AsDBAT, C. A. W. Applicant, African Development Bank, Respondent, 11 May 2006, Judgment.

[61] See for example the UNGA Resolution 70/104, para 9 of the preamble.

[62] See more in Bruderlein and Gassman 2006, p. 63.

mentioned Convention (which entered into force on 19 August 2010) which provide specific obligations on the hosting State. As an alternative, the sending Organization, in the fulfilment of its duty to protect the life of its own staff sent abroad should at least request the hosting State to introduce the necessary national legislation to prevent and punish crimes committed against international personnel. In other words, the sending organization has to do its utmost to ensure that the local State, hosting its staff, d*e facto* or *de jure,* respects the obligations described in the above mentioned Convention and Protocol.

The existence of this specific obligation to provide a safe working place for its employees has been consistently upheld by various international administrative tribunals:[63] in this regard, an authoritative statement is to be found in the decision of the ILOAT in re Grasshoff (Nos. 1 and 2), Judgment No. 402 (1980). In this case the Tribunal examined how to balance the need to perform a given task and the need not to expose personnel working in dangerous places to abnormal risks. The Tribunal stated that

> the employer will not require the employee to work in a place which he knows or ought to know to be unsafe […] If there is doubt about the safety of a place of work, it is the duty of the employer to make the necessary inquiries and to arrive at a reasonable and careful judgment, and the employee is entitled to rely upon his judgment […] This principle is to be applied with due regard to the nature of the employment. In some employments there are unavoidable risks. A doctor may have to risk infection and a soldier or a policeman to risk bombs. The question in each case is whether the risk is abnormal having regard to the nature of the employment.[64]

The workplace has to be intended in a general manner: it refers not only to locations out of the country (specifically to those in high or critical risk countries) but also at headquarters and wherever the organization has (or should have had) reasons to think that a dangerous situation may occur. In a case against the World Intellectual Property Organization the ILOAT stated that

> Moreover, the duty of an international organization to provide a safe and secure workplace extends to ensuring that such conduct does not occur in relation to Staff Association affairs, at least where, as here, it knows that there are strong feelings between the different protagonists.[65]

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[63] See among others UNAT, Haile v. Secretary General of the United Nations, 30 September 2004, Judgment No 1194, para 7; UNDT, Edwards v. Secretary General of the United Nations, 26 January 2011, Judgment No. 2011/022 (see Annex II, Case 39), and UNDT, Mc Kay v. Secretary General of the United Nations, 9 February 2012, Judgment No. 2012/018 (see Annex II, Case 42). The OECD Administrative Tribunal expressed similar position: in a Judgment of 1999, the Tribunal stated to be 'well aware of the Organisation's obligations towards its staff in matters of health and safety at work' (OECD Administrative Tribunal, F. v. Secretary General, 21 June 1999, Case No. 35).

[64] ILOAT, In re Grasshoff (Nos. 1 and 2), 24 April 1980, Judgment No. 402, para 1 (see Annex II, Case 19), emphasis added.

[65] ILOAT, B. F. against the World Intellectual Property Organization (WIPO), 10 May 2007, Judgment No. 2636, para 28.

The EU Civil Service Tribunal contributed additional ideas in the Missir Mamachi di Lusignano case,[66] related to an incident occurring in Morocco, which raised significant interest in the press and in public opinion in Europe. The Tribunal, after a thorough examination of the events and of all relevant and available documents, stated that

> As regards safe working conditions for its staff, it cannot be disputed that the Commission, like any public or private employer, has a duty to act. The staff can rely on a right to working conditions that respect their health, safety and dignity, as recalled in Article 31(1) of the Charter of Fundamental Rights of the European Union […] Moreover, it is clear both from general texts on the subject and from the case-law *that the Commission's duty, as employer, to ensure the safety of its staff must be discharged with particular rigour and that the administration's discretion in this area is reduced, although not eliminated.*[67]

The EU Civil Service Tribunal, however, introduced a few limitations that reduce the scope of this obligation incumbent on EU Institutions.

> Although this duty to ensure the safety of its staff is wide, it cannot go as far as to place an absolute duty on the institution to achieve the desired result. In particular, budgetary, administrative or technical constraints to which the administration is subject, and which sometimes make it difficult or impossible to implement urgent and necessary measures swiftly despite the efforts of the competent authorities, cannot be ignored. Moreover, the duty to ensure safety becomes delicate where the official concerned, unlike a worker in a fixed position in a set location, is required, as was the applicant's son, to work in a third country and to assume a function comparable to a diplomatic function, exposed to a variety of risks that are less easy to identify and manage.[68]

An important contribution to better clarify the scope of this specific obligation is also provided by a sentence of the AsDBAT in the 1995 case Barnes v. the ADB.[69] The Tribunal stated first of all that

> […] as a matter of the general principles of the law of employment, the Bank owes to all members of its staff a contractual duty to exercise reasonable care to ensure their safety whilst on the Bank's premises. This is the same as saying that the Bank must not be negligent in constructing, equipping or maintaining its premises, or in making provision for the personal protection of its staff members on those premises against reasonably foreseeable risks[70]

and that

> […] an organization is not absolutely liable for injury suffered by a staff member in its service. But it necessarily follows from this that an organization is likewise not absolutely

[66] EU Civil Service Tribunal, Livio Missir Mamachi, para 126 (emphasis added).

[67] Ibid.

[68] Ibid., para 130.

[69] ADB Administrative Tribunal, Cynthia M. Bares et al. v. ADB, 31 May 1995, Decision No. 5, para 20 (see Annex II, Case 2).

[70] Ibid., para 21.

> liable for injury suffered by a staff member on its premises. Rather, in both situations the obligation of the organization is only to take reasonable care.[71]

Interestingly, this principle has received worldwide support in the jurisprudence of the competent tribunals of other international organizations: in a recent case the Administrative Tribunal of the African Development Bank confirmed that

> The Bank should intervene in one way or the other to protect its employees who are victims of violence in the workplace. That is what the Bank did both by trying to reconcile the differing points of view and by setting up Committees of Inquiry and convening the Disciplinary Committee. The second is that in case of serious offence, especially involving physical violence, the Bank must initiate disciplinary proceedings, as it rightly did on the recommendation of the Appeals Committee. Inaction by the Bank would have been a breach of both *the duty to protect the employee and of the duty of impartiality*.[72]

2.4.2 *Actively Protect the Officers Facing Specific Challenges and Threats and, When Using Independent Contractors, Use Reasonable Care in Selecting Them and Maintain a Sufficiently Close Supervision over Them to Make Sure That They Use Reasonable Care*

A second element, although closely linked to the previous one, included in the duty of care principles has been identified in the positive obligation of the sending Organization to actively protect their officers facing general and specific (such as those linked to gender or to sexual orientation) challenges and threats (including those assumed to be victims of physical and non-physical violence in the workplace).

There is no doubt that the State hosting foreigners has the primary responsibility to protect them. In particular, when the international organization intends to deploy a significant number of its staff in a given country, it should be highly advisable that it stipulates a Status of Mission Agreement (SOMA) with the interested State, as a useful tool to increase the level of protection of the expatriates.[73]

The specific issue of relations with the host country has received increasing attention, considering that very often the hosting State does not have a real capacity to fulfil this obligation. In the Framework of Accountability for the United Nations Security Management System it is made very clear that

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[71] Ibid., para 23.

[72] Administrative Tribunal of the African Development Bank, Clotilde Anne Isabelle Bai, Applicant African Development Bank, Respondent, 29 June 2010, Judgment No. 72 (see Annex II, Case 1) (emphasis added).

[73] See more about these issues in Sari 2008 and Chap. 4 by Gasbarri.

> the United Nations has a duty as an employer to reinforce and, where necessary, supplement the capacities of host Governments to fulfil their obligations in circumstances where United Nations personnel are working in areas that are subject to conditions of insecurity which require mitigation measures beyond those which the host Government can reasonably be expected to provide.[74]

However, with or without a SOMA, it might well be possible that the local State, mainly in post-war or post-disaster settings, is unable (and, sometimes, even unwilling) to offer such protection. Should this be the case, the sending organization has, on the basis of the duty of care principles, a specific obligation to implement, autonomously but in cooperation with the local State, several safety and security measures aimed at minimizing the potential risks associated with the presence of its staff in the specific country.

In light of the jurisprudence this inevitably implies having in place a professional system for analyzing available data on the security situation in a given area, a sound security risk assessment and risk management system, continuously updated security and emergency plans, a proper decision-making procedure which guarantees that the decision-makers are duly informed about the situation in the field and that they have the professional capacity to take correct decisions in due time.[75] The United Nations Security Management System Security Policy Manual, updated in November 2017,[76] or the UN Minimum Operating Security Standards[77] (MOOS) and the UN Minimum Operational Residential Security Standards (MORSS) are good examples of relevant tools used by the UN to deal with these issues with a more professional approach.

This principle has received worldwide support in the jurisprudence of the competent tribunals of other international organizations: in a recent case the Administrative Tribunal of the African Development Bank confirmed that

> The Bank should intervene in one way or the other to protect its employees who are victims of violence in the workplace. That is what the Bank did both by trying to reconcile the differing points of view and by setting up Committees of Inquiry and convening the Disciplinary Committee. The second is that in case of serious offence, especially involving physical violence, the Bank must initiate disciplinary proceedings, as it rightly did on the recommendation of the Appeals Committee. Inaction by the Bank would have been a breach of both *the duty to protect the employee and of the duty of impartiality*.[78]

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[74] UN Secretary General 2010, Annex 1, para 2.

[75] Oslo District Court, Steven Patrick Dennis.

[76] The November 29, 2017 version of the manual is available at https://www.un.org/undss/sites/www.un.org.undss/files/docs/security_policy_manual_spm_e-book_as_of_29_nov_2017_0.pdf. Accessed 15 February 2018.

[77] The MOOS is the primary mechanism for managing and mitigating security risks to UN personnel, property and assets of the UN. The MOSS encompasses a range of measures designed to reduce the risks to an acceptable and manageable level. These measures include, inter alia, telecommunications, documentation, coordination, residences, equipment, vehicles and training.

[78] Administrative Tribunal of the African Development Bank, Clotilde Anne Isabelle Bai (emphasis added).

The AsDBAT in the 1995 case Barnes v. the ADB adopted a similar approach.[79] After the murder of the Bank's Assistant General Counsel, Mr. Robert E. Bares, committed on the premises of the Bank in Manila by a person employed as a security guard there, Mrs. Cynthia Bares, widow of the deceased, her two children, and the Estate of the deceased, decided to bring an action against the Bank before the competent administrative tribunal of the bank itself. The plaintiff brought extensive arguments based upon authorities relating to the responsibility of States in public international law for the wrongful acts of officials causing injury to aliens. The Tribunal stated first of all that

> […] as a matter of the general principles of the law of employment, the Bank owes to all members of its staff a contractual duty to exercise reasonable care to ensure their safety whilst on the Bank's premises. This is the same as saying that the Bank must not be negligent in constructing, equipping or maintaining its premises, or in making provision for the personal protection of its staff members on those premises against reasonably foreseeable risks[80]

and that

> …an organization is not absolutely liable for injury suffered by a staff member in its service. But it necessarily follows from this that an organization is likewise not absolutely liable for injury suffered by a staff member on its premises. Rather, in both situations the obligation of the organization is only to take reasonable care.[81]

The Tribunal even went beyond these conclusions to include situations arising where the employing organization decided to use external contractors for carrying out given activities which the organizations could perform directly. According to the Tribunal

> the Bank is an artificial legal person, not a natural one. It can act only through those whom it employs, whether as servants, agents or independent contractors. In selecting such persons to perform the functions with which it is charged, the Bank must of course use reasonable care to choose those who are fully capable of performing the functions for which they are employed or retained. It must, moreover, ensure that all who perform these functions themselves exercise reasonable care in doing so. Nevertheless, the Bank, having used reasonable care in the selection of its servants, agents or contractors, cannot afterwards say that it has thereby discharged the whole of its duty and is no longer obliged to see that those persons in their turn exercise reasonable care towards its staff. In short, though the Bank is free to hire a contractor to provide a service within the Bank that it might otherwise itself perform directly through its own employees, the Bank must exercise reasonable care in the selection of the contractor and then maintain a sufficiently close supervision over the latter to ensure that the latter itself uses reasonable care. The employment of a contractor does not reduce the level of care to which the staff member is entitled under the contract of employment.[82]

[79] AsDBAT, Cynthia M. Bares et al., para 20.

[80] Ibid., para 21.

[81] Ibid., para 23.

[82] Ibid., para 26.

The conclusion that may be drawn from this decision is that whenever the employing organization outsources specific activities, and especially those which might affect the safety, security and well-being of the employees, it must exercise reasonable care in the selection of the contractor and then maintain sufficiently close supervision over the latter to ensure that the latter itself uses reasonable care. Such a cautious attitude is required even by the Montreux Document on Pertinent International Legal Obligations and Good Practices for States related to Operations of Private Military and Security Companies during Armed Conflict adopted on 17 September 2008.[83] Although this non-binding document focuses primarily on times of armed conflict, the principles contained therein are expressly relevant to non-armed conflict situations as well. Furthermore, international organizations making use of private contractors to protect their staff should always consider the opportunity to select them from among those companies that have voluntarily agreed to subscribe to, for example, the International Code of Conduct for Private Security Service Providers (ICoC)[84] or other similar documents: adhering to such Codes of Conduct is good evidence of the commitment of the company to respect existing international regulations and to work in a professional manner.

The obligation of the sending Organization to protect its employees was also emphasized by the UN Appeals Tribunal in a case examined in 2003 where the Tribunal stated that

> The Tribunal does not agree with the JAB's analysis, according to which damages can only result from a wrongful act committed either negligently or with intent by the Organization. Clearly, failure to act can result in damages as well, such as in the case when there is a duty to protect but no protection is given.[85]

The UN in recent years has devoted several efforts such as internal restructuring,[86] seminars and strategic reflection, to find a proper balance between the moral and ethical challenges enshrined in the need to protect the local population affected by a disaster (and especially by man-made disasters) and the equally important obligation to protect and safeguard to the maximum extent possible the life and

[83] https://www.eda.admin.ch/eda/en/home/foreign-policy/international-law/international-humanitarian-law/private-military-security-companies/montreux-document.html. Accessed 25 February 2018. The total number of adhering states is 54, plus the EU (2012), the Organization for Security and Co-operation in Europe (2013) and NATO (2013).

[84] https://www.icoca.ch/en/history. Accessed 15 February 2018.

[85] UNAT, Mwangi Against the Secretary-General of the United Nations, 30 September 2003, Judgment No. 1125 (see Annex II, Case 38).

[86] See for example the decision of the UNGA to create, in 2004, the UN Department on Safety and Security to entrust one entity with the authority and accountability for the safety and the security of the UN, its staff and its assets and operations. In 2015, after a long internal discussion and on recommendation of the Secretary-General's Policy Committee, the UN Secretariat Safety and Security Project (UNSSSIP) was launched with the goal to integrate all Secretariat safety and security staff under the authority of UNDSS. It is worthwhile mentioning that in the UN it is the Inter-Agency Security Management Network (IASMN) which brings together representatives of all partners in the UN security management network including UN agencies, funds and programmes to coordinate security practices and policies across the UN system.

well-being of the UN officers and personnel deployed in crisis-affected areas, providing them with a safe and secure working environment.[87] This reflection has been conducive to the development of the new policy identified by the motto 'Stay and deliver',[88] which implies a high number of changes in the attitude and traditional behaviour of the UN. This policy, searching for an acceptable balance between the urgent need to protect civilians and to minimize the risk for humanitarian workers, is pivotal in identifying and suggesting new measures and procedures to reduce the security threats for those delivering emergency relief. The implementation of these measures requires, inevitably, a renewed attention to the financial implications attached to the implementation of the new policy. All this is well summarized in the statement of Irina Bokova, then Secretary General of UNESCO, delivered in her capacity as member of the UN High Level Committee on Management, during the meeting of the HLCM which took place in Paris on 19 and 20 March 2015:

> 'Stay and deliver' means exposing personnel to high-risk environments - this means we need to focus more on security threat analysis capabilities and to think about how to mainstream security resources into planning and budgeting processes, globally and throughout our respective organizations.[89]

It seems clear in the light of this statement that the true challenge for the UN and for other international organizations is now to act coherently and to provide adequate human and financial resources for the full implementation of the new policy aimed at increasing the safety and security of the workplace.[90] It is under this framework that the UNGA, seriously concerned about the security of deployed personnel, requested, in its Resolution 70/104, that the UN Secretary General submit to the Assembly a comprehensive and updated report on the safety and security of deployed personnel. The UNSG report 'Safety and security of humanitarian personnel and protection of United Nations personnel', presented to the

[87] See more on this ethical and moral challenges facing the UN, Haynes 2008, pp. 179 ff.

[88] One of the most comprehensive studies on the new attitude of the UN in critical risk areas was carried out in an independent study commissioned by OCHA: Egeland et al. (2011). See more on this principle Sheran 2015, pp. 101 ff.

[89] Discours de la Directrice générale de l'UNESCO, Irina Bokova, à l'occasion de la 29e session du Comité de haut niveau sur la gestion (HCLM) des Nations Unies, UNESCO, le 19 mars 2015, available at http://unesdoc.unesco.org/images/0023/002323/232347M.pdf. Accessed 31 January 2018.

[90] The UNGA has indicated in a recent Resolution that it must be acknowledged that a more coherent and effective safety and security policy also implies the need for additional funding. In the Resolution the UNGA underlines '[…] the urgent need to allocate adequate and predictable resources to the safety and security of United Nations and associated personnel, through regular and extra budgetary resources, including through the consolidated appeals process, and encourages all States to contribute to the Trust Fund for Security of Staff Members of the United Nations System, inter alia, with a view to reinforcing the efforts of the Department of Safety and Security to meet its mandate and responsibilities to enable the safe delivery of programmes' (UNGA Resolution 70/104, para 18).

UNGA on 21 September 2016[91] contains precious indications about how the UN is responding to the new challenges. This Report highlights the understanding of the UN on the specific duty of care obligations incumbent on the organization related to the safety and security of the deployed staff: it deserves, therefore, a closer examination to determine its implications for the specific issue at stake.

After a thorough examination of the various problems relating to the global security environment, the associated security threats, risks and challenges facing UN and humanitarian personnel deployed in the field, the report presents the Organization's response to such threat, the strategic challenges faced by the UN and the way forward. The priorities of the UN to deal properly with the issue under scrutiny are articulated in 4 areas. First of all, there is a focus on enhancing the security risk management capacity of security decision makers. This implies that security risk decisions need to be taken timely and in a professional manner which requires that proper support is offered to the decision makers.

Secondly, the UN are committed to reinforcing the security management strategies and the policy framework to make possible UN operations in the field. In this framework the following issues have been tackled in the Report:

- the need to use effectively specific security risk-management measures,
- the need to improve the system of response to critical incidents (including the introduction of a system which allows the UN to have clear information on all its personnel present in a particular area in order to quickly contact and inform them about significant incidents which have happened or might happen in that area),
- the commitment to significantly increase security training opportunities for those going to the field and
- the efforts to enhance situational awareness and threat risk analysis.[92]

The third pillar of the UN strategy is devoted to increasing flexibility and efficiency in support of the UN field operations. In this part the issue of integrating the security resources of the Secretariat to further the efficiency of their work, the need of a new human resources strategy for security personnel and the urgency of developing a new approach to compliance and evaluation have been carefully addressed.

Finally, the fourth pillar deals with the urgency of building external collaboration and enhancing internal coordination. Under this pillar, the SG addresses a multitude of aspects such as

- enhancing security collaboration between the UN and host Governments,
- campaigning against impunity and promoting respect for the human rights, privileges and immunities of UN and associated personnel,
- reinforcing partnerships with NGOs,
- promoting gender considerations and inclusion,

[91] UN Secretary General 2016.

[92] UN Secretary General 2016, paras 35 ff.

- developing a UN security management system for road safety and
- enhancing air travel safety globally.[93]

This recent practice represents precious evidence of the interest and the commitment of the UN to fully comply with the duty of care obligations which require the sending Organization to provide a safe and healthy working environment. It is worth noting that the Report specifically mentions the most recent activities of the Working Group on Duty of Care, chaired by the Under-Secretary-General for Safety and Security, and the 15 key recommendations submitted by the WG in five areas including medical, safety and security, psychosocial and administrative/human resources.

To summarize, it emerges from the international jurisprudence that the central issue for the judges has always been to assess *ex post* the degree of risk, the nature of the risk, whether the risk was visible and foreseeable and whether possible and effective alternative courses of action existed[94] Although making reference to a dispute between an employee and his previous employer (an NGO), the conclusions of the Oslo District Court in the Dennis v. Norwegian Refugee Council case offer a clear picture of the present obligation incumbent on the sending Organization and on how it will be examined, *ex post*, by the judges should a case be brought in front of them.

> Overall, the Court finds that the staff could reasonably expect that the NRC would implement necessary security measures in connection with the visit of the Secretary General. The risk of kidnapping was concrete and high. In addition, the risk was visible and foreseeable. The potential for injury in the case of kidnapping is serious and may in the worst case entail fatalities or serious injuries. Kidnapping may also impact programme activity. Considering the degree and nature of the risk, the requirements for diligent handling of security must be considered to be heightened. The Court has found that there were several effective and practicable alternative courses of action that would have improved security. The security plan that was applied was however contrary to applicable guidelines and advice from persons with competence in the field of security. Upon a concrete overall assessment, in the Court's view there is no doubt that NRC staff acted negligently and that the requirements for employer's liability under section 2-1 of the Compensation Act are fulfilled.[95]

2.4.3 *Protect Personnel's Private Property*

The duty of care principles imply that the sending Organization has 'a broad duty to act with care and consideration with regards to the members of their staff *and their*

[93] Ibid., paras 54 ff.

[94] Oslo District Court, Steven Patrick Dennis.

[95] Ibid., p. 28.

property'.[96] According to previous case law, this obligation was violated when the Administration had not conducted disciplinary proceedings properly,[97] or when it acted in a certain way in response to political pressure.[98] This obligation also requires the Administration to take all the necessary precautions when it decides to relocate the personal effects of one of its staff members from one place to another, especially when it is not physically possible for the staff member to carry out the relocation himself because he is kept away from his duty station and when the duration lies solely within the discretion of the Administration.[99]

2.4.4 *Offer Labour Contracts Which Are Fair and Which Take into Due Consideration the Particular Nature of the Risks Associated with the Specific Working Place/Tasks*

The contractual labour relations between an individual and the international organization which recruit him/her are, generally speaking, regulated by the internal law of the international organization and by general principles of law.[100] In this respect, in order to protect the contractual rights of the employees (which otherwise, due to the immunity international organizations enjoy from national jurisdictions, would have no instrument to protect their legitimate rights), International Tribunals have made significant efforts to delimit this obligation in a more precise manner to guarantee a fair labour contract.[101] The notion of fairness has been interpreted, in cases of disputes with staff deployed overseas, to include: social services;[102] the guarantee that in case of transfer from one post to the other, this will be carried out with due respect, 'in both form and substance, for the dignity of the official

[96] UNAT, Case No 1545 against the Secretary-General of the United Nations, 30 September 2009, Judgment No. 1472, para XXIII (see Annex II, Case 34) (emphasis added).

[97] UNAT, Vitkovski and Rylkov against the Secretary-General of the United Nations, 30 June 1992, Judgment No. 559, para XVII.

[98] UNAT, Case 1358 against the Secretary-General of the United Nations, 31 January 2006, Judgment No. 1275, para XIII (see Annex II, Case 33).

[99] UNAT, Case No 1545, para XXIII.

[100] ILOAT, In Re Wahgorn, 12 May 1957, Judgment No. 28: 'Considering that the complainant wrongly alleges that English law is applicable as his national law, whereas the Tribunal is bound exclusively by the internal law of the Organisation and in particular by the provisions of the T.A.B. administrative manual as well as by general principles of law'.

[101] See more in Chap. 14.

[102] According to the EU Civil Service Tribunal: 'Among the right and duties arising from the employment relationship between an institution and its employees is the duty of the employer to provide for its employees various services of a social nature […]' (EU Civil Service Tribunal, Mario Berti v. Commission of the European Communities, 7 October 1982, Case 131/81 (see Annex II, Case 9)).

concerned, particularly by providing him with work of the same level as that which he performed in his previous post and matching his qualifications';[103] the payment of the agreed salary on a regular basis;[104] appropriate consideration for the period spent abroad on official mission;[105] and the founding of decisions to reduce staff following a reconfiguration of the mission on grounds which are not manifestly unfair or erroneous.[106]

2.4.5 *Make Adequate Information Available to Personnel About the Potential Dangers They Might Face and About the Specific Situation in the Country of Destination*

A fifth component of the duty of care has been identified in the obligation of the recruiting institutions to provide adequate information to their personnel about the potential dangers they might face in the mission they have been assigned to and update them continuously should the external situation so require. According to the UK Stabilisation Unit of the FCO, 'informed consent is a key principle of the duty of care and has to be always fulfilled to assist the person in his/her decision whether or not to deploy'.[107] In his Commentary to the UN Staff Regulation Rules of 2002,[108] the UN Secretary General took a clear position on the issue, stating that

[103] ILOAT, R. A.-O. against the United Nations Educational, Scientific and Cultural Organization (UNESCO), 16 July 2003, Judgment No. 229 (see Annex II, Case 25). In another case the ILOAT had stated that 'every transfer must respect the general principles governing decisions affecting an official's status. In order to respect the official's dignity, it is not enough for the person concerned to retain her or his grade and remuneration; care must also be taken to ensure that the new post provides her or him with work of the same level as that which she or he performed in her or his previous post and matching her or his qualification': ILOAT, J. L. Against the International Labour Organization (ILO), 8 July 2009, Judgment No. 2856 (see Annex II, Case 20).

[104] ILOAT, Stanley Robert Wakley v. WHO, 6 October 1061, Judgment No. 53.

[105] 'It would be in breach of an official's rights as such and a denial of his entitlements under the procedure for personal promotion to discount any of his service, including periods he may have spent on secondment to technical assistance projects': ILOAT, Jorge Giusti Bertolotti against the International Labour Organisation (ILO), 10 December 1987, Judgment No. 870.

[106] Although it is a decision of an Ombudsman and not of a Tribunal, it seems worth recalling the European Ombudsman, Decision on own-initiative inquiry OI/2/2015/MG concerning the handling of staff reductions in the EU Rule of Law Mission in Kosovo (EULEX), 23 February 2016, in which the Ombudsman, after having reaffirmed that 'EULEX had a wide discretion in deciding upon the criteria for the posts that were to be filled and in determining, in the light of those criteria and in the interests of the service, the rules and conditions under which a selection procedure is organized', stated that since the choice of selection criteria and what weight to give to each of them falls thus under the discretionary power of EULEX, the Ombudsman's role is 'to assess whether these choices were manifestly unfair or erroneous'.

[107] UK Stabilisation Unit 2004, p. 18.

[108] UN (2002) Status, basic rights and duties of United Nations staff members, T/SGB/2002/13.

> […] since staff is subject to assignment, *measures should be taken to ensure that staff is properly advised, before departure*, of conditions prevailing at the duty station to which they are assigned.[109]

In a recent Resolution, the UNGA has reaffirmed this obligation to adequately and completely inform the staff sent on mission and requested

> the Secretary-General to continue to take the necessary measures to ensure that United Nations and other personnel carrying out activities in fulfillment of the mandate of a United Nations operation are properly informed about and operate in conformity with the minimum operating security standards and relevant codes of conduct and are properly informed about the conditions under which they are called upon to operate and the standards that they are required to meet […][110]

In the case L. J.-S v. European Patent office, the ILOAT clarified that this obligation is incumbent on international organizations but that employees are also charged with the duty to inform themselves:

> International organizations have a duty of care towards their employees and must provide clear rules and regulations as well as clarifications of such when requested, but they cannot be solely responsible for every situation stemming from confusion regarding said rules. Employees are also charged with the duty to inform themselves, and to request clarification when necessary so that the system can work efficiently to the best advantage of both the Organization and the staff members either as a group or individually.[111]

The information to be provided to staff includes not only the security situation in the country but also proper information about specific challenges related to issues such as gender, sexual orientation, and access to medical care in the case of specific medical needs of the staff (such as HIV/AIDS).[112] According to the LGBTI staff group 'UN Globe' incidents of homophobia or transphobia in the country of destination should also be included in the info package to be shared with departing staff.[113] Proper information has to be provided, furthermore, about the need for vaccinations and immunizations, the political situation in the country, specific environmental problems etc.

The UN Department of Safety and Security, in the recently updated version of the United Nations Security Management System (UNSMS), Security Policy Manual,[114] added a specific chapter devoted to Gender Considerations in Security Management in which all organizations of the UNSMS are committed to

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[109] Ibid., p. 16 (emphasis added).

[110] UNGA Resolution A/RES/71/129 (2017) Safety and security of humanitarian personnel and protection of United Nations personnel, para 24.

[111] ILOAT, L. J.-S, para 7.

[112] See more at Chap. 14, Sect. 14.4.3.

[113] Ibid.

[114] See note 75.

> pursue every possible means to ensure that the United Nations personnel are fully briefed and aware of the risks that they may face, including those that are gender-related, and the availability of appropriate gender-sensitive support if there is a security incident.[115]

2.4.6 *Treat the Working Force in Good Faith, with Due Consideration, with no Discrimination, to Preserve Their Dignity and to Avoid Causing Them Unnecessary Injury*

A sixth component of the duty of care, closely associated with the previous ones, has been identified in the obligation of international organizations to treat their staff with due consideration, with no discrimination, to preserve their dignity and to avoid causing them unnecessary injury.[116] Consistent case law based on the jurisprudence of administrative tribunals states that 'the relations between an international organization and a staff member must be governed by good faith, respect, transparency and consideration for their dignity'.[117]

In its Judgment 3024 of July 6, 2011, the ILOAT further declared that

> […] the principle of good faith and the concomitant duty of care demand that international Organisations treat their staff with due consideration in order to avoid causing them undue injury; *an employer must consequently inform officials in advance of any action that may imperil their rights or harm their rightful interests* […][118]

Very recently the ILOAT reaffirmed and added detail to these concepts. In a judgment issued in the case G. V. against IFAD, the Tribunal expressed the opinion that

> […] IFAD violated its duty of care and did not respect the dignity of the complainants. Specifically, with regard to Ms V., it was out of the ordinary for her job title to have suddenly changed from […] to […], and later […] only after she protested against the

[115] Chapter 4, Section M, para 20 of the above-mentioned Manual.

[116] 'The principle of good faith and the concomitant duty of care demand that international organisations treat their staff with due consideration in order to avoid causing them undue injury; an employer must consequently inform employees in advance of any action that may imperil their rights or harm their rightful interests', ILOAT, In re Giordimaina v. the Food and Agriculture Organization of the United Nations (FAO), 30 January 2002, Judgment No. 2116 (see Annex II, Case 18).

[117] ILOAT, H. P. W. against the International Telecommunication Union (ITU), 9 July 2014, Judgment No. 3353, para 26 (see Annex II, Case 17).

[118] ILOAT, L. T. against the International Labour Organization (ILO), 6 July 2011, Judgment No. 3024 (emphasis added). See as well the conclusions of the OECD Administrative Tribunal, Miss C. v. Secretary General, 28 May 2009, Judgment in Case No. 65.

> unjustified change, which appeared to demote her. […] By simply expecting her to apply for posts at the P-4 level, IFAD did not recognize her P-5 level nor did it respect her dignity.[119]

The Tribunal went further and added some considerations which are extremely useful as they contribute to better defining which specific behaviour by IFAD was considered to be in contradiction with the dignity of the claimant:

> With regard to Ms G., the Tribunal considers that the abrupt change in her job title; the last minute notifications regarding changes to her post; the 'less than satisfactory' performance rating that was later changed by recommendation of the JAB, which found no evidence in support of or justification for the inferior rating; the disregard for her qualifications and/or the lack of specific justification for not reassigning her to any of the posts for which she had applied; and the abrupt withdrawal of the termination payment offer, all point to the finding that IFAD did not act with respect for her dignity and did not fulfil its duty of care towards her.[120]

These concepts are also affirmed in the jurisprudence of the NATO Administrative Tribunal, which has stated that the Organization has the obligation

> on the one hand, to provide the interested party with enough information to allow him/her to determine whether the contested decision is justified or otherwise is tainted by an error that makes its legality questionable, and, on the other, to enable the Tribunal to perform judicial oversight thereof. Thus the obligation for substantiation implies that the person who is the subject of a decision that constitutes grounds for grievance must be put in a position to clearly and unequivocally understand the decision-maker's reasoning; the scope of this obligation must be viewed in terms of the practical circumstances of each case.[121]

As far as non-discrimination is concerned it is useful to remember that

> Cases of alleged discrimination may arise in two distinct ways. First, a classification may expressly differentiate between two or more groups of staff members, giving rise to a charge of discrimination. Second, a policy, neutral on its face, may result in some kind of consequential differentiation between groups.[122]

On the other hand, the AsDBAT clarified that:

> The Tribunal cannot say that the substance of a policy decision is sound or unsound. It can only say that the decision has or has not been reached by the proper processes, or that the decision either is or is not arbitrary, discriminatory or improperly motivated, or that it is one that could or could not reasonably have been taken on the basis of facts accurately gathered and properly weighed.[123]

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[119] ILOAT, G. V. against the International Fund for Agricultural Development (IFAD), 11 February 2015, Judgment No. 3409, para 10 (see Annex II, Case 16).

[120] Ibid., para 11.

[121] NATO Administrative Tribunal, Appellants v. NATO International Staff, Respondent, 11 November 2013, Judgment Cases Nos. 889 and 890 PL (Case No. 889) and AL (Case No. 890) (see Annex II, Case 30).

[122] IMF Administrative Tribunal, 'G', Applicant and 'H', Intervenor, para 36.

[123] AsDBAT, Carl Gene Lindsey v. Asian Development Bank, 18 December 1992, Decision No. 1, para 12 (see Annex II, Case 3).

In other terms, whenever the management of an international organization is given a discretionary power (for example in dealing with appointment and promotion of their staff), the Administrative Tribunals have vindicated their right and their duty

> to ascertain if the discretionary authority has been exercised lawfully. This is why it is for the court hearing an appeal to determine not only whether the decision has been taken by a competent authority and whether it is in regular form, but also whether the correct procedure has been followed. The court must also determine whether the administrative authority's decision took account of all the essential facts, whether manifestly wrong conclusions have been drawn from the documents in the file, or finally, whether there has been a misuse of authority.[124]

2.4.7 *Have Sound Internal Administrative Procedures, Act in Good Faith and Have Properly Functioning Internal Investigation Mechanisms to Address Requests and Complaints by Personnel Within a Reasonable Time*

A seventh component is related to the obligation to have sound administrative procedures, to act in good faith and to have a properly functioning internal investigation mechanism to address requests and complaints by the employee within a reasonable time:[125] this aspect has been repeatedly emphasized by the international jurisprudence. First of all, it should be noted that civil servants working for an international organization have the right to present their case to an internal independent body in order to check the respect by the Organization of the relevant rules. This principle was reaffirmed by Administrative Tribunal of the IMF in the recent Judgment 2015-3 where the Tribunal emphasized that '[e]xercising the right to review of administrative acts through the channels established for the resolution of staff disputes, up to and including the review provided by this Tribunal, is a fundamental right of international civil servants'.[126]

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[124] Appeal Board of the CoE Administrative Tribunal, Bohner v. Secretary General, 1 December 1988, Appeal No. 151/1988.

[125] According to the ILOAT: 'It is true that an organisation should investigate allegations of misconduct in a timely manner both in the interests of the person being investigated and the organisation. These interests include, among other things, safeguarding the reputations of both parties and ensuring that evidence is not lost': ILOAT, R. D.A. G. against the Pan American Health Organization, 4 February 2014, Judgment No. 3295 (see Annex II, Case 26).

[126] IMF Administrative Tribunal, 'GG' (No. 2) v. International Monetary Fund, 29 December 2015, Judgment No. 2015-3, para 441 (see Annex II, Case 29), citing the previous case World Bank Administrative Tribunal, Louis de Merode et al. v. The World Bank, 29 December 1981, Decision No. 1, para 21 (see Annex II, Case 44).

Considering this specific right of the employee, the ILOAT has pointed out that the duty of care principle includes the obligation of the Organization to ensure that allegations of harassment are 'properly and promptly investigated'[127] while in the more recent Judgment 369 of July 2016, the same Tribunal stated that

> when an accusation of harassment is made, an international organization must investigate the matter thoroughly and accord full due process and protection to the person accused […] The organization's duty to a person who makes a claim of harassment requires that the claim be investigated both promptly and thoroughly, that the facts be determined objectively and in their overall context (see Judgment 2524), that the law be applied correctly, that due process be observed and that the person claiming, in good faith, to have been harassed not be stigmatized or victimized on that account.[128]

In the opinion of the ILOAT, by failing to conduct an inquiry to determine the validity of serious accusations, the Organization breaches 'both its duty of care towards one of its staff members and its duty of good governance, thereby depriving the complainant of her right to be given an opportunity to prove her allegations'.[129] The duty of care, therefore, includes the duty of the sending Organizations to organize an efficient internal system to allow their staff to submit grievances and complaints and to see them answered in a proper and timely manner. This emerges clearly in a case filed against the WHO, where the ILOAT reiterated that

> By failing to deal with the informal complaints in a manner consistent with its own policy, by failing to conduct an investigation in a timely manner when a formal complaint was filed and then by terminating the investigation, WHO breached its duty of care toward the complainant and caused her serious injury.[130]

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[127] ILOAT, Mr. B. F. against the World Intellectual Property Organization (WIPO), 10 May 2007, Judgment No. 2636, para 28. In the following Judgment 2910 the Tribunal restated very clearly in a case against the IAEA that 'The Agency's failure to do so constitutes not only a breach of its own policy and rules but, as well, a breach of its duty of care towards the complainant. ILOAT, Mrs. A. S. against the International Atomic Energy Agency (IAEA), 8 July 2010, Judgment No. 2910.

[128] ILOAT, B. (No. 2) v. EPO, 6 July 2016, Judgment No. 369, para 18. In the Case of Mr. A. K. v. UNESCO, ILOAT confirmed that 'In view of its duty of care towards its staff, an organisation must spare them the material and psychological drawbacks of endless procedures […]: while an organisation cannot avoid an occasional overload of work, it must take appropriate measures to avert the drawbacks of a massive and foreseeable increase in legal disputes' (ILOAT, Mr. A. K. against the United Nations Educational, Scientific and Cultural Organization (UNESCO), 14 July 2004, Judgment No. 2345).

[129] ILOAT, Mrs. B. K.-M. against the World Health Organization (WHO), 2 February 2011, Judgment No. 2973.

[130] ILOAT, Ms. G. C. against the International Atomic Energy Agency.

Further, according to consolidated jurisprudence, international organizations have a duty not only to 'to maintain a fully functional internal appeals body […]',[131] but also 'a positive obligation to see to it that such procedures move forward with reasonable speed'.[132]

The international jurisprudence offers more details on the way international organizations have to implement these specific obligations. The ILOAT has repeatedly observed, for example, that internal appeals must be conducted with due diligence stemming from the care owed by an international organization to its staff.[133] While the length of the proceedings of an appeal will often depend on the particular circumstances of a given case, in Judgment 2902, the Tribunal judged that 'by any standards a delay of nearly 19 months to complete the internal appeal process is unreasonable'.[134] In a later judgment in 2014 the ILOAT reaffirmed that the need for expeditious proceedings stems from the duty of care which all organizations owe to their staff. It is firmly established by the Tribunal's case law that a staff member is entitled to an efficient internal means of redress and to expect a decision on an internal appeal to be taken within a reasonable time.[135] These statements are quite common among international administrative tribunals: what remains to be clarified therefore is the meaning of the wording 'reasonable time'. The case law once more proves to be fundamental in addressing this problem: as already seen, a 19-month period has been considered to be unreasonable. But what can be considered reasonable? In a recent judgment, the ILOAT developed additional criteria to be used to check whether the decision by the competent bodies was taken within a reasonable period:

> In the absence of any explanation for the delay in a case that was not particularly complex, this delay is unreasonable. However, this is not a case that warranted an expedited process nor did its outcome have a degree of urgency that can be seen in other cases.[136]

The obligation to properly and promptly investigate any grievances submitted by staff can depend on the gravity of the specific case submitted to the attention of the international organizations. Cases of serious misconduct, such as those involving

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[131] ILOAT, Mr. L. J. C. against the Food and Agriculture Organization of the United Nations (FAO), 3 February 2010, Judgment No. 2904, para 15.

[132] See ILOAT, Mrs. B. J. R. against the United Nations Industrial Development Organization (UNIDO), 3 February 2003, Judgment No. 2197, para 33 (see Annex II, Case 12).

[133] See for example ILOAT, Mr. A. F. against the International Atomic Energy Agency (IAEA), 1 February 2006, Judgment No. 2522.

[134] ILOAT, Mr. E. A. against the United Nations Industrial Development Organization (UNIDO), 3 February 2010, Judgment No. 2902.

[135] ILOAT, Mrs. C. E. S. against the World Health Organization (WHO), 9 July 2014, Judgment No. 2642, para 6 (see Annex II, Case 13). See as well for similar conclusions ILOAT, Mrs. Antonella Giordimaina, para 11; ILOAT, Mrs. S. H. against the United Nations Educational, Scientific and Cultural Organization (UNESCO), 8 July 2009, Judgment No. 2851, para 10 (see Annex II, Case 27). ILOAT, Mr. L. J. C., paras 14 and 15, and ILOAT, Mr. J. A. C.-Z. against the World Health Organization (WHO), 6 February 2013, Judgment No. 3168, para 13.

[136] ILOAT, Mr. J. A. C.-Z., para 13.

harassment, and especially those involving a physical or sexual background, need to be prioritized and to be dealt with quickly and with specific attention to the rights and the dignity of the person in question.

To sum up one can conclude, from the above case and from others,[137] that in evaluating whether there was an unreasonable delay it is necessary to take into consideration

(a) the level of complexity of the issue;
(b) if the counterpart has provided credible justification for the length of the procedure;
(c) if the issue at stake is of serious importance which requires an immediate or at least a quick and fast-track procedure.

Depending on the answers to these questions, the judge will be able to evaluate whether the period can be considered reasonable or not. Should the latter be the case, the Tribunals have usually decided to award moral damages for the delay, in an amount usually between 500 Euros[138] and 15,000 Euros.[139]

Finally, the international jurisprudence has offered important additional details on the precise scope and goal of the specific obligation incumbent on international organizations to act in good faith in relations with their staff. In Judgment 3353, the case of Mr. H. P. W. and Mr. H. M. against the International Telecommunication Union, the ILOAT had an opportunity to make a few relevant statements which deserve proper attention. Both complainants in 2009 were offered a two-year fixed-term appointment at grade P.5. During a meeting held on 17 January 2011 Mr. W. was informed of a restructuring process and of the consequent abolition of his post and non-renewal of his appointment upon its expiry at the end of the month. Mr. H. M. received a similar communication from the SG. The complainants subsequently asked the Secretary-General to review these decisions, contending *inter alia* that they were unaware of the alleged restructuring in the Divisions they headed and that the manner and haste in which their appointments were terminated caused them injury. In March 2011 they were notified of the Secretary-General's decision to reject their requests for review. In examining this case the ILOAT, confirming previous jurisprudence, stated that

> […] the relations between an international organization and a staff member must be governed by good faith, respect, transparency and consideration for their dignity (see Judgment 1479, under 12). Accordingly, an organisation is required to treat its staff with due

[137] ILOAT, In re Giordimaina, para 12: 'In this case more than two-and-a-half years elapsed between the complainant's appeal to the Appeals Committee and the Director-General's decision to reject it. Circumstances and the nature of the case demanded an expeditious appeal procedure. Since, in the internal appeal, the complainant was challenging a decision not to keep her on and claiming reinstatement, she needed to know quickly what the outcome of the appeal would be. Indeed, her future to some extent depended on it. Though it raised some delicate issues, the case was not particularly complex. The conclusion is that the appeal was not sufficiently expeditious'.

[138] See for example ILOAT, J. A. C.-Z., para 13.

[139] ILOAT, In re Giordimaina, para 12.

> consideration and to avoid causing them undue injury. An organisation must care for the dignity of its staff members and not cause them unnecessary personal distress and disappointment where this could be avoided.[140]

The Tribunal concluded that the principle of 'good faith' 'requires an organisation to inform a staff member in advance of any action that it might take which may impair a staff member's rights or rightful interest'.[141]

2.4.8 *Provide Effective Medical Services to Personnel Should an Emergency Occur and Afterwards, Even Through an Efficient Insurance Policy, and Adopt the Necessary Measures to Guarantee the Well-Being of Staff*

The eighth component has been identified by the international jurisprudence as the duty of organizing and providing effective medical services to staff should an emergency occur, and afterwards and to adopt the necessary measures to guarantee the well-being of the staff. This duty must be fulfilled not only during an emergency situation but also in the immediate aftermath, and must guarantee that those who suffered an incident receive the necessary medical and psychological attention for the necessary time after the traumatic event occurred. In a very recent case submitted against the WHO by Mr. J. T. B. who contended that he had contracted onchocerciasis—a parasitic disease which may eventually lead to blindness—during the performance of his duties as a collector of blackflies (insects that are vectors of the disease) in Côte d'Ivoire between 1974 and 1978 under WHO's Onchocerciasis Control Programme, the ILOAT stated that

> international organizations have a duty to adopt appropriate measures to protect the health and ensure the safety of their staff members (see Judgments 3025, under 2, and 2403, under 16). An organization which disregards this duty is therefore liable to pay damages to the staff member concerned.[142]

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[140] ILOAT, Mr. H. P. W., para 26.

[141] Ibid.

[142] ILOAT, J. T. B. v. the World Health Organization (WHO), 6 July 2016, Judgment No. 3689, para 5 (see Annex II, Case 21). The Tribunal then added that in the present case, the complainant was instructed to collect blackflies, which are vectors of onchocerciasis, without being issued with adequate protective clothing which would have enabled him to avoid any direct contact with these insects. On the contrary, he was obliged to wait until they settled on him before catching them, a situation which created a high risk of infection. WHO thus committed a serious breach of its duty to protect the complainant.

In its Judgment No. 872, the ILOAT confirmed that a staff member has:

> reason to expect that the organization for which [the staff member] volunteered to serve in a dangerous location had a duty to make extreme medical emergency decisions in a manner so as to provide [the staff member] the greatest opportunity to recover fully from any injury to [the staff member's] physical or mental health that resulted from that service.[143]

The UN Dispute Tribunal was even more explicit and stated that 'The duty of care encompasses that of securing prompt and adequate treatment for those serving in hazardous duty stations in the event of medical emergencies'.[144]

In order to fulfil this component of the duty of care, the sending organization is also required to offer proper health insurance (where the unfortunate case of death should be included) which must cover all possible incidents, including those related to malicious acts and terrorist acts (which often are excluded from the insurance contract). The insurance policy of any deploying institution should be continuously subject to updates and revision to make sure that it reflects in a proper manner the evolution of the situation in the country of deployment.

It is important to stress that the sending organization has to adopt all possible measures to prevent excessive stress and to promote the well-being of its staff, such as measures to facilitate the maintenance of proper connections with their families and their dependants (for example, putting at their disposal free or reasonably cheap internet connections and phone calls or providing for work breaks which should be long enough to allow family reunions) as well as facilitated access to psychological support during the mission and afterwards (as cases of post-traumatic stress disorder may emerge years after the end of the assignment).

The UNGA has repeatedly taken a position on this specific aspect, welcoming the ongoing efforts of the UN Secretary General

> to provide counseling and support services to United Nations personnel affected by safety and security incidents, and emphasizes the importance of making available stress management, mental health and related services for United Nations personnel throughout the system, and encourages all humanitarian organizations to provide their personnel with similar support.[145]

In a 2014 study carried out by the Civilian Planning and Conduct Capability (CPCC) of the EU External Action Service, on the psychological support to staff working in civilian CSDP Missions, a quite unsatisfactory situation emerged. Only a limited number of EU member States have specific policies to assure the mental health condition and psychological well-being of personnel sent on mission and have a proper reaction mechanism in place should an emergency occur.[146]

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[143] UNAT, Hjelmqvist v. the Secretary General of the United Nations, 31 July 1998, Judgment No. 872 (see Annex II, Case 37).

[144] UNDT, Mc Kay, para 43.

[145] UNGA adopted on 10 December 2015, Safety and security of humanitarian personnel and protection of United Nations personnel, A/RES/70/104, para 27.

[146] The results of the investigations carried out by CPCC have not been published. The author has received informally a copy of the outcome of the investigation.

2.4.9 Exercise 'Functional' (or 'Diplomatic') Protection

The ninth aspect of the duty of care is related to so-called 'functional (or diplomatic) protection'. Although functional/diplomatic protection is merely a discretionary right of international organizations according to international practice and rules,[147] it is the opinion of the present author that whenever the violation of the rights of citizens/officers concerns a person working in an international mission on behalf of the sending institution, this institution should use the tools available in the frame of diplomatic protection (such as a request for clarification, a request to stop the assumed illegal act, and even the adoption of peaceful countermeasures). Only by so doing would the sending organization properly discharge the duty of care it owes towards its citizen/officer, obviously provided that the person is suffering a violation of his/her rights and that there are no valid and credible arguments presented by the international organization not to do so.[148]

This conclusion is based on the fact that an international organization, on the basis of the duty of care they owe to their personnel sent on mission, must do whatever is reasonably possible to protect them: absent exceptional circumstances, the denial of diplomatic protection could amount to a clear violation of this duty. These conclusions are also based on an important judgment of the ILOAT[149] in which the Tribunal, in a case presented against ILO, making reference to 'a general principle concerning the rights of the international civil service'[150] concluded that 'it is the duty of ILO to protect and assist its officials in the performance of their functions or in connection therewith'.[151]

The duty to protect the human rights, privileges and immunities of UN staff has been firmly restated in a recent UNGA Resolution in which the SG of the UN was requested

> to take the necessary measures to promote full respect for the human rights, privileges and immunities of United Nations and associated personnel, and also requests the Secretary-General to seek the inclusion, in negotiations of headquarters and other mission agreements concerning United Nations and associated personnel, of the applicable conditions contained in the Convention on the Privileges and Immunities of the United Nations, the Convention on the Privileges and Immunities of the Specialized Agencies and the Convention on the Safety of United Nations and Associated Personnel.[152]

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[147] See more on this Frid 1995, p. 49; Amerasinghe 2004, p. 369 (who states that 'the nature, functions and requirements of an international organization normally make it necessary that its agents should be able to look to it (and not to any state, even their national state) for the protection and the preferment of personal claims arising out of any wrong or injury made to them in the course of carrying out their duties on behalf of the organization') and Amerasinghe 2005, p. 485.

[148] Szezekalla 1999; Porzio 2008; Lindström 2009; and Battini 2011.

[149] ILOAT, In re Jurado, 11 September 1964, Judgment No. 70.

[150] ICJ, Reparation for Injuries Suffered in the Service of the United Nations, 11 April 1949, Advisory Opinion, Rep. 1949, p. 174.

[151] ILOAT, In re Jurado, para 3 (emphasis added).

[152] UNGA Resolution 70/104, para 18.

An additional evidence of this trend to request international organizations to act fin protection of their staff is offered by the OSCE Staff Regulation 2.07 on 'Functional protection' which provides as follows: 'OSCE officials shall be entitled to the protection of the OSCE in the performance of their duties within the limits specified in the Staff Rules'.[153] The interesting element of this rule is that is seems to recognise that the OSCE Staff enjoy a right to diplomatic function which inevitably implies the obligation (and not a mere possibility, as with States in diplomatic protection) on the OSCE to make use of it. However, within the NATO legal framework, it seems quite evident that the exercise of functional protection is considered to be a prerogative of the institution (who has a discretionary power to decide whether to activate it or not) and not a right of the individuals.[154]

2.4.10 *Provide Personnel with Adequate Training and the Necessary Equipment to Carry out Safely the Task to Be Performed*

The tenth component of the duty of care has been identified by the international jurisprudence as the need to provide personnel with adequate training and the necessary equipment to carry out safely the task to be performed. In a noteworthy judgment, the ILOAT formally stated that

> an international organisation owes to its staff a duty of fair treatment, protection of the employees' due reputation a*nd the provision of adequate training for the tasks which they are required to carry out.*[155]

The EU Civil Service Tribunal, in the Missir Mamachi di Lusignano case,[156] also highlighted the pivotal importance of training as a risk-minimizing tool and as an essential component of the duty of care.

The increasing importance of training for Peace-keeping and Peace-building Operations in the UN family, was also dealt with in the 2000 Brahimi Report. In para 192 of that Report it is stated that

> […] Staff should be given the opportunity to design and conduct training programmes for newly recruited staff at Headquarters and in the field. They should finish the guidelines and handbooks that could help new mission personnel do their jobs more professionally and in accordance with United Nations rules, regulations and procedures […][157]

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[153] OSCE, Staff Regulations and Staff Rules, DOC.SEC/3/03 September 2003 Updated: 17 July 2014, http://www.osce.org/employment/108871?download=true. Accessed 10 February 2017. See more in Chap. 10, Sect. 10.5.7.

[154] See more at Chap. 9, Sect. 9.4.7.

[155] ILOAT, A. S. F. v. the European Patent Organization (EPO), 5 November 2004, Judgment No. 2417, para 25 (emphasis added).

[156] EU Civil Service Tribunal, Livio Missir Mamachi, para 186.

[157] Panel on UN Peace-Keeping Operations, Report, 2000, A/55/305 - S/2000/809.

Even the UNGA has repeatedly requested the Secretary-General to make sure that 'all United Nations personnel receive adequate safety and security training' and stressed 'the need to continue to improve training so as to enhance cultural awareness and knowledge of relevant law, including international humanitarian law, prior to their deployment to the field'.[158]

In recent times, international institutions have shown an increasing awareness of the importance of training their staff and have introduced significant organizational changes to provide a better framework for the delivery of training. In several institutions some types of specific training (such as, for example, safety and security training), have become a pre-requisite for recruitment or at least for being sent on mission. The UN[159] and the EU[160] have taken, together with other relevant international organizations, the lead in this framework and have developed not only e-learning tools but also face-to-face training before departure and on mission arrival. Both institutions have begun important projects to harmonize and standardize training content and to certify the quality of the training courses or of the training providers. What still needs to be done, in the opinion of the present author, is to further develop a credible and coherent assessment mechanism which allows the sending Organization to have a clearer picture of the level of knowledge, skills and attitude acquired by the participants on the training courses and also to base their decision of deployment on the outcome of this assessment.

Regarding Common Security and Defence Policy (CSDP) Missions which represent the most sensitive and difficult case given the settings in which they are

[158] UNGA Resolution 71/129, para 24.

[159] The United Nations has in place a system of online and face to face security training that is mandatory for *all staff* (the self-administered learning programme entitled 'Basic security in the field: staff safety, health and welfare'—see ST /SGB/2003/19, Basic security in the field: staff safety, health and welfare (Interactive online learning), 9 December 2003, para 2.2.); for staff going to non-headquarters duty stations and missions (the online self-administered learning programme Advanced Security in the Field); and for staff operating in areas classified by UNDSS as high-risk environments (Safe and Secure Approaches in Field Environments (SSAFE) an instructor-led in-person course designed to achieve a global standard for UN staff operating in high-risk environments. See Security Policy Manual, Framework of Accountability for the United Nations Security Management System, Chapter II, section Q.28, pp. 6, 9.

[160] See the Policy of the European Union on the security of personnel deployed outside the EU in an operational capacity under Title V of the Treaty on European Union contained in Council of the European Union, Brussels, 29 May 2006, doc. 9490/06, in particular paras 18, 34, 41 which include 'adequate training of personnel in field security' among the staff protective measure to be adopted both by seconding States and sending organisation (namely the EU). The Commission and EEAS request for all deployed staff the completion of an online security awareness course (before e-Hest now BASE and SAFE). Several Calls for Contributions also clearly state 'Seconding authorities remain responsible for ensuring that their staff are in possession of a valid Hostile Environment Awareness Training suitable for Afghanistan and meeting their own National Standards.' See for all EU, Team of the EUSR to Afghanistan, 2nd Call for Contributions for the European Union Special Representative Team in Afghanistan, https://eeas.europa.eu/sites/eeas/files/annex_1_jds_eusr_afghanistan.pdf. Accessed on 8 February 2018. Moreover, the Commission and EEAS have commissioned the organisation of Hostile Environment Awareness Training courses for staff (to be) deployed in delegations.

usually deployed, at the Foreign Affairs Council Meeting of 1 December 2011, the Council adopted the Conclusions on CSDP in which the Council took note of the 2011 comprehensive annual report on the CSDP and CSDP-related training.[161] Both documents call for more sophisticated and coordinated training to equip CSDP missions with highly qualified and motivated personnel. In addition, several internal documents adopted within the Committee for Civilian Aspects of Crisis Management (CivCom) highlight the key importance of training.[162]

As far the need to provide proper equipment to staff is concerned, the issue of satellite phones (especially in areas where traditional mobile phones do not work due to given circumstances), bulletproof vests (where needed given the local situation) and VHF radios has been raised in various occasions.

2.5 The Obligations Incumbent on the Personnel of the Sending Organization

In his Commentary to the UN Staff Regulation Rules of 2002,[163] the UN Secretary General, as observed above, clearly indicated that the obligation of the UN to ensure the safety and security of its staff can also be considered a 'basic right of the staff'.[164] To fully enjoy this right, however, the officers sent out on mission in high-risk areas have a duty of loyalty and allegiance, which requires them to respect the instructions received by the employer and act in a cautious and prudent manner, avoiding exposing themselves to unnecessary risks which might be dangerous for them and for the sending Organization.[165] The employee furthermore has an

[161] See: Press Release (2011) 3130th Council meeting, Foreign Affairs, Brussels, 30 November and 1 December 2011. http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/EN/foraff/126518.pdf. Accessed 6 February 2018.

[162] See for example the recent documents CivCom advice on the Report from the training workshop on 'Future training needs for personnel in civilian crisis management operations: Mission Specific Pre-Mission Training (2017) 16849/06; Enhancing civilian crisis management pre-deployment training: 'generic or pre-deployment training' (2017) 15567/2/09. The new draft EU Policy on Training for CSDP currently being examined by PSC and expected to be adopted by the first quarter of 2017, recognises that 'training is a key component of any systematic approach to managing the responsibility of an organization to care for personnel deployed abroad. In the EU context the responsibility to ensure adequate training, corresponding to the needs of a given mission or operation, rests with the contributing authorities, but also to the chain of command' (ibid., para 24).

[163] UN 2002.

[164] Ibid., p. 15.

[165] See more in the 'Standards of Conduct for the International Civil Service' updated by the International Civil Service Commission in consultation with participating organizations and the representatives of the staff. Upon their completion in 2001, they were welcomed by the UNGA in: UNGA Resolution A/RES/56/244 (2002) United Nations common system: report of the International Civil Service Commission.

obligation to immediately and thoroughly inform his/her employer about new and unexpected situations which might create additional risks to the mission. Not doing so, depending on the given circumstances, could represent a violation of his/her duty and prevent or make more difficult future legal actions against the employer.

As already anticipated in Sect. 2.4.3, the ILOAT has made it clear that employees are also charged with

> the duty to inform themselves, and to request clarification when necessary so that the system can work efficiently to the best advantage of both the Organization and the staff members either as a group or individually.[166]

In the 'OSCE Deployee Guide' of the Stabilisation Unit of the UK Foreign and Commonwealth Office, it is stated clearly that 'a deployee should keep himself or herself up to date and aware of the security situation in their respective duty area'.[167] Furthermore, paras 72 and 73 of the African Union Administrative Guidelines for the Recruitment, Selection, Deployment and Management of Civilian Personnel in Field Operations, clearly state that the staff 'bears responsibility for adhering to security and safety advice, directives and guidelines to ensure that they are protected from harm as well to guarantee that their actions and inactions do not place colleagues on harm's way'.[168]

A similar concept was developed by the EU Civil Service Tribunal in the Missir Mamachi di Lusignano case. During the proceedings the issue of the importance of attending a specific training session on security was examined and the Tribunal clearly indicated that 'the official's absence from pre-posting training sessions on security undoubtedly constitutes negligence on his part'.[169] The Tribunal then reached the conclusion, in the specific case submitted to it, that this statement has to be attenuated considering that it was unclear from the invitations to attend these sessions that participation was 'an essential official obligation before posting to a delegation' and that it was possible for the applicant's son to be posted to Morocco without having undergone that training.[170] According to the Tribunal, therefore, the attendance of a training course organized by the sending Organization is a must for staff and failing to do so would represent a violation of the obligations incumbent this time on staff members themselves with the consequences attached thereto.

To conclude, while on the basis of the duty of care principles, international organizations are expected to play an active and multifaceted role to prevent and minimize risks and to immediately react should anything happen which might endanger the personal safety and security of its staff, the latter are also required to behave in a professional manner, to respect the instructions received and to inform the sending Organizations immediately of any new situation which might arise.

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[166] ILOAT, Mrs. L. J.-S.

[167] UK Stabilisation Unit 2004.

[168] Chap. 9, para 1.

[169] EU Civil Service Tribunal, Livio Missir Mamachi, para 186.

[170] Ibid.

2.6 The Consequences of the Violation of the Duty of Care Obligations by International Organizations Sending Their Personnel Abroad

Having ascertained that international organizations are bound to respect the international obligation incumbent on them regarding the duty of care towards their mobile workforce and having clarified the more detailed content of this obligation, attention must now be briefly focused on the consequences attached to the violation of this obligation, in the light of the work of the International Law Commission finalized in the Draft Articles on the Responsibility of International Organizations.[171] As a preliminary remark it should be recalled that the potential remedies available from the different international tribunals depend very much on their constitutive statutes. So, for example, while the possibility to award punitive damages already forms part of the case law of the ILOAT, the UNAT statute[172] provides for the tribunal's power 'to order specific performance, this power is severely limited in practice by the fact that it also has to fix the amount of compensation to a maximum of two years' net base salary and that the Secretary-General may choose to grant compensation only'.[173] Considering that, de facto, the SG almost always decides on compensation instead of remedying the wrongful decision, it has been highlighted that this situation 'undermines staff confidence in the Tribunal and raises questions regarding the independence and fairness of the process.'[174] It should be mentioned, however, that in a few cases, whenever the Tribunal has been convinced of the Organization's negligence in failing to ensure the safety and the protection of a staff member, the Tribunal has decided on significantly higher compensation on the basis that

> the compensation appropriate to a breach of contract is indemnification for loss actually incurred as a result of that particular breach: it cannot, unless the contract expressly provides so, be settled according to a general tariff'.[175]

The obligation of indemnification has recently been reaffirmed by the Panel of Eminent Persons on European Security as a common Project, which stated in its 2015 Interim report on Lessons Learned for the OSCE from Its Engagement in Ukraine,

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[171] Note 23. See more in Chap. 18.

[172] Article 10, para 1 of the UNAT Statute.

[173] Reinisch and Knahr 2008, p. 476.

[174] Administration of Justice: Harmonization of the Statutes of the United Nations Administrative Tribunal and the International Labour Organization Administrative Tribunal, Report of the Joint Inspection Unit, Doc. JIU/REP/2004/3, Geneva 2004, 2.

[175] ILOAT, In re Grasshof, para 6.

> Meanwhile the SMM operated with almost no legal status: SMM monitors had none of the privileges or immunities required for the fulfillment of their functions, nor security guarantees from the host state. The OSCE did not therefore exercise its duty of care as an employer, and *was potentially liable for any damage suffered by its monitors*.[176]

The Appeal Chamber of the EU Civil Service Tribunal, in reviewing the decision in the well-known case of Livio Missir Mamachi, rejected the decision of the First Instance Tribunal which did not recognize the right of the appellant to receive reparation for the moral damages suffered.[177] The Appeal Chamber, after having stated that the Commission had violated its obligation to protect the life of its staff (Livio Missir di Mamachi) and therefore had to be considered as co-responsible for the moral damage suffered by the victim. As a consequence, the Tribunal ordered the European Commission to pay an amount of 100,000 Euros to each of the sons of the deceased Livio Missir Mamachi, on the basis of the consideration that

> il y a lieu de constater que des droits des États membres découle un principe général commun selon lequel, dans des circonstances semblables à celles de l'espèce, est reconnu aux ayant droits, notamment les enfants et les parents de la personne décédée, un préjudice moral réparable, consistant en la douleur morale causée par la mort d'une personne proche, principe duquel les différents critères évoqués par les requérants se rapprochent.[178]

International Tribunals have awarded complainants with specific sums for

- moral damages for the serious affront to their dignity and related violations of their rights;[179]
- moral injury which they sustained as a result of the procedural failures in their cases;[180]
- moral damages for affront to their dignity caused by breaches of due process and the duty of care owed, and for an unreasonable delay in the internal appeal proceedings;[181]
- moral damages due to delays in the carrying out of the internal investigation and adjudication procedure;[182]
- damages suffered due to the Respondent's gross negligence in the handling of an extreme medical emergency, which ended in the death of the victim.[183]

[176] Panel of eminent Persons on European Security as a Common Project 2015 (emphasis added). See more in Zellner 2016, p. 53.

[177] European Union Civil Service Tribunal, Livio Missir Mamachi.

[178] General Court (Appeal Chamber), Livio Missir Mamachi di Lusignano v. European Commission, 7 December 2017, Case T-401/11 P-RENV-RX (see Annex II, Case 10), para 198.

[179] ILOAT, H. P. W., para 35.

[180] Ibid.

[181] ILOAT, P.-M. (No. 2), para 32.

[182] ILOAT, Mr. L. J. C., para 15.

[183] UNAT, Durand, para XXXIII.

2.7 Concluding Remarks

The analysis of the current practice and trends within international organizations aimed at implementing their obligations stemming from the duty of care towards their staff, has offered the opportunity to present an extremely variegated picture and different approaches. This situation has likely been influenced by the complexity of the definition of the precise contours of this obligation and by the evolving jurisprudence of the last few decades. As the number of cases brought to the attention of the internal tribunals of the various Organizations has increased significantly, the jurisprudence inevitably has shown some contradictions and incongruences due to the fact that many issues raised were often new and innovative challenges. The incertitude of the tribunals concerning the legal source of the duty of care or the definition of its precise contours should not be surprising or unexpected. It cannot be denied that the contribution of the jurisprudence in this effort to clarify the details of the notion of duty of care has proved to be essential and very often has inspired the content of internal regulations adopted by the relevant institutions to deal with the issue. To better analyze all the facets of this obligation, in this contribution the different components of the obligation have been analyzed separately. This methodology has proved to be useful not only to offer a comparative view of the issues under scrutiny but also to emphasize the evolution of the manner in which judges have dealt with the duty of care obligations.

Having recognized the relevant and pivotal role played by the Tribunals, it seems important to highlight that, in the meantime, almost all relevant Organizations have demonstrated an increasing awareness of the importance of the duty of care and the need to implement all its facets. The numerous internal regulations, guidelines, manuals, policies and other documents adopted in recent years by almost all international organizations deploying staff in the field and aimed at addressing general or specific aspects of the duty of care are a clear indication of this new and positive trend. Notwithstanding the significant improvements registered in recent years in the practice of international organizations, much stills needs to be done to further disseminate a human rights-oriented staff culture which implies a risk-mitigating attitude, a careful risk assessment mechanism which incorporates the gender dimension, more transparency and accountability in decision making related to staff, and a higher degree of attention to the specific needs of staff before and during the assignment, and afterwards. Inevitably all this implies very often not only a change in the organizational approach and in the prioritization of the organizational values of the different Organizations, but also some financial burden. In a time where reducing the expenditures has become an imperative for almost everyone, the increased financial cost associated with the correct implementation of the duty of care obligations represents, undoubtedly, a major challenge. In the meantime, however, it has to be acknowledged that the increasing awareness of staff rights, and the work of the judges that have not hesitated to condemn international organizations and order them to pay significant amounts of money for having violated their duty of care obligations, should suggest a careful allocation

and prioritization of funds for different field activities, including those related to fulfilling duty of care obligations. The failure to implement duty of care related obligations could result in serious reputational damage to the Organization in question, exposing it to criticism in the international community as well as to the risk of losing the most motivated and qualified staff. Fulfilling all components of the duty of care promptly represents, in this framework, not only an ethical and legal commitment, but more and more, a fundamental tool to increase the credibility of the sending Organization and its capacity to professionally implement its multifold activities abroad.

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Chapter 3
The Duty of Care of International Organizations: Issues of Conduct and Responsibility Attribution

Andrea Spagnolo

Contents

Abstract This chapter addresses the question of how the responsibility to discharge the duty of care is allocated between an international organization, its member States and the civilian personnel deployed abroad by the international organization. First of all, it discusses the applicability of the rules on international responsibility, in particular the Draft Articles on the Responsibility of International Organizations and the Articles on the Responsibility of States for Internationally Wrongful Acts. In this regard, attention will be paid to the interplay between special regimes imposed by the international organizations and general rules. Secondly, and provided that the general rules on international responsibility have a role in

Annex II—the Table of Cases—can be accessed online here: http://extras.springer.com/.

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apportioning the responsibility between States and international organizations, the chapter analyses the rules of attribution of conduct and of responsibility in light of the most recent international practice and jurisprudence.

Keywords attribution of conduct · attribution of responsibility · rules of the organization · Draft Articles on the Responsibility of International Organizations · shared responsibility

3.1 Introduction

This chapter addresses the question of how the responsibility to discharge the duty of care is allocated between an international organization, its Member States and the host States when civilian personnel are deployed abroad on mission. As the preceding chapters showed, when international organizations deploy civilian staff or personnel on mission abroad, the relationship that arises is multi-layered as different actors are involved.

One can consider the following example. A member of the staff of an international organization seconded by one of its member States is sent on mission abroad and is the victim of an attack and dies. The individual involved in the accident can easily maintain that the responsibility involved is primarily that of the host Government, which likely infringed a due diligence obligation towards a foreign national on its territory. But, is this also an exclusive responsibility?

The board of that international organization might be tempted to answer in the positive. In almost all the United Nations (UN) documents dealing with the safety and security of its staff it is stressed that responsibility lies with the Government of the State that hosts the mission, the host Government.[1] The consequence of this answer is that the victim, or her/his relatives, must bring claim before the tribunal of the host Government. Dramatically, this forced choice can result in having no chance of success. In the vast majority of cases, the host Government may be that of a State which has seen the collapse of its judicial institutions. Or, more simply, the host Government could be unwilling to prosecute the responsible individual, or, more generally, to offer a remedy to the victim.[2]

Although, as already stressed, a preliminary and superficial inquiry into the practice reveals that primary responsibility lies with the host Government, from the perspective of the duty of care of international organizations towards their personnel it can be reasonably maintained that the answer to the question posed above should be given in the negative. In fact, the responsibility of the sending international organization cannot be excluded, as they have the duty to properly check that

[1] See for example Convention on the Safety of United Nations and Associated Personnel, opened for signature 9 December 1994, entered into force 15 January 1999, Article 7.

[2] On the allocation of responsibility to the host State, see Chap. 4 by Gasbarri in this volume.

the operating environments are safe and secure and to inform staff of any potential threats. Should responsibility be allocated only to the host Government, international organizations would be relieved of any duty towards the personnel that perform functions on their behalf.

This appears to be the approach followed in the Voluntary Guidelines on the Duty of Care to Seconded Civilian Personnel (Voluntary Guidelines) drafted in 2017 by a group of States (United Kingdom, Germany, Finland, Italy, Switzerland) with the participation of the Organization for Security and Cooperation in Europe (OSCE).[3] The drafters of the Guidelines propose a framework where responsibility does not only lie with one entity, but appears to be presented as shared:

> Seconding organisations (SO) are not (fully) released from their responsibility in a situation where the operational partner (RO) specifies and implements operational safety and security measures. An SO remains legally responsible for ensuring that secondees work safely and securely in the RO's operational environment. To this end, the SO needs to monitor actively, and to verify, both the RO's measures and their implementation and its secondees' compliance with them.[4]

In an expert document of 2016 on the safety and security of UN personnel, it was concluded that, along with the primary responsibility of the host Government, the UN—and all the international organizations part of the UN System—'have a responsibility as employers to ensure that operating environments are safe and secured through the implementation of appropriate mitigating measures, supplementing host Governments' security measures when the risks to be confronted require measures beyond those that can be reasonably provided by the host Government.'[5] Similarly, the European Union (EU) addressed the issue in a 2006 document on the Policy of the European Union on the security of personnel deployed outside the EU in an operational capacity under Title V of the Treaty on European Union, where the responsibilities the EU itself (represented by its Institutions) are set forth.[6]

The scenario depicted above appears to be one in which where responsibility is at least shared among different actors. Indeed, all the elements laid down in the conceptual foundation of 'shared responsibility' are present: multiple actors, a single harmful outcome, and a conduct that is almost impossible to divide among the actors involved.[7]

Relying on the concept of shared responsibility, however, does not solve the legal hurdles that the individuals whose rights are violated while they are on mission abroad on behalf of an international organization might face. These legal

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[3] Merkelbach 2017.

[4] Ibid., p. 14.

[5] Flores Callejas and Wesley Cazeau 2016, p. 1, para 6.

[6] Policy of the European Union on the security of personnel deployed outside the EU in an operational capacity under Title V of the Treaty on European Union, doc. 9490/06 of 29 May 2006, p. 12, paras 28 ff.

[7] See Nollkaemper and Jacobs 2013, pp. 366–368.

hurdles are represented by the involvement of actors bearing different obligations in terms of sources. In fact, the relationship between international organizations and their personnel is primarily regulated by rules and regulations internal to the international organization concerned, while the obligations of host Governments towards the same personnel can be found in international human rights law. Although international organizations can also be bound by international human rights law,[8] the different nature of obligations involved needs to be considered before assessing the rules governing the apportionment of responsibility. The risk, in fact, is that the internal rules of international organizations provide for an apportionment of responsibility which is not known outside the context of an international organization and, in particular, it is not known by the relatives of a victim, who try to seek remedies on her/his behalf.[9] The indeterminacy of this situation might impact on the choice of the venue for obtaining redress and thus undermining the prospect of success.

However, the normative grounds of the responsibility of the international organization to discharge the duty of care towards personnel deployed abroad is not clear. Is it all based on the primary rules applicable to each and every international organization or can we identify common normative grounds?

Additionally, can the law of international responsibility, in particular the responsibility of international organizations, be of some help? In more detail, can the law of international responsibility provide guidance in allocating responsibility not only to the host Government, but also to the international organizations?

The present chapter represents an attempt to answer the aforementioned questions trying to look at them from the perspective of general international law and, more specifically, the rules on the responsibility of international organizations codified by the ILC. Among the actors involved, the chapter will focus on the responsibility of international organizations.

3.2 The Rules on International Responsibility and Their Relevance in Allocating the Responsibility to Discharge the Duty of Care

This section briefly explains why the rules on international responsibility are relevant for allocating the responsibility to discharge the duty of care. In fact, it is necessary to ascertain that the obligation at stake is one of international law. In fact, both the Draft Articles on the Responsibility of International Organizations (DARIO)[10] and the Draft Articles on the Responsibility of States for Internationally

[8] On this issue see more broadly Chap. 16 by Poli.

[9] See accordingly Ahlborn 2013, p. 20.

[10] Draft Articles on the Responsibility of International Organizations (DARIO), with commentaries, in Yearbook of the International Law Commission, 2011, Vol. II, Part Two, Article 1.

Wrongful Acts (DARSIWA)[11] are applicable when international organizations or States commit an internationally wrongful act. The Commentaries to the DARIO clarify that '[the] reference […] throughout the draft articles to international responsibility makes it clear that the draft articles only take the perspective of international law and consider whether an international organization is responsible under that law.'[12] Similarly, in the Commentary to the DARSIWA it is noted that '[w]hether there has been an internationally wrongful act depends, first, on the requirements of the obligation which is said to have been breached'.[13]

An assessment of the nature of the illicit conduct at stake is therefore fundamental to trigger the applicability of the secondary rules of international law. This preliminary operation is all the more necessary because of the uncertainty surrounding the legal bases of the duty of care, as different theories are proposed to qualify it.[14]

The duty of care concerns the relationships between an international organization and its staff or personnel, whether employed or seconded by States. Such a relationship is normally governed by rules emanating from the international organization itself and directed towards its personnel or its member States. The UN, pushed by Resolution 258/III of the General Assembly of 3 December 1948 and by the following Advisory Opinion of the International Court of Justice (ICJ) on the on *Reparation for injuries suffered in the service of the United Nations*,[15] adopted the UN Staff Regulations, recently amended.[16] Similarly, the OSCE has its own Staff Regulations and Staff Rules[17] where the duty of care is properly assessed. The same goes for the EU: the Council adopted Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work. These are just three examples, as other international organizations have adopted similar internal rules.[18]

The legal status of documents of this kind has been—and still is, to a certain extent—the object of an intense debate amongst legal scholars and practitioners. In particular, a confrontation on this issue preceded and followed the adoption of the DARIO.[19] It is disputed, in fact, that the internal rules of international organizations

[11] Draft Articles on the Responsibility of States for Internationally Wrongful Acts (DARSIWA), with commentaries, Article 1.

[12] DARIO, Commentary to Article 1, para 3.

[13] DARSIWA, Commentary to Article 1, para 1.

[14] For an overview of the theories and of the relevant judicial decisions see the chapter authored by de Guttry in this volume, Chap. 2.

[15] ICJ, Reparation for injuries suffered in the service of the United Nations, Advisory Opinion, 11 April 1949, I.C.J. Rep. 1949, p. 174.

[16] Staff Regulations and Rules of the United Nations. Secretary-General's bulletin, UN Doc ST/SGB/2017/1 of 30 December 2016.

[17] OSCE Staff Regulations and Staff Rules, Regulation 2.03, https://jobs.osce.org/resources/document/osce-staff-regulations-and-staff-rules. Accessed 28 February 2018.

[18] In Part II of this volume, the internal rules of each international organization will be analysed.

[19] On such debate see Gasbarri 2017, pp. 87–99.

can be properly considered as international law and, therefore, trigger the application of the rules on international responsibility as codified by the ILC. Some authors opine that such rules are indeed part of the administrative internal legal framework of international organizations, violations of which do not amount to a violation of international obligations.[20]

Rules of this kind are primary rules, namely rules that dictate the rights and duties of employers—in this case, the international organizations—and of the employees, being they proper staff of the international organizations or seconded personnel.

As is known, the ILC adopted a relaxed position on the qualification of the rules of the organizations, refusing to define them for the purposes of the DARIO. Article 10(2), in fact, simply states that an international obligation of an international organization 'includes the breach of an international obligation that may arise for an international organization towards its members under the rules of the organization.'[21] In the Commentary, the ILC further specifies that a violation of the rules of the organization can be qualified as a violation of an international obligation on the part of international organizations insofar as the rules violated could be regarded as international law.[22] Article 10(2) of the DARIO makes explicit reference to the relationship between an international organization and its member States. The choice of the ILC might be interpreted as excluding legal situations such as those arising in the context of the duty of care, which entail a relationship between international organizations and individuals. This narrow interpretation, however, does not seem consistent with the rationale of Article 10(2): again, the Commentary clarifies that the reference to the relationship between international organizations and member States 'is not intended to exclude the possibility that other rules of the organization may form part of international law.'[23] It appears, therefore, reasonable to extend this possibility to the rules governing the discharging the duty of care, which are regarded by many as being the rules of the organization.[24]

The adoption by the ILC of a generous approach toward the interpretation of the scope of application of the DARIO did not match the position that many international organizations maintained during the drafting phase of the articles. In their comments, the European Commission, the ILO and UNESCO criticised the choice made by the ILC strengthening the idea that violations of the rules of the organizations cannot entail the international responsibility of international organizations.[25]

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[20] Amerasinghe 1988, pp. 21–22. But see on the contrary Villalpando 2016, pp. 1072–1073.

[21] DARIO, Article 10(2).

[22] See DARIO, Commentary to Artilce 10, para 7.

[23] See DARIO, Commentary to Article 10, para 8.

[24] Ahlborn 2011, p. 422.

[25] Comments and observations received from international organizations, UN Doc A/CN.4/568 and Add.1, pp. 133–135. The World Health Organization (WHO), to the contrary, showed its appreciation for the inclusion of a similar rules in the DARIO, regarding it as an 'acceptable compromise' (ibid., p. 135).

The criticisms raised by these international organizations is partially mitigated by the inclusion of a *lex specialis* clause in the DARIO. Article 64, in fact, leaves open the possibility for an international organization to have its own 'secondary rules'. This happens when secondary rules are determined by 'special rules of international law' or by the same rules of the organization.[26] Should this be the case, the rules and principles enshrined in the DARIO do not apply.

As the ILC left open the debate on the classification of the 'rules of the organization', it is theoretically possible to apply DARIO to violations of primary rules of this kind when they are regarded as violations of international obligations. Moreover, it must be stressed that the rules of the organizations are basically primary rules of conduct that do not necessarily entail a complete set of secondary rules that could potentially derogate from that enshrined in the DARIO. In this regard the latter rules may well be applied.

The duty of care of international organizations is not only enshrined in the rules of each international organization. As already stressed elsewhere in this book, the legal sources of the book are not only to be found in the rules of the organization, but also in international human rights law. In this case, there is no doubt as to the application of the DARIO.

Finally, it must be added that when staff is deployed on mission abroad, the safety and security of international organizations' staff sent on mission is also regulated in the legal act establishing the mission itself: a UN Security Council Resolution or a Council of the EU Decision, for instance. Also, regulations on the duty of care can be enclosed in the so-called Status of Mission Agreements (or *similibus*), namely the agreements that international organizations conclude with the host Government.

3.3 Can the Answer Be Found in the Principles Governing Attribution of Conduct?

After having discussed to what extent the DARIO are relevant to the allocation of responsibility, it is worth putting forward another methodological clarification.

The duty of care consists, as presented in other chapters, of the duty of international organizations to put in place all necessary measures to ensure the safety and security of its personnel. Hence, a violation of the duty of care on the part of the international organization can be classified as a wrongful abstention or a failure to act. And 'a failure to act never raises any question of attribution, not even

[26] DARIO, Article 64: 'These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of an international organization, or a State in connection with the conduct of an international organization, are governed by special rules of international law. Such special rules of international law may be contained in the rules of the organization applicable to the relations between an international organization and its members.'

"negatively"; pointing out a failure to act requires one to identify who had to act, so that the "subjective" element at stake in the search for attribution is always satisfied by finding the wrongful omission'.[27]

Attribution of conduct, therefore, can result in a superfluous exercise, since if it is established that international organizations are the bearers of the duty of care, then it is simple to verify that the positive obligation to act incumbent upon them was violated. However, the multiplicity of actors involved is a complicating factor in determining whether the international organizations are the duty of care bearers in the light of general international law.

To this end, it is proposed here to use the rules on attribution of conduct in a rather non-orthodox fashion, namely to justify the attachment of a primary rule to a subject of international law. This is not the approach followed by the ILC, which, in fact, did not intend, in its codification effort, to 'define the content of the international obligations, the breach of which gives rise to responsibility'.[28] It dealt exclusively with the 'the general conditions under international law for the State to be considered responsible for wrongful actions or omissions, and the legal consequences which flow therefrom'.[29] This is the approach the ILC followed in drafting the DARSIWA, but the same conclusions are valid also for the DARIO.[30]

This notwithstanding, it seems that the classical divide between primary and secondary rules is no more clear-cut.[31] This is particularly evident when the rules on the circumstances precluding wrongfulness, those on complicity and those on reparations are considered,[32] but this is also true for rules on attribution.[33] The rules on attribution, in fact, lay down the foundation for the application of the primary rules as without them it would be impossible even to elaborate an international law obligation, being absent the duty bearer.

Paradoxically, this is even more important when wrongful abstentions (e.g. violations of a duty to act) are considered. As Frank Latty wrote: 'the operation of the rules of attribution in relation to omission can only operate by means of identifying the obligation breached, and therefore, the subject by which it is owed'.[34]

In this regard, it is possible to say that rules on attribution are constitutive elements of primary rules.[35] Methodologically, therefore, rules on attribution of

[27] D'Argent 2014, p. 230, particularly footnote 75.

[28] DARSIWA, General Commentary, para 1.

[29] Ibid., para 4.

[30] DARIO, General Commentary, para 3.

[31] David 2010, p. 31.

[32] See generally Nollkaemper and Jacobs 2014, pp. 408–412.

[33] Gaja 2014, p. 989; Kolb 2017, pp. 70–71. See also, and again, Nollkaemper and Jacobs 2014, p. 409.

[34] Latty 2010, p. 361.

[35] Linderfalk 2009, p. 62.

conduct will be used to justify, on normative grounds, the attachment of the duty of care to international organizations.

3.3.1 *Relying on the Organic Link*

The first ground for attribution in international law lies in the so-called 'organic link' existing between the subject of international law to which the conduct should be attributed and the individual who materially performed the conduct. Should the latter be an organ or an agent of the former, the organic link is satisfied, and the subject of international law is responsible for its conduct.

As Klein put it, the organic link can either be grounded on formal ties between the international organizations and the individual/agent or on the exercise of a form of control.[36] The second ground will be explored in the next section as it applies when the agent maintains formal ties with the sending States or international organizations. In the present section, the easiest case is explored: the exercise of the duty of care towards the permanent staff of an international organization.

The relationship between international organizations and their organs or institutions is described in the DARIO in Article 6, which states that:

> The conduct of an organ or agent of an international organization in the performance of functions of that organ or agent shall be considered an act of that organization under international law, whatever position the organ or agent holds in respect of the organization.[37]

The definitions of organ and agent of an international organization are to be found in Article 2 of the DARIO, where the ILC defined an organ of an international organization as 'any person or entity which has that status in accordance with the rules of the organization' and agent as 'an official or other person or entity, other than an organ, who is charged by the organization with carrying out, or helping to carry out, one of its functions, and thus through whom the organization acts.'[38]

The distinction between organs and agents of international organizations is not relevant for the purposes of attribution. In international law, in fact, the two terms, when referring to international organizations appear interchangeable. Such a liberal approach to the definition of organ and agent was endorsed by the ICJ in its Advisory Opinions on *Reparation for injuries suffered in the service of the United*

[36] Klein 2010, pp. 298–299.

[37] DARIO, Article 6(1).

[38] DARIO, Article 2(d).

Nations[39] and on *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*.[40]

The common denominator of the three Opinions delivered by the ICJ seems to be the exercise of international organizations' functions. This was stated explicitly in the *Reparation* opinion, which is also quoted by the ILC in its Commentary to the Article 6 of the DARIO: 'The Court understands the word "agent" in the most liberal sense, that is to say, any person who, whether a paid official or not, and whether permanently employed or not, *has been charged by an organ of the organization with carrying out, or helping to carry out, one of its functions – in short, any person through whom it acts*.' (emphasis added).

The formal ties that constitute the organic link between an international organization and its personnel can be traced back in the rules of each international organization, as confirmed by the second paragraph of Article 6 of the DARIO: 'The rules of the organization shall apply in the determination of the functions of its organs and agents.'[41]

The category of the rules of the organization, as seen in the previous section, is broad enough to include those rules aimed at regulating the relationship between an international organization and its staff or personnel.[42] It follows that personnel deployed abroad and tasked with the exercise of its functions can be considered as agents of the same international organization. The criterion of the exercise of functions can be useful to link to an international organization any subject hired by the international organization itself on a contractual and non-permanent basis. The DARIO do not explicitly cover the attribution of responsibility for the conduct of this peculiar category of persons, however the Commentary to Article 6 implicitly allows a broad interpretation of the notion of agent, capable of being extended to personnel hired on contractual basis. In fact, the ILC affirms that:

> [i]t is however superfluous to put in the present draft articles an additional provision in order to include persons or entities in a situation corresponding to the one envisaged in article 5 of the articles on the responsibility of States for internationally wrongful acts. The term "agent" is given in subparagraph (d) of article 2 a wide meaning that adequately covers these persons or entities.

Article 5 of the DARSIWA explicitly covers private persons exercising States' functions; the fact that the ILC did not deem it necessary to include a similar mention in its Commentary to the DARIO demonstrates that the notion of agents is broad enough.[43]

One may wonder whether this conclusion applies also when the personnel is not exercising functions on behalf of international organizations or when it acts

[39] ICJ, Reparation for injuries, p. 177.

[40] ICJ, Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, I.C.J. Rep. 1999, p. 62, pp. 88–89, para 66.

[41] DARIO, Article 6(2). See Klein 2016, p. 1030.

[42] See again Klein 2010, p. 298.

[43] See accordingly Magi 2010, p. 760.

contrary to or exceeds the directions received by the international organization. This is rather interesting for the discourse on duty of care as personnel's rights may be violated because of their *ultra vires* conduct. Should this be the case, does the conclusion reached above change?

Rules on attribution can again be instructive. Indeed, the ILC codified in Article 8 of DARIO a rule according to which:

> [t]he conduct of an organ or agent of an international organization shall be considered an act of that organization under international law if the organ or agent acts in an official capacity and within the overall functions of that organization, even if the conduct exceeds the authority of that organ or agent or contravenes instructions.[44]

The rationale of this norm lies in the protection of the interests of third parties, which are not always in the position to demonstrate that an agent was or was not exercising the functions of the international organization.[45] The codification effort of the ILC relied again on the practice of the ICJ, which in the opinion on *Certain expenses of the United Nations* held that the internal validity of a certain action must not impact on the attribution of conduct.[46] One limit to this conclusion seems to be the scenario in which the agent acts entirely without reference to its official functions, in his/her private domain. Should this be the case, it seems reasonable to affirm that the organic link ceases to exist.

It derives from the aforementioned considerations that a possible basis for attributing the responsibility for violations of the duty of care to international organizations is to be found in the organic link between the agent on mission and the international organization that sent him abroad. Consequently, international organizations' agents whose rights are violated in the exercise of their functions can find legal refuge in the international organization's duty of care.

This conclusion can apply to the permanent staff of international organizations when they are sent on mission abroad. However, in the vast majority of cases, personnel sent on mission is seconded by international organizations' member States or by States which enter into ad hoc agreements with international

[44] DARIO, Article 8.

[45] Klein 2010, p. 305.

[46] ICJ, Certain expenses of the United Nations (Article 17, para 2 of the Charter), Advisory Opinion, 20 July 1962, ICJ Rep. 1962, p. 151, p. 168: 'If it is agreed that the action in question is within the scope of the functions of the Organization but it is alleged that it has been initiated or carried out in a manner not in conformity with the division of functions among the several organs which the Charter prescribes, one moves to the internal plane, to the internal structure of the Organization. If the action was taken by the wrong organ, it was irregular as a matter of that internal structure, but this would not necessarily mean that the expense incurred was not an expense of the Organization. Both national or international law contemplate cases in which the body corporate or politic may be bound, as to third parties, by an ultra vires act of an agent'. See also Salerno 2013, p. 422.

organizations.[47] Article 6 DARIO is not meant to cover attribution of conduct in the relationship between the international organizations and seconded staff. It is not sufficient, in fact, to describe the institutional framework of seconded organs with the status they acquire in the institutional machinery of the receiving international organization.

3.3.2 The Exercise of Control

Things are more complicated when the personnel has a double-hat, namely when they are seconded or lent by States. The double-hat, in fact, means that the individual in question maintains at formal ties with both the sending or seconding State and the receiving international organization. This is the usual scenario of peacekeeping/peacebuilding operations, where States put at the disposal of international organizations their military troops or civilian experts.[48]

In this scenario, the seconded individual becomes part of the institutional framework of the international organization concerned, thus it is possible to regard him or her as an agent of that international organization.[49] This notwithstanding, seconding States retain 'full and exclusive strategic level command and control of their personnel and equipment'.[50] This is not only because seconding States normally exercise disciplinary powers and criminal jurisdiction over them; in peacekeeping operations, for example, seconding States exert a certain degree of influence over the conduct of the troops they lend to international organizations.[51]

The ILC codified a dedicated rule on attribution in the DARIO, as relationships of this kind could not be covered by Article 6.[52] Article 7 applies to organs put at the disposal of an international organization by a State or by another international organization and rules that the receiving international organization is responsible only when it 'exercises *effective control* over that conduct.'[53] (*emphasis* added) As the ILC itself specifies, Article 7 is shaped on the practice of peacekeeping

[47] This is the case of the many agreements concluded by the EU with third Parties for the Organization of EU military and civilian operations and missions. See on this Chap. 8 by Saluzzo in this volume.

[48] See *ex multis* Bothe 2012, p. 1184.

[49] Ibid.

[50] Gill and Fleck 2015, p. 267.

[51] As noted by the ILC in its Commentary to Article 7 of the DARIO at para 1.

[52] See accordingly: Jacob 2013, p. 24.

[53] DARIO, Article 7: 'The conduct of an organ of a State or an organ or agent of an international organization that is placed at the disposal of another international organization shall be considered under international law an act of the latter organization if the organization exercises effective control over that conduct.'

operations, but it is a rule of general application that potentially applies to all cases of organs put at the disposal of an international organization.[54]

The ILC gave great significance to the effective control criterion as the decisive test for attributing a conduct to an international organization. Effective control, however, is a criterion that falls short of being decisive and does not escape criticism. The notion, in fact, is rather obscure. Its wording resembles that coined by the ICJ in the (in)famous judgment in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*[55] and applied later in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*.[56] In both instances the ICJ employed the effective control test to give substance to the rule codified in Article 8 DARSIWA, which regulates the attribution of conduct of individuals or groups of individuals to the State. For the effective control test to be satisfied, the existence of precise orders and directions must be ascertained in relation to each and every factual conduct. This test does not work in the context of international organizations as it is quite obvious that they do not exercise such a high degree of control with respect to seconded agents.[57] Moreover, although the ICJ appears to take it for granted, it is doubtful whether this requirement is of a customary nature;[58] lastly, the ICJ did not clarify what the content of this customary rule should be.[59]

The wording chosen by the ILC, therefore, should not mislead. The reference to effective control in Article 7 should be read and interpreted in accordance with the second Report of the Special Rapporteur on the Responsibility of International Organizations (SR), Giorgio Gaja. It appears there that Article 7 of the DARIO was not drafted with Article 8 of the DARSIWA in mind. Rather, Article 6 of DARSIWA, which deals with responsibility of States for the lending of organs, inspired the work of the ILC:

> Draft article 6 on the responsibility of States for internationally wrongful acts considers that the decisive criterion for attribution to a State of conduct of an organ placed at its disposal by another State is the fact that "the organ is acting in the exercise of elements of the governmental authority of the State at whose disposal it is placed". Reference to governmental authority would not be appropriate with regard to international organizations, which

[54] For an overview of possible applications of Article 7 in other than peacekeeping scenarios see Palchetti 2016.

[55] ICJ, Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), 27 June 1986, I.C.J. Rep. 1986, p. 14, p. 65, para 115.

[56] ICJ, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), 26 February 2007, I.C.J. Rep. 2007, p. 43, p. 208, para 400.

[57] See accordingly Messineo 2014, p. 66.

[58] See accordingly Cassese 2007, pp. 649 ff.

[59] See accordingly Gradoni 2015, p. 298.

> only rarely exercise that type of authority. Reference should be made more generally to the exercise of an organization's functions.[60]

It derives from what precedes that the standard of control required for attributing responsibility to an international organization for the conduct of seconded organs differs from that affirmed in the jurisprudence of the ICJ. Having said that, the control criterion remains to be substantiated. Recent practice shows an interesting approach. The exercise of control, in fact, has been deemed to have a normative and a factual dimension, both of which should be taken into account when apportioning responsibility in complex scenarios. This is the finding of Court of Appeal of The Hague in the *Nuhanovic* case,[61] in which the Netherlands were found liable for the conduct of their troops deployed in the UN peacekeeping operation responsible for the protection of Srebrenica during the massacre perpetrated by the Bosnian-Serbs in 1996. This approach is interesting because it allows consideration of the normative framework in which a person operates and the factual circumstances of a given scenario.[62]

As for the normative dimension of control, one should look at all the relevant documents that govern the secondment of an individual to an international organization, including, if applicable, the decisions authorising the mission or the operation, the mandate and the agreements with the sending or the host States. As for the factual dimension, significance should be given to the actual capacity of international organizations to control the conduct of the individuals formally enclosed in their institutional structures. In this last regard, *Nuhanovic* represents again an interesting case study. The attribution of conduct to the Netherlands, in fact, was justified on the ground that that Government had the power to prevent the contested conduct, namely the killing of two individuals expelled from the Dutch compound.[63]

An inquiry into the power to prevent a certain conduct can be therefore used to give substance to the effective control criterion, providing a realistic and reliable assessment of a complex factual scenario such as that of an international organization's mission,[64] which has been regarded as a *bricolage institutionnel*.[65]

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[60] Gaja 2004, p. 13, para 47.

[61] The Hague Court of Appeal, Hasan Nuhanovic v. Netherlands, 7 July 2011, Case No. 12/03324.

[62] See accordingly Nollkaemper 2011, p. 1150.

[63] The Hague Court of Appeal, Hasan Nuhanovic, para 5.9.

[64] See Dannenbaum 2010, pp. 149–151.

[65] Sorel 2001, p. 138.

3.4 Attribution of Responsibility

The aforementioned considerations are useful when the apportionment of responsibility is uncertain. There could be situations in which responsibility to discharge the duty of care cannot be attributed to the international organization as the harmful outcome is fully attributable to the host Government or maybe to the seconding State (e.g. the State that puts its personnel at the disposal of the international organization).

One can consider the following scenarios. (1) An international organization's mission sent abroad is made the object of an attack directly imputable to the host Government in violation of the agreement concluded with the sending international organization. (2) The seconding State issues a cut-across order to its seconded personnel, thus excluding it from the chain of command and control of the receiving international organization; more simply, the sending State 'reverts back' the control over the personnel deployed.

In the first scenario, it appears that the violation of the duty of care is entirely and exclusively attributable to the host Government. In the second scenario, the personnel deployed is disconnected from the international organization, as it no longer exercises functions on its behalf, the organic link being severed along with any degree of control exercised on the part of the international organization.

Is it possible to conceive in the aforementioned scenarios the responsibility of the sending international organization? To answer this question, one should shift the discourse from the attribution of conduct to attribution of responsibility. The attribution of responsibility, in fact, allows responsibility to be allocated to a subject of international law even if conduct is not attributable to it.[66] Roberto Ago called it indirect responsibility in the Eight Report he issued in his capacity as Special Rapporteur on the Responsibility of States for Internationally Wrongful Acts.[67] The ILC devoted an entire section of the DARIO to the responsibility of international organizations in connection with acts of States.[68] The DARIO describes four possible cases of responsibility attributed to an international organization for conduct performed by a State: aid or assistance,[69] direction and control,[70] coercion,[71] and circumvention.[72]

Some authors have stressed that this section of the DARIO represents a confusion between primary and secondary rules more than is present elsewhere.[73]

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[66] See Fry 2014, pp. 98 ff.

[67] Eighth report on State responsibility by Mr. Roberto Ago, Special Rapporteur, UN Doc A/CN.4/318 and Add. 1–4 of 24 January, 5 February and 15 June 1979, p. 4, paras 1–47.

[68] DARIO, Chapter IV Responsibility of an international organization in connection with the act of a State or another international organization.

[69] DARIO, Article 14.

[70] DARIO, Article 15.

[71] DARIO, Article 16.

[72] DARIO, Article 17.

[73] See broadly Nedeski and Nollkaemper 2012, pp. 33 ff.

Indeed, the articles that put forward the rules on indirect responsibility appears to be conceiving primary obligations that international organizations are required to follow in order to avoid international responsibility.[74] Therefore, from the perspective of the allocation of the duty of care, attribution of responsibility seems to be functional to set the boundaries of the duty of international organizations to take care of personnel sent on missions, especially when the conduct is not directly attributable to them.

This notwithstanding, reading the articles on indirect responsibility is only partially helpful. In fact, although theoretically conceivable, it appears unrealistic to apply the paradigms of aid or assistance and direction and control. In fact, Articles 14 and 15 of the DARIO require an international organization to have 'knowledge of the circumstances of the internationally wrongful act';[75] also, contribution to the wrongful act must be significant, at least in order to consider that an international organization is aiding or assisting a State.[76] The only possible examples quoted by the ILC in its Commentary to Article 14 relates to an internal document of the UN where the personnel employed in UN peacekeeping operation MONUC in Congo were advised not to support the *Forces armées de la République démocratique du Congo* because there was the risk that they were about to violate international humanitarian law, human rights law and refugee law.[77] An application of these paradigms to the duty of care would require a scenario in which an international organization assists—or directs and controls—a State in committing illicit conduct towards its own personnel. It does not seem realistic.

A more promising scenario is that depicted by Articles 16 and 17, namely coercion and circumvention, which have some overlapping features. In fact, in both cases, the responsible international organization issues a decision that forces a State to perform a certain conduct that either violates its own (State) international obligations (Article 16) or the international organization's international obligation (Article 17).[78] Although there are no practical examples, a situation that put in danger the personnel of an international organization might arise as a consequence of an international organization decision that forces the host or the seconding Government to behave in a certain manner.

[74] See accordingly Dominicé 2010, p. 289, but see *contra* Reinisch 2010, p. 76.

[75] See DARIO, Commentary to Article 14, para 5. See also DARIO, Commentary to Article 15, para 6.

[76] Ibid.

[77] DARIO, Commentary to Article 14, para 6.

[78] See DARIO, Commentary to Article 16, para 5.

3.5 An Appraisal

Relying on the rules on attribution of conduct is certainly the most intuitive route when one is asked to apportion responsibility in the context of the duty of care. Against this backdrop, the normative content of the Articles from 6 to 8 of the DARIO reveals that applying the rules on attribution can lead to the following results.

In the case of permanent staff, Article 6, in combination with Article 8 of the DARIO, suggests that when personnel is sent on mission abroad on behalf of an international organization—thus exercising its functions—the duty of care should be always discharged by the sending international organization. This normative construction, in fact, leaves little room for the opposite conclusion, as the organic link always makes the international organizations responsible for their personnel, except when they are undoubtedly acting on a purely individual basis. Such a conclusion, although bearing the privilege of suggesting a definitive answer (international organizations always bear the duty) does not apply in the vast majority of cases, namely when staff is seconded by States (whether they are members or not).

In a secondment situation, an assessment of the degree of control exercised on the part of the international organizations is necessary. In fact, as anticipated above, sending States or Organizations maintain authority over the seconded individual, who, at the same time, becomes part of the institutional machinery of the receiving international organization.

The Voluntary Guidelines mentioned in the introduction seem to recognise the importance of an inquiry into the degree of control exercised by international organizations, whilst admitting that, in practice, such an inquiry might prove to be a difficult endeavour: '[i]n a secondment relationship, however, such control – and consequent responsibility – will rarely be clear-cut, or attributable exclusively to one party: it will most likely be shared.'[79]

This a credible and realistic statement and a possible reliable answer to the question presented in the introduction: the responsibility of the host Government is surely primary, but it cannot be said that it is also exclusive. If the sending international organization exercises control over the seconded individual sent on mission, its responsibility should be considered along with that of the host Government. In this regard, it seems that the recent case law suggests that an inquiry into the power to prevent a certain conduct might correctly substantiate the effective control criterion. It appears to perfectly reflect the situation on the ground when the discharge of the duty of care is called to be assessed.

It is also possible to rely on the rules governing the attribution of responsibility if the conduct is not at all attributable to the international organization. Should this be the case, the rules on coercion and circumvention might provide some insightful thoughts.

[79] Merkelbach 2017, p. 14.

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Chapter 4
Overlapping Responsibility: The Legal Relationship Between the International Organization and the Host State

Lorenzo Gasbarri

Contents

Abstract This chapter focuses on the duty of care from the perspective of the legal relationship that the sending international organization establishes with the hosting State. This is a privileged perspective to investigate the plurality of legal regimes in which the duty of care is implemented. Indeed, the protection of international civilian personnel is at the intersection of international law, national law of the hosting/sending State and internal law of the organization. The aim is to enlighten a fundamental component of the broader obligation that international organizations

Annex II—the Table of Cases—can be accessed online here: http://extras.springer.com/.

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have to protect the safety of their personnel deployed in international missions. In particular, this chapter focuses on the relationship that the sending organization has to establish with the hosting State in order to fulfil its duty of care. Moving between regimes and points of view, it builds on the fundamental principle under which hosting States bear the primary responsibility to protect civil servants deployed in their territories.

Keywords host State · primary responsibility · duty of care · due diligence · personal residence · exchange of information · evacuation · non-cooperation

4.1 Introduction

In the aftermath of the Cold War, the United Nations (UN) Secretary General Boutros Boutros-Ghali addressed the General Assembly on the security of UN operations. He affirmed that '[t]he primary responsibility for the safety of United Nations personnel and their dependents rest[s] with the host government. This responsibility flows from every Government's normal and inherent functioning of maintaining order and protecting persons and property within its jurisdiction'.[1] Relevant legal instruments uphold this formulation, creating a system of overlapping obligations aimed at the protection of international civilian personnel.[2]

This chapter critically appraises the principle of primary responsibility and it contends that the 'normal and inherent' function of maintaining order cannot be considered as establishing a relation of primacy over the duty of care. Indeed, relevant examples will illustrate how the protection of civil servants is nowadays affected by member States' perception that hosting States should be seen as

[1] UN Secretary-General 1993, para 4.

[2] de Guttry 2012, pp. 264, 265. Generally, the principle of primary responsibility of the host State is expressed in these terms: '1. The primary responsibility for the security and protection of personnel employed by United Nations system organizations, their spouses and other recognized dependants and property and the organizations' property rests with the host Government. This responsibility flows from every Government's normal and inherent function of maintaining order and protecting persons and property within its jurisdiction. In the case of international organizations and their officials, the Government is considered to have a special responsibility under the Charter of the United Nations or the Government's agreements with individual organizations. 2. Without prejudice to the above and while not abrogating the responsibility of the host Government for its obligations, the United Nations has a duty as an employer to reinforce and, where necessary, supplement the capacities of host Governments to fulfil their obligations in circumstances where United Nations personnel are working in areas that are subject to conditions of insecurity which require mitigation measures beyond those which the host Government can reasonably be expected to provide. This Framework of Accountability specifies the responsibilities and accountabilities of United Nations officials and personnel for such measures.' UN Department on Safety and Security 2017, p. 2. See also, UNGA 2010, para 30; UNGA 2015, p. 2; UNGA 2016, para 54; UNGA 2017, pp. 4–5, 17–18, 48; UN 2006, paras 4.1, 5.54, 6.34, O.1.1, T.1.1; UNGA 2002, para 3.

primarily responsible for the safety of organizations' personnel.[3] Consequently, the principle of primary responsibility creates a form of shared responsibility that seeks to limit the responsibility of the organization. Conversely, this chapter contends that the notion of primary responsibility of the host State implies a subordination of the responsibility of international organizations that does not find recognition in international law, next to more established forms, such as 'subsidiary' and 'indirect'.[4]

The origin of the principle has to be found in the frictions between the autonomy of the organization and its dependency on its member States.[5] This dilemma is general in character and it applies to every international organization despites their particular features. The UN may privilege dependency over autonomy while the EU may privilege autonomy over dependency, but the issue is the same. The duty of care and the safety of international civilian personnel is another aspect of the law of international organizations that is affected by the unclear relationship between the organization and its member States.[6] Given the impossibility of covering the practice of every international organization, this chapter focuses only on the EU and the UN, merging and comparing two different approaches to the same problem.

In the next section (Sect. 4.2), a first example concerning the security of personal residences gives some preliminary definition to the challenges deriving from the organization's relationship with the host State, while Sect. 4.3 compares the legal obligations of the hosting State under the law of international organizations with the legal obligations of the territorial State under human rights law. Before debating the relevance of the concept of primary responsibility in Sect. 4.5, a second example describes a case concerning evacuation in circumstances of extreme dangers (Sect. 4.4). Finally, the last two sections debate measures of improvement concerning the coordination between organizations and hosting States. Section 4.6 describes a last example concerning a circumstance in which a lack of exchange of information had fatal consequences, while Sect. 4.7 considers the relevance of the agreements that international organizations conclude with host States.

4.2 First Example: Security of Personal Residences

This example introduces the relationship between the sending international organization and the hosting State, analysing the judicial saga concerning the murder of the European Union (EU) official Alessandro Missir Mamachi di Lusignano and his

[3] See, for instance, Independent Panel on the Safety and Security of the UN Personnel in Iraq 2003, para 21.

[4] The notions will be discussed in Sect. 4.5.

[5] See, in general, Collins and White 2011.

[6] Klabbers 2015, p. 6.

wife.[7] The victims were killed by a burglar in 2006 in their personal residence in Rabat, Morocco, and legal claims were brought before EU courts by Mr. Mamachi on his own behalf and as representative of the heirs. In 2011, the EU civil service tribunal affirmed the existence of a 'duty to act' to ensure the security of personnel, under which the EU Commission enjoys limited discretion.[8] This obligation entails the security of personal residences, it extends to the family of the officer and it is composed of three elements, concerning risk assessment, provision of information and employment of protection measures.[9] However, the Tribunal stated that the duty to ensure the safety of staff cannot be considered as an obligation of result, and it is subjected to 'budgetary, administrative or technical constraints'.[10] Consequently, in first instance the applicant did not obtain full compensation. EU responsibility was limited, since 'It cannot seriously be argued that the Commission should be held primarily liable for the damage due to the double murder. Although the Commission created the conditions for this damage to occur by failing to take adequate security measures to prevent the entry of the attacker, the double murder was not the immediate and inevitable consequence of that fault.'[11] Finally, the Tribunal considered that the Commission must be held liable for 40% of the damage suffered.[12]

However, in December 2017 the Tribunal reversed this decision, recognising the Commission's full responsibility for moral and material damages and awarding compensation of €3.5 million.[13] In particular, the Tribunal considered that while the Commission is not solely responsible, it must be held jointly and severally liable in the absence of compensation by the responsible subject.[14] In its decision, it mentioned the role of the burglar without discussing the primary responsibility of the host State for the safety of the personnel of international organizations. Indeed, while claiming that the Commission failed in the implementation of protective measures, the Tribunal did not mention the primary responsibility of the host State in providing the security of international civilian personnel. The only mention of primary responsibility was made by the claimant in his first letter addressed to the

[7] EU Civil Service Tribunal, Livio Missir Mamachi di Lusignano v. European Commission, 12 May 2011 Case F-50/09 (see Annex II, Case 7); the decision was appealed, see General Court (Appeal Chamber), Livio Missir Mamachi di Lusignano v. European Commission, 10 July 2014 Case T-401/11 P; and reached the Court of Justice, see: ECJ, Livio Missir Mamachi di Lusignano v. European Commission, 10 September 2015 C-417/14 RX-II; the case was deferred to the Tribunal, see General Court (Appeal Chamber), Missir Mamachi di Lusignano and Others v. Commission, 7 December 2017 Case T-401/11 P RENV-RX, paras 114–119 (see Annex II, Case 10).

[8] EU Civil Service Tribunal, Livio Missir Mamachi di Lusignano, para 126.

[9] Ibid., para 132.

[10] Ibid., para 130.

[11] Ibid., para 192.

[12] Ibid., para 197.

[13] EU Civil Service Tribunal, Livio Missir Mamachi di Lusignano.

[14] Ibid., para 114.

President of the Commission in 2008.[15] He asked whether the EU Commission had begun negotiations with Morocco to obtain adequate compensation. The vice-President of the Commission, responsible for personnel, answered the letter, assuring that no negligence or fault could be attributed to the Moroccan government, and that the conditions for opening diplomatic negotiations with a view to obtaining compensation were not fulfilled. For their part, the Moroccan authorities arrested the burglar and sentenced him to death in 2007.[16] In 2017, the EU civil service tribunal discussed the Moroccan decision in order to exclude that the applicant should have exhausted all local remedies before heading towards the Commission.[17]

Clearly, the EU civil service tribunal does not have jurisdiction to rule on the responsibility of a third country, but it is still striking that the primary responsibility of the hosting State has never been discussed, not even for limiting the responsibility of the EU.[18] From the Commission standpoint, claiming the absence of responsibility of the Moroccan government without further examination contributes to considering that hosting States do not have an obligation to provide 'special' protection, which falls under the duty of care of the organization only. Conversely, the 2008 EU Field Security Handbook clearly states that the security and protection of mission personnel and property rests with the host government, and it contains a specific section on the security of personal residences.[19] Only when governments are not able to provide the necessary protection, the duty of care obliges the international organization to take relevant measures. The handbook lists a series of criteria to enact safety measures, such as window bars, alarms and security guards.[20] Partially differing from these provisions, the 2006 policy of the EU on the security of personnel establishes the primary responsibility of the host State only after acknowledging the roles and the responsibilities of the EU, member States and contributing third States. [21]

The relevance of this introductory example rests in showing the ambiguity of the principle under which host States bear the primary responsibility for the safety of

[15] EU Civil Service Tribunal, Livio Missir Mamachi di Lusignano, paras 30, 31.

[16] BBC News (2007) Morocco death sentence for murder http://news.bbc.co.uk/2/hi/africa/6381087.stm. Accessed 14 February 2018. The sentence was not executed under the 1993 moratorium on the death penalty, see Human Rights Council 2017, para 52.

[17] EU Civil Service Tribunal, Livio Missir Mamachi di Lusignano, para 114.

[18] See Chap. 8.

[19] Council of the European Union 2008a, pp. 96–97.

[20] 'Measures are justified only if: 1. The risk in the area is rated at 'high' to 'critical' and the hosting state cannot provide protection; 2. The landlord will not install the protective devices required; 3. The type of crime is violent in nature and it is widespread; 4. The preventive measures in question are commonly used in the foreign community; 5. Appropriate measures should be implemented to provide additional security for single female members of staff who may be living alone. Finally, proceedings against common crime and violence shall include promptly reporting to the host country authorities'.

[21] Council of the European Union 2006, para 28.

civilian personnel. It shows that the duty of care is caught between a rock and a hard place. On the one hand, the duty of care must reflect the need to find the consent of the hosting State for deploying the mission; on the other hand, it must reflect the need of contributing States to limit their responsibility and that of the organization. The next section will begin by defining the controversial position of the host State relying on a comparison with the legal obligation of the territorial State under human rights law.

4.3 Comparison Between the Hosting State Under the Law of International Organizations and the Territorial State Under Human Rights Law

The principle that the hosting State has the primary responsibility to protect the members of the international mission deployed on its territory overlaps with customary international law on the treatment of foreigners in the territory of the State. The latter is part of the broader duty to respect, protect and fulfil human rights that is applicable to foreigners and citizens under a State's jurisdiction.

The obligation to protect the safety of individuals within State's jurisdiction is a fundamental principle of human rights law, as enshrined in Article 2 of the International Covenant on Civil and Political Rights.[22] It is generally recognised that the obligation to ensure the enjoyment of human rights is a duty of the State to organize itself.[23] In the circumstances concerning international missions, this general obligation covers the personnel deployed under the auspices of international organizations and it is developed as the principle of 'primary' responsibility of the host State.[24] Both the 2006 UN Field Security Handbook and the 2008 EU Field Security Handbook derive the principle from the notion of State jurisdiction.[25] Conversely, the 1994 Convention on the Safety of United Nations and Associated Personnel does not mention the concept of 'primary' responsibility, but Article 7 specifies the duty of States parties to protect UN and associated personnel who are deployed in their territories.[26]

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[22] International Covenant on Civil and Political Rights, 1966, 999/1057 U.N.T.S. 171/401. 'Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant' (Article 2.1).

[23] IACtHR, Velásquez v. Honduras, 29 July 1988, App. No. 7920, para 166.

[24] Hunt 2010.

[25] Council of the European Union 2008a, p. 35; UN 2006, para 4.1. See *infra*, note 2.

[26] Convention on the Safety of United Nations and Associated Personnel, 1994, 2051 U.N.T.S. 363; Bloom 1995: '1. United Nations and associated personnel, their equipment and premises shall not be made the object of attack or of any action that prevents them from discharging their mandate. 2. States Parties shall take all appropriate measures to ensure the safety and security of United Nations and associated personnel. In particular, States Parties shall take all appropriate steps to protect United Nations and associated personnel who are deployed in their territory from

This section focuses on the legal status of the hosting State from the perspective of human rights regimes. In particular, it draws an interesting analogy with the status of States subjected to a limitation of sovereignty over a part of their territory.[27] The classic example concerns territorial occupation and it is usually addressed as a question of extraterritorial jurisdiction exercised by the sending State.[28] Here the focus is different, and it deals with the residual human rights obligations of the territorial State that suffers a limitation of sovereignty. Clearly, there are fundamental differences with the position of sending international organizations, but the relevant question is the same: to what extent the 'primary' responsibility of the territorial State to secure the protection of human rights within its jurisdiction is affected by the presence of a third entity in its territory?[29]

The European Court of Human Rights (ECtHR) dealt with the responsibility of the territorial States in a series of circumstances, mainly concerning territorial occupation.[30] In 1978, the Commission (EComHR) denied that Cyprus maintained jurisdiction over its occupied territory, while contending that the Convention continued to apply to the whole of its territory.[31] Again, in 1991 it confirmed that Cyprus cannot be held responsible for facts concerning the north of Cyprus.[32] Finally, in *Loizidou* the Court upheld the submission of the applicant, claiming that 'Since the Republic of Cyprus obviously cannot be held accountable for the part of the island occupied by Turkey, it must be Turkey which is so accountable'.[33]

The circumstances concerning Moldovia and the separatist region Transnistria led the Court to change its precedent, contending for the first time that territorial States do not cease to have jurisdiction over the whole of their territory even if prevented from exercising authority. Consequently, 'the State in question must endeavour, with all the legal and diplomatic means available to it vis-à-vis foreign States and international organisations, to continue to guarantee the enjoyment of the rights and freedoms defined in the Convention'.[34] This finding was confirmed in other cases concerning Moldova,[35] and applied to the situation

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the crimes set out in Article 9. 3. States Parties shall cooperate with the United Nations and other States Parties, as appropriate, in the implementation of this Convention, particularly in any case where the host State is unable itself to take the required measures' (Article 7).

[27] Larsen 2009.

[28] Wilde 2013a; Sassoli 2005.

[29] Lubell 2012.

[30] Wilde 2013b.

[31] EComHR, Cyprus v. Turkey, Admissibility, 10 July 1978, App. No. 8007/77.

[32] EComHR, An and Others v. Cyprus, Admissibility, 8 October 1991, App. No. 18270/91.

[33] ECtHR, Loizidou v. Turkey, 18 December 1996, App. No. 15318/89, para 49.

[34] ECtHR (GC), Ilascu and Others v. Moldova and Russia, 8 July 2004, App. No. 48787/99, para 333.

[35] ECtHR, Ivanţoc and Others v. Moldova and Russia, 15 November 2011, App. No. 23687/05; ECtHR (GC), Catan and Others v. the Republic of Moldova and Russia, 19 October 2012, App. Nos. 43370/04, 8252/05 and 18454/06; ECtHR (GC), Mozer v. the Republic of Moldova and Russia, 23 February 2016, App. No. 11138/10.

in Georgia,[36] and Azerbaijan.[37] However, the responsibility of the territorial State was not upheld in circumstances concerning international territorial administration.[38] In politically charged circumstances, the Court held that Serbia did not have jurisdiction over the territory of Kosovo, placed under the control of UNMIK.

UN human rights treaty bodies confirm the general trend to uphold the jurisdiction of the territorial States in all the circumstances of limited territorial control caused by the activities of a third entity on their territories. In addition to the situations faced by the ECtHR, the Human Rights Committee debated this issue for the circumstances concerning Colombia,[39] and the Democratic Republic of Congo.[40] Moreover, acknowledging the lack of effective control, the Human Rights Committee contended that the Covenant continues to apply to Kosovo, encouraging UNMIK to provide for it.[41]

Concerning the principle of primary responsibility of the hosting State for the safety of international civilian personnel, is interesting to stress its derivation from human rights law and the notion of State jurisdiction. In particular, in analogy with the above-mentioned case law, the responsibility of the host State is not excluded by the presence of a third entity on its territory. The principle of primary responsibility concerns positive obligations to do the utmost to protect all the individuals within its jurisdiction.[42] The notion of effective control over the territory becomes relevant to identify the subject that possesses jurisdiction. Obviously, the degrees of control over a territory are variable and, generally, hosting States cannot be compared to States that are subjected to foreign occupation. However, their legal status is not different, subjected to 'primary' responsibility derived from territorial jurisdiction.

4.4 Second Example: Evacuation

Moving forward on the issue of overlapping responsibilities, this section will describe an example concerning evacuation in circumstances of extreme danger. An evacuation is another circumstance that shows the role of the relationship with the hosting State in fulfilling organizations' duty of care. Among relevant cases, the 2003 Canal Hotel bombing in Baghdad is one of the most tragic events that can be described from this perspective.

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[36] ECtHR (GC), Assanidze v. Georgia, 8 April 2004, App. No. 71503/01.

[37] ECtHR (GC), Sargsyan v. Azerbaijan, 16 June 2015, App. No. 40167/06.

[38] ECtHR, Azemi v. Serbia, Admissibility, 5 November 2013, App. No. 11209/09.

[39] Human Rights Committee 1997, para 4; Human Rights Committee 2004a, para 3.

[40] Human Rights Committee 2006a, para 4; Human Rights Committee 2006b.

[41] Human Rights Committee 2004b, para 3; Human Rights Committee 2011, para 3.

[42] Larsen 2009, p. 85.

In March 2003 the UN Secretary General ordered the evacuation of all UN international staff from Iraq, following the invasion of the United States-led coalition. Prior to this conflict, the Canal Hotel was the UN headquarters in Baghdad, and the protection given by the government was considered sufficient. The situation concerning the UN was stable and the evacuation plan was implemented without issue.[43]

The failures of security were found after the decision to reopen the UN headquarters when the conflict was still ongoing. The Report of the Independent Panel on the Safety and Security of UN Personnel in Iraq attributes to the US-led coalition that occupied Iraq the primary responsibility to provide the security of UN personnel. As discussed in the previous section, there is a relationship between effective control over a territory and primary responsibility. The Report states that no formal agreement was concluded between the UN and the coalition and only an informal exchange took place concerning the security of the premises. It defines their relationship as 'ambiguous', divided between the UN's necessity to maintain neutrality in the conflict and its dependency on the coalition for its security.[44] This unclear relationship is considered to be one of the main factors that impeded the prevention of the car bomb that struck the Canal Hotel on the 19th of August. In the context of the previous evacuation, the rapidity with which the UN returned to Iraq did not allow for a full security assessment.

For the purposes of the relationship between the hosting State and international organizations in the context of evacuation, it is also relevant to describe what happened after the attack. On 2 September, the UN Security Coordinator advised the implementation of a new evacuation plan, which was refused by the Secretary General.[45] Ten days later, plans to evacuate from Iraq were again discussed by the Security Management Team, which recognised the necessity of implementing the measure. After gun fire and the explosion of a second car bomb near UN premises, a new request for evacuation was presented to the Secretary General. Again, he declined to follow this recommendation, justifying his decision with the necessity of maintaining an institutional presence in the country. At that point, the Report affirmed that 'it is the opinion of all UN security staff interviewed by the Panel that current conditions in Iraq have far surpassed the capacity of the United Nations to provide adequate security to its staff in the country'.[46]

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[43] Independent Panel on the Safety and Security of the UN Personnel in Iraq 2003, p. 6.

[44] Ibid., p. 6: 'In this context, the relationship between the United Nations and the Coalition Forces regarding the security of UN staff and premises remained ambiguous. Although there were clear needs for security arrangements and Coalition Forces/CPA was formally responsible for the security UN staff in Iraq, members of UN senior management in Baghdad felt uncomfortable because of the visible presence of Coalition Forces elements in and around the UN Canal Hotel compound. On several occasions, they asked the Coalition Forces to remove protective positions and equipment around the perimeter of the Canal Hotel without requesting alternative security arrangements.'

[45] Ibid., p. 15.

[46] Ibid., p. 16.

Three findings of the Report are fundamental: 1. No prior risk assessment was conducted before the return of the UN team; 2. The UN failed to appreciate the change in the operational environment since its evacuation in March 2003; and 3. The UN failed to prepare an evacuation plan and contingency plans to respond to an attack on the building.[47] Concerning the relationship between the UN and the hosting State/occupying power, the Report concluded that maintaining a presence of the UN in Iraq was a priority of member States, despite the fact that no sufficient security assessment was conducted after the evacuation. In particular, the Report considered that the 'ability to establish proper security mechanisms appears contingent on the perception of Member States that the host Government should be seen as primarily responsible for the security of UN staff in all circumstances'.[48] The UN Field Security Handbook requires a series of steps to be taken in case of evacuation and it requires the notification of the host government and local authorities and the request of assistance as necessary.

The distinction between the primary responsibility and an unclear form of 'secondary' responsibility blurs in this context. As reported, the UN in Baghdad was 'uneasy' with the highly visible military presence. According to the occupying power, the UN even asked to withdraw heavy equipment and remove the obstacles from the road that was later used to perform the attack. Actually, the political need to distinguish between the international organization and the military invasion can be considered as one of the reasons that impeded the prevention of the attack. Evidently, in this context the duty of care cannot be considered to be subordinate to the primary responsibility of the host government. The next section will theoretically appraise the notion of 'primary' responsibility.

4.5 Primary (and 'Secondary') Responsibility

The duty of care binding the international organization and the human rights obligation binding the hosting State are both obligations of means, defined in a different context by the International Tribunal for the Law of the Sea as requiring 'to deploy adequate means, to exercise best possible efforts, to do the utmost, to obtain this result'.[49] Whilst the notion of due diligence obligations is well established in the law of State responsibility, its content becomes more complex in dealing with international organizations.[50] In the relationship between member States and international organizations, due diligence obligations play a fundamental

[47] Ibid.

[48] Ibid., p. 21.

[49] ITLOS, Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the area, Advisory Opinion, 2011, ITLOS Rep 10 [110].

[50] International Law Association 2014; International Law Association 2016.

role.[51] The presence of a plurality of subjects entails the risk of a dilution of the protection of civilian personnel and its fragmentation in different regimes.[52] Indeed, complex legal issues arise from the establishment of an obligation of means (organization's duty of care) to assure the respect of a different obligation of means (State's primary responsibility). Assumed that the primary responsibility of the hosting State to fulfil its due diligence obligation complements the duty of care of the sending international organization, the question is how the two obligations interact.[53]

The relationship between the two obligations can be understood in three different ways. First, the primary responsibility of the hosting State can be considered as implying a 'secondary' or 'subordinate' nature of the responsibility of international organizations, limiting their duty of care in situations in which State authority is limited or non-existent, or only in providing the necessary help for the fulfilment of a State's obligation. This conceptualisation implies what can be called the 'hard' version of the principle of primary responsibility, meaning that the host State has to provide 'special' protection to international civilian personnel. Going back to the case of Missir Mamachi di Lusignano, Morocco would be responsible for not having prevented the murders by adding extra protection to his personal residence. The UN supports this thesis, considering first the primary responsibility of hosting States, and later claiming that the responsibility of the organization is triggered only in certain circumstances, like emergencies.[54]

Secondly, the relationship can be inverted and the organization's fulfilment of its duty of care can be considered as the precondition for the fulfilment of the hosting State's obligations. The primary responsibility would fall on the organization, while the hosting State has only a duty to provide the necessary contribution. This hypothesis contrasts with the principle of State sovereignty over its territory. It implies that the sending organization has the capacity to claim territorial jurisdiction and be responsible for the protection of individuals, while the role of the hosting State is relevant only in certain circumstances. Again, it is based on the 'hard' version of the principle of 'primary' responsibility, binding the sending organization instead of the host State. This conceptualisation could be applied in two circumstances. First, within those international organizations that claim a supranational status: the deployment of missions within the EU can be subjected to the primary responsibility of the organization to guarantee the safety of its staff.[55] Secondly, in circumstances concerning international territorial administration,

[51] Gasbarri 2015.

[52] Watson et al. 2011.

[53] Engdahl 2007, p. 88.

[54] See for instance, UN 2006, para 4.5: 'It is recognized, however, that during some emergencies and particularly in cases where civil disorder may ensue, the security and protection factors will be uncertain. In such instances the organizations of the United Nations system must take necessary action for the protection and security of their staff members, their spouses and eligible dependants, in accordance with the directives of the Secretary-General'. In general, see *infra*, note 2.

[55] Sari 2009.

such as in the situation of Kosovo. Indeed, UNMIK is generally considered as responsible for human rights violations in the territory of Kosovo,[56] and the Ombudsperson Institution claimed that the interim civilian administration was acting as a 'surrogate state'.[57]

These two alternative relationships have the unfortunate consequence of falling within the complex relations that international organizations establish with member States. The duty of care is another legal instrument subjected to their unclear relationship, in this case moving between State sovereignty and the organizations' security. The third and preferable solution rests in considering the complementary relationship between the obligations of the hosting State and the duty of care of the sending international organization. Under this framework, the responsibility of the host State does not obviate the requirement for the organization to take adequate steps of its own to ensure the security of its personnel. Hosting States' and organizations' obligations are not in a relation of presupposition but they coexist. This conceptualisation rebuts the distinction between the notion of 'primary' and 'secondary' (or 'subordinate') responsibility. Indeed, the circumstances in which the notion was developed do not reflect either the concept of subsidiary responsibility that applies between an organization and member States,[58] or the concept of indirect responsibility that applies in cases concerning complicity.[59] If there is not a 'secondary' responsibility, there cannot be a 'primary responsibility'.

Applying this three-fold conceptualisation to the example of the Canal Hotel bombing, the 'hard' version of the principle of primary responsibility was applied by the UN for providing the security of civilian personnel. This created a form of subordination of the duty of care that was criticised by the Ahtisaari report.[60] Indeed, while treaty sources do not explicitly recognise the principle of primary responsibility, the UN extensively relies on the principle in soft law instruments.[61] Conversely, the complementary relationship considered in the third hypothesis mentioned above has the advantages of coordinating the two forms of responsibility towards a common aim. The next sections will elaborate on the implementation of an obligation of coordination binding the international organization as part of its duty of care.

[56] See Sect. 4.3.

[57] Ombudsperson Institution in Kosovo (2001) Special Report No. 1, para 23; De Brabandere 2010.

[58] See Articles 48 and 62 ARIO.

[59] Aust 2011.

[60] Independent Panel on the Safety and Security of the UN Personnel in Iraq 2003, p. 40.

[61] UN Department on Safety and Security 2017, pp. 2, 24, 36; UNGA 2017, pp. 4–5, 17–18, 48; UNGA 2016, para 54; UNGA 2015, p. 2; UNGA 2010, para 30; UN 2006, paras 4.1, 5.54, 6.34, O.1.1, T.1.1; UNGA 2002, para 3.

4.6 Third Example: The Exchange of Information Between International Organizations and the Hosting State

On 11 December 2007 two vehicle-borne bombs struck the Algerian Constitutional Court and the UN office in Algiers. Whilst the total number of deaths is still unknown, 17 UN personnel were killed and 40 injured. The attack caused the third highest number of staff casualties in the history of the UN, after the 2003 bombing in Baghdad and the 2010 Haiti earthquake. In response to this incident, the UN Secretary General established in 2008 an 'Independent Panel on Safety and Security of United Nations Personnel and Premises Worldwide', with the mandate to focus on 'strategic issues vital to delivery and enhancement of the security of United Nations personnel and premises and the changing threats and risks faced by it'.[62]

The panel produced the report 'Towards a Culture of Security and Accountability', in which it stressed the lack of coordination with the Government of Algeria in preventing the attack.[63] In particular, it stressed the primary responsibility of the host State for the security and safety of international civilian personnel, recognising that the measures put in place were not enough to prevent the incident. The primary responsibility is defined as a 'guiding' principle of the UN security management system that derives from member States' sovereignty. The report criticised how member States have interpreted this principle in its 'hard' version, claiming that the UN is only responsible for helping the hosting State to fulfil its obligation. Thus, it limits the scope of the principle of primacy and clarifies the relationship that the organization has to establish with the hosting State:

> The first duty of the UN is to understand fully what it can—and cannot—expect from the host government in terms of information exchange, regular consultations, possible secondment of senior security personnel to the UN offices, and of what other financial, material, or physical support sought by the Organization that particular Government is willing to provide.[64]

The report contends that the main security gap was the absence of direct contact with the Algerian Security Service, which could have prevented the attack.[65] Indeed, the relationship with the hosting State is also relevant to fulfil the obligation to provide adequate information about the potential dangers. This obligation to inform personnel about potential dangers and risks which might affect their lives is only fulfilled in coordination with the hosting State. In complex scenarios, only national organs may possess relevant information on security threats. The 2008

[62] UN Secretary General (2008) Press Release, SG/SM/11403. http://www.un.org/press/en/2008/sgsm11403.doc.htm. Accessed 11 February 2018.

[63] UN, Independent Panel on Safety and Security of United Nations Personnel and Premises Worldwide 2008, para 49.

[64] Ibid., para 259.

[65] Ibid., para 54.

panel on safety report stresses that the assessment of risk may differ significantly between the host State and the UN.[66] Exchange of information is the only way to significantly narrow the gap. Information sharing about security conditions is the central element for building close cooperation.[67]

However, in the UN Field Security Handbook there is no general provision to maintain constant contact with the authorities of the hosting State. Conversely, relevant obligations are contained in the 1994 UN Convention on the Safety of United Nations and Associated Personal.[68] In particular, Article 11(b) states that State parties shall cooperate in exchanging information to prevent the commission of the core crimes listed in Article 9. After an event has occurred, Article 12 establishes the obligation to provide the Secretary General with all relevant information. The Report contends that the 1994 Convention and its protocol are weak instruments to guarantee the security of UN personnel. It stresses that there is a high degree of State incapacity to investigate and prosecute the core crimes.

The Report concludes that in order to fulfil their obligation of protection, organizations need to establish close connections with hosting governments. The central element of cooperation is reciprocal trust and information sharing. The next section will discuss why international agreements between international organizations and hosting States are the best instruments to establish the preconditions for the fulfilment of the duty of care. From the hosting State perspective, agreements are also a way to discharge their separate duty to protect individuals within their jurisdiction.

4.7 Coordination with the Hosting State

The agreements concluded between the sending international organization and the hosting State are the legal instruments that implement the complementary protection. This section focuses on the status of forces agreements (SOFA) and status of mission agreements (SOMA) concluded between the host country and a third entity stationing military forces or civilian personnel in that State.

SOFAs and SOMAs are multilateral or bilateral agreements that define the legal status of military and civilian personnel deployed by States or international organizations in the territory of another State with its consent.[69] They deal with a variety of issues such as the entry into the country, taxation, settlement of claims, carrying of arms and the establishment of a protection against civil and criminal jurisdiction over personnel deployed in mission. SOFAs can take different forms. They can be international treaties which must be signed and ratified by the parties or they can

[66] Ibid., para 260.

[67] Ibid., para 261.

[68] Arsanjani 2009; Llewellyn 2006; Siobhán 2003.

[69] Fleck 2001; Bowett 1997; Erickson 1994.

take the form of memoranda of understanding.[70] The circumstances in which the mission is deployed affect the possibility of creating a stable and long-lasting relationship. This is particularly the case for those organizations that do not have a clear status in international law.[71] For instance, when the Organization for Security and Cooperation in Europe was called to deploy the special monitoring mission to Ukraine, its activities were affected by a lack of legal capacity that prevented any fundamental operations, such as opening bank accounts, entering into contracts or importing equipment.[72] A memorandum of understanding was signed providing its provisional application, and ratified by Ukraine 12 weeks after the deployment, finally granting privileges and immunities to OSCE's staff.

There is no obligation to conclude a SOFA/SOMA before the deployment of an international mission. The UN Field Security Handbook does not mention the conclusion of SOFAs in general terms, but it recalls the necessity of agreements 'to ensure uninterrupted access to local communication networks'.[73] However, in the 18 international missions conducted by the EU between 2003 and 2007, in only one case a SOFA/SOMA was not concluded or preexistent agreements were not implemented.[74] This case concerns the mission *Artemis* in the territory of the Democratic Republic of Congo, for which the General Secretariat of the Council explicitly mentioned that customary international law would be applicable.[75] If the international organization obtains the consent for the mission but it is not able to conclude an agreement with the host State, its member States can remedy this lack of protection with existent agreements or concluding separate agreements for their own military and personnel sent on missions.[76] This fragmented landscape seriously affects the unity of the operation and clearly undermines the autonomy of international organizations.

Once a SOFA/SOMA is negotiated, is there an obligation to include provisions on the protection of civil personnel? Paragraph 18(b) of the policy of the EU on the security of personnel states that measures for protection should include the

[70] Conderman 2013.

[71] Bertrand 1998.

[72] OSCE, Legal Services, 2015, para 5. See Chap. 10.

[73] UN 2006, para 5.34.

[74] Sari 2008.

[75] Council, 'Public access to documents – Confirmatory application n. 33/c/03/05', 11621/055 Sept. 2005, p. 4: 'Article 13 of Joint Action 2003/423/CFSP provided that, 'if required, the status of the EU-led military forces in the DRC shall be the subject of an agreement with the Government of the DRC to be concluded on the basis of Article 24 of the TUE'. Since no agreement was concluded between the EU and the DRC on this issue, the SOFA as regards the EU-led military force in the DRC was governed by customary international law and by the current practices in international relations in conformity with the mandate conferred by UN Security Council Resolution No 1484(2003)'.

[76] Sari 2008, p. 75 at footnote 56.

conclusion, whenever possible, of agreements with the host State.[77] Similarly, the EU Field Security Handbook states that the EU 'shall' conclude a SOMA, but only 'where possible'.[78] For instance, Article 8 of the 2004 'Agreement between the European Union and Georgia on the status and activities of the European Union Rule of Law Mission in Georgia' (EUJUST THEMIS), states that '[t]he Host Party, through its own capabilities, shall assume full responsibility for the security of EUJUST THEMIS personnel […] To that end, the Host Party shall take all necessary measures for the protection, safety and security of EUJUST THEMIS and EUJUST THEMIS personnel'.[79] As already mentioned, SOMA/SOFA could include relevant provisions contained in the 1994 UN Convention. Alternatively, sending international organizations could exercise political pressure on the hosting State to ratify this convention and other relevant instruments. For instance, the 1981 ILO Convention on 'Occupational Safety and Health' (no. 155) includes provisions that are relevant for the fulfilment of the duty of care.

The absence of a clear mention of agreements to provide for the security of international civilian personnel reflects the idea that the duty of care becomes relevant only after the 'primary' responsibility of hosting States. As an example, para 4.7 of the UN Field Security Handbook states that '[t]he organizations of the United Nations system will, where necessary and if so requested, facilitate the tasks of the host governments in the discharge of their obligations by making appropriate supporting arrangements.'[80] Conversely, Article 4 of the 1994 Convention on the Safety of United Nations and Associated Personnel includes an obligation for the host State to conclude SOFAs on the UN operation and all personnel engaged in it.[81] Some aspects of the convention have been implemented in mission-specific SOFAs.[82] For instance, the agreement concerning the status of the UN mission in Sudan contains a general clause, affirming that the host State shall ensure that the provisions of the UN Convention are applied in respect to UNMIS.[83] On a number of occasions, the UN Security Council has requested the Secretary General and

[77] 'Such measures should include […] the conclusion, whenever possible, of arrangements granting a protected status to deployed personnel, including privileges and immunities (e.g. in a status of forces or a status of mission agreement) and the provision of acceptable security measures by the host State'.

[78] Council of the European Union 2008a, p. 35.

[79] Council decision concerning the conclusion of the Agreement between the European Union and Georgia on the status and activities of the European Union Rule of Law Mission in Georgia, EUJUST THEMIS 2004/924/CSFP OJ L 389/41.

[80] Ibid., para 4.7.

[81] Greenwood 1996.

[82] See, for instance SOFAs for UNMIS (para 48), UNAMI/Iraq (Article V, paras 7.a–7.e), UNAMI/Jordan (paras 9–12), UNAMIS (Article VI, para 2).

[83] SOFAs for UNMIS, para 48.

hosting States to conclude a mission-specific SOFA, both when the hosting State was party or non-party to the 1994 Convention.[84]

In the context of structured military cooperation, SOFAs can be designed for permanent missions. These are frequently based on the NATO's Status of Forces Agreements of 1951.[85] For instance, the 2003 EU SOFA is based on this antecedent in order to govern the deployment of civilian and military personnel within the territory of its member States.[86] In these circumstances, agreements do not usually include general obligations concerning the safety of civilian personnel. For instance, Article 7(11) of the NATO's SOFA mentions the protection of installations, equipment and other property without considering personnel.[87] Clearly, the absence of a provision does not deprive civilian personnel from the protection of the hosting State, deriving from other relevant rules of the international organization and general human rights law.

The different approaches that have been described can be categorised between a form of 'primary' responsibility that requires the hosting State to provide special protection, and a form of human rights responsibility that is based on the positive obligations that territorial States have to protect individuals within their jurisdiction. Applying the first notion, the UN clearly considers agreements with hosting States as a way to reaffirm the distinction between primary and secondary responsibility.[88] Concerning the protection of international civilian personnel, agreements are only an instrument that facilitate the role of member States.

In the context of the EU, the relationship is inversed. Agreements are seen as a way to fulfil the duty of care of the Organization, because they allow a coordination for the benefit of the EU mission.[89] Indeed, the EU draft model SOMA employs the term 'full' responsibility of the host State, instead of 'primary'.[90] Again, the political context plays a role in defining the duty of care. Within the UN, the primary responsibility of the host State serves the purpose of reaffirming its sovereignty and limiting UN responsibility. Within the EU, its nature as a regional

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[84] See, for instance UN Security Council (2007) Resolution 1769(2007) S/RES/1769, para 15(b); UN Security Council (2005) Resolution 1590(2005) S/RES/1590, para 16(ii); UN Security Council (2004) Resolution 1545(2004) S/RES/1545, para 10; UN Security Council (2004) Resolution 1528(2004) S/RES/1528, para 9.

[85] Sari 2009.

[86] Sari 2008.

[87] 'Each Contracting Party shall seek such legislation as it deems necessary to ensure the adequate security and protection within its territory of installations, equipment, property, records and official information of other Contracting Parties, and the punishment of persons who may contravene laws enacted for that purpose.'

[88] UNGA 2017, para 28: 'The Inspectors believe that host country agreements should be consistent with the primary responsibility of host country authorities and consequently reflect the specific security local context, including relevant security provisions, and should be updated regularly. In that regard, they encourage host countries to fulfil their responsibility and make every effort to provide United Nations organizations with the safest environment possible.'

[89] See Chap. 8, Sect. 8.2.1.

[90] Council of the European Union 2008b, Article 9.

economic integration organization leads to a consideration of the relevance of its autonomy towards member States, developing its primary responsibility in cooperation with the hosting State.

In sum, rebutting the notion of primary responsibility means relying on the responsibility of the host State that derives from human rights law, concerning positive obligations to provide the security of all individuals under its jurisdiction. Under this framework, concluding agreements with the organization for the protection of civilian personnel is part of the positive obligations of the host State. From the organization's perspective, agreements fall within the broader duty of care. In conclusion, the agreements containing relevant provisions on the protection of civil personnel should reflect the complementary nature of the duty of care. SOFAs/SOMAs should enact forms of shared responsibility that are consistent with the distinction between the primary obligation of the hosting State and the 'secondary' obligation of the international organization. These agreements are the privileged instrument for the coordination of activity towards the security of civilian personnel.[91]

A last scenario must be considered. In cases in which the cooperation with the hosting State is difficult or absent, three possibilities arise. First, the mission does not have the consent of the territorial State. Second, the mission has the consent of the hosting State, but it does not have full cooperation. Third, the mission has the consent of the hosting State and its full cooperation, but its authority is limited or non-existent. Only the last two circumstances are relevant for discussing the safety of international civilian personnel, while the first one concerns military operations.[92]

The consent of the hosting State for the deployment of international missions takes different forms. Without indulging in describing different theories on how consent can be formally given, what is relevant is the distinction between formal consent and full cooperation. international organizations may operate in contexts where consent is given in the framework of a stable cooperation with the host State, or where consent allows the deployment of the mission and nothing more. In these three circumstances, the duty of care cannot be secondary in relation to the concept of primary responsibility of the host State. Distinctions between organizations become relevant. For instance, in order to trigger primary responsibility, the EU Field Security Handbook requires the consent of the host State for the deployment of the mission.[93] Conversely, within the UN there is not the same requirement. The 1994 UN Convention mentions the consent and the cooperation of States parties in

[91] Fleck 2013.

[92] Kohen 2003.

[93] Council of the European Union 2008a, p. 30: 'The government of the Host State (where consent has been given for a crisis management operation) has the primary responsibility for ensuring the security and safety of personnel travelling or deployed within its borders in the context of a crisis management operation, in accordance with agreements or arrangements to be concluded between the European Union and the Host State in question'.

the preamble only, which only acknowledges that the consent and cooperation with the hosting State is fundamental to guarantee the safety of UN personnel.[94]

When the hosting State gives its consent to the mission without cooperating with the international organization, the duty of care is not subject to the concept of primary responsibility of the host State. The threshold for the international organization is higher and the existence of a separate responsibility of the hosting State does not affect the content of the duty of care. In particular, in order to fulfil their duty of care, international organizations shall demonstrate their effort in obtaining the collaboration of the host State, demanding the conclusion of agreements and all the necessary measures. In this circumstance, the fulfilment of the duty of care entails the deployment of all possible means. For instance, the exercise of diplomatic protection is a feasible instrument to take action against the host State on behalf of officers whose rights have been violated.[95]

When hosting States are willing to provide assistance but they do not have the capacity to do so, the duty of care of the international organization remains the only means to provide security. Whilst the host State has a lower threshold for the fulfilment of its obligation of means, the duty of care of the organization is not affected. Relying on the difference between primary and secondary responsibility, the UN Field Security Handbook considers this circumstance as the only one that triggers its duty of care.[96] Indeed, the duty of care is perceived as an obligation to facilitate the tasks of the host government in discharging their obligation. This thesis has been criticised throughout this chapter.

4.8 Conclusion

Using the words of the 2003 Ahtisaari report on the safety and security of UN personnel in Iraq, this chapter examined 'in which circumstances the security of UN staff falls primarily under the UN's auspices and what preventive or protective measures the United Nations is expected to implement'.[97] It focused on the relationship between the sending organization and the hosting State, and, in particular, on the concept of the 'primary' responsibility of the hosting State.

Two notions of the principle have been identified. The first one is based on the idea that the 'primary' responsibility of the hosting State implies the 'secondary' responsibility of the organization. This thesis has been criticised throughout the chapter, describing how the responsibility of the host State derives from human

[94] Convention on the Safety of United Nations and Associated Personnel, 1994, 2051 U.N.T.S. 363; Bloom 1995.

[95] See Chap. 18.

[96] UN 2006, para 4.5.

[97] Report of the Independent Panel on the Safety and Security of the UN Personnel in Iraq 20 October 2003, p. 21.

rights law and it does not establishes a position of 'primacy' over the responsibilities of third entities acting on its territory. The second notion of this principle is based on the idea that the overlapping responsibilities are not in a position of subordination but they complement each other under a form of shared responsibility. The chapter upheld this thesis, considering that agreements between the international organization and the hosting State are the best form of implementation.

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Chapter 5
The Duty of States to Ensure Respect of the Duty of Care through Their Membership in International Organizations

Martina Buscemi

Contents

Annex II—the Table of Cases—can be accessed online here: http://extras.springer.com/.

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Abstract This chapter stems from the consideration that States, when becoming members of international organizations, remain bearers of obligations under international human rights law. This entails that, on the one hand, both in implementing binding acts of the international organizations to which they are members (ECtHR, *Bosphorus v. Ireland* (GC), App. no. 45036/98, 2005, §153) and in case of failure by those international organizations to ensure respect for human rights, States are not relieved from their own obligations under international human rights law (ECtHR, *Al-Dulimi and Montana Management Inc. v. Switzerland* (GC), App. no. 5809/08, 2016). This applies also to the contribution of States in the elaboration of the rules of the organization (ECtHR, *Gasparini c. Italie et Belgique*). As this chapter argues, it means that States must use their leverage (expressed through their right to vote or their diplomatic influence) to ensure that violations do not result from the programmes, policies and rules of the organization of which they are members (Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, §19). This chapter also finds, more specifically, that they are required to act within those international organizations in a manner that fosters respect for human rights in general and, more specifically, for duty of care obligations towards civilian personnel sent on mission.

Keywords membership responsibility · institutional veil · equivalent protection · DARSIWA · DARIO · duty of care

5.1 Introduction and Purpose of the Chapter

It is safe to posit that member States, as founding fathers of international organizations, are in the best position to steer their governance in a responsible manner. By exercising their voting powers and diplomatic influence, member States have room for manœuvre within the 'institutional life' of international organizations: either *ab initio* by drafting their constitutive instruments, and *in itinere* by supporting or obstructing specific acts and projects. It is, however, controversial whether and under what conditions member States can be held responsible, due solely to their membership, for wrongdoings of an international organization. A member State's responsibility should be, in principle, ruled out, as the international organization's legal personality is certainly separate from that of its member State.[1] It remains no less true, though, that under the institutional cloak of an

[1] The question of separate legal personality of international organizations has been addressed by the International Court of Justice (ICJ) on several occasions. See ICJ, Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 11 April 1949, I.C.J. Reports 1949, p. 174; Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, 20 December 1980, I.C.J. Reports 1980, p. 73; Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, 29 April 1999, I.C.J. Reports 1999, p. 62.

international organization there are member States, who concretely participate in its decision-making process. As hidden actors (or even puppeteers), member States drive the international organization's agenda, also pursuing their own national interests and shaping the institutional will.

For the above reasons, the topic under consideration—the obligations incumbent upon States to guarantee the duty of care of civilian personnel through their membership in international organizations—is rather complex. The issue requires close examination of the intricate relationship between member States and international organizations, focusing on the behaviour of States as members in international organizations that send civilian personnel in field missions. This chapter seeks to understand (i) to what extent human rights obligations contracted by States require them to act within international organizations in a manner that ensures respect for the duty of care towards civilian personnel sent on missions,[2] and (ii) what specific conducts States are requested to perform in institutional settings. To fully explore these questions, the chapter will focus on the theoretical question of piercing the international organization's institutional veil (Sect. 5.2), recalling some general principles on 'membership responsibility' (Sect. 5.2.1), as well as the remarkable contribution made in this regard by the European Court of Human Rights (hereinafter ECtHR) (Sect. 5.2.2). It therefore remains to be seen how these legal assumptions apply with regard to the duty of care towards civilian personnel sent on missions (Sect. 5.3.1). Against the jurisprudential and doctrinal background discussed above, the study will identify possible obligations incumbent on member States. Those include a duty to properly exercise voting powers and diplomatic influence to respect and ensure the duty of care (Sect. 5.3.2) and an obligation to guarantee an adequate level of judicial protection in labour disputes rising between international organizations and their civilian personnel sent on missions (Sect. 5.3.3). The analysis will then shift from theory to practice, providing a concrete case study related to the protection of personnel deployed in a UN mission from infectious diseases and the role of member States in elaborating and adopting the rules to this end (Sect. 5.4). The chapter will conclude with final remarks (Sect. 5.5).

[2] The duty of care can be fairly considered as part of human rights law (see Chap. 2 by de Guttry and Chap. 16 by Poli in this volume).

5.2 Piercing the 'Institutional Veil':[3] The Duty of States to Ensure Human Rights in the Framework of International Organizations of Which They Are Members

5.2.1 Preliminary Remarks on the Responsibility of Member States in Connection with the Conduct of an International Organization

The question of whether and under what conditions member States may be held responsible for wrongdoings of international organizations has turned out to be one of the most problematic in the law of States and international organizations' responsibility.[4] Membership responsibility emphasised the Janus-faced character of international organizations, that is to say, the dual nature of their personality: an autonomous subject, although composed of States. In this context, the idea of the 'piercing the institutional veil' of international organizations has been increasingly evoked in literature which has come up with different solutions to highlight the prominent role of member States within the legal order of international organizations.[5]

Attributing to member States the wrongdoing of international organizations has thus become one of the main legal challenges for international lawyers. This has proved to be easier when conduct has been autonomously undertaken materially by States acting under the international organizations' framework, for instance in the context of UN military missions,[6] and far more difficult when it comes to actions

[3] The metaphor of 'institutional veil' in the area of international organizations law has been used in Brölmann 2007, *passim*, and in Brölmann 2015, pp. 358–381.

[4] The topic of 'membership responsibility' was—to a certain extent—addressed by the International Law Commission in the Draft Articles on Responsibility of International Organizations adopted in 2011, especially in Part V under the heading 'Responsibility of a State in connection with the conduct of an international organization' (see Draft articles on the responsibility of international organizations, with commentaries, in Yearbook of the International Law Commission, 2011, vol. II, Part Two, pp. 89 ff.). For an assessment of the approach endorsed by the International Law Commission on this matter see, among others, the contributions written by Nakatani, Palchetti, Šturma, Yee 2013, pp. 293–338.

[5] For a powerful overview of different solutions related to the 'membership responsibility', see Volume 12 of the International Organizations Law Review (2015, pp. 285–517), extensively devoted to it. For a particular critique of the trend towards the establishment of member State responsibility for wrongdoings of international organizations, Blokker 2015, p. 324.

[6] The literature in this field is particularly broad. As for the specific question of attribution of wrongful acts committed by troops put at the disposal of international organizations by sending States, see the pioneer study conducted by Condorelli 1995, further developed (Condorelli 2014, pp. 3–15), as well as the work of Palchetti (among many articles written, see Palchetti 2007, pp. 681 ff.). As for the approach adopted by the ILC see UN Doc. A/CN.4/541 (2 April 2004), para 7 and Article 7 of the DARIO (see DARIO, p. 20).

taken in institutional settings, such as the drafting of a decision to be adopted by international organizations. While in the first scenario, the control held by States over a specific conduct is often factual, in the second situation it can be conceived —if any—as only 'normative'. In this latter scenario, it is even more complex to understand to what extent human rights obligations bind member States while participating in international organizations' affairs.

One clear standpoint is that when States become members of international organizations, 'they do not leave their international obligations at home',[7] in accordance with the idea concisely expressed in the Latin principle *nemo plus iuris in alium transferre potest quam ipse habet*. This means that States cannot relinquish their international obligations, including human rights duties, when they accede to international organizations. Some authors grounded this general presumption on the doctrine of abuse of right and the principle of *pacta sunt servanda*, which would operate as legal limit on the conduct of States when creating, controlling, and functioning within international organizations.[8] Many authors maintain that, otherwise, the membership would serve as a tool to States to circumvent, abusively, the international obligations undertaken.[9]

This view is partially upheld by the International Law Commission (ILC) in the Draft Articles on the Responsibility of international organizations (DARIO), where it is stated that States cannot take advantage of the separate personality of an international organization and act within its institutional order disregarding the international obligations incumbent on them.[10] At the same time, the DARIO make clear that the separate personality of international organizations can never be called into question to find States responsible due solely to their membership.[11]

In the same direction several legal instruments aimed at protecting human rights. For instance, the Maastricht Guidelines on Violation of Economic, Social and Cultural Rights, adopted in 1997, state in para 19 that '[t]he obligations of States to protect economic, social and cultural rights extend also to their participation in international organizations, where they act collectively'.[12] This line of reasoning has been adopted also by the United Nations Committee on Economic, Social and Cultural Rights, which noted in the General Comment on the Right to Social Security that 'States parties should ensure that their actions *as members of international organizations* take due account of the right to social security'.[13] Similarly,

[7] Ryngaert 2015, p. 516.

[8] In this context see Murray 2011, pp. 291–347.

[9] See, *ex multis*, d'Aspremont 2007, pp. 91–119.

[10] Article 61 of the DARIO and the Commentary enclosed thereby (DARIO, p. 93).

[11] '[…] membership does not as such entail for member States international responsibility when the organizations commits an internationally wrongful act' (DARIO, p. 96). In similar terms, see also Annuaire de l'Institut de Droit International, vol. 66-II (1996), p. 445.

[12] Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, para 19; emphasis added.

[13] CESCR (2008) General Comment 19—The right to social security, E/C.12/GC/19, para 58 (emphasis added).

the Legally Binding Instrument on Transnational Corporation and Other Business Enterprises with respect to human rights, recently drafted, affirmed in provisional para 3.3:

> State Parties shall strive to ensure that international organizations, including international and regional economic, financial and trade institutions, in which they are Members, do not adopt or promote any international norm or decision that could harm the objectives of this legally binding instrument, or affect the capacity of the Parties to fulfill their obligations adopted herein.[14]

What clearly underpins those provisions is the concern that member States behave within international organizations' institutions in a way so as not to impair the human rights commitments they have undertaken. On the basis of this same assumption, the ECtHR has propounded a far more sophisticated theory.

5.2.2 The Contribution Made by ECtHR Jurisprudence

In recent decades, the ECtHR has often held States responsible for violations of the European Convention on Human Rights and Fundamental Freedoms (ECHR) that were caused by conduct in connection with acts of an international organization. In doing so, the Court designed the so-called 'equivalent protection doctrine' to verify whether States Parties have not departed from conventional obligations when acceding to an international organization. Applied originally with regard to the European Union (EU), this praetorian theory has been invoked by applicants in claims filed against States as members of a large and variegated number of international organizations (e.g. the United Nations, NATO, the European Patent Organization, and many others). Interestingly enough, the 'equivalent protection' test turned out to be also a powerful tool capable of solving normative conflicts between obligations enshrined in the ECHR and those stemming from international organizations—and therefore a way to coordinate colliding legal regimes.[15] The outcome of this jurisprudence can be divided into two main sections, depending on the type of conduct under the scrutiny of the ECtHR.

[14] The text provisionally drafted can be found at: www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/LegallyBindingInstrumentTNCs_OBEs.pdf, p. 6 (accessed on 21 February 2018).

[15] While some authors consider the equivalent protection formula as a 'soft' way to avoid normative conflicts, others maintain that the difference between this and the 'supremacy clause' enshrined in Article 103 of the UN Charter 'would reside more in their respective scope than in their very nature and purpose' (in this way, see Arcari 2014, p. 40).

5.2.2.1 The Equivalent Protection Doctrine and the Domestic Implementation of Binding Acts Emanating from International Organizations

The equivalent protection doctrine was originally devised in a context where a State had adopted national measures in order to enforce binding acts of an international organization in a manner that was (allegedly) in violation of the ECHR.[16] Since at stake in these cases there were domestic acts or conduct implementing binding acts of international organizations, the ECtHR retained its competence *ratione loci* and *personae* over such situations by imputing the challenged measures (for instance, the freezing of assets) to the Contracting States—and not to the international organizations who adopted the binding act in the first place.[17]

It was the well-known *Bosphorus v. Ireland* case that paved the way in this direction.[18] The ECtHR, having considered that the respondent State had no discretion in implementing an EU regulation imposing the seizure of an aircraft owned by Bosphorus Airways,[19] in accordance with a UN Resolution,[20] held that

> […] state action taken in compliance with such legal obligations is justified as long as the relevant organization is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides.[21]

[16] The equivalent protection test can be traced back to the early European Commission of Human Rights case law (see EComHR, X v. Federal Republic of Germany, 10 June 1958, App. No. 235/56, para 256 and M & Co v. Federal Republic of Germany, 9 February 1990, App. No. 13258/87, p. 138; the latter decision, rendered in the aftermath of the 'Solange saga' (German Constitutional Court, Wünsche Handelsgesellschaft (Solange II), Decision of 22 December 1986, Case n. 73, 339 2 BvR 197/83, para F), affirmed: 'The Convention does not prohibit a Member State from transferring powers to international organisations. Nonetheless […] a transfer of powers does not necessarily exclude a State's responsibility under the Convention with regard to the exercise of the transferred powers […] the transfer of powers to an international organisation is not incompatible with the Convention provided that within that organisation fundamental rights will receive an equivalent protection'; and then, again in the Matthews v. United Kingdom, 18 February 1999, App. No. 24833/94, on which see the comments by Wellens 2004, pp. 1159–1181, by Lenaerts 2000, pp. 575–585 and by Costello 2006, pp. 87 ff.).

[17] The boundaries between the question of attribution of conduct (which relates to the subjective element of a wrongful act) and the issue of jurisdiction (which instead is linked with the objective one) seem blurred and partially overlapped in the rationale endorsed by the ECtHR (see, in this regard, De Sena 2002, p. 207).

[18] ECtHR (GC), Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirket v. Ireland, 30 June 2005, App. No. 45036/98. The decision has rightly been considered 'as the seminal ECtHR case concerning the responsibility of Member States for the acts of IOs' (Ryngaert 2011, p. 1000).

[19] Regulation CE No. 990/93.

[20] UNSC Resolution S/RES/820 (1993), para 24.

[21] ECtHR (GC), Bosphorus v. Ireland, para 155.

> The presumption of compliance, however, is deemed rebutted
>
> If, in the circumstances of a particular case, it is considered that the protection of Convention rights was *manifestly deficient*.[22]

Actually, a similar approach had already been adopted in a case where the issue at hand was the decision of a national court to grant immunities to an international organization, thus preventing its staff members from accessing justice. Immunity of international organizations from legal proceedings concerning employment disputes was at the core of the *Beer and Regan v. Germany* and *Waite and Kennedy v. Germany* decisions, where the Court applied the equivalent protection formula to assess the existence and effectiveness of labour dispute resolution machinery within the European Spatial Agency (ESA).[23] A decisive factor in determining whether granting the ESA immunity from German jurisdiction was compatible with the ECHR was whether the applicants had access to reasonable alternative means to protect effectively their convention rights.[24]

The 'equivalent protection test' was then applied in many other different cases where States had no leeway in giving effect to binding acts adopted by international organizations amounting to a potential breach of the Convention. Recently, it was applied in relation to the EU in *Avotiņš v. Latvia* case[25] and to the United Nations in *Al-Dulimi v. Switzerland*, decided by a chamber of the ECtHR.[26] Conversely, in a different line of cases (*Al-Jedda*,[27] *Nada*,[28] *Michaud*,[29] and the Grand Chamber

[22] Ibid., para 156. The correction served as a way to narrow the scope of the theory at hand (De Hert and Korenica 2012, p. 883).

[23] ECtHR, Waite and Kennedy v. Germany and Beer and Regan v. Germany, 18 February 1999, App. No. 28934/95 and App. No. 26083/94. For an overview on the issue of international organizations' immunities, see Ascensio 2009, p. 117; and Flauss 2009, p. 85.

[24] This principle has been partially put aside with the recent decision Stichting Mothers of Srebrenica and others v. the Netherlands, 11 June 2013, App. No. 65542/12 (where the Court found that Netherlands did not violate the Convention by granting jurisdictional immunities to the United Nations, even though there were not alternative means available to the victims within the legal order of the Organization. For this reason the decision received a great deal of criticism; see, among others, Spagnolo 2013, pp. 806 ff.; Papa 2016, pp. 893–907; Spijkers 2016, pp. 819–843), and partially confirmed in *Klausecker* and *Perez v. Germany* (see *infra* Sect. 5.2.2.2). For an overview on the issue of jurisdictional immunity of international organizations and rights of their staff, see the draft resolution and draft recommendation recently adopted by the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe (11 October 2017). As for the national court's decision to waive international organizations' immunities where the latter have no 'reasonable alternative means of protection' available to individuals, see, *ex multis*, Reinisch 2013.

[25] ECtHR (GC), Avotiņš v. Latvia, 23 May 2016, App. No. 17502/07.

[26] ECtHR, Al-Dulimi and Montana Management Inc. v. Switzerland, 26 November 2013, App. No. 5809/08.

[27] ECtHR (GC), Al-Jedda v. United Kingdom, 7 July 2011, App. No. 27021/08, para 102.

[28] ECtHR (GC), Nada v. Switzerland, 12 September 2012, App. No. 10593/08.

[29] ECtHR, Affaire Michaud v. France, 6 December 2012, App. No. 12323/11.

decision in *Al-Dulimi*)[30] the ECtHR established that when States have room for manœuvre in giving effect to international organizations' acts in their domestic legal orders, they are required to make all possible efforts to compose the (apparently) normative conflict by way of 'harmonious interpretation'.[31]

To summarise, what can be inferred from this jurisprudence is that States cannot be relieved of their human rights obligations when they implement acts of international organizations or when they grant immunities to them.

5.2.2.2 The Equivalent Protection Doctrine and the Responsibility of States as Members

The ECtHR moved these principles a step further, applying the rationale behind the *Bosphorus* case in situations where respondent States did *not* adopt any domestic measure, but, on the contrary acted within the international organizations' institutional framework. In these cases, the responsibility of States came into play for the mere establishment of an international organization without a level of human rights protection equivalent to that laid down in the Convention. To be admissible *ratione personae*, such complaints had to provide evidence of a certain degree of 'involvement' by the respondent States in the commission of the act of the international organization. While an involvement is not difficult to establish when national authorities enforce legal obligations stemming from an international organization by adopting national measures, the engagement of States is more difficult to prove when they act within the legal order of the Organization.[32] If a State has at no time been involved in the disputed decision taken by an international organization, nor has it intervened, directly or indirectly, in the commission of the disputed act, an alleged violation of the ECHR cannot—in principle—be attributable to that State. In this scenario, the situation brought in front of Strasbourg judges is likely to fall outside the competence *ratione personae* and *loci* of the Court with the meaning of Article 1 ECHR and the complaints would be inadmissible.

This is what the ECtHR affirmed in *Boivin*[33] and *Connolly*[34] where it attributed labour law decisions taken by the administrative tribunals of two international organizations (respectively the Eurocontrol and the EU) to the international

[30] ECtHR (GC), Al-Dulimi and Montana Management Inc. v. Switzerland, 21 June 2016, App. No. 5809/08.

[31] When the 'harmonious interpretation' is feasible, the presumption of equivalence does not come into play and the conduct of the State is scrutinised as such.

[32] One of the conditions set in *Bosphorus v. Ireland* in order to apply the presumption of equivalence seems to be precisely the adoption of national measures into the domestic orders of States Parties (ECtHR (GC), Bosphorus v. Ireland, para 137).

[33] ECtHR, Boivin v. 34 Member States of the Council of Europe, 9 September 2008, App. No. 73250/01.

[34] ECtHR, Connolly v. 15 Member States of the European Union, 9 December 2008, App. No. 73274/01.

organizations themselves and not to the member States. It thus confirmed the idea that States cannot be held responsible (only) by virtue of their membership in international organizations.[35] A similar line of reasoning was followed in *Galić* and *Balgojević v. Netherlands*,[36] and in *Lopez Cifuentes v. Spain*,[37] where the Court found the complaints inadmissible because they were based on the (sole) fact that the respondent States hosted in their national territory international organizations' headquarters or International Tribunals premises (respectively the International Criminal Tribunal for the Former Yugoslavia and the International Olive Council).[38]

Against this background, the *Gasparini*[39] case may be considered as a remarkable step forward in the context of 'membership responsibility', especially for labour disputes arising with the staff members of international organizations. The applicant, an employee of the North Atlantic Treaty Organization (NATO), complained about the inadequacy of the NATO settlement procedure concerning employment disputes, without the two respondent States (Italy and Belgium) having directly intervened in that institutional procedure, nor having adopted any domestic measure.[40] The Court deduced from the principles developed in the *Bosphorus* case that 'when transferring part of their sovereign powers to an international organisation of which they are a member, Contracting Parties were under an obligation to monitor that the rights guaranteed by the Convention received within that Organization an 'equivalent protection' to that secured by the Convention system'.[41] The ECtHR maintained that the two respondent States had correctly considered, at the time they approved the NATO Civilian Personnel Regulations, that the procedure provided thereby met the requirements of fairness with the meaning of Article 6 ECHR and that the lack of publicity of a hearing in

[35] ECtHR, Boivin v. 34 Member States of the Council of Europe, para 2.

[36] ECtHR, Galić v. the Netherlands and Blagojević v. the Netherlands, 9 June 2009, App. No. 22617/07, para 46. The applicants complained of the unfairness procedures before the Tribunal because the International Criminal Tribunal for the Former Yugoslavia (ICTY) failed to prove a specific 'involvement' on the part of the respondent State and the sole fact that the ICTY had its seat in The Hague was not considered a sufficient ground to attribute the matters complained of to the Netherlands.

[37] ECtHR, Lopez Cifuentes v. Spain, 7 July 2009, App. No. 18754/06.

[38] Conversely, the application lodged in *Kokkelviserij v. Netherlands* was found admissible *ratione personae* (but then considered manifestly ill-founded), since the complaint was based on an intervention by the European Court of Justice which had been actively sought by a domestic court in proceedings pending before it (ECtHR, Cooperatieve Producentenorganisatie Van De Nederlandse Kokkelvisserij U.A. v. the Netherlands, 20 January 2009, App. No. 13645/05, para 3).

[39] ECtHR, Gasparini v. Italy and Belgium, 12 May 2009, App. No. 10750/03. For comment, see Rebasti 2010, pp. 65–88.

[40] The applicant falls within the jurisdiction *ratione loci* and *personae* of the EtCHR although the (alleged) violations have occurred outside the national territory of the respondent States and, precisely, within the legal order of NATO.

[41] ECtHR, Gasparini v. Italy and Belgium.

labour disputes before an internal body of an international organization did not render the proceedings manifestly deficient for the purposes of the ECHR.[42] Conversely, should the two States have approved a manifestly deficient Civilian Personnel Regulation, they would have been held responsible—most likely—for violations of human rights standards laid down in the ECHR.

The principles at the core of *Gasparini* have been consolidated—to a certain extent—in the subsequent case law. In *Perez v. Germany*, for instance, the Court did not rule out the possibility of holding a State responsible for structural deficiencies before the UN internal appeal bodies and the United Nations Administrative Tribunal (but then it declared the case inadmissible due to the non-exhaustion of local remedies).[43] Similarly, in *Klausecker v. Germany*, the Court found itself competent to assess, in principle, Germany's responsibility for its failure to secure an equivalent protection of fundamental rights within the European Patent Organization (but then it found that the protection offered by that Organization in labour law dispute mechanisms was not manifestly deficient with the meaning of Article 6).[44]

This case-law strikes the attention inasmuch as it opens the door to scrutiny over the member States' voting behaviour in international organizations' decision-making process. According to the ECtHR, the voting discretion retained by States in this context has to be exercised in compliance with their own human rights obligations, thus becoming less and less unfettered. Although the ECtHR—for the time being—has never held a State responsible solely for having cast a vote within an institutional organ, it has nevertheless put forward this possibility. Therefore, it deems it necessary to further explore the ECtHR contribution to the debate on 'membership responsibility' with respect to the drafting and the adoption of duty of care regulations by member States.

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[42] 'Compte tenu de ce qui précède, la Cour estime que les deux Etats mis en cause ont pu à bon droit considérer, au moment où ils ont approuvé le règlement sur le personnel civil et ses annexes par l'intermédiaire de leurs représentants permanents siégeant au Conseil de l'Atlantique Nord, que les dispositions régissant la procédure devant la CROTAN satisfaisaient aux exigences du procès équitable' (ECtHR, Gasparini v. Italy and Belgium, para B). On this specific issue of voting power, see *infra*, Sect. 5.3.2.

[43] ECtHR, Perez v. Germany, 6 January 2015, App. No. 15521/08. The applicant also complained of the infringement of her right to access to (German) courts because of UN jurisdictional immunity.

[44] ECtHR, Klausecker v. Germany, 6 January 2015, App. No. 415/07. The applicant, a candidate for a position in the EPO, complained about the violation of Article 6 ECHR (right to a fair trial), in relation to the procedures he had instituted before the German Courts and before the EPO's bodies, as well as before the Administrative Tribunal of the ILO. In dismissing his claims, the Court referred to the *Beer and Regan* and *Waite and Kennedy v. Germany* and to *Bosphorus v. Ireland* cases (see above Sect. 5.2.2.1).

5.3 Ensuring the Duty of Care Towards Civilian Personnel Sent on Missions Through the Membership of International Organizations

5.3.1 Applying the Inferred Principles in the Context of the Duty of Care

When an international organization, in discharging its functions, employs civilian personnel under different contractual arrangements and sends them on field missions, it goes without saying that the same international organization is required to exercise a duty of care towards its staff, providing them with an adequate standard of human rights protection.[45] For the purpose of the present analysis it is relevant to establish the role of member States in pursuing this specific end.

On a general note, it is possible to deduce from the analysis conducted in the previous section that States remain bearers of human rights obligations when participating in international organizations. Emphasized by legal scholarship and prominent ECtHR case law, this assumption is also grounded on important texts such as General Comment No. 19 of the Right to Social Security, the Maastricht Guidelines, as well as the DARIO, albeit indirectly.[46] These legal sources make it clear that international obligations, including human rights, place a limit on the conduct of States not only within their domestic legal order but also in the context of international organizations' legal regimes. Applying these principles to the matter under consideration in this book, it entails that States are required to respect the duty of care of civilian personnel deployed in international organizations' missions, assuring them an adequate level of protection of human rights—at least equivalent to the standard enshrined in human treaties they have entered into. Member States should therefore act accordingly in international organizations' institutions, granting to its civilian personnel sent on missions the substantial and procedural guarantees laid down under human rights law.

Given the above, one may wonder what particular courses of action member States are required to take within an international organization in order to guarantee the duty of care owed to its civilian personnel.

[45] See *supra* note 2.

[46] See Sect. 5.2.1 above.

5.3.2 *The Duty to Act and Vote in Institutional Settings in a Manner That Ensures the Respect of the Duty of Care*

From a general standpoint, States must act within the institutional framework in a manner that respects and promotes the duty of care of the civilian personnel sent on missions. To do so, States must use their leverage—expressed through their right to vote or their diplomatic influence—to ensure that violations of civilian staff rights do not result from the programmes, policies, or rules of the international organization of which they are members. It is not clear, however, what specific conducts fall within this principle.

One may ask, for instance, if a State is under any legal obligation to put pressure on the Organization to take action (namely, resorting to functional protection) against a third State that has mistreated one of its citizens while he/she is carrying out his/her institutional duties in a field mission. With scant practice in this regard,[47] the answer tends to be negative. As is well known, customary international law has not yet developed to the point of establishing a legal obligation on States to take up the case of their citizens injured abroad.[48] *A fortiori*, an obligation to persuade an international organization to provide functional protection cannot be easily established in this context.[49]

The next question to investigate is whether States are required to direct and influence international organizations' decisions on the duty of care standard, through their voting powers. In this regard it must be borne in mind that the vote as such is different from the final decision adopted by an international organization: while the first expresses the will of a member State, the second represents the '*volonté distincte*' of the Organization.[50] Insofar as it is possible to conceive of

[47] In that regard it should also be borne in mind that service-related injury or death occur, usually, as a result of the misconducts of non-State actors, rather than of the host State.

[48] However, as pointed out in the First Report on Diplomatic Protection adopted by the Special Rapporteur of the ILC, there are elements of State practice that point towards a different conclusion (see UN Doc. A/CN.4/506 (7 March 2000), paras 80–86, and see Article 19 of the Draft Articles on Diplomatic Protection adopted by the ILC in 2006). An in-depth inquiry into the existence of an obligation to resort to diplomatic protection goes behind the purpose of this chapter (see, *ex multis*, Condorelli 2003, pp. 5 ff.; Pisillo Mazzeschi 2009, pp. 211 ff.; Flauss 2003; Milano 2004, pp. 85–142; Pergantis 2006, p. 351).

[49] The application of diplomatic and/or functional protection in this context has been analysed by Capone, see Chap. 18 in this volume.

[50] Academic literature to the present has paid limited attention to the role assumed by member States in the process of the formation of the institutional will of international organizations. As for the possibility to qualify State voting behaviour as an act of that State, distinct from the final decision of the international organization, see, for some insightful considerations: Palchetti 2012, pp. 352–373; Barros and Ryngaert 2014, pp. 53–82; and Murray 2011, pp. 327–345. The authors all explore the issue from the perspective of the international responsibility of States and tackle the complex question of how to insulate the unilateral conduct of a member State from the expression of the separate will of the international organization. In order to attribute the voting behaviour to a

voting behaviour as an individual and a unilateral attitude of a State, one can assume that States are under a legal obligation to vote on rules and regulations that respect the human rights of civilian personnel. This 'analytical' approach to the institutional decision-making process has been explicitly endorsed not only by the ECtHR in the aforementioned *Gasparini* case[51] but also by the ICJ in a more recent decision. In *The Former Yugoslav Republic of Macedonia v. Greece*[52] the ICJ reviewed the conduct of a member State (Greece), in relation to its exercise of a vote within an institutional decision-making process (namely, the NATO decision on the admission of a new State member, Macedonia) in the light of the obligation that it had bilaterally undertaken (i.e. a treaty concluded with Macedonia, in which it had agreed not to object to Macedonia's application to take part in new international organizations).[53]

The *Macedonia v. Greece* decision, together with the above mentioned ECtHR case law (namely the *Gasparini*, *Klausecker* and *Perez* cases), enables us to delve deeper into the core questions of the present chapter—the participation of States in institutional settings and the issue of 'membership responsibility'. According to both the ICJ and the ECtHR, States are required to take part in decision-making organs of international organizations in a manner that respects the international obligations they have already undertaken—being the obligations enshrined in human rights treaties or those stemming from bilateral agreements. Moreover, the two Courts confirm—albeit indirectly—that in international law there is a strong presumption against 'normative conflict'[54] and a favour for 'systemic integration' of different international obligations. Therefore, States must seek to harmonize diverging commitments as far as possible, even when voting or otherwise participating in the affairs of an international organization.

With this in mind, it can be deduced that human rights obligations pose a significant limit on the exercise of voting powers by member States also in the matter of duty of care—as well as on the final decision adopted by an international organization which, however, remains an act of that Organization. The presumption against normative conflict can be interpreted—in our view—as restricting the States' voting discretion on duty of care rules, constraining them to take positions

State, the authors deem necessary that the subject casting a vote is sitting in the institutional organs as a representative of a given State. In relation to the decision adopted by member States within financial and economic institutions, see De Sena 2010, pp. 247–274.

[51] See Sect. 5.2.2.2 above and *infra* Sect. 5.3.3.

[52] ICJ, The Application of the Interim Accord of 13 September 1995 (The Former Yugoslav Republic of Macedonia v. Greece), Judgment, 5 December 2011, I.C.J. Reports 2011, p. 644.

[53] According to some authors the willingness of the ICJ to review the voting discretion exercised by a State within an international organization can be traced back to the advisory opinion delivered in Conditions of Admission of a State to the United Nations, Advisory Opinion, 28 May 1948, I.C.J. Reports 1948, p. 57, where it held that the discretion inherent in the right to vote must be exercised in good faith (in this way see Murray 2011, p. 335, who cites the opinion expressed by Cheng 1953, p. 135).

[54] See Report of the ILC on the 'Fragmentation of international law', under the heading 'Harmonization – Systemic integration' (UN Doc. A/CN.4/L.682 (13 April 2006), para 37).

that prevent and avoid any (potential) conflict of obligations with human rights duties. Likewise, it can be assumed that States are under a legal obligation to draft regulations in a manner that respects the human rights of civilian personnel sent to missions. In other words, States continue to bear responsibility—at least under the Articles on State Responsibility (DARSIWA)—for any breach of their own human rights obligations arising from their participation in the activities of an international organization related to treatment of its civilian personnel.[55]

In the light of the above, one may contend that member States (i) must abstain from adopting rules which manifestly violate the human rights of international organizations' staff; and also they (ii) must exercise human rights due diligence protection when they express their positions in relation to rules, projects, acts, or programmes dealing with the treatment of civilians to be adopted by the competent organs of an international organization. The obligations thus inferred (i-ii) can be considered as complementary to primary human rights duties[56] and must be fulfilled depending on the different voting mechanisms and on the degree of influence a member State exercises over a particular decision-making process related to duty of care. The more States have power in a voting procedure, the higher standard of due diligence protection is required from them. On the contrary, where the rules are established by offices and agencies of international organizations with a great level of autonomy from the representatives of member States (as in the case-study discussed below),[57] the due diligence standard becomes lower.

5.3.3 *The Duty to Ensure an Adequate Level of Judicial Protection in Labour Disputes*

The way in which member States should behave within an institutional setting also includes a number of positive obligations on how they design an international organization, providing adequate instruments and conditions for the organization to respect fully the human rights of its staff members. Therefore, it is possible to separate from the generic duty of care an obligation on member States to equip international organizations with appropriate (quasi-)judicial mechanisms available

[55] As the ILC stated, international obligations undertaken by a State 'may well encompass the conduct of a State when its acts within an international organization. Should a breach of an international obligation be committed by a State in this capacity, the State would not incur international responsibility under the present article [Article 58], but rather under the articles of the responsibility of States for internationally wrongful acts' (DARIO, p. 91).

[56] Some scholars fairly maintained that the theory of abuse of rights operates as a fundamental legal limit on the exercise of voting discretion and that it forms a complementary primary obligation placed on the State in the context of their participation in international organizations (see Murray 2011).

[57] See Sect. 5.4.

for civilian personnel employed who become involved in labour disputes with the Organizations and who do not have access to alternative remedies.[58]

Employment disputes are, generally speaking, dealt with in accordance with the rules governing the functioning of international organizations, usually contained in their statutes and internal staff regulations. Hence, States are required to ensure that international organizations' staff have effective access to justice either when they draft their statutes (setting up administrative tribunals or bodies competent to hear labour claims), and when they establish or amend, at a later stage, specific procedures and regulations concerning employment disputes. In this regard, the standard of 'effectiveness' to be incorporated in the judicial or quasi-judicial dispute settlement mechanisms depends on the level of protection granted in each and every human rights treaty. As for the ECtHR protection system, for instance, the standard is set down in Article 6, as interpreted in the abovementioned cases *Gasparini*, *Perez*, *Waite* and *Kennedy*, and *Klausecker*, dealing specifically with the effectiveness of labour dispute mechanisms established by international organizations.[59]

Although the relevant ECtHR case law refers to labour disputes arising mainly with permanent staff employed in the Organizations' headquarters, the underlining principles can also apply—*mutatis mutandis*—to disputes arising with personnel sent to missions. There is, in fact, no need to depart from these principles, since the difference between the issue at hand and the situation scrutinised by the ECtHR does not call for a different approach; neither does it prevent the use of a means of analogy. The *ratio* behind the ECtHR case law is grounded on the necessity to provide a (procedural) means of redress to individuals who have been (allegedly) subjected to unfair labour treatment that cannot be scrutinised by national courts due to the international organizations' immunities. The obligation to ensure access to justice should be granted towards international organizations' employees regardless of their contractual arrangements or liaison, both for permanent staff and seconded workers.[60] Hence, the mere fact that the civilian staff are sent to carry out their functions outside of the international organizations' headquarters or outside of their normal place of activity does not *per se* call for a different conclusion.

Against this background, it is safe to affirm that member States are required to equip international organizations with adequate internal labour dispute resolution machinery to which civilian personnel may resort for a wide range of possible claims against their employers, ranging from recruitment procedures and

[58] Disputes concerning employment relations between an international organization and its staff fall—usually—under the competence of administrative tribunals instituted by the same organization or by other organizations, such as the Administrative Tribunal of the International Labour Organization. For an overview on the existing international administrative tribunals, see Riddell 2013; for an appraisal of a need for a reform of those, in the light of the ICJ Advisory Opinion of 1 February 2012, see Gallo 2015, p. 509.

[59] See Sects. 5.2.2.1 and 5.2.2.2 above.

[60] To be precise, in the case of *Waite and Kennedy v. Germany*, the applicants were employed by foreign companies and were placed at the disposal of the European Space Agency to perform services at the European Space Operations Centre in Darmstadt.

promotions to transfers, salary, pension, and social security to non-observance of the terms of appointment, and to compensation in the event of death, injury or illness attributable to the performance of official duties in missions.

5.4 From Theory to Practice: The Case Study of the UN Medical Support Manual for United Nations Field Missions and the Role of Member States

Until now, this study has been conducted from a rather theoretical perspective, so that the legal rules inferred can apply—in principle—to each and every international organization and to its member States. The analysis turns now to a case study: the recent outbreak of cholera in Haiti, caused by the UN peacekeeping operation (MINUSTAH) in 2010, which brought about large scale death and injuries, presents important issues in terms of the scope of the chapter's analysis.

The cholera case in Haiti has drawn great attention from legal scholars who have mainly focused on the issue of the responsibility of the UN and on the remedies available to Haitian victims.[61] Mostly disregarded—but relevant to this chapter—is the question of rules adopted by the UN to protect the health conditions of the personnel deployed in field missions. Since the Vibrio cholera bacterium was accidentally introduced in Haiti by MINUSTAH staff (namely, by the peacekeepers coming from Nepal), the UN significantly revised its duty of care policy in the aftermath of the outbreak, with specific reference to the transmission of infectious diseases through and among its personnel—both military and civilian—[62] employed in peacekeeping operations.

The healthcare regulations in force 'at the time of cholera' (as some authors ironically put)[63] were envisioned in the 2nd edition of Medical Support Manual for United Nations Field Missions adopted in 1999.[64] Chapter 6 of the Manual, under the heading 'Preventive Medicine', dealt with immunization and chemoprophylaxis policies (both mandatory and recommended) for its staff. Surprisingly, these policies did not cover expressly the transmission of cholera and its prevention. As a lesson learnt from the spread of the disease in 2010, the 3rd revised edition of the

[61] See, *ex multis*, Pavoni 2015, pp. 19–41; Freedman 2014, pp. 4 ff.; Daugirdas 2015, pp. 991–1018.

[62] The number of civilians deployed in the MINUSTAH is 1,116 (279 international civilians and 837 local civilians). Note that MINUSTAH ended its mandate on 15 October 2017 and has been replaced by a follow-on mission, the United Nations Mission for Justice Support in Haiti (the MINUJUSTH), as established by SC Res. 2350 (UN Doc. S/RES/2350 (13 April 2017), paras 4–5).

[63] See Megret 2013, p. 161; and Alvarez 2014.

[64] The 2nd edition is available online at: www.reliefweb.int/sites/reliefweb.int/files/resources/D196C0B0FF3A637BC1256DD4004983B9-dpko-medical-1999.pdf (Accessed on 21 February 2018).

Manual adopted in 2015[65] explored in depth the prevention of cholera, according to the recommendations given by the UN Panel of Experts. In this regard the Panel recommended:

> that United Nations personnel […] traveling from cholera endemic areas should either receive a prophylactic dose of appropriate antibiotics before departure or be screened with a sensitive method to confirm absence of asymptomatic carriage of *Vibrio cholerae*, or both

And that:

> All United Nations personnel and emergency responders traveling to emergencies should receive prophylactic antibiotics, be immunized against cholera with currently available oral vaccines, or both, in order to protect their own health and to protect the health of others.[66]

The resultant amendment of the Manual points to an interesting (and positive) evolution in the implementation of the duty of care standard specifically related to health care and the safety of personnel sent on missions. In this regard, it is relevant to understand what role—if any—has been played by the UN member States. One clear point is that States are normally responsible for implementing health care policies with respect to their own personnel sent to peacekeeping operations by providing them with medical and vaccine treatment.[67] Less clear, however, is to what extent States contribute, as members, in the drafting and the adoption of these specific rules. Unlike the UN Staff Regulation that is agreed by the General Assembly—where, needless to say, every State can express its preference through its voting powers—and implemented by the Secretary General, the Manual has been drafted and adopted by the UN Department of Peacekeeping Operations and the UN Department for Field Support. These, far from constituted by representatives of member States, are technical offices belonging to the Secretariat of the Organization, entrusted with functions to technically support the political decisions taken by UN organs. This means, that their actions and omissions are attributable exclusively to the sole Organization and that UN member States exercise, within these offices, little—if no—direct influence.

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[65] The 3rd edition is available online at: www.dag.un.org/bitstream/handle/11176/387299/2015.12%20Medical%20Support%20Manual%20for%20UN%20Field%20Missions.pdf?sequence=4&isAllowed=y (see Annex D and p. 228. Accessed on 21 February 2018).

[66] See www.un.org/News/dh/infocus/haiti/UN-cholera-report-final.pdf, p. 30 (Accessed on 21 February 2018).

[67] The role of a State in providing medical treatment to its own personnel (seconded to an international organization) triggers the different question of how to allocate and share the responsibility between Sates and the Organization to discharge the duty of care owed to personnel employed (see Chap. 3 by Spagnolo in this volume). According to the Medical Manual, while medical examination and clearance of personnel from national contingents of a peacekeeping force remain the responsibility of the troop contributing country, 'UN Military Observers, Civilian Police monitors and civilian staff, including those recruited locally, is examined in accordance to UN medicals standards and it is the responsibility of the UN Headquarters to ensure that medical clearance is obtained prior to the deployment in the field of such personnel' (Medical Manual, 2nd edition, p. 46).

However, the 'membership role' in the advancement of the duty of care rules on safety and health care, should not be completely underestimated. In fact, member States have exercised a certain degree of influence in other UN settings, such as the General Assembly, which might have contributed to the decision of the UN bodies to revise the duty of care rules. The urgent need to take measures in order to prevent this kind of disease from being transmitted in UN field missions, causing injuries to third parties and UN staff,[68] has been voiced by several States. These States, *qua* members of the Organization, raise up their voice in the discussions among their permanent representatives within either the General Assembly or the Security Council. While only a few member States called upon the Secretary General to provide remedies for the victims (for instance, the representatives of Malaysia and New Zealand),[69] the majority of them agreed on the need to combat the ongoing cholera epidemic and to take measures capable of preventing similar events in UN peacekeeping operations.[70] Therefore, although in the case at hand member States did not exercise their margin of manoeuvre directly by drafting and voting on the rules enclosed in the Medical Manual, they nonetheless exercised their power and diplomatic influence on the Organization with a view to (re)shaping and improving the duty of care rules and standards.

5.5 Final Remarks

In the light of above, it is possible to draw a number of conclusions on whether and how States as members of international organizations should comply with obligations as to the duty of care owed to the civilian personnel they employ.

One clear standpoint of the analysis is that when States become members of international organizations they are nonetheless subject to obligations inherent in human rights. Being enclosed in several legal texts, this principle has been powerfully emphasised in the case law of the ECtHR, where States have been held responsible for failing to ensure compliance with the ECHR in a field where they have attributed competence to an international organization. The 'equivalent protection' formula crafted in this context serves as a reminder for States not to hide beneath the legal veil of international organizations of which they are members. This means that States must guide, monitor, and check the exercise of competence

[68] From an exchange of emails with the Institute for Justice and Democracy in Haiti (an NGO actively involved in filing a class action against the UN on behalf of the victims), it seems that the cholera also affected UN staff.

[69] The permanent representative of Malaysia addressed the UN General Assembly, stating that '[…] in the interest of achieving closure and justice for the victims, we would encourage greater engagement by the Secretariat with those victims, particularly on the issue of possible remedies and compensations, where appropriate'. See UN Doc. S/PV.7651 p. 16 (17 March 2016).

[70] As for the role played by UN member States within the specific discussion held in the General Assembly on cholera in Haiti, see Buscemi 2017, pp. 1007–1010.

and powers retained by international organizations and specifically related to the treatment of their civilian personnel sent on missions in accordance with human rights standards.

Particularly relevant to this chapter is the case law concerning the jurisdictional immunity of international organizations and the rights of their staff. In this respect, the ECtHR has inferred an obligation upon States to introduce in international organizations 'reasonable alternative means' of protecting the rights of staff, by granting them access to justice with the meaning of Article 6 of the ECHR. Although the concerned case law refers to labour law disputes arising mainly between the Organization and its 'permanent' staff, the underlying principles can also apply to disputes arising with a mobile workforce. From this perspective, States have a duty to ensure that civilian personnel sent on missions have access to justice for employments disputes, by setting up an adequate dispute resolution mechanism within the Organization.

In addition to judicial protection, States are also required to ensure the substantive rights of the international organizations' mobile staff—especially their right to security and safety. To do so, States must use their discretion in casting a vote or adopting a particular position within the decision-making process concerning the duty of care regulations.

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Chapter 6
International Organizations as Employers: Examining the Duty of Care in the Light of the Different Forms of Employment Relationships

Vania Brino

Contents

Abstract This chapter examines the duty of care from the perspective of employment law. The aim is to identify whether and how the content of international organizations' duty of care obligations may vary according to the different types of employment contracts. In the absence of a clear and uniform system of regulatory sources, this remains a controversial issue, for reasons that are examined at the start of this chapter. The various forms of employment relationship that international organizations enter into with mission personnel are then examined, analysing whether the duty of care varies according to the type of labour contract. From a legal point of view, the worker's rights depend on their legal status and traditionally the protection of labour law is granted only to employees and is based

Annex II—the Table of Cases—can be accessed online here: http://extras.springer.com/.

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on the employment contract. The analysis in this chapter shows that the classification of labour relations used by international organizations has developed separately from the provisions of national systems, introducing a categorisation based on the distinction between staff-members and non-staff members.

Keywords Labour relations · Discriminating Criterion · Temporary Appointments · Continuing Appointments · Staff members · Non-Staff members

6.1 The Context and the Critical Issues: Some Preliminary Remarks

This chapter examines the duty of care from the perspective of employment law. The aim is to identify whether and how the content of the duty of care obligations incumbent upon international organizations may vary according to the different types of employment contracts. It is a controversial issue for several reasons.

First, there is an absence of a clear and uniform system of regulatory sources. international organizations' staff are not covered by national labour legislation.[1] All conditions need to be negotiated directly with employer representatives or are set by the regulatory staff of each international organization. Generally speaking employment contracts have to comply with 'internal employment law', as a sort of self-regulation introduced by international organizations (so-called 'Staff Rules and Regulations'), and with general principles of law, in particular of employment law. However internal regulations of international organizations are often relatively limited and 'they generally do not contain or address criminal law, health and safety law, fire/building regulations, or other law that would normally apply to employer-employee relationships'.[2]

Second, there is the impossibility of adopting the traditional categories identifying the legal nature of the contractual relationship between international organizations and their personnel (employee vs. self-employed). According a legal point of view the worker's rights depend on their legal status and traditionally the protection of labour law is granted only to employees and is based on the employment contract.

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[1] Reinisch 2006, according to which 'this exemption from national employment law, together with the immunity from national labour courts, is often regarded as necessary in order to create and maintain a uniform and independent international civil service'. However, a reference to national legislation is possible where the parties act as if they are bound by it and refer to it in the labour contract, and also where it is specifically stipulated in the staff rules, and finally if the national labour laws express a general principle on labour law. In this sense ILOAT, Re Kock, N'Diaye and Silberreiss, 6 July 1995, Decision No. 1450.

[2] Kemp and Merkelbach 2016, p. 61. See also Flaherty and Hunt 2007.

The classification of the labour relations used by international organization s has developed separately from the provisions of national systems, introducing a categorisation based on the distinction between staff-members and non-staff members.

This critical issue has been highlighted by the Federation of International Civil Servants' Associations (FICSA) according to which 'United Nations entities have a legal and moral imperative to be guided by international labour standards' and in particular by ILO Recommendation No. 198 (2006) 'which stipulates that if the work requires an employer-employee relationship, the contract should be an employment contract and staff so employed should be accorded the rights they are due. However, if the work entails an independent contractor relationship rather than an employment relationship, it should then be a non-staff contract'.[3] FICSA invites the UN organizations 'to apply this distinction' and to take 'corrective action where there has been an excessive use of non-staff contracts'.

This is a crucial issue especially considering that the increasing flexibility of the labour market in recent years has impacted upon the employment policies of international organizations, leading to an increase in both temporary relationships and the use of independent consultants/experts. As will be seen, the latter constitute a large part of the category of non-staff members.[4]

This tendency is to be viewed also from the perspective that the usage of flexible employment forms allows organizations to cut their costs. In this sense, it has been observed that within the staff of international organizations 'many of them are working for extended periods under a de facto employment relationship, like staff. This is due to the relative flexibility and lower cost implications of non-staff contracts compared with staff contracts. As a result, a new category of personnel is being created as a significant part of the total workforce, performing all kinds of functions, including administrative, managerial, technical and particularly project-related work'.[5] Due to this framework 'United Nations system organizations have a dual workforce: one with full rights and entitlements and another with no or limited entitlements, working in the same organization'.[6]

Thirdly, the specific risks and dangers to staff working in conflict and other non-secure locations should be considered.[7] Given a widespread tendency towards workers' mobility, which has intensified due to globalisation and migratory phenomena, the problem of workers' protection is most pertinent when they operate in

[3] See Federation of International Civil Servant Associations 2015. High-Level Committee on Management 2016.

[4] See Federation of International Civil Servant Associations 2015, according to which in 2012 'in a system that employs about 185,000 staff members, some 90,000—i.e. 48.6 per cent of the total workforce—belong to the so-called non-staff category. Such employees can serve for many years on short, precarious contracts, often without the benefit of health insurance for themselves and their families, and can be deprived of other social security provisions such as sick leave, maternity leave and pension'.

[5] Terzi and Fall 2014, point 168.

[6] Ibid.

[7] See UN Secretary-General 2016a, b.

high-risk areas. The main issue is identifying the employer's legal or ethical obligations to prevent potential hazardous situations. There is widespread uncertainty on the issue, concerning both the obligations of international organizations in their role as employers, but also given the difficulty of predicting complex risks and thus intervening with adequate measures of prevention.

It is within these issues that the debate on the duty of care in employment law thus lies, pervaded by strong criticalities. Although the meaning and the sources of the concept will not be explored in this chapter (see Chaps. 1–3), the duty of care presumes that organizations 'are responsible for their employees' well-being and must take practical steps to mitigate foreseeable workplace dangers'—a responsibility that takes on additional implications when the employees are working overseas'.[8]

The duty of care mainly concerns 'workplace health and safety' regimes, as in many national legislations (for example, Italian labour law has introduced a general obligation to ensure a safe working environment for employees: 'the employer shall take all the necessary measures to ensure the safety, and to protect the physical and mental health of workers'—Article 2086 Civil Code) and generally speaking employers' legal liabilities include assessing the risk inherent in the job, site and tools; taking steps to secure the work site; warning employees of the dangers; communicating, training and providing assistance.

However, as we know, the duty of care is a nebulous and fluid concept which could actualise in a different way. As has been observed, the duty of care '*still* raises key questions around the potential practical and legal implications,[9] which need to be evaluated on a case-by-case basis as they depend as much on the contexts of intervention as on national legal frameworks'.[10]

It is therefore necessary to establish the extent of this principle and whether it could be considered a general principle useful to protect every person working for international organizations, independently from the legal nature of the employment relationship. It will be shown that several documents elaborated by the UN give an unclear solution to this question.

Having begun with these observations, this chapter looks at the various forms of employment relationship that international organizations enter into with their mission personnel, analysing whether the duty of care varies according to the type of labour contract. This study focuses on the United Nations (UN) system, but as most of the problems associated with the specific employment status of the international organizations personnel sent on missions are similar, the conclusions may also extend to the context of other international organizations.

[8] Claus 2010.

[9] de Guttry 2012. See also Claus and McNulty 2015.

[10] Edwards and Neuman 2016. See also Merkelbach 2017.

6.2 The Variety of Employment Relationships Between International Organizations and Their Personnel

As de Guttry explains in the introductory chapter of this book, 'mobile working force has to be understood in the frame of this book as any person, international or local, recruited or seconded, temporary or permanent staff, working for or on behalf of or in any case under the responsibility of an international organization'.

Starting with this general description the analysis must consider a large range of subjects and, consequently, a variety of professional figures that may be qualified differently in legal terms depending on their particular status and agreement. In other words the contractual status of people who perform functions for international organizations is complex and varied.

We could use different combinations to describe this scenario: staff versus non-staff members; independent versus dependent contractors; fixed-term and temporary appointments versus full/continuing appointments; public versus private contracts; local/national staff versus international staff; internal staff versus seconded civilian personnel. The central issue of the matter however is the distinction between staff and non-staff members.

First of all this is relevant in general terms, given that the applicable discipline depends on the qualification of the relationship and, in particular, on whether or not the 'Staff Regulations and Rules' of each international organization are applicable.[11] Second, with specific reference to the duty of care issue, it is necessary to understand whether the latter operates independently from the contractual status or if, on the contrary, the protective function may be extended only to staff members.

The factual data outlines a framework that may be described as fragmented. The typology of tasks in the field of the relations between international organizations and their staff is heterogeneous and the qualification of such relations is complicated by the lack of clarity in the discretional criteria for whether they are included among staff or non-staff members.

According to national employment law the main element which distinguishes an employee from a self-employed person is so-called 'subordination', or the fact that the employer has the power to manage, control and inflict sanctions on the employee. The employer has also duties and responsibilities towards an employee. In particular it is important to mention responsibility on the issue of security such as the duty to ensure a safe working environment.

The distinction between employee and self-employed is not adopted by international organizations.

[11] In the UN Staff Regulations 2017, the expression 'United Nations Secretariat', 'staff members' or 'staff' refers to 'all the staff members of the Secretariat, within the meaning of Art 97 of the Charter of the United Nations, whose employment and contractual relationship are defined by a letter of appointment subject to regulations promulgated by the General Assembly pursuant to Art 101, paragraph 1, of the Charter'.

If we take as reference the variegated world of UN specialised agencies, there is a systematisation, introduced by the International Civil Service Commission, on the typologies of roles that may be put forward by an international organization with its own staff. This systematisation depends on a criterion based on the duration of the contract, and accordingly there are three different types of appointments: continuing appointments; fixed-term appointments; and temporary appointments.[12]

A continuing appointment is open-ended and 'continuity will be based on criteria such as organizational interests, the full meeting of performance expectations and the upholding of standards of conduct'.[13] A fixed-term appointment is 'expected to be of at least one year in duration with a maximum of up to five years. The contract may be terminated or renewed on the basis of criteria such as organizational interests, the full meeting of performance expectations and the upholding of standards of conduct'.[14] Finally a temporary appointment is expected to be for less than one year.

It can be inferred from the above-mentioned terms that the discriminating criterion is the temporal duration of the relationship.

However, even having determined whether it is a continuing or fixed-term appointment, the conditions of the actual relationship remain unclear and, most of all, it is not clear whether this distinction is critical only for staff members, or for all those who collaborate with the organization.

Further, it must be observed that each international organization has the possibility to autonomously decide, within their 'Staff Rules and Regulations', which type of contract to offer. The organization's decisional autonomy does not end in defining this, since it may then decide the norms to be applied to the contractual circumstance.

By way of example, according to the ILO Staff Rules (2015) there are two type of contract ('established officials' and 'fixed term officials'—Article 2.1) but 'the Director-General, after consulting the Joint Negotiating Committee, could insert in the Staff Rules framework persons engaged for a period of less than one year or persons engaged as consultants' (Article 2.2).

Whilst the second part of this volume provides detailed analysis of the recruitment policies of each organization, the analysis thus far outlines the crucial role of international organizations in the construction of their organizational structure and in the definition of the applicable rules.

The resulting multiplication of models of reference makes the staff of international organizations more vulnerable and it amplifies the uncertainties and the risks of disparity of treatment that are not always justifiable in the light of the particular nature of the relationship.

It will be attempted to demonstrate that the changes to the rules resulting from the varied nature of mobile international organization workers necessarily also

[12] UN International Civil Service Commission 2016.

[13] Ibid.

[14] Ibid.

impose a revision of their internal policies, towards greater harmonisation of the latter. This is true in particular when there is the need to protect the basic rights of individuals regardless of the mode of employment or contract within the organization.

The duty of care towards staff sent on a mission might represent in this sense a privileged field of observation, both to ponder on criticalities and on possible instruments of intervention, and to re-consider and adapt the classification of staff employed by the international organizations in order to guarantee a safe working environment for all.

6.2.1 *Non-staff Members as a 'Shadowy and Silent Workforce'?*

There is no effective definition of the term 'non-staff' members. Generally speaking there are more than 30 non-staff contractual modalities currently used by organizations such as Special Service Agreements, Individual Contractor Agreements, Service Contracts, Government Secondees, Supernumerary Contracts, Individual Contractor Contracts, External Collaboration Contracts, United Nations Volunteers, Individual Consultants, Individual Specialists, Contractual Service Agreements, Consultants, Casual Labour, Visiting Experts,, National Project Personnel, National Correspondents, South/South Subscribers, Experts, Editors, Proofreaders, Teachers, Contractual Service Agreements, Agency Field, Ministry Staff, National Staff, and Gratis Personnel.[15]

Some non-staff representatives have coined the term 'shadowy and silent workforce' to refer to non-staff personnel.[16] The uncertainty on the qualification of the relationship and on its constitutive elements is reproduced in the field of the applicable protections and it certainly makes those who belong to the mobile category of independent contractors more vulnerable.[17]

The UN system and the treatment of consultants or individual contractors—the largest two groups that are not considered staff members of international organizations—is a good example to show the lack of clarity in this scenario.

According to the UN rules on consultants and individual contractors,

> the consultant or individual contractor shall have the legal status of an independent contractor vis-à-vis the United Nations, and shall not be regarded, for any purposes, as being either a staff member of the United Nations, under the Staff Rules and Staff Regulations of

[15] UN Chief Executives Board for Coordination 2011, p. 16.

[16] Terzi and Fall 2014, point 168.

[17] See the recent case which involved two UN experts killed in Congo in 2017, De Freytas-Tamura K, Sengupta S (2017) For 2 Experts Killed in Congo, U.N. Provided Little Training and No Protection. https://www.nytimes.com/2017/05/20/world/africa/congo-zaida-catalan-michael-j-sharp-united-nations-democratic-republic-of-congo.html. Accessed 1 September 2017.

> the United Nations, or an official of the United Nations, for purposes of the Convention on the Privileges and Immunities of the United Nations, adopted by the General Assembly on 13 February 1946.[18]

Moreover 'nothing within or relating to the contract shall establish the relationship of employer and employee, or of principal and agent, between the United Nations and the consultants or individual contractors'.[19] So the UN appears not to consider consultants or individual contractors as employees or as agents.

This is also evident if we consider the specific field of health and security. The UN 'does not provide or arrange life or health insurance coverage for consultants and individual contractors, and consultants and individual contractors are not eligible to participate in the life and health insurance schemes provided by the United Nations for its staff members'.[20] This means that

> consultants and individual contractors are fully responsible for arranging, at their own expense, such life, health and other forms of insurance covering the period of their services and they consider appropriate. The responsibility of the United Nations is limited solely to payment of compensation for service-incurred death, injury or illness.[21]

Concerning training, consultants and individual contractors 'shall not receive training at the expense of the United Nations' even if 'an exception may be granted only for mandatory safety and security-related training'.[22] So, if it is true that organizations provide training opportunities to their long-serving non-staff, at the same time this is not systematic nor part of training policy.

In fact, 'non-staff sometimes complained that, although they were doing the same or similar jobs, they received fewer training opportunities than regular staff. In particular, where training must be paid for per participant by the organization, it is mostly staff who are allowed to participate. Again, if non-staff were used as short-term independent contractors, as they should be, then training would be unnecessary, because non-staff should be hired for the expertise they already have. Given that non-staff are used like staff, it would be fair to allow them, particularly long-serving individuals, to receive training'.[23]

So, adopting a duty of care perspective, the framework described above reflects both substantial disparities of treatment among staff and non-staff members, even though performing analogous tasks and functions, and the absence of a harmonised and uniform system inside international organizations.[24]

Considering the evolution in international organization recruitment policy and the high percentage of non-staff employees, this situation should be modified. It is

[18] UN Secretariat 2013.

[19] Ibid., p. 12.

[20] UN Secretariat 2013.

[21] Ibid.

[22] Ibid.

[23] Terzi and Fall 2014, point 111.

[24] De Freytas-Tamura and Sengupta 2017.

necessary to go beyond the traditional staff/non-staff member dichotomy and recognise a common system of rules to protect fundamental rights. If non-staff members provide flexibility to the organization, they deserve the corollary of protection, especially during missions in high-risk environments.[25] The key concern should be that international organizations policy and procedures must reflect 'a duty of care relevant to the type of work and environment their staff work in and these will be used in a court or tribunal when assessing whether an employer has fulfilled its duty of care'.[26]

It seems that a more inclusive vision, extending the subjective field of application of protection also to non-staff members, can be found in several recent UN documents focusing on the safety and security field.

In the Report of the Secretary-General 'Safety and security of humanitarian personnel and protection of United Nations personnel' the term 'United Nations personnel' refers to all personnel covered by the UN security management system, including UN system personnel, UN Volunteers, individually deployed military and police personnel in missions led by the Department of Peacekeeping Operations or the Department of Political Affairs, consultants, individual contractors, experts on mission and other officials with a direct contractual agreement with an organization of the UN system.[27]

This perspective seems to be confirmed in the UN Department of Safety and Security (DSS) paper titled 'Reconciling duty of care for UN personnel while operating in high risk environment' which stressed that 'the UN moral obligation to protect its staff and called on all entities of the Organization to strengthen their support systems for UN personnel working across the globe, particularly those in high risk environments'.[28]

In the Conclusions of the Thirty-Fourth Session of the High Level Committee on Management (HLCM) in 2017 the Task Force noted its objective of 'going beyond the minimum', which underpins the UN system's responsibility to provide a duty of care for its workforce, regardless of contractual status.

As stressed in the 'Duty of Care Task Force Interim Report'[29] the UN 'has a legal and moral obligation under duty of care for its personnel' comprising both staff and non-staff members. To explain this inclusive statement the Report recalled the sources of the duty of care for staff and non-staff members.

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[25] UN International Civil Service Commission (2016) Conditions of service applicable to both categories of staff: contractual arrangements: review of the implementation of the three types of contracts. http://www.ccisua.org/wp-content/uploads/2016/06/ICSC83R4-Final.pdf. Accessed 1 September 2017, p. 8, which reveals the increased use of contingency workforce.

[26] Hoppe and Williamson 2016.

[27] UNGA (2016) Safety and security of humanitarian personnel and protection of United Nations personnel. http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/71/129. Accessed 1 September 2017.

[28] High-Level Committee on Management 2016.

[29] High-Level Committee on Management 2017.

First the duty of care for UN Staff members is codified in the staff rules and regulations of each UN organization. In particular UN Staff Regulation 1.2(c) provides that

> staff members are subject to the authority of the Secretary-General and to assignment by him or her to any of the activities or offices of the United Nations. In exercising this authority the Secretary-General shall seek to ensure, having regard to the circumstances that all necessary safety and security arrangements are made for staff carrying out the responsibilities entrusted to them.

Second, the duty of care for non-staff personnel could be considered as part of the 'general principles of the law of responsibility, either tort law under the common law system, or the law of responsibility under the civil law system'. The Report quotes also the jurisprudence of the UN Administrative Tribunal and the UN Dispute Tribunal according to which 'the UN Staff Regulation 1.2(c) codified a duty of protection having the value of a general principle of law'.[30] So 'as a general principle of law, the duty of care would also be applicable to all UN personnel in a direct contractual relationship with the UN'.[31]

6.2.2 *Locally Recruited Staff Versus Internationally Recruited Staff*

The complex mapping of the labour relationships international organizations have with their collaborators lies on a double dichotomy. Beyond what we has already been said about staff and non-staff members, the question of the protections given to local staff in relation to those attributed to international staff has become increasingly relevant in recent years.

National aid workers could be described 'as paid personnel working on assistance programming in their home countries. This includes both the national staff of international organizations and the personnel of local or national aid

[30] UNDT, Edwards v. Secretary-General of the UN, 26 January 2011, Decision No. 22 (see Annex II, Case 39). In particular para 60 affirmed that 'in its Judgments No. 1125, Mwangi (2003), and No. 1204, Durand (2005), the former UN Administrative Tribunal took the view that staff regulation 1.2(c) codified a duty of protection having the value of a general principle of law. In the former Judgment, it stated: […] even were such obligation not expressly spelled out in the Regulations and Rules, general principles of law would impose such an obligation, as would normally be expected of every employer. The United Nations, as an exemplary employer, should be held to higher standards and the Respondent is therefore expected to treat staff members with the respect they deserve, including the respect for their well being'.

[31] UNDT, Edwards.

organisations'.[32] Past studies have noted the discrepancies between national and international staff in terms of access to security training, physical security measures for residences and vehicles, and telecommunications equipment.[33] In particular, concerning health and security aspects, authors have identified a strong disparity between the level of security support provided to national as compared to international aid actors.[34] Moreover according a recent Report,[35] these differences in the allowances, benefits, and entitlements for internationally-recruited versus locally-recruited staff, including with regard to danger pay and health benefits, have a negative effect on morale, organizational cohesion and performance.

Fortunately in recent years it seems that the gap has been closing. The security needs of national aid-workers has received some emphasis, and the UN Security Management System could be mentioned as an example of an international organization attempting to make improvements in that field. The Resolution 'Safety and security of humanitarian personnel and protection of United Nations personnel', adopted by the General Assembly on 8 December 2016,[36] stressed

> the need to ensure adequate levels of safety and security for United Nations and associated personnel, including locally recruited staff, which constitutes an underlying duty of the Organization, and mindful of the need to promote and enhance security consciousness within the organizational culture of the United Nations and a culture of accountability at all levels, as well as to continue to promote awareness of and sensitivity to national and local cultures and laws.

In the same perspective the UN General Assembly has reaffirmed

> the need to ensure adequate levels of safety and security for United Nations and associated personnel, including locally recruited staff, which constitutes an underlying duty of the Organization, and mindful of the need to promote and enhance security consciousness within the organizational culture of the United Nations and a culture of accountability at all levels, as well as to continue to promote awareness of and sensitivity to national and local cultures and laws.[37]

[32] Stoddard et al. 2011.

[33] Stoddard et al. 2006. See also Haver 2007, p. 10.

[34] Ibid.

[35] High-Level Committee on Management 2016.

[36] UNGA Resolution A/72/490 (2017) Safety and security of humanitarian personnel and protection of United Nations personnel. https://reliefweb.int/sites/reliefweb.int/files/resources/N1729514.pdf. Accessed 1 December 2017.

[37] UNGA (2017) Safety and security of humanitarian personnel and protection of United Nations personnel. http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/71/129. Accessed 1 December 2017, para 24.

6.3 Concluding Remarks

As clearly observed in the High-Level Committee on Management (HLCM) reports,[38] the key issue is the need to operationalise what is meant by 'duty of care', as there is no real reference documentation clearly spelling out the actions underlying that duty.

It is also important to stress that usually the duty of care is examined more from a security angle but this is not enough. In fact the HLCM set up a task force which is currently looking at the duty of care from a human resources, Medical, Safety and Security and Psychosocial angle.[39] The Coordinating Committee for International Staff Unions and Associations (CCISUA) is also participating in this work in progress.

Of course the question of the legal meaning of the duty of care (see Chaps. 1–3) is linked to the question discussed in this chapter concerning differentiated treatment of staff and non-staff members.

As recognised in the 'Duty of Care Task Force Interim Report', the duty of care should be applied to staff and non-staff members but, at the same time, it has yet to be fully recognised that the UN should 'take harmonized measures regardless of the contractual status of those engaged by the UN in high risk environments'.[40] The need to introduce a clear and uniform system of rules to protect staff and non-staff members regardless of their specific status emerges. The reality shows us that generally actions to improve working and living conditions in high-risk environments have been left to the discretion of managers and organizations.

Moreover, as observed by FICSA, there is an 'excessive and abusive use of non-staff personnel contracts' and 'in the event of a security situation, care should be taken of all United Nations personnel'.[41] In this perspective

> the harmonization of non-staff policies and practices should be the subject of a comprehensive study by the High-level Committee on Management (HLCM) of the United Nations System Chief Executives Board for Coordination (CEB), covering all aspects of the use of non-staff personnel with a view to enabling organizations to provide the same or similar contracts and entitlements, in line with international labour principles.[42]

This inclusive approach seems to be recognised also by the Coordinating Committee for International Staff Unions and Associations (CCISUA).

Finally the duty of care should be recognised as a key principle not only at the formal level but also in reality. In order to achieve this it could be useful to emphasise the duty of care as a principle with a double identity. Its aim is to protect individuals who works for international organizations but also to protect an organization itself from liability and reputational risks. Stressing the double identify of

[38] See for example UN Chief Executives Board for Coordination 2016.

[39] High-Level Committee on Management 2016.

[40] See UN Department of Safety and Security 2011.

[41] See Federation of International Civil Servant Associations 2015, point 99.

[42] Terzi and Fall 2014, p. 1.

duty of care could be a good way to enforce the implementation of this principle and to reduce the risks of failing to implement it. The duty of care could thus be the catalyst for introducing a set of minimum standards. However, to realise this it would be necessary to standardise the policies across all agencies.

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Part II
The Implementation of the Duty of Care by Selected International Organizations: Specific Legal and Practical Challenges

Chapter 7
Implementation of the Duty of Care by the United Nations

Annalisa Creta

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Annex II—the Table of Cases—can be accessed online here: http://extras.springer.com/.

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Abstract The duty of care of the United Nations corresponds to a 'non-waivable duty on the part of the organization to mitigate or otherwise address foreseeable risks that may harm or injure its personnel and their eligible family members'. It is crystallised in an implicit and explicit way in the obligations the organization has towards its staff that are contained in both hard and soft law instruments, policies, regulations and rules, administrative instructions, other internal acts of the organization. Its components have been further delineated through the jurisprudence of the organization's administrative tribunals. Recent reviews conducted by the Joint Inspection Unit and the High-Level Working Group on 'reconciling duty of care for UN personnel with the need 'to stay and deliver' in high-risk environments' have upheld that, apart from selected critical areas that need further development and attention, the main issue at stake for ensuring the duty of care of the UN vis-à-vis its staff is the *enforcement of compliance* with, and further *operationalization* of, existing rules and policies in a coherent and systematic manner throughout the UN System. This chapter undertakes a survey of relevant legal sources to frame the contours and content of the duty of care of the UN as an employer. It identifies the personal and geographical scope of such obligation and focuses on its key components *rationae materiae* for then reflecting on challenges that need to be addressed to ensure that the health, well-being, security and lives of staff will not be subject to unnecessary risks.

Keywords United Nations · duty of care · personnel · staff rules and regulations · risk management framework · high risk environments

7.1 Introduction

Over the last twenty years, there has been a swift change in the environments in which United Nations (UN) personnel are tasked to operate. Indeed, there is increasing evidence of attacks on institutions and officials that have been 'traditionally protected from such acts of violence, whether by norms of diplomacy or by

the benevolent nature of humanitarian work'.[1] According to data released by the Department of Safety and Security (DSS),[2] about 180,000 staff members are covered under the UN Security Management System (UNSMS) across 53 agencies, funds and programmes, including 400,000 dependants. DSS provides services in 122 countries and is responsible for 4,500 UN premises. The total number of uniformed and civilian personnel in peacekeeping operations has increased from 60,000 to 120,000 in the past 10 years. The latest reports on the safety and security of humanitarian personnel and protection of UN personnel presented by the Secretary-General to the General Assembly show a worrying trend that testifies that 'as the United Nations is consolidating international efforts to provide solutions to the world's conflicts, the intensity of the attacks and threats against its personnel and premises has increased concurrently'.[3]

While references to the protection of UN personnel, to their safety and security, can be found in resolutions of the main political bodies of the organizations and in policy documents of the Secretariat, agencies, funds and programmes for many years now, it was the deadly attacks on the Canal Hotel in Baghdad on 19 August 2003 that heralded a significant change. The nature of threats faced by UN staff was underscored, together with the gaps and failures in the mission of the organization in providing adequate safety and security to its personnel and offices. In response to that, a major systemic analysis[4] and restructuring process has been undertaken leading to the establishment in 2005 of DSS and the adoption of a plethora of reinforced policy measures for protecting staff.

The 11 December 2007 attack against the UN in Algiers also triggered an in depth reflection on the 'strategic issues vital to the delivery and enhancement of the security of United Nations personnel and premises and the changing threats and risks faced by it'.[5] The report of the Independent Panel on Safety and Security of United Nations Personnel and Premises Worldwide, established in the aftermath of the Algiers attack, called on DSS to address four key issues in serious need of improvement: accountability, leadership, internal management and oversight.

In 2009, the vision statement by the UN System Chief Executives Board for Coordination (CEB) reiterated the strategic role played by the UNSMS in enabling the UN system to implement its mandates, programmes and activities in an effective and secure way. The CEB also endorsed a shift from 'when to leave' to a 'how to stay' approach for additional reinforced measures on staff security.[6]

The new Security Risk Management (SRM) model under the UNSMS constitutes the foundation of this approach.

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[1] UN 2008, para 4.

[2] CEB 2016c, para 86.

[3] UN Secretary-General 2016, para 3. For an updated account, see UN Secretary-General 2017a.

[4] UN 2003a.

[5] UN 2008, passim.

[6] UN 2010a, b.

In February 2011, the Framework of Accountability for the UNSMS was revised.

In 2016, the CEB set forth eleven common principles to guide the UN system's support to the implementation of the 2030 Agenda for Sustainable Development, the overarching framework for action for the next 15 years. Common Principle 11 is entitled 'Duty of Care' and establishes that:

> The organizations of the UN System will preserve and foster the health and wellbeing as well as safety and security of their staff – while remaining committed to stay and respond to the ever-increasing demand for their services, despite the often deteriorating conditions in which those services are being delivered.[7]

Against such background, the present chapter offers an examination of relevant legal sources to frame the contours and content of the duty of care of the UN as an employer. After a review of hard and soft law instruments and an analysis of relevant organizational internal rules, policies and measures, the analysis will continue through the identification of the personal and geographical scope of such obligation. Finally, the focus will turn to the key components of the obligation of the UN to take reasonable care of its employees by dividing the Duty into the following main areas: preventive and mitigating measures for the health, well-being and safety of UN personnel, their dependants and property; adequate and effective medical services in case of emergency and the aftermath; information, awareness and training; staff care and support; contractual issues; reasonable care in selecting private contractors and in maintaining a sufficiently close supervision over their work; mechanisms for redress and functional protection; and the extent of protection in cases of expulsion from a host member State. The content of the obligation will be framed through a review of relevant case law of administrative tribunals and relevant policy measures and procedures in force.

7.2 Review of the Relevant Internal Legal Sources

The legal concept of duty of care postulates that organizations 'are responsible for their employees' wellbeing and must take practical steps to mitigate foreseeable workplace dangers'—a responsibility that implies additional implications when the employees are working overseas.[8]

At the UN level, the legal concept of 'duty of care' of the organization *vis-à-vis* its personnel is embodied in various legal documents—from international treaties and conventions, to soft law instruments to internal rules and regulations, Secretary General Bulletins (ST/SBGs) and Administrative Instructions, and specific internal

[7] CEB 2016a.

[8] Claus 2009, p. 8. See in this regard Chap. 2 of this book by Andrea de Guttry.

policies and working documents. An examination of such instruments contributes to framing its contours and demonstrates that the duty of care is crystallised both in an implicit and explicit way in the obligations the organization has towards its staff.[9]

7.2.1 An Examination of Relevant Hard and Soft Law

The point of departure for any analysis related to the duty of care of the UN in relation to its employees is the founding document of the organization, namely the Charter of the UN. Its Article 105, contained in Chapter XVI Miscellaneous Provisions—establishes that the organization is entitled to enjoy such privileges and immunities as are necessary for the fulfilment of its purposes in the territory of each of its member States. Likewise, UN officials are accorded with such privileges and immunities as are necessary for the independent exercise of their functions. UN entities and their staff, as well as some categories of non-staff personnel, enjoy similar privileges and immunities under the respective founding instruments, international conventions and agreements with host States.

Such provision has been upheld in a consistent manner in General Assembly resolutions and it is also recalled systematically in legal instruments, such as the Convention on the Safety of UN and Associated Personnel[10] (1994) and its Optional Protocol (2006).

The 1994 Convention establishes—at Articles 7 and ff.—a series of duties upon State Parties to it to, *inter alia,* ensure the safety and security of UN and Associated Personnel, to release or return such personnel captured or detained or to prevent

[9] The specific extent of the provisions identified in this paragraph will be further explored in para 5.4 related to the content of the Duty of Care.

[10] As established in its Article 1, for the purposes of the Convention 'United Nations personnel' means: (i) Persons engaged or deployed by the Secretary-General of the United Nations as members of the military, police or civilian components of a United Nations operation; (ii) Other officials and experts on mission of the United Nations or its specialized agencies or the International Atomic Energy Agency who are present in an official capacity in the area where a United Nations operation is being conducted. 'Associated personnel' means: (i) Persons assigned by a Government or an intergovernmental organization with the agreement of the competent organ of the United Nations; (ii) Persons engaged by the Secretary-General of the United Nations or by a specialized agency or by the International Atomic Energy Agency; (iii) Persons deployed by a humanitarian non-governmental organization or agency under an agreement with the Secretary-General of the United Nations or with a specialized agency or with the International Atomic Energy Agency, to carry out activities in support of the fulfilment of the mandate of a United Nations operation. 'United Nations operation' means an operation established by the competent organ of the United Nations in accordance with the Charter of the United Nations and conducted under United Nations authority and control: (i) Where the operation is for the purpose of maintaining or restoring international peace and security; or (ii) Where the Security Council or the General Assembly has declared, for the purposes of this Convention, that there exists an exceptional risk to the safety of the personnel participating in the operation.

crime. In 2003, the Security Council through Resolution 1502[11] requested the Secretary-General to pursue the inclusion of—and host countries to include—key provisions of the 1994 Convention in future and, if necessary, existing Status of Forces Agreements (SOFA), Status of Mission Agreements (SOMA), and host country agreements with the UN.[12]

The 2006 Optional Protocol extends the scope of this legal protection to encompass all other UN operations, whether related to the delivery of humanitarian, political or development assistance, peacebuilding and emergency relief operations.

Relevant provisions of the Conventions on the Privileges and Immunities of the UN and the Specialized Agencies respectively of 1946 and 1947, establish further measures for the protection of officials and experts on mission on behalf of the UN (see respectively Articles V and VI of both conventions). Bilateral agreements with host States may further extend the same protections to certain categories of non-staff personnel. The Conventions also stipulate that UN staff members 'shall be given, together with their spouse and relatives dependant on them, the same repatriation facilities in time of international crisis as diplomatic envoys' and that premises of the UN and UN entities are 'inviolable' and that their property, wherever located and by whomsoever held, is immune from 'any form of interference'.

Of course these instruments focus on State parties' obligations in relation to the organization and its staff present on their respective territories reinforcing the concept that it is the primary responsibility of member States to ensure the safety and security of UN officials and premises. However, as an employer, the UN is morally and legally responsible for what happens to its personnel.[13] As stated in the Report of the Independent Panel on Safety and Security of UN Personnel and Premises Worldwide:

[11] In a previous resolution the General Assembly had only recommended that the Secretary General 'continue to seek the inclusion of, and that host countries include, key provisions of the Convention, among others, those regarding the prevention of attacks against members of the operation, the establishment of such attacks as crimes punishable by law and the prosecution or extradition of offenders, in future as well as, if necessary, in existing status-of-forces, status-of-mission and host country agreements negotiated between the United Nations and those countries, mindful of the importance of the timely conclusion of such agreements'. See UN 2003a, para 3. The Council makes such a recommendation a 'determination' to take appropriate steps in order to ensure the safety and security of humanitarian personnel and United Nations and its associated personnel, including, inter alia, by making a direct request to the Secretary-General in this regard. See: UNSC Resolution S/res/1502 (26 August 2003) Protection of Humanitarian Personnel and the UN and its Associated Personnel in conflict zones, para 5(a).

[12] In this regard, the UN has developed a practice of including elements of the conventions in SOMA/SOFA and the Security Council may also request it in the resolution establishing the operation. As an example see SOFAs for UNMIS (para 48); UNAMI/Iraq (Article 7, para 7a–e); UNAMI/Jordan (paras 9–12); UNAMIS (Article VI para 2), UNMISS (para 48).

[13] UN 2008, para 259.

> the first duty of the UN is to understand fully what it can – and cannot – expect from the host government in terms of information exchange, regular consultations, possible secondment of senior security personnel to the UN offices, and of what other financial, material, or physical support sought by the Organization that particular Government is willing to provide.[14]

Such a duty is well explained in the Framework of Accountability for the United Nations Security Management System which specifies that:

> […] the United Nations has a duty as an employer to reinforce and, where necessary, supplement the capacities of host Governments to fulfil their obligations in circumstances where United Nations personnel are working in areas that are subject to conditions of insecurity which require mitigation measures beyond those which the host Government can reasonably be expected to provide.[15]

The obligations inherent in the duty of care of the UN towards its personnel have been repeatedly reaffirmed in various General Assembly resolutions related to the safety and security of humanitarian personnel and protection of UN personnel. The main political organ of the organization has continually stressed that 'the need to ensure adequate levels of safety and security for United Nations and associated personnel, including locally recruited staff […] constitutes an underlying duty of the organization'[16] and has requested the Secretary-General to continue to take the necessary measures to ensure that:

- United Nations and other personnel carrying out activities in fulfilment of the mandate of a United Nations operation *are properly informed* about and operate in conformity with the *minimum operating security standards* and relevant codes of conduct and are properly informed about the *conditions under which they are called upon to operate* and the standards that they are required to meet;
- All United Nations premises and assets, including staff residences, *are compliant with the United Nations minimum operating security standards* and other relevant United Nations security standards.[17]

7.2.2 *Review of Internal Regulations and Rules, ST/SGBs and Administrative Instructions*

The very essence of the duty of care of the UN in relation to its officials is enshrined in the UN's Staff Regulations and Rules and further reiterated in the Standards of Conduct for the International Civil Service. General Assembly Resolution 258/III

[14] Ibid.

[15] UN 2015, Annex 1, para 2.

[16] UNGA Resolution A/Res/70/104 (2015) Safety and security of humanitarian personnel and protection of United Nations personnel.

[17] Ibid., paras 24–25. Emphasis added.

of 3 December 1948, refers to 'arrangements to be made by the United Nations with the view of ensuring to its agents the fullest measures of protection.'[18] In this case, the focus is on primary duties and responsibilities of the organization vis-à-vis its staff as 'employer'.

The UN Staff Regulation 1.2(c)[19] reads as follows:

> Staff members are subject to the authority of the Secretary-General and to assignment by him or her to any of the activities or offices of the United Nations. In exercising this authority the Secretary-General shall seek to ensure, having regard to the circumstances, that all necessary safety and security arrangements are made for staff carrying out the responsibilities entrusted to them.

The commentary to such provision specifies that the 'security' of UN staff is an obligation of member States as set out in Article 105 of the Charter and in relevant international conventions and treaties, which provide that the organization and its officials shall enjoy such privileges and immunities as are necessary for the exercise of their functions. However, seeking to ensure the 'safety' of staff is an inherent duty of the UN Secretary-General, as chief administrative officer.

The regulation thus recognises such responsibility as a basic right of staff. This right is specifically spelled out in the Standards of Conduct in the International Civil Service that, at para 41, state that:

> While an executive head assigns staff in accordance with the exigencies of the service, it is the responsibility of organizations to ensure that the health, well-being, security and lives of their staff, without any discrimination whatsoever, will not be subject to undue risk. The organizations should take measures to protect the safety of their staff and that of their family members. At the same time, it is incumbent on international civil servants to comply with all instructions designed to protect their safety.[20]

In exercising his authority to assign staff to any activity within the scope of the organization's mandate, the Secretary-General must moreover 'ensure that, while assigned to hardship areas, staff are afforded reasonable conditions of life and work having regard to the existing conditions. Furthermore, since staff are subject to assignment, measures should be taken to ensure that staff are properly advised, before departure, of conditions prevailing at the duty station to which they are assigned.'[21]

[18] UNGA Resolution 258/III (1948) Reparation for Injuries incurred in the service of the United Nations, preambular para 1.

[19] UN 2016e. The Staff Regulations embody the fundamental conditions of service and the basic rights, duties and obligations of the UN Secretariat. They represent the broad principles of human resources policy for the staffing and administration of the Secretariat.

[20] International Civil Service Commission 2013, para 41.

[21] UN 2016b, commentary to regulation 1.2(d), p. 14.

In *Edwards*[22] the UN Dispute Tribunals, in recalling judgments of the former UN Administrative Tribunal[23] recalled that its predecessor took the view that 'staff regulation 1.2(c) codified a duty of protection having the value of a general principle of law'. In particular, in *Mwangi* the former Administrative Tribunal stated that

> […] even were such obligation not expressly spelled out in the Regulations and Rules, general principles of law would impose such an obligation, as would normally be expected of every employer. The United Nations, as an exemplary employer, should be held to higher standards and the Respondent is therefore expected to treat staff members with the respect they deserve, including the respect for their well being.[24]

In *Haile*,[25] the former Administrative Tribunal also recognised that the organization had a duty to 'maintain a healthy working environment' which extended to protection of staff members' physical and psychological integrity.

7.2.3 Other Relevant Policies and Prospective New Developments

The duty of care of the UN is a concept that has been discussed at length in various forums of the organization. The most advanced and latest developments towards clarifying the tenets of such a duty for the UN as an employer can be found in reports of discussions and deliberations of the High-Level Committee on Management (HLCM)[26] that discussed the issue through a holistic approach. At its 27th session of April 2014, the Committee discussed a paper prepared by DSS titled 'Reconciling duty of care for UN personnel while operating in high risk environment'. The document presented the moral obligation of the UN to protect its staff and called upon all entities of the organization to reinvigorate their support systems for UN personnel, particularly those deployed in high risk areas.[27]

The HLCM agreed on the necessity to conduct an all-inclusive review of the programmatic need to stay and deliver[28] against the organizational imperative of

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[22] UNDT, Edwards v. the Secretary-General of the United Nations, 26 January 2011, Judgment No. 22 (see Annex II, Case 39), para 60.

[23] In particular UNAT, Mwangi v. the Secretary-General of the United Nations, 30 September 2003, Judgment No. 1125, (see Annex II, Case 38); UNAT, Durand v. the Secretary-General of the United Nations, 19 August 2005, Judgment No. 1204 (see Annex II, Case 36).

[24] UNDT, Edwards, para 60.

[25] UNAT, Haile v. the Secretary-General of the United Nations, 30 September 2004, Judgment n. 1194, para VI.

[26] The HLCM is comprised of senior administrative managers from the member organizations of the United Nations system who meet twice a year. It has the task of identifying and analysing administrative management reforms with the aim of improving efficiency and simplifying business practices.

[27] CEB 2014, paras 6 ff.

[28] For an account of good practices on the "stay and deliver" programmatic need, see Egeland 2011.

duty of care for staff in high-risk environments.[29] To this end, it established a working group with the mandate of undertaking a comprehensive examination of the questions raised in the DSS paper.[30]

This HLCM High-Level Working Group on 'reconciling duty of care for UN personnel with the need 'to stay and deliver' in high-risk environments' (hereinafter High-Level Working Group) decided to divide its work into two phases: fact-finding field analysis in Phase 1, and Phase 2 with the purpose of discussing and recommending how to strategically address and coordinate the issues identified in Phase 1.

For the purposes of the work of the Group, the following definition of the duty of care was adopted:

> the duty of care' constitutes a non-waivable duty on the part of the organizations to mitigate or otherwise address foreseeable risks that may harm or injure its personnel and their eligible family members. […] Staff have a duty of 'self-care' and a responsibility to comply with institutional rules and regulations pursuant to the terms of their employment.

The High-Level Working Group thus pursued a practical approach and identified different forms of security, medical, administrative and psychosocial support that the organizations need to provide to ensure that UN personnel are able to perform their functions in a hostile environment.[31]

7.3 The Scope of Application of the Duty of Care for UN Personnel

7.3.1 The Personal Scope of the Duty of Care: Duty Bearers

The UN Staff Regulation 1.2(c) places on the Secretary-General, as chief administrative officer of the organization, the primary responsibility as an employer vis-à-vis its staff in terms of ensuring that all necessary safety and security arrangements are made for personnel carrying out the responsibilities entrusted to them. A framework for accountability for UNSMS was developed in 2002[32] to clarify responsibilities and roles in exercising such a duty. The framework was revised several times, in 2005, 2009 and 2011.[33] It establishes the responsibilities of the organization as an employer for the duty of care of its staff while reinforcing the concept that 'the primary responsibility for the security and protection of personnel

[29] Ibid., para 26.

[30] Ibid., para 29.

[31] As a follow up to the work of the High-Level Working Group a task force under the leadership of the Deputy High Commissioner for Refugees was established. See CEB 2017a, paras 36 ff.

[32] UN 2002a. The framework for Accountability was then welcomed by the General Assembly in UNGA Resolution 57/155 (2002).

[33] UN 2010a, paras 1–22 and Annex I.

employed by United Nations system organizations, their spouses and other recognized dependants and property and the organizations' property rests with the host Government.'[34] As already restated, such an obligation directly flows from Governments' intrinsic function of maintaining public order and protecting persons and property within their jurisdiction. In the case of international organizations and their officials, the Government bears a special responsibility under the UN Charter and/or Government's specific agreements with individual organizations.[35] The Framework for Accountability provides guidance on how to enable the UN to implement its mandated activities and carry out its programs while ensuring the safety, security and well-being of its staff, premises and assets. It also establishes the roles and responsibilities in this regards concentrating the governance of the UNSMS at the CEB level in its High level Committee on Management and the IASMN.[36]

The Secretary-General is accountable to the member States for the proper running and administration of the organization, the implementation of its programmes and the overall safety and security of UN personnel, premises and assets at headquarters and field locations. The Under-Secretary-General for Safety and Security has the delegated authority to make decisions inherent to the direction and control of the UNSMS and the overall safety and security of UN personnel and property.

The members of the Executive Group on Security, appointed by CEB, play an advisory function aimed at facilitating and reinforcing the decision-making authority and accountability of the Under-Secretary-General and at supporting the discharge of his/her mandate. The executive heads of the UN agencies, funds and programmes are responsible and accountable to the Secretary-General for ensuring that the goal of the UNSMS is met within their respective organizations. In each organization, there is a senior security manager and/or security focal point at headquarters responsible for coordinating the organization's response to safety and security and for providing the executive head and all other relevant actors with advice, guidance and technical assistance.

In each country/region/area where the UN is present, the most senior official is usually appointed in writing by the Secretary-General as the designated official for security and is accredited to the host Government as such. The designated official is responsible for the security of UN personnel, premises and assets throughout the country or designated area. Representatives of organizations of the UN system at the country level participate in the security management system and are accountable to the Secretary-General through their respective executive heads or to the executive heads of the specialised agencies, as appropriate, for all issues linked to the security of their staff at the duty station.

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[34] Ibid., para 1.

[35] Here the focus will be only put on the responsibility of the UN vis-à-vis its staff, leaving aside host country considerations. For an analysis of the host state's responsibility towards the protection of staff of international organizations refer to Chap. 4 by Lorenzo Gasbarri.

[36] UN 2010a, paras 1–22 and Annex I, para 6.

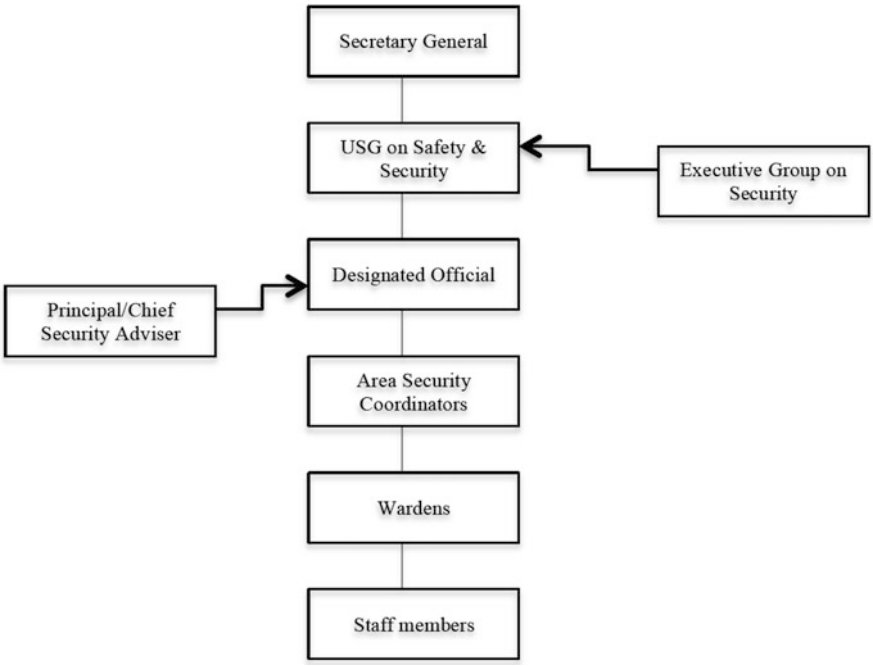

Fig. 7.1 Framework for Accountability [*Source* UN 2010a, Annex II.]

Besides specific roles and responsibilities falling on staff directly tasked with security related functions, the Framework for Accountability underlines that 'personnel employed by the organizations of the UN system are accountable to their respective organizations. Hence personnel, irrespective of the level or position, have the responsibility to comply with security policies, guidelines, procedures and plans of the UNSMS and their organizations'[37] (Fig. 7.1).

7.3.2 The Addressees of the Duty of Care: Right Holders

The working definition of the 'duty of care' adopted by the High-Level Working Group identifies as right holders 'personnel of the organizations (part of the UN system) and their eligible family members'. UN Staff Regulation 1.2(c) refers to 'staff members'. The 1994 Convention on the Safety of UN and Associated Personnel focuses on 'United Nations and Associated Personnel', the 1946 and 1947 Conventions on the Privileges and Immunities of the United Nations and the Specialized Agencies establish measures for the protection of 'officials and experts

[37] Ibid., para 28.

on mission on behalf of the United Nations'. The Standards of Conduct in the International Civil Service adopted by the International Civil Service Commission refers to 'staff and their family members'.

The Commentary to the Status, basic rights and duties of UN staff members[38] when defining the notion of 'staff member' specifies that

> the Charter requires that staff members be 'appointed' by the Secretary-General (or by those to whom this power has been delegated, either by the Secretary-General alone or by the Secretary-General at the direction of the General Assembly). The hallmark of a staff relationship is a letter of 'appointment' issued pursuant to staff regulation 4.1. Staff members.[39]

The 1994 Convention defines as 'United Nations personnel' persons engaged or deployed by the Secretary-General of the UN as members of the military, police or civilian components of a UN operation and other officials and experts on mission of the UN or its specialised agencies or the International Atomic Energy Agency who are present in an official capacity in the area where a UN operation is being conducted.

When it refers to 'Associated personnel' it encompasses: persons assigned by a Government or an intergovernmental organization with the agreement of the competent organ of the UN; persons engaged by the Secretary-General of the UN or by a specialised agency or by the International Atomic Energy Agency; persons deployed by a humanitarian non-governmental organization or agency under an agreement with the Secretary-General of the UN or with a specialised agency or with the International Atomic Energy Agency, to carry out activities in support of the fulfilment of the mandate of a UN operation.

A definition of the expression 'personnel and their eligible family members' used in the definition of the duty of care given by the High-Level Working Group can be found in Chapter III of the UN Security Policy Manual where the personal scope of policies, procedures, standards and other arrangements of the UN Security is spelled out. In this regard:

United Nations personnel:

(i) All United Nations system staff members, including temporary staff, in posts subject to international or local recruitment (except those who are both locally-recruited and paid by the hour);
(ii) United Nations Volunteers (UNVs);
(iii) Individually deployed military and police personnel in DPKO- or DPA-led missions, including, but not limited to:
    (a) United Nations police officers, military observers, military liaison officers, military advisors and staff officers; and
    (b) Military members of national contingents or members of formed police units when not deployed with their contingent or unit.

[38] UN 2016b, p. 9.
[39] Ibid.

(iv) Consultants, individual contractors and experts on mission when actually employed by an organization of the United Nations system; and
(v) Officials other than United Nations Secretariat staff members and similar non staff officials of other organizations of the United Nations system with a direct contractual agreement with a United Nations System organization;

Other Individuals Covered:

(i) Eligible family members (as determined by the staff rules and regulations of the organizations comprising the United Nations System);
(ii) Eligible family members (who are authorized to be at the duty station) of United Nations Volunteers;
(iii) United Nations fellows, either non-resident fellows studying in the country, or nationals who are on leave from the country of study;
(iv) Personnel and their eligible family members of Intergovernmental Organizations that have signed a Memorandum of Understanding (MOU) with an organization of the United Nations system to cooperate on security matters.[40]

It is to be stressed that staff members of the organizations of the UN system are part of a workforce that is made up of different categories of staff. Within each category there are different levels, which reflect increasing levels of responsibilities and requirements but also different conditions of service (the most evident being that between national and international categories of staff). These are the different categories of staff at the UN:

- Professional and higher categories (P and D)
- General Service and related categories (G, TC, S, PIA, LT)
- National Professional Officers (NO)
- Field Service (FS)
- Senior Appointments (SG, DSG, USG and ASG)

Across the different agencies, funds and programmes of the UN, there is a great variety of contract arrangements covering professional and general services categories with differing allowances, entitlements or coverage. However, for safety and security reasons all individuals, irrespective of their contractual situation, fall under the wider UN security plan. Nonetheless, such diversity in contract types unavoidably influences the safety and security of personnel by creating groups of UN personnel with different benefits and insurance coverage arrangements. Moreover, consultants and Special Service Agreement-type contract holders with separate contractual arrangements contribute to increasing differences and diversity of treatment.

[40] UNDSS 2011.

This creates situations where diverse standards linked to the contractual status of the person or the financial viability of the parent agency/office/programme co-exist. As an illustrative example of this plethora of treatments, the Brahimi Panel, in the aftermath of the Algiers attacks found that UN staff sharing the same office space, working side by side but from different agencies or being international and national staff, were entitled to different arrangements and entitlements.[41]

7.3.3 *The Duty of Care and Its Application* Ratione Loci

The duty of care of the UN applies worldwide wherever organizations of the UN system have authorised operations and tasks to perform. Policies and procedures are in place to commensurate the extent of protective measures of the organization with the actual and potential risks incurred by staff at specific locations. The critical instruments for analysis, assessment and standard-setting in the UNSMS are the SRM,[42] the Security Risk Assessment (SRA) and the Minimum Operating Standards (MOSS).

A single MOSS system applies throughout the UNSMS without distinction between Headquarters, the field or missions for the purposes of SRM. In order to mitigate risks identified in the SRM process, MOSS must be applied and maintained at all duty stations. Each country and/or duty station is to develop and maintain a Country MOSS based on a mandatory Global MOSS. The measures contained in the Country MOSS must be commensurate with the results of the SRM process applicable to the country or location. The SRM process must clearly demonstrate that the MOSS measures proposed for the country will reduce risks to an acceptable and manageable level.

The level of protection of UN personnel is weighed against the level of risk incurred. While there are protective measures that apply everywhere and anytime irrespective of the physical location where staff is called to operate, others are commensurate to the potential level of risks identified.

[41] UN 2008, para 309.

[42] The Security Risk Management 'is the process of identifying future harmful events ('threats') that may affect the achievement of UN objectives. It involves assessing the likelihood and impact of these threats to determine the assessed level of risk to the UN and identifying an appropriate response. Security Risk Management involves four key strategies: controlling, avoiding, transferring and accepting security risk. Security risks are controlled through prevention (lowering the likelihood) and mitigation (lowering the impact).' UNDSS 2017, Chapter IV: Security Management—A. Policy on Security Risk Management (SRM), para 14.

7.4 The Content of the Duty of Care: Analysis of Policies and Practices

The UN has a legal and moral obligation to provide a standard of care 'to ensure that the health, well-being, security and lives of their staff, without any discrimination whatsoever, will not be subject to undue risk'[43] Moreover, since staff is subject to assignment, the organization 'should take measures to ensure that they are properly advised, before departure, of conditions prevailing at the duty station to which they are assigned'.[44] The Task Force on the duty of care has identified several factors affecting the duty of care[45] of the organization (Fig. 7.2).

Against such background, the following action points can be broadly identified as tools for meeting the duty of care:

(a) Preventive and mitigating measures for the health, well-being and safety of UN personnel, their dependants and their property
(b) Adequate and effective medical services in cases of emergency and their aftermath
(c) Information, awareness and training
(d) Staff care and support
(e) Contractual issues
(f) Reasonable care in selecting private contractors and in maintaining a sufficiently close supervision over their work
(g) Mechanisms for redress
(h) Functional protection and,
(i) Extent of protection in cases of expulsion from a host member State.

7.4.1 Preventive and Mitigating Measures for the Health, Well-Being and Safety of UN Personnel and Their Dependants and Their Property

Through the structured process of the SRM,[46] future harmful events ('threats') that may affect the achievement of UN objectives are to be identified. SRM involves four key strategies: controlling, avoiding, transferring and accepting security risk. Security risks are controlled through prevention (lowering the likelihood) and

[43] International Civil Service Commission 2013, para 41.

[44] UN 2016b.

[45] CEB 2017a, p. 8.

[46] The SRM process aims to be: (a) Objective, fact-based, logical and systematic; (b) Globally applicable in a consistent, de-politicised manner; (c) Reliable (achieve similar results when different people use it); (d) Valid (accurately represent the security environment on the ground), and (e) User-friendly without being over-simplistic.

Fig. 7.2 Factors affecting the duty of care [*Source* CEB 2017b, p. 9.]

mitigation (lowering the impact). In the SRM process, likelihood and impact are assessed on a 1–5 scale and combined in a risk matrix. In environments of high and very high security risk, the UN Programme Criticality (PC) Framework—a component of the UNSMS—is implemented as a mandatory policy of the organization. The Framework establishes the guiding principles and a structured approach for conducting Programme Criticality assessments. The results of such assessments are applied through the SRM process to weight programmatic and mandated priorities against the security risks.[47]

[47] The PC was identified in 2009 as one of the tools to assess acceptable risks. Further in 2010, the HLCM established a 'Programme Criticality Working Group' (PCWG) with the goal to 'define four levels of programme criticality and to develop a common framework for informing decision making within the guidelines of acceptable risk'. In October 2011, the HLCM and CEB approved the initial Programme Criticality Framework. In March 2013, the HLCM approved a revised Programme Criticality Framework. In 2014, an independent review of the Programme Criticality Framework was undertaken. This gave evidence of the positive influence of the PC on the United Nations' ability to implement its activities under difficult security circumstances. It concurrently recommended the design of a more robust system of support and oversight of Programme Criticality assessments, the full integration of Programme Criticality into the processes of all UN entities, and the full embedment of Programme Criticality decisions within the UN Security Management System (UNSMS) at country level. In January 2016, the UN Secretary-General's Policy Committee reaffirmed that the Programme Criticality Framework should be implemented as a mandatory policy of the organization in areas where present security risk levels are high or above high, and that the CEB-endorsed methodology should be used. In October 2016, the HLCM approved the latest revision of the Programme Criticality Framework that incorporates the

The approach to risk-based decision-making in meeting the duty of care is complementary to the UNSMS acceptable risk model. As part of the work of the Task Force on the Duty of Care there is the task of developing a Duty of care-specific risk management framework that captures not only security threat and risk assessment but also other factors (Fig. 7.2) that affect the duty of care to UN personnel in an actionable way and establishes a clear accountability framework (based on the UNSMS model).[48]

The MOSS is the primary mechanism for managing and mitigating security risks to the personnel, property and assets of the organizations of the UN system. MOSS, that applies for all staff, encompasses a set of measures aimed at reducing the level of risk to acceptable and manageable levels in fields such as: telecommunications, documentation, coordination mechanisms, medical, equipment, vehicles, premises, training and residential security measures (RSMs).[49]

Based on a security risk management process that reasonably justifies the existence of a 'partial or total breakdown of law and order resulting in increased criminal activity,' RSMs can also be approved at a given duty station as an add-on to MOSS. They may be approved to enhance residential security and can include residential security advice and training, procedures and restrictions, and the installation of security enhancements in or around residences. RSMs do not constitute a set of baseline measures to be applied uniformly across all duty stations. They may vary across duty stations depending on the residential security risk environment and they are only applicable to 'internationally-recruited or internationally-deployed individuals'[50] and to their eligible family members residing with such personnel at the duty station or installed at an Administrative Place of Assignment (APA) by the respective parent organization where RSMs have been approved. The RSM measures have financial implications that increase with the increased vulnerability of the environment. There are no RSMs for national staff or for unarmed uniformed personnel such as Military Liaison Officers. As highlighted in the Brahimi high-level panel report, this 'generates a sense of inequity in the system'.[51]

There are various security measures that can be enacted for reducing the risk to acceptable levels to allow the UN to continue operations. These can entail the possibility of temporarily removing persons or assets from a situation of

decisions by the Secretary-General's Policy Committee on Programme Criticality and takes into account advances made in UNSMS with the roll-out of the new SRM process. See CEB 2016d.

[48] CEB 2017a, pp. 7, 10, 24.

[49] For a detailed account of the specific measures under each of the above categories refer to UNDSS 2017, Chapter IV Section N, Policy for United Nations Minimum Operating Security Standards (MOSS), pp. 125–140.

[50] UNDSS 2011.

[51] UN 2008, para 314.

unacceptable residual risk through alternate work modalities[52] or relocation or evacuation.[53]

The UN Staff Regulation 1.2(c) establishes that the 'Secretary-General shall seek to ensure, having regard to the circumstances, that all necessary safety and security arrangements are made for staff carrying out the responsibilities entrusted to them.' In order to exercise such a duty, and for taking measures to also '*ensure that staff is properly advised, before departure*, of conditions prevailing at the duty station to which they are assigned'[54] or are travelling to, a mandatory system of security clearance for all official travel[55] before it commences, regardless of the location, is in place for UN system personnel and eligible family members. This also entails receiving security information and advice related to the specific destination prior to travelling and obtaining a security briefing upon arrival. Personal travel, including for annual leave, is not official travel and does not require security clearance. However, all UN system personnel and/or eligible family members going on personal travel can register their personal travel in the Travel request Information process (TRIP). In the event of an emergency or crisis, they can receive security support by the local UNSM, provided it has the capacity to do so at the time of the crisis.

A systematic review of relevant jurisprudence of different international administrative tribunals also supports that the duty of care, *inter alia,* encompasses the obligation of:

- both employee and employer to act in good faith towards each other. Good faith includes acting rationally, fairly, honestly and in accordance with the obligations of due process;[56]

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[52] 'Alternate Work Modalities' are measures that limit or totally remove the number of personnel or family members at a specific location(s), short of official relocation or evacuation, so as to limit or remove their exposure to a sudden situation that creates unacceptable residual risk.'

[53] Relocation is the official movement of any personnel or eligible dependant from their normal place of assignment or place of work to another location within their country of assignment for the purpose of avoiding unacceptable risk. Evacuation is the official movement of any personnel or eligible dependant from their place of assignment to a location outside of their country of assignment (safe haven country, home country or third country) for the purpose of avoiding unacceptable risk. Evacuation can be applied only to internationally recruited personnel and their eligible family members. Locally-recruited personnel and/or their eligible family members may be evacuated from a duty station only in the most exceptional cases in which their security is endangered as a direct consequence of their employment by organizations of the UN common system. A decision in this regard can only be made by the Secretary-General.

[54] UN 2002b, p. 16. Emphasis added.

[55] The Policy on security clearance indicates that 'official travel includes official home leave or other entitlement travel where the cost of travel is borne by organizations of the United Nations system. This applies regardless of whether official travel is undertaken by air, sea, land or any combination thereof.' UNSMS, Chapter V: Compliance with Security Policies and Procedures—A. Security Clearance Procedures and TRIP, para 31.

[56] UNDT, James v. the Secretary-General of the United Nations, 30 September 2009, Judgment No. 25, (see Annex II, Case 41).

- creating working conditions conducive to the employee's health;[57]
- protecting staff members and not putting them in dangerous situations, if these can be avoided;[58]
- exercising reasonable care in every aspect of its activity that impinges upon the safety, health and security of its staff.[59]

However, though sound procedures are in place to ensure health, well-being and safety of UN personnel and their dependants, practice and compliance with them is sometimes uneven.

A recent review of Safety and Security in the UN conducted by the JIU in 2016[60] revealed deficiencies in the implementation of safety and security policies, especially in the field that resulted in many instances in a breach of the organization's obligation as an employer to comply with international labour standards on occupational safety and health including the ILO Occupational Safety and Health Convention 155 of 1981. Illustrative examples in this regard relate to the insufficient implementation of road safety procedures and a lack of basic safety and regulations in place. The lack of a security culture was also identified as a common cause for residential security issues. In some duty stations where physical security and standard procedures were in place, staff considered them just an addition to the existing bureaucratic system of regulations and frequently challenged them. In some countries a minimal analysis of the operating environment was registered together with inconsistent application of UNSMS security standards in particular in relation to UN-approved residences and enactment of monitoring and oversight mechanisms and procedures. One of the main issues remains therefore the consistent implementation and enforcement of security and safety policies and procedures in place.[61]

UNFPA enacted a good practice to work towards such aim. Mandatory security training was included as part of the performance appraisal and development system for all staff at all levels, including a central facility for compliance monitoring. UNHCR has also issued guidance to managers operating in high-risk environments to insert safety and security in the assessment of performance of staff.[62]

[57] UNDT, Edwards v. the Secretary-General of the United Nations, 26 January 2011, Judgment No. 22 (see Annex II, Case 39). Refer to Burton 2010 for an account of healthy workplace-related practices.

[58] UNAT, Mwangi v. the Secretary-General of the United Nations, 30 September 2003, Judgment No. 1125, (see Annex II, Case 38).

[59] AsDBAT, Cynthia M. Bares et al. v. ADB, 31 May 1995, Decision No. 5 (see Annex II, Case 2).

[60] Flores Callejas and Wesley Cazeau 2016.

[61] Ibid., p. 12.

[62] Ibid., p. 16. For an account of recurrent security management issues of UNHCR field operations, see OIOS 2016.

7.4.2 *Adequate and Effective Medical Services in Cases of Emergency and in Their Aftermath*

A component of the duty of care of the UN towards its staff consists of the provision of adequate and effective medical services, in particular should an emergency occur and in its aftermath. Such responsibility has been repeatedly underlined by the UNAT in some of its pronouncements whereby the Tribunal has referred to the obligation of 'securing prompt and adequate treatment for those serving in hazardous duty stations in the event of medical emergencies[63] and taking adequate and timely action to effect a medical evacuation in a life-threatening situation.[64] Also, the organization has the duty to make extreme medical emergency decisions so as to provide the greatest opportunity to recover fully from any injury to physical or mental health that resulted from service.[65]

The manner in which medical services in the UN system are provided, managed, supported and monitored, influences the way the UN fulfils its duty of care with regard to the health and safety of staff. The High-Level Working Group underlined in its final report that, in many high-risk environments, 'medical support was described as being inadequate or unavailable, with erratic standards of medical care and overreliance on external medical providers'. It recommended in this regard 'developing and mainstreaming an occupational health risk management approach, through the adoption of a health risk analysis and mapping methodology and the implementation of systematic health support planning.'[66] The High-Level Working Group also underlined the critical challenges related to the living and working conditions of UN staff, especially in start-up missions, considering that while some organizations have implemented internal policies on global staff accommodation, UN system-wide standards in this area have not yet been developed. Currently, the Task Force on the Duty of Care is working on the definition of consistent standards on working and living conditions for personnel deployed in high risk environments so as to frame common minimum standards in this field accompanied by a set of technical guidelines compliant with MOSS/MORSS including accountability mechanisms for managers.[67] A tool has also been standardised and validated for capturing health risks in duty stations (health risk methodology).[68] The Task force is also focusing its work on the implementation of a systematic health support plan in all high-risk duty stations. The Health Support Plan—developed together with

[63] UNAT, Hjelmqvist v. the Secretary-General of the United Nations, 31 July 1998, Judgment No. 872 (see Annex II, Case 37); UNAT, Durand v. the Secretary-General of the United Nations, 19 August 2005, Judgment No. 1204 (see Annex II, Case 36).

[64] UNAT, Applicant v. the Secretary-General of the United Nations, 23 November 2005, Judgment No. 1273.

[65] UNAT, Hjelmqvist.

[66] CEB 2016c, para 107.

[67] CEB 2017a, p. 15.

[68] Ibid., p. 16.

each country team and the UN medical directors of each UN system agency—is meant to provide plans for level 1 care, level 2 care, level 3 care, including contingency plans and for medical evacuation. The Health Support Plan aims also at ensuring that the care documented in the same plan is covered by the staff health insurance policies.

The plan, based on the health risk assessment methodology, is also accompanied by the establishment of an overarching UN psychosocial and Healthcare policy framework aimed at addressing all aspects of mental health and wellbeing. This should be done through the development of a comprehensive Mental Health and Well-being Strategy document and a companion explanatory document for all staff in any type of setting.[69]

7.4.3 *Towards a Culture of Security: Information, Awareness and Training*

One component of the obligations stemming from the duty of care of the UN vis-à-vis its staff is awareness raising: staff need to receive detailed up-to-date information and guidance and training related to the risks they are exposed to.

The UN must ensure that its personnel, regardless of contractual status are given the resources and information necessary to undertake their duties in a secure manner, including information on the security resources available to respond to different risks. The MOSS require that all new UN personnel and recognised dependants be provided with security relevant information: e.g. country-specific security orientation briefing; an excerpt of the country security and evacuation plans; relevant country security plans, SOPs and policies, copy of the MOSS and RSMs, information on the medical arrangements available and their accessibility also in emergency cases, and a copy of the Country PEP protocol.[70]

The development of a comprehensive standardised pre-deployment management package for staff and their dependents that should include resilience briefing, risk disclosure, medical preparedness (vaccinations, establishment of medical supplies etc.) and family briefing, and security training has also been recently recommended by the High-Level Working Group as an additional instrument to provide key information to staff before actual deployment to high risk areas. This because a recurrent issue raised during consultations with staff is their frustration with the inability to often get up-to-date information related to the risks they might face in

[69] CEB 2017a, pp. 18–19.

[70] The UN operates in different security scenarios that require diverse types and means of security information provision. Usually, the decision to set up information provision mechanisms is taken by the local Security Management Team. In various field locations Security Information Operation Centres (SIOC) have been established as facilities for managing security issues in given operational areas. The SIOC operates 24/7 and provides information and advice on security-related incidents, and gathers information from different sources, including staff.

their new duty station or function. Also, the current approach through the UN system agencies is piecemeal and influenced both by the sending organization's practices and the specific location from where staff is deploying. For staff being deployed from and through headquarters, in most instances agencies provide for pre-deployment briefings and medical kits. This however does not apply from elsewhere in a consistent manner. To this end, a draft comprehensive pre-deployment package for staff and their family is currently being developed by the Task Force on the Duty of Care. Such a tool should provide some elements of guidance common to all UN agencies while other aspects will necessarily be agency-specific to reflect individual policies, procedures and arrangements of each entity. Along the same lines, some materials will be generally applicable to all duty stations while others will be location-specific. Some parts of the package will be mandatory, others optional.[71]

In 2016, the UNSMS promulgated a policy 'Gender considerations in Security Management' for promoting the understanding by all UN security personnel of gender-specific risks for different groups of individuals, as well as the need for gender-sensitivity and gender-responsiveness in all aspects of the security management process. One component of such 'Gender Considerations' in the UNSMS is the Women's Security Awareness Training (WSAT). The training is designed to focus specifically on issues with direct and unique impacts on the safety and security of female personnel. Approximately 700 women underwent the WSAT in 2017. Further, several trainings for trainers were also conducted to enable these trainers to conduct WSAT training in field locations.[72]

The UN has in place a system of online and face to face security trainings that are mandatory for *all staff*, the self-administered learning programme entitled 'Basic security in the field: staff safety, health and welfare;[73] *for staff going to non-headquarters duty stations and missions*, the online self-administered learning programme Advanced Security in the Field;[74] and *for staff operating in* areas classified by DSS as *high-risk environments*, Safe and Secure Approaches in Field Environments (SSAFE), an instructor-led in-person course designed to achieve a global standard for UN staff operating in high-risk environments. The certificates for the basic and advanced security learning programmes are valid for three years, after which the individual must re-certify.

[71] CEB 2017a, p. 12.

[72] UNDSS 2017, Chapter IV: Security Management—M. Gender Considerations in Security Management, pp. 120 ff.

[73] UN 2003b, para 2.2.

[74] UNDSS 2017, Chapter V: Compliance with Security Policies and Procedures—C. Security Training and Certification, para 12.

7.4.4 Staff Care and Support

The increased presence of UN programmes and operations in extremely volatile security environments has brought to a considerable intensification of the possibility of staff exposition to stress and critical incident stress. As part of its duty of care as an employer, the UN has an obligation to enact preventive and mitigating measures to support staff in such endeavours. The study conducted within the framework of the High-level Committee on Management also explored such aspects revealing that many initiatives have been taken by the UN system particularly with respect to support for family and victims. In 2010, an emergency preparedness and support team was created within the UN Secretariat as an entity dedicated to supporting staff. A robust counselling facility, coordinated by the Critical Incident Stress Management Unit (CISMU) of the DSS, was also established. Other initiatives have encompassed the deployment of a medical emergency response team; the streamlining of procedures to settle compensation claims; the establishment of a UN memorial recognition fund and; support measures for educational assistance for surviving children. The same study also proved however, that the current system focuses more on mitigation rather than prevention, with many differences in the practice of the various UN system organizations. This is particularly true with regard to medical and psychosocial support. Post-crisis stress management and counselling services should be delivered in a timely manner to needy staff. Some UNSMS organizations have a comprehensive set of services relating to crisis preparedness and follow-up. Others rely on the services provided by the DSS, local UN staff and, in some specific cases, consultants and/or through the CISMU. In June 2015 a management of stress and critical incident stress policy was also adopted by the IASMN to enhance the coordination between the Unit, UNSMS stress counsellors and security professionals in the provision of psychosocial services.

The Office of the UN Ombudsman and Mediation Services[75] has also been examining the special needs of staff serving in dangerous duty stations.[76] In noting that increasingly, the organization is deploying staff members to high-risk environments, where they are exposed to a host of tangible threats, such as violent attacks, insecurity, accidents and disease, the Office has indicated that 'staff members may not be fully informed of the risks that are involved before going to serve in dangerous regions', and 'even if they are aware, they may not have a

[75] *Infra* Sect. 7.4.7. Such activity is carried out when gathering facts and analysing issues brought by individuals, whereby the Office also discerns trends and identifies systemic issues underlying conflicts. These are the brought to the attention of the organization's management on an on-going basis in accordance with UNGA Resolution 64/233 (2009), in which the Assembly emphasised that the role of the Ombudsman was to report on broad systemic issues that he or she identified, as well as issues that were brought to his or her attention. The General Assembly, in UNGA Resolution 70/112 (2015), encouraged the continued involvement of the Office in the progressive development and refinement of human resources policies and practices.

[76] UN 2016a, para 17.

realistic assessment of their ability to cope'.[77] When such exposure continues over an extended period of time, it also presents a risk to mental health and wellbeing owing to high stress, lack of social support systems, inadequate medical care and extremely rudimentary living conditions. The Office has stressed in this regard 'it is a normal assumption that the organization is responsible for providing support infrastructure and is mindful not to expose its staff to undue risks and dangers. There is an organizational obligation to support the resilience of staff, which in some of today's environments is being seriously tested. Special attention may therefore be called for at the workforce planning stage and during screening for some mission assignments. There is also a need to consider a regimen of institutionalized support and rotation for staff in volatile work environments'.[78] The Office also suggested to look for 'opportunities to review some human resources and other operational processes, practices and policies to ensure that staff posted in dangerous and/or remote duty stations are adequately prepared and supported to protect their well-being',[79] by for example establishing a ceiling on the time a staff member can spend in a high-risk environment and providing adequate psychosocial support and pre-mission full-disclosure briefings on the risks and safeguards.[80]

In its analysis of systemic conflict, the Ombudsman's office has also flagged another important risk faced by staff, especially in dangerous duty stations and related to physical injury or disability. For such situations, there are existing avenues of support or compensation. However, there is often a lack of awareness among staff in general and those who work in administrative, human resources, medical or security roles about the process and requirements for filing such claims, including those falling under Appendix D to the UN Staff Rules and Regulations.[81] In order to process such benefits there is normally a chain of documents and approvals necessary for the payments to become effective, some of which are handled through different offices in the Secretariat and others through the Pension Fund. Those processes can be confusing and obscure and one of the recommendations that has been stressed is encouraging the organization to look at means of enhancing awareness among human resources staff in the field regarding compensation claims and pension benefits (disability pension and survivor's benefits) and of designating specific focal points that can assist and follow through on such matters.[82]

[77] Ibid., para 75.

[78] Ibid., para 76.

[79] Ibid., para 79.

[80] Ibid., paras 58–65.

[81] UN 2016e, Appendix D, Rules governing compensation in the event of death, injury or illness attributable to the performance of official duties on behalf of the United Nations.

[82] Ibid., para 65.

7.4.5 The Duty of Care and Contractual Issues—Special Provisions and Established Allowances

A set of special allowances have been introduced over the years to compensate for the hardship and risks incurred by staff for working in an increasingly dangerous, complex and challenging environment where the UN is striving to consolidate international efforts to provide solutions to conflicts and tensions. Such instruments and arrangements are varied and do not always apply to all staff irrespective of conditions of service (national, international, UN Volunteer (UNV), consultants etc.). In this respect, there have already been several initiatives towards bridging the gap in the degree and nature of protection offered to international versus national staff. In certain duty stations, local staff are undoubtedly subject to additional risks for the mere fact of working for the UN and the risks are more cogent when they commute to their workplace and in particular while at their habitual residences. The diversity of contractual arrangements inevitably affects the safety and security of personnel by creating groups of staff with different coverage, entitlements and arrangements. The Task Force on the Duty of Care is currently working on a review of compensation, benefits and entitlement of different categories of staff operating in high-risk environments in particular to ascertain whether national staff are sufficiently protected.[83] An overview of the different entitlements is proposed to give an overall picture of the several co-existing contractual caveats.

Danger pay is a special allowance granted to internationally and locally recruited staff required to work in very dangerous duty stations[84] It is an entitlement payable irrespective of whether the staff concerned is required to report for duty.[85]

Danger pay has been considered one of the compensation mechanisms that 'most vividly highlighted the disparity in the level of remuneration between international and national staff. This vividness stems from the rationale of the payment itself and gives rise to the perception that the organization considers some lives monetarily more valuable than others'.[86]

UN Staff Rules and Regulations foresee that personnel requested to perform 'for extended periods at duty stations under hazardous, stressful and difficult conditions shall be granted regular periods of *rest and recuperation (R&R)*'.[87] This for the protection of their health and well-being and 'to ensure optimal work performance

[83] CEB 2017a, p. 14.

[84] Information can be found at the following link: https://icsc.un.org/secretariat/hrpd.asp?include=dp. Accessed on 3 October 2017.

[85] Ibid.

[86] CEB 2016b, para 43. This relates to the different system of calculation of the allowance for national and international staff. Indeed, for internationally-recruited staff, the amount is currently set at US$1,600 per month. For locally-recruited staff members serving in designated locations, the allowance is calculated locally at the rate of 30 per cent of the net midpoint of the applicable 2012 local General Service salary scale (excluding possible long-service and longevity steps).

[87] UN 2011, para 1.1.

upon the resumption of their duties, while preserving the operational readiness of the organization'.[88] As a rule, all staff members that have international status, including UNVs appointed or on travel status to the duty station, are granted such possibility.[89] For locally recruited staff, they are only entitled to R&R if they are on travel status to the duty station approved for rest and recuperation purposes, provided the duty station is in a country other than the country of the parent duty station. The benefit of rest and recuperation does not extend to family members who are authorised to be present at duty stations approved for rest and recuperation purposes. Duty stations eligible for R&R are designated each year and circulated through an Information Circular.[90]

A *hardship allowance* is granted to compensate for the degree of hardship experienced by internationally recruited staff on an assignment for minimum one year in hardship duty stations. Other categories of personnel—namely international staff on short-term assignment to the duty station, international staff in receipt of a daily subsistence allowance (DSA), UNVs, consultants, contractors under Special Service Agreements (SSAs) and locally recruited staff—are excluded from such entitlement.[91]

The *UN Malicious Acts Insurance Policy (MAIP)* has been in place since 1990 being expanded and developed over the years to include additional countries (now the coverage is worldwide while initially it was limited only to those duty stations classified as hazardous by DSS). The policy covers all national and international designated UN contract holders, consultants and official visitors across 21 out of 24 agencies, funds and programmes. The cost sharing that each participating agency has to pay is determined by the level of risk in the country of operations, the number of personnel deployed in that location and the grades of personnel. MAIP covers death or permanent disability (total or partial) caused directly or indirectly by war or a malicious act.[92] Since 2006, permanent disabilities brought about by chronic Post Traumatic Stress Disorder (PTSD), caused directly or indirectly by war or a malicious act, are also covered.[93]

Appendix D of the UN Staff Rules details the 'Rules Governing Compensation in the Event of Death, Injury or Illness Attributable to the Performance of Official Duties on Behalf of the United Nations'. It applies equally to national and international staff members, based on their contract, length of service and pension fund scheme.[94]

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[88] Ibid.

[89] Ibid., para 1.4.

[90] Ibid., paras 2.1–2.3.

[91] UN 2016e, Rule 3.14.

[92] A malicious act means hostilities, revolution, rebellion, insurrection, riots or civil commotion, sabotage, explosion of war weapons, terrorism, murder or assault by foreign enemies or an attempt threat.

[93] UNOHRM-EPST 2012, pp. 76 ff.

[94] UN 2016e, Appendix D, Rules governing compensation in the event of death, injury or illness attributable to the performance of official duties on behalf of the United Nations.

The UN Staff Rules and Regulations also include a 'Death Benefit or Grant'. This is an immediate grant of one month's net pay for every year of service with a minimum grant of three months' pay and a maximum grant of nine months' pay. It is paid to the surviving dependants of staff members who have contracts of at least a year, or who have completed at least one year's service.[95]

Locally recruited staff is excluded from most of the compensation available to UN staff, apart from Malicious Acts Insurance. For this reason UN system organizations usually provide insurance for those falling outside the provisions of the Appendix D Compensation Plan in the event of death or disability from any cause. Such insurance may also be extended to internationally recruited non-staff such (e.g. consultants).[96]

7.4.6 Reasonable Care in Selecting Private Contractors and in Maintaining a Sufficiently Close Supervision over Their Work

The UN has been availing itself of the services of private security companies for many years, mainly unarmed local contractors engaged to secure its premises, personnel and assets against criminal activities. However, in recent years, due to the increasing engagement in carrying out mandates and programmes in high-risk areas and the fact that the organization and its personnel have become more and more a direct target in some of these environments, there have been many instances in which, as a last resort, armed private security companies have been contracted to protect UN personnel, premises and assets. As specified by the Secretary-General in his report on the subject to the General Assembly, 'this has occurred where there was no other means to ensure the protection of UN personnel and operations by the Host Government, member States or the UN system'.[97]

Such a delegation of 'powers' to ensure the protection of staff and premises as a means of last resort has triggered the need to develop a common UN system-wide policy and guidelines for the proper use of such entities.

In May 2011 the Secretary-General established that the organization should resort to the use of armed private security companies and their personnel only as a final option to enable the Organisation to carry out activities in high-risk environments; that the UN should opt for those services only after a UN security risk assessment had considered other alternatives as insufficient; and that the use of an armed private security company 'should be consistent with national and international law, the Charter and relevant United Nations resolutions, including General Assembly resolution 55/232 on outsourcing practices, and relevant UN

[95] UN 2016e, Rule 3.19(h).

[96] CEB 2009, para 36.

[97] UN 2012, para 3.

administrative policies and guidelines'.[98] Moreover, the following criteria were established for such last resort use:

a. 'The decision to contract an armed private security company should be taken in accordance with existing approval processes and accountability mechanisms for all security-related decisions;
b. The United Nations should use services provided by armed private security companies only to cover guarding of personnel at United Nations facilities and mobile armed escorts;
c. An armed private security company contracted by the United Nations should come under the clear authority and direction of the appropriate organization of the United Nations system with specific policies and guidelines for the United Nations security management system;
d. In procuring the services of an armed private security company, the United Nations should ensure adherence to the Financial Regulations and Rules and procurement policies and procedures and should choose only companies that meet agreed criteria according to the established vetting standards and mechanisms.'[99]

A specific policy and guidelines 'governing the use of armed private security companies' was subsequently adopted in June 2012 by the Inter-Agency Security Management Working Group. The policy also contemplates the management and oversight responsibilities of the UN in line with the framework for accountability of the UNSMS. Indeed the use of armed private security companies as a means of last resort to protect personnel, premises and assets of the organization does not constitute a delegation of responsibilities for the duty of care of the organization vis-à-vis its staff. The Policy identifies the responsible senior security official, supported by the Security Management Team as the person in charge of supervising the work of the contractor and evaluating any potential negative impacts the contracting of armed security services from a private security company could have on the UN system and its programmes. The day-to-day management of the contract is the function of the UNSMS organization that has engaged the company and is also to assess its performance and identify and report potential issues that might have a negative impact.[100] The Framework for Accountability also applies in this regard.

The elements of reasonable care in the choice of a private security contractor and the exercise of reasonable supervision are important for the UN to discharge its duty of care in the provision of security through the employment of a private security company, as clearly stressed in the Guidelines. A failure to do so would be a dereliction of duty and thus a violation of the obligations vis-à-vis the protection of its personnel. These important elements (e.g. the reasonable care in the selection of the company and the continuous supervisory role) were singled out in a

[98] Ibid., para 8.

[99] Ibid., para 9.

[100] UNDSS 2017, Chapter IV—I. Armed Private Security Companies, paras 16 and 27–29.

pronouncement of the Asian Development Bank Administrative Tribunal in the *Bares* case where the Tribunal affirmed that 'the Bank must exercise reasonable care in the selection of the contractor and then maintain a sufficiently close supervision over the latter to ensure that the latter itself uses reasonable care.'[101]

The Guidelines also contain as an annex a model contract for the provision of security services by armed security companies. One provision under Article 4 relating to the General Responsibilities of the Contractor specifically establishes that the contractor shall abide by the provisions contained in the International Code of Conduct for Private Security Providers of 9 November 2010 even if the concerned contractor is not a signatory company to the Code.[102] Such a specification in the contract clauses is of utmost importance since in providing their services, the activities of private security contractors can have potentially both positive and negative consequences for their clients, the local population in the area of operation, the general security environment, the enjoyment of human rights and the rule of law. With such reference to the International Code of Conduct as set of rules to be respected, the UN in the exercise of its duty of care for its employees requires a commitment to the responsible provision of security services that supports the rule of law, respects the human rights of all persons (personnel, clients, suppliers, shareholders, and the population of the area in which services are provided), and protects the interests of clients (the UN and its personnel).[103] A specific provision of the Code focuses on liabilities and established that companies have to ensure that they have

> sufficient financial capacity in place at all times to meet reasonably anticipated commercial liabilities for damages to any person in respect of personal injury, death or damage to property. Sufficient financial capacity may be met by customer commitments, adequate insurance coverage, (such as by employer's liability and public liability coverage appropriately sized for the scale and scope of operations of the Signatory Company) or self insurance/retention […].[104]

7.4.7 Mechanisms for Redress

One component of the duty of care of the UN as an employer relates to the 'obligation to have sound administrative procedures, to act in good faith and to have proper functioning internal investigation mechanism to address requests and complaints by the employee within reasonable time'. The Staff Regulations and

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[101] AsDBAT, Cynthia M. Bares et al. v. ADB, 31 May 1995, Decision No. 5, para 26 (see Annex II case n. 2).

[102] UNDSS 2017, Chapter IV—I. Armed Private Security Companies, Annex B—*Model Contract,* Article 4.3.

[103] International Code of Conduct Association 2010.

[104] Ibid., para 69.

Rules of the Organization[105] contemplate such procedures in Article XI entitled 'Appeals'. Regulation 11.1 describes the system of administration of justice of the organization composed of: the UN Dispute Tribunal tasked with hearing and rendering judgment on an application from a staff member alleging non-compliance with his or her terms of appointment or the contract of employment, including all pertinent regulations and rules, and; the UN Appeals Tribunal that exercises appellate jurisdiction over an appeal of a judgment rendered by the lower tribunal.[106] The procedures for addressing such judicial avenues are further detailed in Rules 11.4 and 11.5. Rule 11.2 provides for the management evaluation of administrative decisions through a request to the Secretary-General entailing that a staff member wishing to contest formally an administrative decision alleging non-compliance with his/her contract of employment or terms of appointment can address the Secretary-General as a first step.[107]

Rule 11.1 further establishes avenues of informal resolution of disputes through the Office of the Ombudsman.[108] The Office of the UN Ombudsman and Mediation Services provides confidential and impartial assistance with the aim of resolving a wide range of workplace issues and disputes. It serves staff globally, including at headquarters duty stations and in field operations. Issues concerning safety, health, well-being and physical environment comprised 12 per cent of total issues raised by staff in field missions, compared with 7 per cent for staff at Headquarters during 2015.[109]

7.4.8 Functional Protection

The UN has 'the capacity to exercise a measure of functional protection of its agents'[110] broadly analogous to the right of a State to exercise diplomatic protection on behalf of its nationals.

Functional protection arises as an 'implied power of the organization necessary for the fulfilment of the organization's functions. As such it is a limited power

[105] UN 2016e, Article XI.

[106] Ibid., Chapter XI.

[107] Ibid.

[108] Ibid.

[109] UN 2015, paras 74–79.

[110] ICJ, Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 11 April 1949, I.C.J. Rep. 174, p. 184. Article 1 of the ILC Draft Articles on Diplomatic Protection defines diplomatic protection as 'the invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility.' UN 2006, p. 24.

extending only insofar as it is required to allow the agent to perform his or her duties successfully'.[111]

In Chap. 2 of this book, its author asserted that

> whenever the violation of the rights of citizens/officers concerns a person working in an international mission on behalf of the sending institution, this institution should use the tools available in the frame of diplomatic protection (such as a request for clarification, a request to stop the assumed illegal act, and even the adoption of peaceful countermeasures). Only by so doing would the sending organization properly discharge the duty of care it owes towards its citizen/officer, obviously provided that the person is suffering a violation of his/her rights and that there are no valid and credible arguments presented by the international organization not to do so.[112]

While there are no available statistics of instances in which the UN has exercised such a measure on behalf of staff in specific situations, it is worth mentioning in this endeavour that the organization has a procedure in place to gather information and to follow up on the arrest or detention of staff members, other agents of the UN and members of their families.

Administrative Instruction ST/AI/299 of 10 December 1982[113] establishes a procedure for informing immediately the UN Headquarters of such incidents after they take place and has precisely the purpose of enabling the UN to safeguard its legal rights in such situations and to discharge its obligations to the staff, other agents and family members concerned. The procedure also applies in the case of staff members who have disappeared or have been killed. Annex I to this Administrative Instruction contains a Memorandum on the UN legal rights when a staff member or other agent of the organization, or a member of their family, is arrested or detained.[114]

The Memorandum, after having restated that 'all United Nations officials and experts on mission for the United Nations are immune from legal process in respect of words spoken or written and all acts performed by them in their official capacity'[115] *inter alia* specifies that 'the position of the United Nations is that it is exclusively for the Secretary-General to determine the extent of the duties and functions of United Nations officials and of experts on mission for the United Nations'.[116] This means that the determination whether a given act was official or not, is a prerogative of the sending organization and not of the member State at stake. Moreover, the Memorandum recalls the *Reparation for Injuries* Advisory Opinion stating that the Court established

> that in the event an agent of the United Nations in the performance of his duties should suffer injury in circumstances involving the responsibility of a State, the United Nations has the legal capacity to bring an international claim against the responsible State with a view to

[111] UN 2016c, para 27, p. 394.
[112] See Chap. 2.
[113] UN 1982.
[114] Ibid., Annex I.
[115] Ibid., p. 4.
[116] Ibid., p. 5.

obtaining the reparation due in respect of the damage caused both to the United Nations and to the victim or persons entitled through him.[…].[117]

The Memorandum re-emphasises that any such claim brought by the UN must be based on a breach of obligations due to the organization. Hence, the UN has a 'right of functional protection of those of its staff members or other agents in respect of whom a State possibly may have violated its international obligations'.[118] Information on the arrest or detention of UN or other personnel is contained in reports of the Secretary-General to the General Assembly. The latest information reported in this regard counted 102 personnel detained or arrested in 2016. Another 53 personnel were arrested during the first six months of 2017.[119] The majority of arrests relate to violations of local laws.

7.4.9 *Extent of Protection in Cases of Expulsion from a Host Member State*

A corollary obligation of the duty of care of the UN *vis-à-vis* its personnel also implies the extent of protective measures in cases of expulsion or declaration of *persona non grata* of UN staff. In these cases the jurisprudence of administrative tribunals goes in the direction of affirming that the organization has the obligation to take steps to alleviate the predicament in which the staff member finds himself/herself following his/her expulsion from the host country through no fault of his or hers.[120]

The (old) UN Administrative Tribunal specified in the *Mwangi* judgement that the 'United Nations, as an exemplary employer, […] is expected to treat staff members with the respect they deserve, including the respect for their well-being'. Further, in the *Durand* case, the (old) UN Administrative Tribunal, in reconstructing the obligations composing the duty of care of an international organization as employer by elaborating upon the relevant tribunal(s)' case law, quoted the *Bares* decision by the Asian Development Bank Administrative Tribunal (AsDBAT) to signify that the duty of care has also been expanded to the agents and representatives of the international organization and that '[t]he employment of a contractor does not reduce the level of care to which the staff member is entitled under the contract of employment.'[121]

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[117] Ibid.

[118] Ibid.

[119] UN Secretary-General 2017a, para 24.

[120] UNDT, Hassouna v. the Secretary-General of the United Nations, 10 July 2014, Judgment No. 094, (Annex II, Case 40); UNDT, Tal v. the Secretary General of the United Nations, Order on an Application for Suspension of Action pursuant to article 13 of the Rules of Procedure n. 51, 15 June 2017.

[121] Ibid., para 26.

In two recent cases before the UNDT, the Tribunal analysed specifically how the duty of care of the organization translated to legal obligations of the UN towards staff members placed on *persona non grata* (PNG) status by a host member State. In this endeavour, in the *Houssana* judgment, the UNDT affirmed that 'in the case of a staff member who has been declared *persona non grata* and the host country is not forthcoming with information as to the basis for his/her expulsion or the reasons, if any, do not justify a PNG decision, […] a change in the terms and conditions of the staff member's contract or non-renewal is not an option open to the Secretary-General.' The Tribunal specified 'under such circumstances it is the duty of the organization to take steps to alleviate the predicament in which the staff member finds himself/herself following his/her expulsion from the host country.'[122]

In the *Tal v. Secretary General* Order on an Application for Suspension of Action, the Tribunal restated that it is the duty of the organization to take steps to alleviate the predicament in which the staff member finds himself/herself following his/her expulsion from the host country through no fault of his or hers:

> This duty, forming part of a more general 'duty of care' discussed by UNAT in *Lauritzen*, in the face of *force majeure* must, however, be interpreted in consideration of balancing legitimate interests of the Organization and the staff member. And thus, the scope of the Organization's duty to alleviate predicaments concerning performing staff members' function will be greater with regard to staff holding permanent appointments with the Organization, as was the case in *Lauritzen*, where reciprocal interest in maintaining the employment relation is readily built into the terms of appointment. This duty will be more limited with regard to staff on fixed-term appointments.[123]

7.5 Consequences of Violations

It is a consolidated principle in the jurisprudence of administrative tribunals of international organizations that there is a violation of the duty of care when a conduct attributed to the organization as an employer amounts to a 'failure to comply with one of the terms of the staff member's employment or is contractual in nature'.[124]

In those instances where breaches of such type are ascertained, administrative tribunals have also allowed compensation—and where applicable—specified that the latter is not limited by the application of Appendix D or other contractual social security benefits.[125]

[122] UNDT, Hassouna, para 51.

[123] UNDT, Tal, para 54.

[124] UNAT, Durand, para XXVI

[125] Ibid.

In *Hjelmqvist,* the Applicant brought his claim to the Tribunal, alleging the organization's failure to evacuate him in a timely and reasonable way after he sustained a gunshot wound while performing his duties with the UN. The Tribunal awarded the Applicant three years' net-base salary, to be paid in addition to the amount to which he was entitled and did receive under Appendix D. In reaching its decision, the Tribunal relied on the 'breach of the Organization's duty of care to ensure the safety and protection of its staff members, a term of employment enjoyed by all staff members.'[126]

In the *Daw Than Tin* case,[127] the Tribunal also made an award in excess of the amount paid pursuant to Appendix D, based on the negligence of the organization with respect to another term of employment. In this case the Applicant was the widow of a staff member, who had died of a heart attack while serving the UN. The widow received entitlements under the Staff Rules as well as a widow's benefit under the UN Joint Staff Pension Fund but she had never been informed of her rights under Appendix D. The Tribunal considered the organization negligent in not rendering assistance to the widow and in failing to notify her of her rights under Appendix D and of the timeframe within which a claim under that Appendix had to be made.

In *Grasshoff*, the International Labour Organization Administrative Tribunal (ILOAT) also refused to be bound by the limits of Rule 720 (complementary to Appendix D) in the case of the organization's negligence in failing to ensure the safety and protection of a staff member and stated that the 'compensation appropriate to a breach of contract is indemnification for loss actually incurred as a result of that particular breach; it cannot, unless the contract expressly so provides, be settled according to a general tariff.'[128]

In the *Durand* case, the Tribunal also recognised as an exception to its general practice, the reimbursement of legal and procedural costs and compensation for the unreasonable delay with which the entire situation brought before the judicial organ was handled by the Respondent. It also considered 'inexcusable and yet another instance of the dilatory manner in which the matter was handled' the fact that the UN had not even reimbursed the applicants for the costs of the decedent's funeral and transportation expenses.[129]

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[126] Ibid., para XXVII. In the *Hjelmqvist* judgement, the Tribunal referred to the 'respondent's gross negligence in the handling of an extreme medical emergency arising in a situation known to be very dangerous to the applicant, which resulted in severe physical and psychological impairment for the applicant' (para XVIII).

[127] UNAT, Daw Than Tin v. the Secretary-General of the United Nations, 26 February 1991, Judgment No. 505, (Annex II, Case 35), paras IV–V.

[128] ILOAT, In re Grasshoff, para 6.

[129] UNAT, Durand, para XXXI.

7.6 Conclusions and Recommendations

The concept and legal contours of the duty of care of the UN as an employer are contained in a plethora of hard and soft law instruments, policies, regulations and rules, administrative instructions and other internal acts of the organization.

The very essence of such a duty is crystallised in Staff Regulation 1.2(c). The working definition adopted by the High-Level Working Group describes it as a duty incumbent on the organization to mitigate or otherwise address foreseeable risks that have the potential of harming or injuring its personnel and eligible family members and as an obligation of the same staff members of 'self-care' and an ensuing responsibility to comply with institutional rules and regulations.

The content of such obligations, as seen in the previous sections, is further outlined in Conventions, Administrative Instructions and SGBs, policies and manuals. The jurisprudence of Administrative Tribunals has moreover shed light on the extent of such moral and legal duties, by specifying their tenets through the analysis of specific cases.

A recent review of the Safety and Security in the UN System conducted by JIU in 2016 and the review carried out by the High-Level Working Group have upheld that, apart from selected critical areas that need further development and attention, the main issue at stake for ensuring the duty of care of the UN vis-à-vis its staff remains the *enforcement of compliance* with existing rules and policies. This 'compliance' challenge can be spelled out in the following elements:

(a) Security risk management should be seen an enabler and not an obstacle: **there is the need to reinforce a security culture**.
(b) Substantive management at all levels should ensure compliance with regulations and policies and should be held accountable for their implementation also through the **introduction in individual performance assessment mechanisms of provisions for the proper compliance with security regulations**.
(c) **Disciplinary measures** should be endured for maintaining the respect for security standards and mandatory prescriptions for staff to be followed.
(d) **Meeting the duty of care requires the identification of operational risks and their mitigation so that what remains are acceptable risks:** this requires the systematic use of a well-developed risk management framework beyond security towards personnel in high-risk environments.
(e) A sort of statement of '**Employer Responsibility**' should be prepared to display measures enacted by the UN to manage risk, duties of staff for risk mitigation, procedures in place to ensure that personnel and their dependants are cared for if an incident occurs.
(f) Guidelines for a standardised approach throughout the UN system as it relates to **common minimum qualitative and quantitative requirements for premises and equipment** should be developed.
(g) The issue of significant differences in the allowances, benefits and entitlements for **internationally recruited versus locally recruited personnel** should be

addressed so as to bridge the gap in the degree and nature of protection offered to different categories of staff.

(h) Although provisions exist for the **proper awareness, information and training of staff**, further measures should be enacted to make sure personnel are duly aware of potential risks at the duty station, and put in place preventive and mitigation measures, resilience toolkits, plans and procedures that are to be followed.

(i) **Preventive and mitigation measures for ensuring the health and well-being** of UN personnel and their dependents should be further strengthened through enhancing medical and psychological services both in terms of support services and communication of medical and psychological risks to staff.

(j) The so called '**transfer of risk**' to implementing partners (be they NGOs, contractors and other entities) to which organisations of the UN system assign the implementation of programme activities allocating them resources (funds and materials) to enable programme delivery mostly in areas considered 'off limits' for UN staff and its implications for the duty of care should be further addressed.[130]

The recently presented Report on Improving Security of Peacekeepers, drafted by a team headed by Lieutenant General (Ret.) Carlos Alberto dos Santos Cruz, appointed last November by the Secretary-General, highlights complementary issues.[131] The report, which has the aim to carry out an in-depth review of peacekeeping fatalities and injuries due to hostile acts, focuses upon improving the security of UN peacekeeping personnel. The four broad areas in which the UN and the member States should take action to reduce fatalities identified in the document are: (1) *changing mind-sets*, for making personnel aware of potential risks and empowering them to take the initiative to deter, prevent, and respond to attacks; (2) *improving capacity*, for equipping and training personnel to operate in hostile environments, and ensuring that missions have the assets and procedures needed to counter attacks and reduce fatalities and injuries; (3) *achieving a threat sensitive mission footprint* consistent with mission mandates and that limits the exposure of the mission to threat; and, (4) *enhancing accountability*, for making sure that those able to take action to prevent fatalities and injuries are placed before their responsibilities.[132] These aspects on which the organization and its member States are called to invest further testifies to the need to change the way the organization does business to ensure its duty of care vis-à-vis its personnel.

The work being carried out by the Task Force on the Duty of Care constitutes an additional effort towards the operationalization and enforcement of policies, procedures and measures towards ensuring that an adequate standard of care is provided for by the UN to ensure that the health, well-being, security and lives of staff are not subject to unnecessary risks.

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[130] On this issue of the transfer of risk, see also Jackson and Zyck 2016, pp. 56–57.

[131] For an analysis of the importance of ensuring safety and security of personnel in UN peacekeeping operations for fulfilling the Organization's duty of care, see Willmot 2015.

[132] UN Secretary-General 2017b.

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Chapter 8
Implementation of the Duty of Care by the European Union

Stefano Saluzzo

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Annex II—the Table of Cases—can be accessed online here: http://extras.springer.com/.

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A. de Guttry et al. (eds.), *The Duty of Care of International Organizations Towards Their Civilian Personnel*, https://doi.org/10.1007/978-94-6265-258-3_8

Abstract This chapter deals with the implementation of the duty of care within the European Union (EU). It examines the sources (both at the international and at the internal level) from which the duty of care is derived and its scope of application. Given the complex nature of the EU, a specific section is devoted to the distribution of tasks between the EU and its Member States, on the one hand, and the EU and third countries, on the other. This chapter also attempts to identify the various obligations flowing from the duty of care and gives some indications on how EU institutions act in the planning and the risk assessment phase. Moreover, it also describes the ways in which the administrative and judicial organs of the EU can intervene when a violation of the duty of care by the organization occurs. The final section presents a number of conclusions and recommendations aimed at improving the effectiveness of duty of care-related measures in the EU legal order.

Keywords European Union · duty of care · Staff Regulation · CSDP missions · European External Action Service · EU Delegations · Host State · Status of Mission Agreements · European Court of Justice

8.1 Introduction

The EU has one of most advanced systems of implementation of the duty of care towards its staff. It was one of the first organizations in the world to recognise and to regulate the duty of care in various internal instruments. Naturally, the peculiarities of the EU as a *sui generis* international organization have numerous consequences on the general rules of international law applicable in this context. This explains why the EU has preferred to enact a comprehensive internal system of rules aimed at guaranteeing the protection of its staff and personnel and, conversely, the lack of relevance of international norms in the practice of EU institutions as far as the duty of care is concerned.

8.2 Legal Sources

Within the EU legal order, there are multiple legal sources providing for the duty of care of EU institutions towards their staff, both of an internal and of an international nature. The former are by far the most relevant, as they encompass precise standards and measures that the EU has to adopt in implementing the duty of care. Nonetheless, international agreements concluded by the EU with third countries may also play a role in identifying the organs upon which the burden to ensure the duty of care is placed.

8.2.1 Internal Sources

General provisions on duty of care within the EU are to be found in the Staff Regulations[1] (SR), a body of law that governs the relationship between EU institutions and their personnel. Staff Regulations include a number of provisions dealing with the duty of care, in particular as far as remedies are concerned. Moreover, some provisions also set the general standard of duty of care applicable to EU staff in general. According to Article 1e(2) SR,

> Officials in active employment shall be accorded working conditions complying with appropriate health and safety standards at least equivalent to the minimum requirements applicable under measures adopted in these areas pursuant to the Treaties.

In addition, Article 24 SR provides for a specific duty of assistance, together with a general obligation of reparation on the part of EU institutions:

> 1. The Union shall assist any official, in particular in proceedings against any person perpetrating threats, insulting or defamatory acts or utterances, or any attack to person or property to which he or a member of his family is subjected by reason of his position or duties.
>
> 2. It shall jointly and severally compensate the official for damage suffered in such cases, in so far as the official did not either intentionally or through grave negligence cause damage and has been unable to obtain compensation from the person who did cause it.

The general rule enshrined in Article 1e(2) does not contain any substantive standard as regards the concrete implementation of the duty of care, but is limited to incorporating in the SR all the rules adopted by the EU—essentially by means of secondary legislation—in the field of safety and health in workplaces. The

[1] Regulation No 31 (EEC), 11 (EAEC), laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Economic Community and the European Atomic Energy Community, OJ P 45, 14 June 1962, with subsequent amendments, pp. 1385 ff. On the categories of EU staff to which the Staff Regulations apply see Sect. 8.3.3 of the present chapter.

European Court of Justice (ECJ) has in fact confirmed that the EU Directive 89/391/EC on the safety and health of workers at work[2] is applicable to EU staff by virtue of the reference made by Article 1e(2) SR.[3] In particular, Article 6 of Directive 89/391 sets forth the general obligation of the employer to guarantee the health and safety of the staff through the adoption of all necessary measures, including information and training.

In general terms, most EU institutions have in recent times adopted internal regulations for the implementation of the duty of care towards their staff. The Commission has recognised the applicability of workplace condition standards in the relationship with its staff in a document of the 26 April 2006 related to a 'harmonized policy for health and safety at work for all commission staff'. The Council did the same in 2006, when the Political and Security Committee (PSC) of the Council adopted a policy on the protection of personnel deployed outside the EU in the context of crisis management operations.[4] In 2008, the policy was integrated in the *Field Security Handbook for the Protection of Personnel, Assets, Resources and Information.*[5] Moreover, the Commission has recently adopted a decision on the security of its staff, assets and information. The decision aims at guaranteeing 'an appropriate level of protection to persons in the premises of the Commission, taking into account security and safety requirements'.[6] The growing relevance of internal regulations and policy guidelines in this field is demonstrated by the recent Handbook on the EU's Election Observation Mission, which also addresses the issue of the security of election missions deployed abroad.[7]

The separate regulation for the European External Action Service (EEAS) is worth mentioning. The duty of care is provided for in more general terms, as applicable to the security interests of the EEAS, including those connected to the safety and health of staff.[8] According to Article 4 of the Regulation, the EEAS 'shall put in place all appropriate physical security measures (whether permanent or

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[2] Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work, OJ L 183, 29 June 1989, pp. 1 ff. See also COM(2017) 12 final, Safer and Healthier Work for All—Modernisation of the EU Occupational Safety and Health Legislation and Policy, 10 January 2017.

[3] EU Civil Service Tribunal, Livio Missir Mamachi di Lusignano v. Commission, 12 May 2011, Case F-50/09, para 127 (see Annex II, Case 6). See also EU Civil Service Tribunal, Laleh Aayhan et al. v. Parliament, 30 April 2009, Case F-65/07, para 116 (see Annex II, Case 8).

[4] See Council 2006. The guidelines enshrined in the PSC's policy specifically address civilian ESDP missions as well as to the deployment of EU Special Representatives. They do not cover military operations.

[5] General Secretariat of the Council 2008.

[6] Commission decision (EU, Euratom) 2015/443 of 13 March 2015 on Security in the Commission, OJ L 72, 17 March 2015, pp. 41 ff.

[7] EEAS 2016.

[8] Decision 2013/C of the High Representative of the Union for Foreign Affairs and Security Policy of 19 April 2013 on the security rules of the European External Action Service, OJ C 190, 29 June 2013, pp. 1 ff. A general obligation on security (including the security of staff) was already enshrined in Article 10 of Council Decision 2010/427/EU of 26 July 2010 establishing the

temporary), including access control arrangements, in all EEAS premises, for the protection of EEAS security interests'.[9] Security interests also include the protection of classified information, communications and information systems.[10]

Finally, reference must be made to the provisions of the EU Charter of Fundamental Rights, which contains a number of provisions potentially relevant for the implementation of the duty of care, including the right to life (Article 2), the right to the integrity of the person (Article 3), the right to fair and just working conditions (Article 31), the right to diplomatic and consular protection (Article 46) and the right to an effective remedy and a fair trial (Article 47). Under Article 51(1) of the Charter, the obligations provided therein apply to EU institutions in relation to any activity that may affect individuals, including those falling within the scope of the employment relationship with their staff.[11]

8.2.2 International Sources

Similarly to other international organizations, the EU can be considered bound by certain norms of general international law which are relevant to our analysis.[12] First, once it is established that a norm is of a customary nature, it would form an integral part of the EU legal order, as repeatedly asserted by the ECJ.[13] A set of

organisation and functioning of the European External Action Service, OJ L 201, 3 August 2010, pp. 30 ff.

[9] In recital 2 of the EEAS security decision of 2013, the EEAS acknowledged the necessity to 'decide on security rules for the EEAS covering all aspects of security regarding the functioning of the EEAS, so that it can manage effectively the risks to staff placed under its responsibility, to its physical assets, information, and visitors, and fulfil its duty of care responsibilities in this regard'. As we will see, the variety of regulations and guidelines, covering different aspects of the Duty of Care of each EU institution, may produce uncertainties as to the applicable regime and to the consequences of violations of protection obligations.

[10] The Council has a regulation on security as well, although it covers only the security of classified information. See Council Decision 2001/264/EC of 19 March 2001 adopting the Council's security regulations, OJ L 101, 11 April 2004, pp. 1 ff.

[11] ECJ, Commission v. Guido Strack, 19 December 2013, Case C-579/12 RX/II, paras 38–39; ECJ, Arango Jaramillo et al. v. European Investment Bank, 28 February 2013, Case C-344/12 RX-II, paras 40 ff. See also recently General Court (First Chamber), HF v. Parliament, 24 April 2017, Case T-584/16, paras 149–156. In the *Missir Mamachi* case, the Tribunal expressly acknowledged that EU staff can rely on the protection afforded by Article 31(1) of the Charter. See EU Civil Service Tribunal, Livio Missir Mamachi di Lusignano, para 126.

[12] See on the issue Chaps. 14 and 17 of this volume.

[13] See ECJ, Anklagemyndigheden v. Peter Michael Poulsen and Diva Navigation Corp., 24 November 1992, Case C-286/90; A. Racke GmbH Co. v. Hauptzollamt Mainz, 16 June 1998; Case C-63/09, A. Walz v. Clickair SA, 6 May 2010, Case C-162/96. In this regard, see Wouters and Van Eeckhoutte 2002; Gianelli 2012, pp. 93 ff.

international norms to look at in this context is that of diplomatic law and of general obligations of due diligence.[14]

Besides customary international law, some treaties may constitute a source for the various components of the duty of care, provided that they have been concluded by the EU directly. This is the case, for instance, of the United Nations (UN) Convention on Disabilities. A special role is to be attributed to the European Convention on Human Rights, which, although not acceded to by the EU, still has a prominent role in the protection of fundamental rights within the EU legal order.[15] However, as of today, no case concerning the duty of care of EU institutions has been addressed from the perspective of international human rights law.

In addition to human rights treaties, the EU often stipulates bilateral agreements with third countries when it deploys a mission abroad. Agreements such as SOMA (Status of Mission Agreement) and SOFA (Status of Force Agreement) generally devote a number of provisions to the implementation of the duty of care and to the subjects responsible for it. Furthermore, duty of care related norms can be found in agreements on the participation of third countries in CSDP missions and in those providing for the protection of EU delegations in a third country's territory.[16]

8.3 Scope of Application

EU provisions on the implementation of the duty of care can have different scopes of application, as they are intended to cover a variety of situations in which the staff of EU Institutions are exposed to risks to their safety and health. This section deals with the application of those norms *ratione materiae*, *ratione loci* and *ratione personae*.

8.3.1 The Application Ratione Materiae

We can assume that EU law does provide for the application of the duty of care to the EU institutions in every situation in which their personnel are exposed to a particular risk for safety and health. From this perspective, Article 1e(2) and Article 24 SR seem to afford a protection which is very general in scope, since it is not

[14] For the analysis of specific obligations arising in these cases, see Sect. 8.4 of this chapter.

[15] The ECHR and the case-law of the European Court of Human Rights form part of the general principles of EU law. Moreover, according to Article 52(3) of the EU Charter of Fundamental Rights '[i]n so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection'.

[16] On these aspects, see Sect. 8.4 of the present chapter.

limited to certain kinds of activities or missions. The degree of protection and the quality of measures to be adopted may vary depending on the concrete situation, but —in general terms—every individual entertaining an employment relationship with the EU is protected under the duty of care when he is discharging his duties. Nonetheless, the extent of the Duty and the subjects responsible for it are to be assessed in relation to each specific situation, taking into consideration other elements, such as the place where the staff are operating, the nature of the employment relationship and the organs to which they belong.

For the purpose of this work, however, it should be kept in mind that duty of care obligations are those applicable only to civilian tasks and activities performed by the EU, and to civilian personnel.[17]

8.3.2 The Application Ratione Loci

The application *ratione loci* of obligations flowing from the duty of care depends on the place where EU personnel are performing their duties. While certain general provisions—such as those of the SR—apply to every workplace of the Union, be it a seat or an office, there are more specific provisions which apply only to a specific territory. The EU being a regional organization, the main distinction in this context is between norms applying inside or outside the EU territory (that is, the territory of its Member States).

Norms applying inside the EU are essentially those of general application and they do not pose any particular questions. In fact in this case, every workplace falling under the responsibility of the EU must ensure the safety and health of its staff. At the same time, within the EU borders, those provisions do not apply to private places, although this does not mean that staff are protected only when in their office. According to Article 5 of Directive 89/391, 'the employer shall have a duty to ensure the safety and health of workers in every aspect related to the work'. This provision may extend the responsibility of EU institutions to situations where the duties assigned to its personnel must be discharged out of office.[18] An example is the case of EU staff sent to one of the Member States where tensions, protests or terrorist activities may pose a threat to the integrity and the safety of the staff or to

[17] Duty of care obligations also cover military operations and armed forces, although in different terms and through different mechanisms. See, for some references, de Guttry 2012.

[18] See in this sense de Guttry 2015, p. 681. The author underlines that duty of care provisions (in particular those related to the Commission staff) shall not be restricted to buildings and areas surrounding the location of the workplace. The obligations of the duty of care need to be applied, as far as it is reasonably possible, 'to protect the employee wherever he/she carries out his/her duties'.

missions established within the framework of the EU's Civil Protection Mechanism in order to intervene in the territory of a Member State.[19]

The major focus of duty of care provisions, however, is related to the protection of EU personnel where they are deployed outside the territory of the EU. In this context, even the general obligations on the duty of care may be extended in their scope. For instance, the ECJ has recognised that the duty of the Commission to ensure and guarantee the safety of its staff is applicable in a third country posing a particularly serious threat not only to the workplace, but to also to private (temporary) accommodation, when the latter has been arranged by the EU institutions.[20] Moreover, the EU Institutions have adopted several acts dealing with the protection of their staff abroad. These internal instruments usually deal with the deployment of crisis management missions or with the presence of EU delegations in third countries. As to the first, a specific regulation may be found in the decision establishing the mission or in a bilateral agreement concluded with the third country where the mission is deployed. A more comprehensive framework in this regard is provided by the already mentioned PSC policy for the protection of EU mission staff, which applies to both crisis management operations (encompassing any operation, mission or action, including preparatory missions, conducted under Title V of the TEU involving the deployment of personnel outside the EU) and the deployment of EU Special Representatives (EUSRs) and personnel under their authority outside the EU.[21] For EU delegations around the world, duties on security and safety are provided within the EEAS security regulation, but specific provisions are also to be found in agreements concluded with the host countries.[22]

According to the practice of the EU institutions, there is no doubt that general provisions on the duty of care under the SR are of general territorial application. Every internal regulation of the EU institutions, in fact, can be considered an implementation of the SR provisions, aimed at governing the material procedures and mechanisms to fulfil the duty in relation to staff deployed outside the EU territory. The applicability of the SR provisions on the duty of care to staff sent outside the EU is implicitly confirmed by the SR themselves. Annex X of the SR lays down certain special and exceptional provisions only applicable to officials of

[19] See Decision No 1313/2013/EU of the European Parliament and of the Council of 17 December 2013 on a Union Civil Protection Mechanism, OJ L 347, 20 December 2013, pp. 924 ff. See also Gestri 2012, pp. 117 ff.

[20] EU Civil Service Tribunal, Livio Missir Mamachi di Lusignano, paras 116 ff. Article 2(a) of the 2006 Commission decision defines the Commission workplaces as the places 'intended to house workstations on the premises of the Commission and any other place within the area of these premises to which the Staff has access in the course of their work'. This conclusion flows also from the rule enshrined in Article 5(2) of the Annex X of the SR, according to which '[i]f the institution provides the official with accommodation which corresponds to the level of his duties and to the composition of his dependent family, he shall reside in it'.

[21] Council 2006, Annex, para 2.

[22] The content of these agreements is examined in the next section the present contribution on subjects responsible for the implementation of the duty of care.

the EU serving in third countries.[23] Among those rules, no reference is made to the protection of safety and health of staff, thus implicitly confirming that the general provisions of Article 1e(2) and Article 24 SR apply in their entirety.

8.3.3 The Application Ratione Personae

EU staff are primarily composed of permanent officials, which means 'any person who has been appointed […] to an established post on the staff of one of the institutions of the Union by an instrument issued by the Appointing Authority of that institution'.[24] The SR—including provisions on the duty of care—apply to all the EU permanent staff.

Other types of employment relationship are nonetheless very relevant for the work of EU institutions. All these positions are regulated by the Conditions of Employment of Other Servants of the EU (CEOS), whose Article 1 distinguishes between (1) temporary staff; (2) contract staff; (3) local staff; (4) special advisers; and (5) accredited parliamentary assistants.[25] The question for these positions is one of coordination with the provisions of the SR. CEOS rules on temporary staff make reference to numerous SR provisions, applicable by analogy. These include Article 1e and Article 24 SR on the duty to protect and to afford assistance, as well as Articles 72 and 73 SR on sickness and accident cover.[26] The same regime is confirmed for contract staff and parliamentary assistants.[27]

Different treatment is applicable to local staff, that is, staff engaged in places outside the EU 'according to local practice for manual or service duties'.[28] Indeed, in this kind of relationship, the SR provisions on the duty of care are not applicable as they are not included by means of a reference in the regulation of local staff.[29] This exclusion is explained by the fact that local staff, usually hired in the context of specific EU missions abroad, generally fall within the responsibility of the third country's authority.[30]

Besides personnel directly engaged by EU institutions, EU staff may also include personnel seconded by the Member States. This is the case of national experts and personnel seconded to the EEAS by the diplomatic services of Member States. Seconded National Experts (SNEs) are staff employed by a national, regional or local public administration and seconded to an EU institution or agency so that it

[23] See Article 1, Annex X of SR.

[24] See Article 1a of SR.

[25] For the definition of these different roles see Articles 2–5a of CEOS.

[26] See Articles 10 and 28 of CEOS.

[27] See respectively Articles 80(5) and 81 and Articles 126(2) and 127 of CEOS.

[28] Article 4 CEOS.

[29] See Article 124 CEOS mentioning all the rules of the SR applicable by analogy to local staff.

[30] This issue will be dealt with in the next section.

can use their expertise in a particular field. In all these situations, there is no doubt that the obligations flowing from the duty of care apply, but this raises a twofold question: first, who bears the responsibility for implementing the duty of care in relation to seconded personnel between the EU and the seconding State and, second, what is the source of the duty of care in the latter case? The first question will be dealt with in the next section. As for sources obliging States to protect their staff sent on missions other parts of this volume will be referred to,[31] but it will also be demonstrated that in EU practice such a duty may be incumbent on the seconding State as a matter of EU law.

8.4 The Responsibility to Afford Protection

Now that the existence of a general obligation, under EU law, to protect and assist personnel sent on mission has been ascertained, the issue of the subjects responsible for the concrete implementation of this duty has to be examined. The following analysis will show that the practice of EU institutions is rather fragmented and diversified, for at least two reasons: there exists no general rule identifying the subject responsible for affording protection, and at the same time, the implementation of the duty of care in certain cases may require the involvement of multiple actors, such as Member States and third countries, besides of course the EU institutions. Major problems in this regard emerge in the context of the deployment of CSDP civilian missions and the establishment of EU delegations in a third country.

8.4.1 The EU and Third Countries

The fulfilment of the duty of care in relation to staff deployed outside the Union's territory often requires the cooperation of third countries. This is true as far as both EU missions and EU delegations are concerned. This section takes into consideration three different situations in which third countries may be asked to share the burden of the implementation of the duty of care: first, when an agreement with the host country is concluded on the status of the mission; second, when a third country decides to contribute with its own personnel to an EU mission; and third, when an EU delegation is established in a third country.

[31] See especially Chaps. 16 and 17 of this volume.

8.4.1.1 Status of Mission Agreements

Notwithstanding the numerous obligations that EU institutions have in discharging the duty of care in the course of a field deployment, the traditional powers exercised by the territorial sovereign cannot be neglected.[32] This is particularly evident when CSDP civilian missions are deployed in a foreign country. In this particular context, the EU has developed the practice of signing so-called Status of Mission Agreements (SOMAs), in order to codify the reciprocal rights and duties of the mission and of the host country.[33] They generally regulate issues such as the entry and the departure of foreign personnel, taxation, settlement of disputes and the exercise of criminal and civil jurisdiction over members of the foreign staff.[34] Although the practice of concluding SOMAs is quite extensive for many countries and international organizations in the world, there exists no such international law regime for diplomatic relations.

The conclusion of SOMAs by the EU with the State hosting the mission is frequently envisaged by the same decision establishing the mission. The common formula prescribes that the

> the status of [the mission] and its staff, including where appropriate the privileges, immunities and further guarantees necessary for the completion and smooth functioning of [the mission], shall be the subject of an agreement concluded pursuant to Article 37 TEU and in accordance with the procedure laid down in Article 218 of the Treaty on the Functioning of the European Union.[35]

Among the provisions related to rights and privileges of the EU mission and its staff, EU SOMAs also include the duty of the host State to guarantee the security of the mission. For instance, the EU-Guinea Bissau SOMA acknowledges that

> The Host State, through its own capabilities, shall assume full responsibility for the security of EU SSR Guinea-Bissau personnel. To that end, the Host State shall take all necessary measures for the protection, safety and security of EU SSR Guinea-Bissau and EU SSR Guinea-Bissau personnel. Any specific provisions proposed by the Host State shall be

[32] For an analysis of the host country's obligations, see Chap. 4 of this volume.

[33] CSDP missions are not the only case in which the EU concludes such agreements. In the context of the EU's Election Observation Missions, the European Commission seeks to sign memorandums of understanding (MoU) with the state and electoral authorities of the host country before the deployment of the mission. The memorandums set out the role and responsibilities of the mission and EU observers and the corresponding role and responsibilities of the host country authorities. See EEAS 2016, pp. 127–128. The distinction with SOMAs, however, lies in the fact that these MoUs are not considered binding under international law.

[34] On the issue see Sari 2008, pp. 68–69. This contribution does not take into consideration the practice of Status of Force Agreements (SOFAs) as they usually deal only with the presence of foreign military forces. See generally Bowett 1997, p. 266; Erikson 1994, p. 137.

[35] See e.g. Council Decision 2014/486/CFSP (EUAM Ukraine), Article 9.

> agreed with the Head of Mission before implementation. The Host State shall permit and support free of any charge activities relating to the medical evacuation of EU SSR Guinea-Bissau personnel.[36]

This provision, which is common to many other SOMAs concluded by the EU,[37] although drafted in rather general terms, does not affect the corresponding duty of care of EU institutions and authorities in relation to their staff deployed in a foreign country.[38] Indeed, the reference to the host State 'capabilities' must be intended as a way of sharing the responsibility of guaranteeing the integrity and the safety of the mission between the EU and the host State, according to their own powers and instruments.[39] In this sense, the respective obligations of the EU authority and the host State are to be assessed on a case by case basis, looking at which of the two entities is in the best position to fulfil a certain aspect of the duty of care.[40] Furthermore, there are activities falling within the scope of the duty of care which cannot be carried out by the hosting country. Obligations regarding the training of the staff, the internal security of offices or medical evacuation plans rest entirely upon the EU or its Member States.

8.4.1.2 The Participation of Third Countries in EU-Led Missions

A different issue is that of the applicability of the duty of care to personnel seconded by a third country to an EU-led mission. Most of the international agreements concluded by the EU in the field of the CFSP concern the participation of third

[36] Agreement between the European Union and the Republic of Guinea-Bissau on the Status of the European Union Mission in Support of Security Sector Reform in the Republic of Guinea-Bissau, OJ L 219/66, 14 August 2008, Article 9.

[37] Agreement between the European Union and the Islamic Republic of Afghanistan on the Status of the European Union Police Mission in Afghanistan, OJ L 294/2, 12 November 2010, Article 9; Agreement between the European Union and the Republic of Niger on the status of the European Union mission in Niger CSDP, OJ L 242/2, 11 September 2013, Article 9. All of these provisions follow the common pattern inserted in the EU model for SOMAs adopted by the Council in document no. 17141/08 of 15 December 2008.

[38] See also Council 2006, p. 12, para 30: the conclusion of an agreement with the host country '[…] does not obviate the requirement for the European Union to take adequate steps of its own to ensure the security of its personnel, particularly where state authority is limited or non-existent'.

[39] The duty of protection of EU forces and personnel (SOFA) imposed on the host country is sometimes more burdensome and detailed. See for instance Agreement between the European Union and the Republic of Uganda on the Status of the European Union-led Mission in Uganda, OJ L 221/2, 24 August 2010, Article 13(1) ('[t]he Host State shall take all appropriate measures to ensure the safety and security of EUTM Somalia and its personnel, including those necessary to protect its facilities against any external attack or intrusion') and Article 13(2) (The EU Mission Commander may establish a military police unit in order to maintain order in EUTM Somalia facilities').

[40] The question of whether the EU has a duty to conclude a SOMA with the host State in order to guarantee the full implementation of duty of care obligations is analysed in the next section.

countries in specific CSDP operations or missions.[41] As for SOMAs, the possibility for third countries to contribute to a specific mission is usually envisaged in the decision (or Joint Action) establishing the mission. At the same time, as in the case of contributions from Member States, personnel seconded by third countries remain under the ultimate command of their national authorities, although the operational control must be transferred to the EU authorities leading the mission.

Agreements on the participation of third countries in EU-led missions also include provisions which are relevant in assessing the subjects bearing responsibility for the implementation of the duty of care. First of all, falling under the operational control of the Head of Mission means that the EU will be bound to guarantee the safety and security of personnel seconded by a third country in the same way as it does for Member States' seconded staff. This is also made clear by the same provisions which allow the participation of third States in the EU mission, which state that 'third States contributing to the Mission shall have the same rights and obligations in terms of day-to-day management of the Mission as EU Member States'.[42] As is evident, retaining ultimate control over seconded staff also implies that some duties rest upon the contributing third country. In particular the costs related to the secondment are their responsibility, such as salaries, medical coverage, allowances, high-risk insurance, and travel expenses to and from the mission area, similarly to what is provided in relation to secondment by Member States. As we will see, specific obligations of contributing States as regard the costs of the secondment may have a role when it comes to reparation for injuries suffered during the secondment.

It seems noteworthy, however, that some agreements on the participation of third countries also identify certain duties which fall within the scope of the duty of care and that remain a responsibility of the seconding country. The agreement on the participation of Croatia in the EUPOL Afghanistan mission, expressly provides that

> Personnel seconded to EUPOL AFGHANISTAN shall undergo a medical examination, vaccination and be certified medically fit for duty by a competent authority from the Republic of Croatia. Personnel seconded to EUPOL AFGHANISTAN shall produce a copy of this certification.

This seems to confirm the applicability of the general rule on the exercise of effective control as a trigger for the duty of care implementation. There are indeed some activities falling within the duty of care that can only be conducted by the seconding third State, as is the case of medical assistance measures that need to be discharged before the secondment.

[41] For an overview of the EU's practice see Koutrakos 2013, pp. 192–193.

[42] See e.g. Council Joint Action 2008/736/CFSP (EUMM Georgia), Article 11(2); Council Joint Action 2005/797/CFSP (EUPOL COPPS), Article 12(2).

8.4.1.3 EU Delegations in Third Countries

The emergence of a comprehensive international representation of the EU besides that of its Member States has fostered numerous developments in the institutional architecture of the EU. The establishment of the EEAS has also fostered the development of a complex diplomatic network with third countries, which is based on EU delegations and offices abroad.[43]

With regard to the establishment of diplomatic relations, the High Representative (together with the Council and the Commission) decides on the opening or closing of a Union delegation.[44] The High Representative then negotiates an 'Establishment Agreement' with the third country, which will grant the EU delegation privileges and immunities similar to those granted to diplomatic missions. Following these steps, the Head of Delegation will be accredited by the third country concerned. Although the Union is not a party to the 1961 Vienna Convention on Diplomatic Relations, many of its provisions apply to the relationship between the Union delegation and the host country by virtue of explicit reference in the Establishment agreement.[45]

Amongst the rules of the 1961 Vienna Convention, Article 22 deals with the inviolability of the mission premises, and it affirms that

> The receiving State is under special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity.[46]

The special duty of protection of the diplomatic premises is uncontested in State practice and it has been repeatedly confirmed by the International Court of Justice.[47] The duty applies not only to activities carried out by the receiving State and its organs, but also to threats posed by private groups.[48] If read in conjunction with EU internal provisions on the duty of care as applicable to missions abroad, the

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[43] See Wouters and Duquet 2011, p. 6; Kerres and Wessel 2015.

[44] EEAS Decision, Article 5(1).

[45] Certain provisions of the Vienna Convention, such as the most favoured nation requirement, are per se not applicable to the Establishment Agreement. See Wouters and Duquet 2011, p. 15. For a template of the Establishment Agreement see Kuijper et al. 2013, pp. 51–52.

[46] 1961 Vienna Convention on Diplomatic Relations, Article 22(2).

[47] ICJ, Case Concerning United States Diplomatic and Consular Staff in Teheran, 20 May 1980, I.C.J. Reports 1980, p. 3, para 63, where the Court recognised that 'the Iranian Government failed altogether to take any 'appropriate steps' to protect the premises, staff and archives of the United States' mission against attack by the militants, and to take any steps either to prevent this attack or to stop it before it reached its completion'. On Article 22 of the 1961 Vienna Convention see Denza 2016, pp. 110 ff.

[48] ICJ, Case Concerning Armed Activities on the Territory of Congo (Democratic Republic of Congo v. Uganda), 19 December 2005, I.C.J. Reports 2005, p. 168, para 342: 'The Vienna Convention on Diplomatic Relations not only prohibits any infringements of the inviolability of the mission by the receiving State itself but also puts the receiving State under an obligation to prevent others – such as armed militia groups – from doing so'.

rule in Article 22 of the 1961 Vienna Convention places upon the receiving State the burden of protecting the integrity of the mission and its staff from external threats. Accordingly, while the safety and the health of the workplace of Union delegations certainly falls within the responsibility of the EEAS, the receiving State is fully responsible for the conduct of its organs and of private individuals damaging or exposing the Union mission to risks.[49]

8.4.2 The EU and the Member States

The implementation of the duty of care is also the result of a distribution of powers between the EU and the Member States that needs to be carefully assessed. In general terms, the main criterion in this regard lies in identifying the subject exercising the effective control over the staff member concerned.[50] In the majority of EU Joint Actions (which later became Council decisions under the Lisbon Treaty) establishing a field mission of the EU, there are specific rules on the protection to be afforded to personnel of the mission, including seconded staff from Member States.

The control of the mission is generally attributed to a Civilian Operation Commander (COC) and to the Head of the Mission. The former exercises command and control at the strategic level, under the political control of the PSC, while the latter is entrusted with command and control at the 'theatre' level, which is more operational in nature. The Head of the Mission shall be directly responsible to the COC and shall act in accordance with his instructions.[51]

The COC also has 'overall responsibility' for ensuring that the EU's duty of care is properly discharged. However, concrete enactment measures regarding the security of the mission and its staff are to be adopted by the Head of Mission. Most of the decisions establishing civilian missions place upon the Head of Mission not only a general task on security, but also the specific duty of ensuring

> compliance with minimum security requirements applicable to the operation, in line with the policy of the European Union on the security of personnel deployed outside the European Union in an operational capacity under Title V of the Treaty on European Union and its supporting instruments.[52]

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[49] When the host State is materially incapable of guaranteeing the security of the mission, one might argue that the whole set of duty of care obligations rests solely on the EU. In any event, each specific obligation needs to be construed by taking into consideration the concrete powers that the EU is able to exercise when acting in a foreign country.

[50] de Guttry 2012, p. 281. See also Chap. 3 of this volume.

[51] Generally on the organization of CSDP civilian mission, see Koutrakos 2013, pp. 57 ff. and pp. 134 ff.; Bossong 2013, pp. 94 ff. On past EU civilian missions, see also Naert 2007, pp. 61 ff.

[52] See for instance Council Joint Action 2007/405/CFSP of 12 June 2007 on the European Union police mission undertaken in the framework of reform of the security sector (SSR) and its interface with the system of justice in the Democratic Republic of the Congo (EUPOL RD Congo), Article

The effective and coherent execution of the respective duties of the COC and the Head of Mission must be guaranteed through mutual consultation.[53] The question remains as to what role is reserved in this context to Member States with regard to their seconded staff.

In CSDP missions,[54] seconded staff generally remain under the command of the national authorities of the seconding State according to national rules. Nevertheless, those authorities are required to transfer the Operational Control (OPCON) of their staff to the COC.[55] This mechanism aims, on the one hand, not to entirely cut the link between seconded staff and their State,[56] but on the other hand, to guarantee that they are firmly put at the disposal of the mission. Indeed, the Head of Mission exercises 'command and control over personnel, teams and unit from contributing States as assigned by the Civilian Operation Commander'.[57]

14(2); Council Joint Action 2008/736/CFSP of 15 September 2008 on the European Union Monitoring Mission in Georgia (EUMM Georgia), Article 12(2); Council Decision 2012/392/CFSP of 16 July 2012 on the European Union CSDP mission in Niger (EUCAP Sahel Niger), Article 11(2); Council Decision 2014/219/CFSP of 15 April 2014 on the European Union CSDP mission in Mali (EUCAP Sahel Mali), Article 11(2); Council Decision 2014/486/CFSP of 22 July 2014 on the European Union Advisory Mission for Civilian Security Sector Reform Ukraine (EUAM Ukraine), Article 11(2); Council Decision 2017/1869/CSFP of 16 October 2017 on the European Union Advisory Mission in support of Security Sector Reform in Iraq (EUAM Iraq), Article 11(2).

[53] See e.g. Council Decision 2014/219/CFSP (EUCAP Sahel Niger), Article 5(7); Council Decision 2017/1869/CSFP (EUAM Iraq), Article 5(6).

[54] CSDP civilian missions are not clearly defined in the Treaties, but their core element lies in the absence of military objectives and instruments. See however the definition provided in European Council 2003, p. 7, according to which 'civilian crisis management helps restore civil government'.

[55] See, *inter alia*, Council Joint Action 2008/124/CFSP of 4 February 2008 on the European Union Rule of Law Mission in Kosovo, (EULEX Kosovo), Article 7(4): 'All seconded staff shall remain under the full command of the national authorities of the seconding State or EU institution concerned. National authorities shall transfer Operational Control (OPCON) of their personnel, teams and units to the Civilian Operation Commander'. See also Council Joint Action 2007/405/CFSP, (EUPOL RD Congo), Article 3a(4); Council Decision 2014/219/CFSP (EUCAP Sahel Mali), Article 5(5).

[56] This would allow reverting the command of seconded staff to Member States in exceptional situations. On the concept of command and control in EU civilian missions, see Council 2008.

[57] Council Decision 2013/233/CFSP of 22 May 2013 on the European Union Integrated Border Management Assistance Mission in Libya (EUBAM Libya), Article 6(2); Council Joint Action 2008/736/CFSP (EUMM Georgia), Article 6(2); Council Decision 2014/219/CFSP (EUCAP Sahel Niger), Article 6(2). While the illustrated mechanism only applies in the context of CSDP civilian missions, there are examples of secondment from the Member States following a similar pattern, as in the case of Civilian Response Teams (CRT) and Security Sector Reform Units. See Marhic 2011, pp. 248–249. CRTs, for instance, can be deployed before the adoption of the decision establishing the civilian mission and can be entrusted with fact-finding tasks. In this case too, notwithstanding the absence of the Head of Mission, they fall under the chain of command of the Council Secretariat. When they are deployed in support of a EUSR, CRTs work under the authority of the EUSR. See Council 2005, para 14.

Some provisions of the above-mentioned decisions often envisage a division of powers between the EU and Member States in relation to seconded staff. For instance, it is generally provided that they will be respectively responsible 'for answering any claims linked to the secondment from or concerning the member of staff seconded, and for bringing any action against that person'.[58] Similarly, seconding States are still competent for the disciplinary matters of their seconded staff.[59] These provisions, nonetheless, do not seem to affect either the general exercise of command and control by the COC and the Head of Mission, or their duty to guarantee the protection and the security of the mission's staff. Indeed, they refer to situations falling outside the scope of obligations related to the duty of care and they do not affect the role attributed to the COC and the Head of Mission in guaranteeing the security of staff and of the mission's premises, also because Member States have no concrete power in this regard.[60]

Notwithstanding these considerations, there may be cases in which certain duties connected to the duty of care remain within the authority of seconding Member States, such as medical assistance and coverage linked to future field deployment. This means, for instance, that Member States are generally responsible for medical examinations and vaccinations prior to deployment and they are required to provide seconded staff with the necessary visas and personal protection equipment.[61] However, the EU institutions remain responsible for the implementation of major duty of care obligations, and especially for the adoption of protective measures.

In order to assess the scope of Member States' obligations other provisions of EU law can be taken into account. A major role is played by the duty of loyal cooperation under Article 24(3) TEU, according to which the Member States 'shall

[58] Depending on whether the seconded staff come from a Member States or a EU institution. See Council Joint Action 2007/369/CFSP of 30 May 2007 on establishment of the European Union Police Mission in Afghanistan, Article 8(2); Council Decision 2014/219/CFSP (EUCAP Sahel Mali), Article 8(2); Council Decision 2017/1869/CSFP (EUAM Iraq), Article 7(2). Claims may relate to the treatment of staff by seconding State. See for instance Council Decision 2014/486/CFSP (EUAM Ukraine), Article 8(2): '[e]ach Member State […] shall bear the costs related to any of the staff seconded by it, including travel expenses to and from the place of deployment, salaries, medical coverage and allowances other than applicable daily allowances'.

[59] Council Joint Action 2005/797/CFSP of 14 November 2005 on the European Union Police Mission for the Palestinian Territories (EUPOL COPPS), Article 6(2); Council Decision 2013/233/CFSP of 22 May 2013 on the European Union Integrated Border Management Assistance Mission in Libya (EUBAM Libya), Article 6(5); Council Decision 2014/219/CFSP (EUCAP Sahel Niger), Article 6(2).

[60] See e.g. Council Decision 2014/219/CFSP (EUCAP Sahel Niger), Article 11(1): '[t]he Civilian Operation Commander shall direct the Head of Mission's planning of security measures and ensure their proper and effective implementation by EUCAP Sahel Niger in accordance with Article 5'.

[61] See Civilian Planning and Conduct Capability Directorate 2016. On the distribution of costs between Member States and the EU in relation to seconded personnel see also Council, Guidelines for allowances for seconded staff participating in EU civilian crisis management missions, doc. 7291/09, 10 March 2009; Council, New method of calculation of the per diem for seconded staff participating in EU civilian crisis management missions and EUSRs teams, doc. 9084/13, 30 April 2013.

support the Union's external and security policy actively and unreservedly in a spirit of loyalty and mutual solidarity and shall comply with the Union's action in this area'. Thus, Member States have both the positive duty to take action in accordance with Union's policy and objectives and a negative one not to behave in a manner capable of jeopardising the effectiveness of the Union's action.[62] Besides this general duty of loyalty, Member States have also a duty to consult with EU institutions in the field of foreign and security policy,[63] while under Article 28(2) TEU actions undertaken by the Union (such as those establishing a civilian mission) 'shall commit the Member States in the positions they adopt and the conduct of their activity'. If applied in the context of the duty of care, these duties oblige Member States to exercise their retained powers over seconded staff not only consistently with the aim and the objective of the EU mission, but most importantly in a manner coherent and coordinated with the measures taken by EU authorities in relation to security and safety of staff.[64] These provisions of EU primary law do not impose a duty of care on Member States *per se*, but they can be useful in assessing the way in which Member States are required to exercise their powers in relation to seconded staff.[65]

8.5 The Content of the Duty of Care Within the EU

The content of the duty of care is to be construed by taking into consideration the different sources and instruments which apply to the various EU institutions in this regard. Nonetheless, a starting point for the analysis is the statement in the *Missir Mamachi di Lusignano* judgment, where the Civil Service Tribunal held that

> […] in the light of the main rules laid down in Directive 89/391 […] the Commission's duty to ensure safety in such a situation implies, first, that the institution must assess the risks to which its staff is exposed and take integrated preventive measures at all levels of the

[62] See Koutrakos 2013, p. 61.

[63] Article 32 TEU: 'Member States shall consult one another within the European Council and the Council on any matter of foreign and security policy of general interest in order to determine a common approach. Before undertaking any action on the international scene or entering into any commitment that could affect the Union's interests, each Member State shall consult the others within the European Council or the Council. Member States shall ensure, through the convergence of their actions, that the Union is able to assert its interests and values on the international scene. Member States shall show mutual solidarity'.

[64] See more generally on this issue Buscemi, Chap. 5, Sect. 5.3.2.

[65] This is also evident from the nature of the mentioned TEU provision, which constitutes a special application of the principle of sincere cooperation, enshrined in Article 4(3) TEU. On the principle of sincere cooperation and on its role in regulating Member States' competences see Blanke 2013, pp. 232 ff. and Thies 2012, pp. 326 ff.

> service, secondly that it should inform the staff involved of the risks that have been identified and check that the staff have received appropriate instructions on the risks to their safety, and finally that it should take protection measures and establish the organization and means it considers necessary.[66]

The relevance of this statement for the assessment of a general legal framework for the duty of care lies especially in the reference the Tribunal made to Directive 89/391, which prescribes the standard of protection applicable throughout all EU institutions' activities. Further elements of the same judgment may help in identifying the proper standard for the duty of care implementation by EU institutions. In particular, the Civil Service Tribunal has characterised the duty of care as an obligation of means and not as one of result:

> [a]lthough this duty to ensure the safety of its staff is wide, it cannot go as far as to place an absolute duty on the institution to achieve the desired result. In particular, budgetary, administrative or technical constraints to which the administration is subject, and which sometimes make it difficult or impossible to implement urgent and necessary measures swiftly despite the efforts of the competent authorities, cannot be ignored. Moreover, the duty to ensure safety becomes delicate where the official concerned, unlike a worker in a fixed position in a set location, is required […] to work in a third country and to assume a function comparable to a diplomatic function, exposed to a variety of risks that are less easy to identify and manage.[67]

Moreover, the Civil Service Tribunal made clear that:

> The Commission's duty, as employer, to ensure the safety of its staff must be discharged with particular rigour and that the administration's discretion in this area is reduced, although not eliminated.[68]

The lack of discretion given to EU institutions seems quite debatable, as they still enjoy a certain margin of appreciation in identifying risks and the measures necessary to avoid them. However, it is true that most of the decisions taken by the EU in this regard can be strictly scrutinised by the ECJ.

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[66] EU Civil Service Tribunal, Missir Mamachi di Lusignano, para 132. The acknowledgment of duty of care obligations and the findings on the responsibility of the Commission towards Mr. Missir Mamachi and his heir have been recently confirmed by the General Court of the EU (Appeal Chamber), Stefano Missir Mamachi di Lusignano v. Commission, 7 December 2017, Case T 401/11 P-RENV-RX (see Annex II, Case 10).

[67] EU Civil Service Tribunal, Missir Mamachi di Lusignano, para 130. Note that also the EEAS has recognised that the duty of care entails a due diligence standard. See EEAS Security Decision, Article 3(2): '[t]he EEAS duty of care comprises due diligence in taking all reasonable steps to implement security measures to prevent reasonably foreseeable harm to EEAS security interests'.

[68] EU Civil Service Tribunal, Missir Mamachi di Lusignano, para 126.

8.5.1 Provide a Working Environment Conducive to the Health and Safety of Its Personnel

As already observed, the rules laid down in Directive 89/391 apply also to the physical premises of an EU mission in a third country and, more generally, to the working environment where the officer is expected to perform his/her duties. The Directive requires Member States (and in this case, the EU institutions) to adopt the necessary legal and operational measures in order to eliminate risk factors for occupational diseases and accidents, and at the same time it encourages the development of improvements in the safety and health of workers.[69] Several provisions are devoted to the need to adapt the working environment to the individual and to technological developments, together with obligations concerning preparedness and awareness of workers.[70]

The obligation to guarantee the health of workers in EU workplaces should also include measures aimed at protecting mental health. Although not clearly defined in Directive 391/89, this aspect of health protection has gained more and more attention in the context of EU institutions' staff.[71]

8.5.2 Actively Protect Officers Facing Specific Challenges and Threats

Attaining the objectives set forth in Directive 391/89 could be problematic when EU staff are deployed in missions presenting particular challenges or threats. In order to comply with duty of care obligations, EU institutions need procedures to establish sound mission planning, which allow them to identify in a preliminary phase the risks and threats their staff may be exposed to during the mission.[72] Various EU institutions have accordingly adopted a specific framework on risk assessment.

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[69] See also Directive 2008/104/EC of the European Parliament and the Council of 19 November 2008 on temporary agency work, OJ L 327, 5 December 2008, pp. 9 ff., extending certain guarantees to workers with a temporary-work agency employment relationship.

[70] See in particular Articles 6, 8, 10 and 12 of Directive 89/391.

[71] See Chartered Institute of Personnel and Development 2016. In 2014, a 'Joint Action on Mental Health and Well-being' was launched with support from the EU Health Programme, 'seeking to create a framework for action in mental health policy at European level'. However, a specific set of provisions dealing with mental health, also in relation to EU personnel, is still missing. Some references to the obligation to guarantee mental health of employees in workplaces can be found in Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding, OJ L 348, 28 November 1992, pp. 1 ff.

[72] de Guttry 2012, p. 283.

The Council, for instance, has underlined that risk assessment forms an integral part of the planning of a crisis management operation or of a Union's special representative deployment abroad. The General Secretariat is in charge of this procedure, together with the Member States involved and the Head of Mission. The risk assessment is conducted using risk ratings defined by the General Secretariat, which are instrumental for the setting of the appropriate security measures.[73] A similar mechanism has been adopted by the Commission in the context of the so-called 'pre-posting programme', that is, the phase which precedes the effective deployment of staff.[74] The Field Security Handbook of the Council also envisages the possibility to deploy an 'exploratory mission' with the aim 'to determine the general security environment, threat analysis, security risk assessments, highlighting up front as many of the potential security issues, in broad terms, that any mission in the area is likely to face'.[75]

After risks have been identified and their degree assessed, the planning of a mission or of a deployment identifies the necessary security measures. These are generally included in the Concept of Operation (CONOPS), whose implementation is further detailed by the Head of Mission in the Operation Plan (OPLAN).[76] Appropriate protection measures will thus be put in place 'to ensure an operationally acceptable level of security of personnel, assets (including premises, transport and communication), resources and information'.[77] The EEAS also acknowledges its own duty to put in place in all its premises 'all appropriate physical security measures' (including access control arrangements), which shall be commensurate to the assessed risk.[78]

At this point, it must be questioned whether the EU and its institutions have an obligation, under the duty of care, to conclude an agreement with the host country on the protection of the mission and of its staff. The Council itself has acknowledged that, amongst protection measures to be adopted, a special role is attributed to 'the conclusion whenever possible, of arrangements granting a protected status to deployed personnel, including privileges and immunities (e.g. in a status of forces or a status of mission agreement) and the provision of acceptable security measures by the host State'.[79] Moreover, the conclusion of such agreements is generally envisaged by the decision establishing the mission and it is framed in terms of a

[73] Council 2006, p. 7.

[74] EU Civil Service Tribunal, Missir Mamachi di Lusignano, para 135.

[75] General Secretariat of the Council 2008, p. 9. On risk assessment procedures see also EEAS Security Decision, Article 10. Similar procedures are also envisaged for election observation missions, including the possibility to deploy an exploratory mission with the aim to assess the risk, while an ongoing assessment of security risks to the EU EOM will be made by the core team in consultation with the European Commission. See EEAS 2016, pp. 121–122.

[76] General Secretariat of the Council 2008, pp. 14–17. The Head of Mission is assisted in this task by a Mission Security Officer.

[77] Council 2006, p. 8.

[78] EEAS Security Decision, Article 4.

[79] Council 2006, p. 9.

duty for the EU itself.[80] Similar provisions exist also in relation to Union delegations in third countries.[81] This derives from the fact that an effective and comprehensive framework of protective measures can indeed only be put in place with the consent and cooperation of the hosting country's authorities. These elements thus seem to confirm the existence of such an obligation incumbent upon the EU.[82]

As already mentioned, the conclusion of the agreement with the hosting country does not preclude the possibility of the EU incurring responsibility for violations of the duty of care. The EU cannot avoid its obligations simply by shifting them onto a third subject. While the agreement may be helpful in distributing tasks regarding protective measures, the EU is still required to exercise due diligence over the host country's conduct, and to guarantee that the latter properly complies with its international obligations. This also includes an evaluation of the measures adopted by the third country and of their concrete capability of preventing harm to EU staff, in the light of the assessed risk.

The duty to conclude a SOMA with the host country, however, is a best effort obligation, as there are situations in which the third country concerned may not be willing to voluntarily limit its jurisdiction, despite granting permission to the EU mission to enter its territory. In these cases, the duty of care upon the EU is of course much more onerous, since it entails the adoption of extensive protective measures in the absence of concrete cooperation on the part of the host country. Nevertheless, even in the absence of a SOMA, customary international law prescribes certain obligations regarding the protection of aliens and of their assets that the territorial sovereign has to respect including in relation to EU personnel.[83]

Notwithstanding the role of SOMAs or of general obligations of the Host State, EU institutions still have to guarantee the security of personnel, especially in the case of security incidents occurring during field missions. In particular, the EU has the duty to establish effective mechanisms to protect its staff from escalating threats or injuries. To this end, both the Council and the EEAS have adopted rules on

[80] See e.g. Council Joint Action 2008/736/CFSP (EUMM Georgia), Article 8(1): '[t]he status of the Mission and its staff, including where appropriate the privileges, immunities and further guarantees necessary for the completion and smooth functioning of the Mission, shall be agreed in accordance with the procedure laid down in Article 24 of the Treaty. The SG/HR, assisting the Presidency, may negotiate such an agreement on its behalf'.

[81] EEAS Security Decision, Article 3(3): '[t]aking into account the duty of care responsibility of Member States, EU institutions or bodies and other parties with staff in Union Delegations and/or in Union Delegation premises, or such responsibility incumbent upon the EEAS when Union Delegations are hosted in above mentioned other parties' premises, the EEAS shall enter into administrative arrangements with each of the above entities that shall address the respective roles and responsibilities, tasks and cooperation mechanisms'.

[82] Omissions by EU institutions in this context may also be scrutinised by the ECJ under Article 265 TFEU on actions on failure to act.

[83] See Shaw 2014, pp. 598–601. On the standard of treatment of aliens in the host country's territory, see Brownlie 2008, pp. 524–525. Specific obligations on the treatment of individuals, irrespective of their nationality, also flow from international human rights law, especially as far as the right to life and to personal integrity are concerned. See on this issue Lillich 1984.

emergency situations and on measures necessary to cope with them. In particular, the Council's Field Security Handbook contains very detailed provisions on security incidents. It regulates the drafting of the Emergency Evacuation and Relocation Plan (EERP), in order to provide planned, agreed and, where possible, practised procedures for the emergency evacuation of mission personnel from the duty station or other mission premises to areas where their safety can be assured and/or where they can continue activity.[84] Moreover, the Handbook also establishes procedures for the reporting of security incidents.[85] The EEAS has also enacted such procedures, as confirmed by security incident management rules enshrined in its recent Security Decision. These include a system of incident reporting, the possibility to suspend the mission or to proceed with the extraction of staff members, and special forms of intervention in cases of missing personnel or kidnap and hostage situations.[86]

8.5.3 Offer Labour Contracts Which Are Fair and Which Take into Due Consideration the Peculiar Nature of the Risks Associated with the Specific Working Place/Tasks

The obligation to guarantee fair labour contracts is generally regulated by the internal law of the organization, although some indications of minimum contractual conditions have been identified by international tribunals.[87] In the case of the EU, numerous contractual rights are expressly provided in regulations dealing with the employment relationship between the EU and its personnel. These also include some specific rights for officers performing their tasks in a third country, such as those governed by Annex X of SR or by Article 118 of CEOS for contract staff.

In general terms, contractual regimes have to provide for certain social services and benefits[88] and for annual leave of various durations; they also include emoluments and family allowances when living conditions are particularly hard due to insecurity, climate, medical assistance or isolation of the area where the mission takes place.[89]

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[84] General Secretariat of the Council 2008, pp. 137 ff.

[85] Ibid., pp. 167 ff.

[86] EEAS Security Decision, Article 6.

[87] See Chap. 2 of this volume.

[88] Such as medical insurance. According to the ECJ, the employer has to provide the staff with various services of a social nature, which, under specific circumstances, extend to other members of the family. See ECJ, Mario Berti v. Commission of the European Communities, 7 October 1982, Case C-131/81 (see Annex II, Case 7).

[89] See Article 10 of Annex X of the SR.

8.5.4 Make Adequate Information Available to Personnel About the Potential Dangers They Might Face

Duty of care also includes the obligation for the recruiting institution to hire staff on the basis of a genuine consent, grounded on awareness of the potential threats to be faced during the mission. Accordingly, it is necessary to make explicit the sources and the level of risk for security and safety of staff from the very beginning, and especially prior to employing them. This has not always been the case, as Calls for Contributions to EU missions and job description forms lacked specific information in this regard or provided only extremely generic information.[90] Some improvements have nonetheless been adopted and Calls for Contributions now detail the level of risk and some of the measures that will be adopted in order to protect the mission's personnel. These documents also make clear whether the position is a family or a non-family one and they also indicate general rules on accommodation of staff.[91]

8.5.5 Treat the Working Force in Good Faith, with Due Consideration, with no Discrimination, to Preserve Their Dignity and to Avoid Causing Them Unnecessary Suffering

These aspects of the duty of care entail numerous and specific obligations on the part of EU institutions, the fulfilment of which however often require the cooperation of the staff themselves. Amongst them, the ECJ has consistently held that EU institutions have to guarantee the equal treatment of staff[92] and avoid any form of discrimination.[93] Moreover, EU institutions are also required to put in place measures preventing and punishing harassment behaviour towards their personnel.[94] To attain these objectives and to avoid such behaviours occurring among members of

[90] de Guttry 2012, p. 287.

[91] See e.g. the Call for Contributions to EUAM Iraq, available at www.eeas.europa.eu (accessed 14 January 2018): 'EUAM Iraq has a High Risk Non-Family Mission status due to the present risk rating of the Mission area as high. As such, international seconded and contracted Mission Members shall at no time receive visits or be habitually accompanied by any family member in the Mission area for the duration of their tour of duty or contract. For security reasons, the Mission Members are obliged to live in restricted areas, where security responsibilities are borne by the Mission'. See also the Job Description for posts to the EUCAP Sahel Niger Mission of 2017, available at www.eeas.europa.eu (accessed 15 January 2018).

[92] ECJ, Michael Weiser, 14 June 1990, Case C-37/89.

[93] ECJ, Lindorfer v. Council, 11 September 2007, Case C-227/04, paras 50–59.

[94] See recently EU Civil Service Tribunal, Carlo De Nicola v. European Investment Bank, 8 December 2015, Case F-104/13.

the staff, the EU institutions have also adopted several codes of conduct (applicable to different contexts), which set forth general obligations for personnel.[95] Violations of the code of conduct may also entail the application of disciplinary sanctions.[96]

8.5.6 *Provide Effective Medical Services Should an Emergency Occur*

The duty in this case flows directly from the SR[97] and the Rules of Insurance against the Risk of Accidents and of Occupational Disease. Moreover, the EU institutions usually pay an insurance policy which includes worldwide coverage and physician-directed access to local medical units and hospitals, 24-hour assistance, clinical resources, and medical evacuation.[98]

8.5.7 *The Exercise of Diplomatic and Functional Protection*

The EU does not have the power to exercise proper diplomatic protection for its citizens as States do, although the EU has enacted a legal framework on diplomatic and consular assistance for EU citizens in third countries. Article 23 of the TFEU and Article 46 of the EU Charter of Fundamental Rights provide that

> every citizen of the Union shall, in the territory of a third country in which the Member State of which he is a national is not represented, be entitled to protection by the diplomatic or consular authorities of any Member State, on the same conditions as the nationals of that State. Member States shall adopt the necessary provisions and start the international negotiations required to secure this protection.

The Council has recently adopted a Directive with the aim of implementing this general obligation, by detailing means and procedures through which Member States may discharge their duty of diplomatic and consular protection of EU citizens.[99] The Directive also specifies the role of Union Delegations, providing that they

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[95] See e.g. General Secretariat of the Council 2016, which makes reference to the Annex to the Generic Standards of Behaviour for ESDP Operations (8373/3/05, 18 May 2005). See also European Ombudsman 2001.

[96] General Secretariat of the Council 2016, Articles 16 ff.

[97] See especially Article 73 SR.

[98] de Guttry 2012, p. 288.

[99] Council Directive (EU) 2015/637 of 20 April 2015 on the coordination and cooperation measures to facilitate consular protection for unrepresented citizens of the Union in third countries and repealing Decision 95/553/EC, OJ L 106/1, 24 April 2015.

> shall closely cooperate and coordinate with Member States' embassies and consulates to contribute to local and crisis cooperation and coordination, in particular by providing available logistical support, including office accommodation and organisational facilities, such as temporary accommodation for consular staff and for intervention teams. Union delegations and the EEAS headquarters shall also facilitate the exchange of information between Member States' embassies and consulates and, if appropriate, with local authorities.[100]

However, diplomatic and consular protection of EU citizens remains a primary duty of Member States.[101] EU staff could thus invoke this protection by Member States, provided that there is no representation of the State whose citizenship they possess in the third country where the mission is deployed.

The EU legal order does not expressly envisage the possibility for the EU to exercise functional protection with regard to its agents. Nevertheless, functional protection is generally deemed to constitute an inherent right of international organizations possessing international legal personality.[102] Accordingly, the EU—whose international personality is today beyond doubt[103]—is able to exercise functional protection in relation to its agents, irrespective of the country in which they are carrying out their tasks.[104] The conditions for exercising the functional protection *ratione personae* are to be established according to customary international law, due to the silence of EU law on the matter. Thus, it can be assumed that functional protection can be exercised in relation to any person working for the organization, regardless of the administrative status deriving from the mode of recruitment (international or local, permanent or temporary).[105]

Besides these instruments, the EU institutions also bear a more general duty of assistance under Article 24(1) SR. According to the latter provision, the EU has to assist its staff in proceedings against authors of threats, damages, and attacks to their dignity and their integrity. This may also be construed as entailing a duty for the EU to bring claims on behalf of its injured staff, to assist the staff in defending such claims or eventually to participate in criminal proceedings against the author of a crime for claiming compensation. This is confirmed by the action for damages

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[100] Directive 2015/637, Article 11.

[101] On the functioning of consular and diplomatic protection of EU citizens abroad see CARE 2010.

[102] ICJ, Reparations for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 11 April 1949, in I.C.J. Reports 1949, p. 174. See also Benlolo Carabot and Ubéda-Saillard 2010, p. 1075.

[103] Koutrakos 2015, pp. 14–15. See also ECJ, France v Council (re: Competition Agreement with USA), 9 August 1994, Case C-327/91.

[104] This derives from the objective (or *erga omnes*) nature of the organization's international legal personality. See d'Argent 2013, pp. 450–452. No rule under international law clarifies whether, in the case of concurrent claims by the State of nationality and the organization to which the agent belongs, one claim has to take priority over the other. In this context, duties of consultation and cooperation between Member States and the EU, as established by the principle of sincere cooperation, are of the utmost importance.

[105] Benlolo Carabot and Ubéda-Saillard 2010, pp. 1078–1079.

brought independently by the Commission before the Moroccan courts in the context of the criminal proceeding against the party responsible for the death of Mr. Missir Mamachi di Lusignano and his wife.[106]

8.5.8 *Provide the Personnel with Adequate Training*

Various sources of EU law establish such an obligation for the sending institution. Sometimes, this has led to a fragmented practice regarding training, which has only recently been addressed by the EU.

Training is a key element of an effective framework of measures on duty of care implementation.[107] It is not unsurprising then, that EU institutions are devoting remarkable efforts to this. Every level of risk (low, medium or high) related to the deployment entails a specific training of EU staff, in accordance with the degree of threats likely to occur. The EEAS has confirmed the relevance of security awareness and training of its staff, establishing that the EEAS Security authority must guarantee that staff will receive the necessary awareness briefings and training 'commensurate to the risks in their place of work or residence'.[108]

Training programmes are also envisaged in decisions establishing civilian missions, where they are generally considered as a mandatory step before deployment. They also include the possibility of a two-step training programme, one before deployment and the second 'in-theatre'.[109] These provisions clearly establish a duty not only for EU organs (such as the Head of Mission), but especially for Member States in relation to their seconded personnel.[110] The divergence in Member States' practice in this regard has raised numerous questions as to the effectiveness of national training, not entirely solved by the EU.[111] However, several training programmes have been established at the EU level to provide a comprehensive and coherent training of field personnel, particularly in the context of the EU Civil Protection Mechanism, Election Observation Missions, and CSDP missions.

The Council has recently tried to tackle the issue, by adopting a policy on training for CSDP missions. While it recognises that training is 'key component of

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[106] EU Civil Service Tribunal, Missir Mamachi di Lusignano, para 22.

[107] Council 2006, p. 9.

[108] EEAS Security Decision, Article 11(1).

[109] See e.g. Council Joint Action 2008/736/CFSP (EUMM Georgia), Article 12(4); Council Decision 2014/486/CFSP (EUAM Ukraine), Article 11(4) and Council Joint Action 2008/124/CFSP (EULEX Kosovo), Article 14(5).

[110] Council 2006, p. 14, para 34(b), which states that Member States are responsible for ensuring 'that appropriate measures are taken at national level for the security and safety of their respective personnel seconded to crisis management operations in accordance with requirements set out in the CONOPS and/or OPLAN or other arrangements setting out specific requirements for the security of seconded personnel including, but not limited to, their *training*, protection and insurance'.

[111] de Guttry 2012, p. 291.

any systematic approach to managing the responsibility of an organisation to care for personnel deployed abroad', it also sets forth some guidelines with the aim to guarantee the coherence of national and supranational training programmes. The Council has recognised that responsibility for training rests with the contributing authorities, but also with the chain of command.[112] However, it has acknowledged the need for basic training to be 'aligned for staff posted to EU Delegations, CSDP missions or operations, and other field activities' and it has called upon the EEAS to adopt guidelines and performance standards in order to support Member States' training activities.[113]

8.6 Remedies and the Consequences of Violations of the Duty of Care

First of all, not all damage suffered by EU staff during their deployment abroad may be imputable to the EU sending institution. Article 24 SR takes into account this possibility, by enshrining a duty to compensate the damage suffered by staff even in the absence of a direct responsibility for violations of the duty of care. In fact, the EU institutions shall jointly and severally compensate the damage suffered, in so far as the official 'did not either intentionally or through grave negligence caused the damage and has been unable to obtain compensation from the person who did cause it'. This is further reinforced by Article 73 SR, which lists insurance coverage and benefits the member of the staff (or his/her family in case of death) is entitled to for occupational diseases or accidents suffered when fulfilling his/her duties.

The question remains what happens when, instead, the damage has been caused by wrong actions or omissions on the part of EU institutions. The SR provide for a system of actions allowing the staff member affected by an institution's behaviour to obtain redress which is based on a two-fold procedure. The first step is an administrative procedure of complaint against the allegedly responsible institution. Under Article 90 SR

> Any person to whom these Staff Regulations apply may submit to the appointing authority a complaint against an act affecting him adversely, either where the said authority has taken a decision or where it has failed to adopt a measure prescribed by the Staff Regulations.[114]

In the context of this procedure, the appointing authority having received the complaint shall notify the person concerned of its reasoned decision within four months from the date on which the complaint was lodged. If at the end of that period no reply to the complaint has been received, this shall be deemed to

[112] Council 2017, para 25. According to the Council, 'each Member State preserves full discretion with regard to the organisation of its own training system' (para 28).

[113] Ibid., para 29.

[114] Article 90(2) further details the timeline for such a procedure.

constitute an implied decision rejecting it, against which an appeal may be lodged under Article 91. The latter prescribes the jurisdiction of the ECJ on disputes between a staff member and the appointing authority, provided that the former has already filed a complaint to the latter and that he/she has received a negative decision.[115] This procedure is regulated by Article 270 TFEU on disputes between the Union and its servants under the SR and the CEOS.[116] The nature of the responsibility of the responding institution and the requirements set forth for its invocation are different from those of Article 340 TFEU on non-contractual liability of the Union.[117]

It seems noteworthy that the Civil Service Tribunal has excluded—although not in general terms—the possibility of identifying a separate responsibility of the Union for lawful acts (without fault) which would overlap with the obligations of the institution to pay benefits and remunerations for damage suffered by the staff member under the SR.[118]

Not all claims regarding violations of the duty of care fall under the jurisdiction of the ECJ. Local staff, under Article 122 of the CEOS, must bring any dispute between them and the institution concerned before the arbitral body indicated in their contract of employment.[119] This exception is also explained by the role of national law in regulating the employment relationship between the local staff and EU institutions or agencies.[120]

8.7 Conclusions and Recommendations

The analyses conducted of EU practices and procedures highlights a high degree of compliance with general requirements of the duty of care as established at the international level. This is guaranteed also by the adoption on the part of the EU of a comprehensive and diversified internal framework on the safety and security of staff, capable of taking into consideration the variety of situations and risks that EU

[115] See Article 91(2) SR.

[116] See generally, ECJ, Meyer-Burckhardt v. Commission, 22 October 1975, Case C-9/75, para 7; ECJ, Pomar v. Commission, 10 June 1987, Case C-317/85, para 7; EU Civil Service Tribunal, Nonopoulos v. Commission, 11 May 2010, Case F-30/08, paras 130–133 (see Annex II, Case 9).

[117] The relationship between this head of jurisdiction and the one under Article 340 TFEU on non-contractual liability of the Union is still debated within the ECJ. See however EU Civil Service Tribunal, Missir Mamachi di Lusignano, para 122. For recent developments on the same case see General Court of the EU (Appeal Chamber), Livio Missir Mamachi di Lusignano v. Commission, Case T-401/11 P, 10 July 2014; ECJ, Livio Missir Mamachi di Lusignano v. Commission, 10 September 2015, Case C-417/14 RX-II; General Court of the EU (Appeal Chamber), Stefano Missir Mamachi di Lusignano v. Commission 2017.

[118] EU Civil Service Tribunal, Missir Mamachi di Lusignano, paras 209 ff.

[119] Lenaerts et al., p. 672.

[120] On this aspect see ECJ, Betriebsrat der Vertretung der Europäischen Kommission in Österreich, 10 July 2003, Case C-165/01.

Staff may encounter when deployed abroad. The following recommendations try to identify priorities of intervention on the part of both the EU legislator and the Member States.

(1) The legal framework for the duty of care is extremely vast and complex. This may give rise to overlapping regimes and uncertainties regarding specific obligations of EU institutions or agencies, which also negatively affect the capacity of ascertaining violations and provide the necessary remedies. Moreover, while for certain institutions or organs internal binding regulations have been adopted, other activities performed abroad by EU personnel are only regulated by soft law instruments or not regulated at all. In this perspective, an integrated internal legal instrument, bringing together the main principles and rules of the subject matter, will certainly enhance certainty of the law and the effectiveness of redress mechanisms.
(2) EU Member States still play a prominent role in guaranteeing major aspects of the duty of care implementation. As highlighted in this chapter, the distribution of powers between the EU and its Member States in a wide range of activities related to the duty of care is still unclear. While the criterion of authority (or that of control) may help in identifying the subject responsible in a certain situation, this only works in an *ex post* phase and it may affect both prevention and mitigation of risks. The EU needs to develop a coherent cooperation structure between EU institutions and Member States in order to create an effective set of preventive and protective measures.
(3) Risk assessment is today limited only to certain areas of EU activities and it focuses in particular on missions outside the Union's territory. However, the changing landscape of the internal situation of the EU calls for a more integrated approach, capable of taking into account threats personnel may face even when discharging their duties within the European borders. Moreover, improvement is expected in relation to other kinds of missions in the field, not entirely regulated as concerns the duty of care, such as missions operated by the EU Civil Protection Mechanism.
(4) The issue of training is of pivotal importance in creating awareness of risks in the staff deployed abroad and in identifying effective protective measures or equipment. The framework in which national and EU authorities carry out their training programmes is still excessively fragmented. While this appears inevitable, given the retained powers of Member States in this context, an effort to provide general and binding guidance for national authorities seems all the more desirable. Improving the training system, by creating a general framework where Member States and EU institutions act in a coherent manner, is central to avoid conduct on the part of staff that may jeopardise the measures and the mechanisms put in place for their protection.
(5) The internal legal framework is still unclear as regards remedies for violations of the duty of care and the conduct of some institutions—such as the Commission—is creating uncertainty as to the obligations of the EU related to payment of compensation and benefits. Procedural pathways still overlap each

other, rendering the ascertainment of facts and responsibilities extremely complex. The system of redress, where administrative and judicial procedures are intertwined, needs an intervention from the EU legislator, clarifying the scope and the objectives of the different procedures available to staff members having suffered damages or injuries during their deployment.

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Chapter 9
Implementation of the Duty of Care by NATO

Luisa Vierucci and Polina Korotkikh

Contents

Abstract The very nature of the North Atlantic Treaty Organization (NATO), namely a military alliance of a defensive character, points to the relevance that the duty of care may have for the organization, as it implies the prospect for deploy-

Annex II—the Table of Cases—can be accessed online here: http://extras.springer.com/.

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ment abroad and in a dangerous environment for personnel either directly hired by the organization or having some other working link with it. Civilians having a working relationship with NATO are not only those recruited to run the Headquarters or to support Council approved operations or missions but also consultants, temporary staff, staff seconded from a member State and members of the civilian component of a NATO force deployed in the field. This chapter will analyse the extent to which NATO implements its duty of care when these categories of civilians perform functions outside the Headquarters. In addition, the paper attempts to address the degree of applicability of NATO duty of care obligations to non-staff members, namely contractors and locally employed personnel.

Keywords seconded personnel · contractors · civilian personnel regulations · SOFA · Partnership for Peace

9.1 Introduction

The very nature of the North Atlantic Treaty Organization (NATO), namely a military alliance of a defensive character, points to the relevance that the duty of care may have for the organization. Article 5 of the founding treaty of 1949, providing for assistance by any means, including recourse to armed force, to a NATO Party that has been the object of an attack,[1] illustrates the prospect for deployment abroad and in a dangerous environment for personnel either directly hired by the organization or that have some other working link with it.

In addition, NATO pursues objectives of a broader political nature, such as the 'development of peaceful and friendly international relations' and the strengthening of 'economic collaboration' between the Parties.[2] Since the beginning of the 1990s these purposes have been enriched with tasks relating to 'crisis management' and 'security cooperation'. In this respect the 2010 Strategic Concept adopted during the Lisbon Summit is very explicit.[3]

The tasks requiring the use of armed force also need the support of civilian personnel. Since the very first deployments of NATO forces, the civilian

[1] According to Article 5 of the 1949 North Atlantic Treaty, 'The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defence recognised by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area'.

[2] See Article 2 of the North Atlantic Treaty.

[3] NATO 2010a. Also the projection from security to stabilisation tasks is currently being discussed, see Lucarelli et al. 2017.

component has been 'a normal feature of the system'.[4] Today the presence of civilians within NATO both at the Headquarters and outside Brussels has increased also because of the rise in jobs of a political and organizational nature.[5] Because of the origins of NATO and the type and number of activities that the organization is mandated to perform, the question of the duty of care for civilian personnel deployed abroad in a dangerous area is potentially of great importance for NATO. That being said, no cases or examples of the concrete implementation of the duty of care by NATO were found by the authors' research.

9.2 Legal Sources

The main document that sets out the rights and obligations of the civilians having a working relationship with NATO is the Civilian Personnel Regulations (NCPR) of 2005 (as amended in 2016),[6] adopted by the Council and constituting binding contractual arrangements between the civilian and the organization. The document is composed of a general part containing the main rules governing the working relations of staff members, consultants and temporary personnel with the organization, and fifteen annexes detailing specific aspects of the relationship such as performance assessments, administrative review and indemnity for loss of jobs. While some of the provisions contained in the general Part One (Rules Governing Members of the Staff) and Part Two (Rules Applicable to Consultants and Temporary Personnel) of the NCPR are of interest for this paper, Annex XIV is particularly relevant since it governs the 'Participation of International Civilian Personnel in Council-Approved Operations and Missions'. In twelve concise articles, this Annex sets out the legal framework applicable to civilians sent abroad on NATO missions, including the provisions of deployment, pre-deployment readiness, legal status and security matters. The NCPR will be the chief reference document for the analysis of the duty of care for NATO staff members.[7]

[4] Draper G.I.A.D. 1966, p. 21.

[5] Around 1,000 civilians are today working as NATO international staff at the headquarters in Brussels (see https://www.nato.int/cps/en/natohq/topics_58110.htm? Accessed 3 November 2017). According to the NATO Handbook 2006, p. 73: 'civilian staff employed by NATO worldwide, including the staff of NATO agencies located outside Brussels and civilians serving on the staff of the military commands throughout NATO, number approximately 5200' (NATO 2006).

[6] NATO 2005.

[7] Also the directives implementing Annex XIV, C-M(2005)0041 and C-M(2010)0115, would undoubtedly be of high importance for this study since they not only complement the provisions of the NCPR but also have primacy over the latter in case of a conflict of interpretation (see, in this sense, Article 12, para 1, of Annex XIV to the NCPR). However they are not publicly available. Equally not disclosed are ACO Directive 50-11, Deployment of NATO Civilians (a living document) and ACT Directive 50-13, Deployment of ACT NATO Civilians (12 February 2010), reference to which is made in: NATO 2010b, p. 172 (NATO Legal Deskbook).

Remarkably, some provisions relevant to the duty of care were already included in the 1951 Agreement on the Status of the North Atlantic Treaty Organization, National Representatives and International Staff (Agreement on the Status of NATO). The Agreement grants 'the immunities and privileges accorded to diplomatic representatives and their official staff of comparable rank' (Article XII) to the permanent representatives to NATO in the territory of another member State. In addition, it clarifies the terms under which NATO international staff and experts on mission operate in a party State, by recognising a wide range of, though not full, privileges and immunities to them and to 'the members of their immediate families residing with and dependent on them' (Article XVIII(b)).

The 1951 Agreement between the Parties to the North Atlantic Treaty regarding the Status of Forces (NATO SOFA) is also important, because it covers the 'civilian personnel accompanying' an armed force of a contracting party who are employed in the armed service of that party and are serving in the territory of another party.[8] This Agreement was supplemented by the 1952 Protocol on the Status of International Military Headquarters set up pursuant to the North Atlantic Treaty (Protocol to NATO SOFA), that contains several provisions devoted to the status of civilian personnel of military headquarters and their dependents.

While the Agreement on the Status of NATO, the NATO SOFA and the Protocol to NATO SOFA draw up the standard regulation for some categories of civilians, the specificities relating to the functions to be performed in a single State party may be established in a supplementary arrangement concluded between NATO and the member State.[9] In this respect it is important to note that the NCPR also apply to the civilians whose treatment is regulated by an agreement supplementing either the NATO SOFA or the Agreement on the Status of NATO. Departure from the NCPR provisions has to be expressly specified in the bilateral arrangement.[10] On account

[8] This was the first SOFA ever to apply to the civilian component of an armed force, see Draper 1966, p. 184.

[9] This possibility is envisaged in Article XIX of the Agreement on the Status of NATO, in para 2 of the Preamble to the NATO SOFA and in Article 7, para 2 of the Protocol to the NATO SOFA. Similar agreements have been concluded, for example, between NATO and Germany (Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces with respect to Foreign Forces stationed in the Federal Republic of Germany (Revised Supplementary Agreement, effective 29 March 1998), (NATO SOFA with Germany) available at: http://www.eur.army.mil/aepubs/docs/NATO-SOFA.pdf. Accessed 10 November 2017) and between NATO and Italy (Agreement between the Government of the Italian Republic and the Supreme Allied Commander in Europe on the special conditions applicable to the establishment and operation in Italian territory of International Military Headquarters which are or may be there installed, in Gazzetta Ufficiale della Repubblica Italiana, no. 182, 9-7-19963, p. 3565).

[10] An agreement concluded by NATO with a member State may expressly recognise priority to the NCPR. This is the case of the Agreement between the Portuguese Republic, of the one part, and the Supreme Headquarters Allied Powers Europe and Headquarters, Supreme Allied Commander Transformation, of the other part, to supplement the protocol on the Status of International Military Headquarters set up pursuant to the North Atlantic Treaty, Resolução da Assembleia da República n. 79/2014, 04-09-2014 (Article 13, para 1(a)). See also below n. 23.

of this, the present analysis will be mainly devoted to the duty of care provisions as they emerge from the NCPR.

NATO has also concluded several agreements with non-member States. Since the organization launched the Partnership for Peace Programme and invited national exchange missions to NATO and the partner countries, the question on the status of the personnel of such missions, mostly civilians, has arisen. In 1995 a Partnership for Peace Status of Forces Agreement (PfP SOFA) was concluded. It grants to the representatives and missions of the Partner States the status virtually equal to those of the representatives of NATO member States and vice versa.[11] Another case in point is the 2014 Agreement between the North Atlantic Treaty Organization and the Islamic Republic of Afghanistan on the Status of NATO Forces and NATO Personnel Conducting Mutually Agreed NATO-Led Activities in Afghanistan (NATO SOFA with Afghanistan).[12]

The NATO Standardisation agreements (STANAGs) also may include standards that are relevant in a duty of care perspective. Generally, a standardisation document specifies the processes, procedures, terms, and conditions for common military or technical procedures, which are intended to be implemented by the member States. Their aim is to provide common operational and administrative procedures and logistics, so one member State's military force may use the facilities and support of the structures and facilities of another member.

Finally, reference will be made to two documents, the NATO Legal Deskbook and the NATO Logistics Handbook, which contain information useful for the purposes of this paper especially with respect to contractors, because the lack of availability of model contracts between NATO and this category of civilians constitutes a constraint of this research. However it is important to stress that not only are these handbooks not a legal source but also, although they were elaborated by a NATO division (respectively the legal office and the logistic committee) they have not been approved by the Council.

Although all the above mentioned documents are relevant to the analysis of the way NATO implements the duty of care towards the civilian personnel sent abroad, it must be remarked that the organization does not therein use the very expression 'duty of care'.[13] The only reference to this expression can be found in some

[11] Agreement among the States Parties to the North Atlantic Treaty and the other States participating in the Partnership for Peace regarding the Status of their Forces, opened for signature 19 June 1995, entered into force 13 January 1996. Available at: https://www.nato.int/cps/ic/natohq/topics_50086.htm. Accessed 5 January 2018.

[12] Agreement between the North Atlantic Treaty Organization and the Islamic Republic of Afghanistan on the Status of NATO Forces and NATO Personnel Conducting Mutually Agreed NATO-Led Activities in Afghanistan, entered into force 1 January 2015. Available at https://www.nato.int/cps/ic/natohq/official_texts_116072.htm?selectedLocale=en. Accessed 14 December 2017.

[13] Such an expression cannot be found either in the official NATO Terminology database (available at https://nso.nato.int/natoterm/content/nato/pages/home.html?lg=en. Accessed 10 October 2017), or in non official documents such as the 2016 NATO Encyclopedia (available at https://www.nato.int/cps/en/natohq/topics.htm. Accessed 10 October 2017).

judgments of the NATO Administrative Tribunal. In this case, however, the expression is employed with a meaning different from the one that is attached to it in the present research.[14] Overall, it can be said that within NATO terms such as protection, assistance or safety are most often used as synonyms for the duty of care expression in the sense of this volume.

9.3 Scope *Ratione Personae* and *Loci* of the Duty of Care

Identifying the type of working relationship that a civilian has with NATO is crucial for the analysis of duty of care since this relationship determines the extent of the subjection of the civilian to NATO internal regulations and/or agreements concluded between NATO and a member State or between NATO and a third State.

The following categories of civilian personnel may be identified:[15]

(i) International civilians: they are recruited from among the nationals of the member States of the organization and assigned to an international post appearing on the approved establishment of a specific NATO body;
(ii) Consultants: they are civilians with special expertise, not otherwise available among the NATO personnel system, who are hired normally from among nationals of a member State for a maximum period of 90 days;[16]
(iii) Temporary personnel: they are engaged among nationals of a member State either to replace members of the staff who are absent or to undertake tasks temporarily in excess of the capacity of the establishment approved for the NATO body concerned';[17]

[14] The jurisprudence of the bodies competent to adjudicate upon the disputes between staff members and NATO (the NATO Appeals Board, active between 1965 and 2013, and the NATO Administrative Tribunal established in 2013 through an amendment to the NCPR) is not useful for the analysis of the duty of care of civilians personnel sent on mission. In the judgments issued by the Administrative Tribunal until the end of 2016, the expression 'duty of care' is used exclusively in respect to labour issues such as the dismissal of a person, the termination of a mission or the rejection to renew a contract due to a prolonged sick leave. Only the following statement seems to refer more closely to the notion of duty of care that we adopt: 'This duty implies, in particular, that when the administration takes a decision concerning the situation of a staff member, the competent service should take into consideration all the factors which may affect its decision, and when doing so it should take into account not only the interests of the service but also those of the staff member concerned' (Appellant v. NATO Joint Force Training Centre Respondent, 27 April 2016, Judgment Case No. 2015/1066 MDP, Article 58 (see Annex II, Case 30)).

[15] NATO Legal Deskbook, pp. 165–166.

[16] NCPR, Part Two, Article 69, para 1.

[17] NCPR, Preamble, Article B(v)(e).

(iv) Seconded staff: they are recruited with the agreement of the national authorities:

- 'from a national administration, public institution or the armed forces of a NATO member state, who retain a formal link with the administration, institution or armed forces from which they were recruited';[18] or
- are made available to serve as international civilian personnel under supplementary arrangements concluded with the Council under Article 19 of the 1951 Agreement on the Status of NATO or Article 7.2 of the 1952 Protocol to NATO SOFA.[19]

(v) Civilian component of a NATO force: it is the civilian personnel accompanying the armed force of a Contracting Party who are employed by an armed service of that Party and deployed in the territory or another party, and who are not nationals nor ordinarily resident in the host State.[20]

In this paper, the above categories of NATO civilians will be referred to as *staff members* of the organization, since they are subject to the NCPR. However, it is important to stress that the treatment of the seconded staff and the civilian component of a NATO force may be defined, also in contrast to the NCPR,[21] in agreements supplementing, often on a bilateral basis, the Agreement on the Status of NATO or the NATO SOFA, should the specificities of the circumstances require departure from the NCPR.

A further distinction, which is of relevance for the duty of care, concerns the NATO staff members who are sent abroad in support of an operation or mission approved by the North Atlantic Council (Council) and those who are on mission independently from a conventional force being deployed in the field. While a specific Annex to the NCPR, Annex XIV, is devoted to the first class of civilians on mission,[22] no specific regulation seems to apply to the other class of civilians. One may therefore suppose that the latter are covered by Part One of the NCPR, which governs 'members of the staff' as therein defined (namely limited to international

[18] NCPR, Preamble, Article B(f)(i).

[19] Ibid., Article B(f)(ii).

[20] NATO SOFA, Article I, para 1(b).

[21] See NCPR, Preamble para A (devoted to 'Applicability'), subpara (iii): Compliance with these Regulations, except as specified in agreements concluded between the member government concerned and the Secretary General or Supreme Allied Commander as appropriate, is likewise incumbent on nationals of a country which has elected to avail itself of the special provisions of Article 19 of the Agreement on the status of the North Atlantic Treaty Organization, national representatives and international staff or Article 7(2) of the Protocol on the status of international military headquarters'.

[22] NCPR, Annex XIV, Article 5: 'When a staff member is sent on a Council approved mission on a foreign territory, an 'appropriate legal status' must be accorded to him/her prior to assignment or appointment'. Deployment is defined as 'the assignment of a staff member to a remote location, to perform duties (inside or outside a theatre/deployment location) in support of a Council-approved operation or mission'.

civilians, seconded staff and, to some extent, civilian component of a NATO force) or, as the case may be, Part Two which regulates 'consultantss and temporary staff'. Nevertheless, it is not to be excluded that Annex XIV applies by analogy, at least when the function of a civilian on mission outside the framework of a NATO force is the same as that performed by a civilian supporting a Council approved operation or mission.

Other civilian personnel having a working relationship with NATO are:

(i) Contractors: these individuals enjoy the rights and obligations defined by the terms of their employer's contract with the NATO entity. They may range from self-employed individuals with a business license, to employees of a large multinational contracting company;[23] and
(ii) Local wage rate civilians:[24] they are hired by a force stationed in another NATO State among local nationals and do not enjoy NATO status.

For the purposes of this paper, these two categories of civilians will be named *non staff members* of the organization because, in principle, the NCPR do not apply to them.

On account of the increase of the use of *contractor*s in recent years,[25] in 2007 NATO developed a Policy on Contractor Support to Operation, in which it is required to 'clearly define the status of contractor personnel and equipment in all agreements, understandings, arrangements and other legal documents with host nations'.[26] In particular, 'documents, such as a Status of Forces Agreement (SOFA) or Transit Agreement, should establish legal jurisdiction, the rights to tax and customs exemptions, visa requirements, movement limitations and any other matters which host nations are willing to agree'.[27] As a matter of fact, several supplementary NATO SOFA agreements contain provisions concerning contractors, e.g. the NATO SOFA with Germany[28] and the NATO SOFA with Afghanistan.[29]

Local employees are not entitled to the provisions of the NATO SOFA and are not covered by the NCPR; they are fully subject to the legislation and regulations of the host State.[30] Probably for this reason, no reference to this category of civilians useful to the duty of care analysis could be found in the NATO documents examined in this study. As a consequence, this paper will not deal any further with this category of non-staff members.

The other aspect of the *ratione personae* scope of the duty of care concerns the identification of the individual or body who holds responsibility to ensure that this

[23] NATO Legal Deskbook, p. 166.
[24] NATO SOFA, Article IX, para 4.
[25] NATO Legal Deskbook, p. 166.
[26] NATO 2012, p. 161.
[27] Ibid.
[28] See e.g. Article 49, para 6(b) of the Agreement.
[29] See e.g. Article 9 of the Agreement.
[30] NCPR, Preamble, Article A(ii).

duty is duly implemented and, in case of violation, that a proper remedy is available.

The full operational responsibility for the duty of care in relation to *staff members* is delegated from the Heads of NATO bodies to the Senior NATO Military Commander in-theatre.[31] The Heads of NATO bodies, however, 'retain administrative authority over the personnel while deployed with respect to all other aspects concerning their employment'.[32] In particular, the approval of the employee's participation in a NATO operation or mission fully lies within the responsibility of the Supreme Allied Commander Europe (SACEUR).[33]

It is more difficult to establish responsibility for seconded personnel. This issue is addressed in the agreement between NATO and the seconding State, in the absence of which the provisions of international law apply.[34] Similarly, this issue should be detailed in the contract linking the contractor to the organization.[35]

Ratione loci, duty of care issues may arise when a civilian is sent on mission in the territory of a NATO member State or outside the NATO area, namely in countries that have partnership agreements with NATO, e.g. in the framework of the Partnership for Peace,[36] or in third countries not enjoying any special form of cooperation with the organization, such as Afghanistan[37] and Libya.[38]

9.4 Content of the Duty of Care

9.4.1 Health and Safety

As far as the deployment of staff members is concerned, the NATO general policy offers compulsory insurance coverage for employees and members of their families

[31] NCPR, Annex XIV, Article 9, para 1.

[32] NCPR, Annex XIV, Article 9, para 2.

[33] See http://www.nato.int/cps/en/natohq/topics_50110.htm.

[34] See Spagnolo, Chap. 3.

[35] According to the NATO Logistic Handbook (NATO 2012, p. 157), the NATO Commander has 'full control' over the activities of a contractor 'in accordance with applicable regulations, terms and conditions laid down in the contract'. However, 'where a nation is the contracting authority, and the contracted support is for national purposes only, the NATO Commander's authority over the contracted support will be in accordance with the Transfer of Authority (TOA) or other arrangements agreed between the NATO Commander and the nation' (ibid.).

[36] In the countries that belong to the Partnership for Peace programme, several liaison offices have been set up which are staffed mainly by civilians, see https://www.nato.int/cps/en/natohq/topics_79926.htm.

[37] See NATO and Afghanistan at https://www.nato.int/cps/ic/natohq/topics_8189.htm.

[38] See NATO 2014 Wales Summit declaration, para 38 (available at https://www.nato.int/cps/en/natohq/official_texts_112964.htm. Accessed 19 November 2017), according to which 'following a request by the Libyan authorities, we continue to stand ready to support Libya with advice on defence and security institution building and to develop a long-term partnership'.

'in order to provide them with appropriate compensation related to physical injury suffered by reason of their present or former office or duties with the organization'. The only condition that must be fulfilled is that 'the injury has not been willfully or through serious negligence provoked by the injured'.[39]

Coverage usually includes life insurance, temporary incapacity and permanent invalidity, as well as medical insurance for the staff member and his/her family.[40]

More specifically, for international civilians and temporary personnel,[41] the insurance can be provided in two different ways: either by 'participation in the national social security system of the host country, supplemented as necessary by a group insurance scheme, or by 'participation in a group insurance only'.[42] It is to be noted that the NCPR expressly provides for forfeiture of the benefits ensuing from the insurance for 'voluntary' participation by the international civilian in 'certain special activities carrying abnormal risk or visits to certain countries'.[43]

Consultants enjoy a different insurance treatment, since they may be covered by 'accident insurance for occupational risks during the period of engagement' only 'at their request and at their expense'.[44] Nevertheless, if the consultant is deployed in support of a Council-approved mission or operation, 'the Head of NATO body shall ensure that appropriate insurance cover is provided.'[45] This seems to be very limited coverage, considering the possibility for field activities of a consultant in third countries without the support of a military mission in the field.

While general provisions concerning the responsibility of the Head of the NATO body or the Head of operations for medical assistance can be found both in the NCPR and the Agreement on the Status of NATO, the most detailed provisions concerning specific instances of medical emergency are addressed in several STANAGs to a remarkable level of detail.[46] The STANAGs cover issues as specific as the requirements for chirurgical operations,[47] vaccination[48] or dental care.[49]

[39] NCPR, Article 14, para 3.

[40] NCPR, Article 47 provides details on the extent of the insurance coverage. It is the responsibility of the Secretary General and the Supreme Allied Commanders 'to define the method of insurance to be applied in each host country', and, once it is defined, it becomes compulsory for all members of the staff (NCPR, Article 48, paras 2–3).

[41] Ibid., Article 83.

[42] Ibid., Article 48.

[43] Ibid., Article 47, para 3.

[44] Ibid., Article 74.

[45] Ibid., Article 76bis (for consultants) and Article 87 (for temporary personnel).

[46] The key document is the 2008 Allied Joint Medical Doctrine for medical evacuation (NATO 2008a).

[47] NATO 2015a. See also NATO 2015b.

[48] NATO 2008b.

[49] NATO 2014.

The assessment of the level of risk, both relating to the decision to deploy and to remain in the operational area, has to be certified by the Senior NATO Military Commander in-theatre.[50] The responsibility to keep the staff informed of the prevailing security conditions also lies with the Senior NATO Military Commander in-theatre, who shall provide for the evacuation of staff members from the operational theatre as soon as the level of risk is judged to be unacceptable.[51]

When 'high physical standards' are required for a specific post, this has to be specified in the job description for staff members.[52]

The prohibition on carrying a weapon or wearing military clothing so as not to be mistaken for military personnel may be considered as a measure aimed at improving the safety of the civilian.[53] While this provision only applies to a staff member being deployed in support of a Council mission or operation, several agreements contain reference to this rule. For example, according to the SOFA between NATO and Germany, civilians may be authorised to carry arms when they 'are particularly endangered by the special nature of their official position or activities'.[54] Similarly, the SOFA between NATO and Afghanistan allows the organization's personnel to carry arms 'as required for the performance of their duties'.[55] By contrast, this SOFA allows NATO contractors to carry weapons only in accordance with Afghan laws and regulations.[56]

The assessment of the level of risk relating to the specific task to be performed is particularly important for contractors, since they are often deployed to work in a dangerous environment in close connection with military personnel. For this category of NATO *non staff members*, the Logistic Handbook indicates that a thorough scrutiny takes place in advance of an operation that includes the analysis of the type and phase of the operation, force protection and operational security.[57] Most relevant to our purposes are force protection issues, since they involve provision of security for the contractors and identification of the requirement for equipping and training them for defence against chemical, biological, radiological and nuclear threats. In addition, in areas where local medical care is not available, the Logistic Handbook indicates that 'the force may need to provide it' to contractors.[58]

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[50] NCPR, Annex XIV, Article 8, para 1. For personnel deployed to a location remote from the actual theatre of operation or mission, the responsibilities fall on the Senior NATO Military Commander responsible for the deployed location.

[51] NCPR, Annex XIV, Article 8, para 2.

[52] NCPR, Article 4, para 4.

[53] NCPR, Annex XIV, Article 8, para 4.

[54] Article 12, para 1 of the Agreement.

[55] Article 12 of the Agreement.

[56] Ibid., Article 12, para 2.

[57] NATO 2012, p. 162.

[58] Ibid. The NATO Policy on Contractor Support to Operations C-M (2007)004 might provide protection towards contractors deployed on Council approved missions but it is not publicly available.

9.4.2 Protection of Private Property

According to Article 14, para 1, of the NCPR NATO has to provide assistance in cases where staff members or former staff members or their families, by reason of their present or former office or duties with the Alliance, suffer 'any insult, threat, defamation or attack on their … property', 'in particular in taking action against the author of any such act'.

The authorities competent to apply these provisions are either the Secretary-General of NATO, for personnel employed by NATO bodies under the Agreement on the Status of NATO, or the Major NATO Commanders for personnel employed by NATO bodies under the Protocol to NATO SOFA. If any material damage has taken place, the bodies enjoy an arbitrary power to determine 'whether there is a direct link between the injury suffered and the staff members' and whether the latter have willfully or through serious negligence provoked the injury, whether proper redress has been obtained, what form any assistance should take and, in the case of material damage, what compensation, if any, should be granted.'[59]

9.4.3 Labour Contracts

Comprehensive rules on labour contracts are set forth in the NCPR with respect to a specific category of civilians, namely those being deployed in support of a Council-approved operation or mission. Annex XIV of NCPR at Article 3, para 1, establishes that if the period of the deployment is to be longer than 30 consecutive days, a staff member can only be deployed after he or she expressed consent. Additionally, it requires the Head of the NATO body to take every possible effort in order to deploy volunteers for the positions that are no longer than 30 days. Consent to be deployed for a longer period can be expressed either by signing an employment contract linked to a job description which carries a requirement to deploy, or by agreeing to deploy on an ad hoc and voluntary basis.

Moreover, Article 3, para 3 establishes an obligation for the Heads of NATO bodies to take into consideration any claim by a staff member that the deployment in support of an operation or mission would cause 'undue hardship'.

Article 4 provides that the Head of NATO body 'shall not require staff members to deploy to a remote location, not specifically mentioned in their contracts, on a single assignment for periods exceeding 6 months (183 days) in any period of 18 months (547 days).'[60] Exceptionally, if operational circumstances require it, authority is delegated to SACEUR to waive these limits.

Article 4 also provides that, 'if a staff member is unable to agree to the terms outlined within a changed post description, and cannot be reassigned or otherwise

[59] NCPR, Article 14, para 4. See further below, Sect. 9.4.7.

[60] NCPR, Article 4, para 1.

re-employed, the contract will be terminated with the payment of indemnities and allowances as provided within the[se] regulations.'

Lastly, Article 3, para 4 preserves the post from suppression or downgrading during the staff member's absence due to the deployment to a remote location, by requiring that the engagement of a civilian staff member in a Council-approved mission for more than 30 consecutive days must not adversely affect the member's position.

9.4.4 Training and Equipment

In general terms, the NCPR prescribes that the Head of each NATO body 'establish a program to ensure the training of staff, based on a continuous assessment of the skills needed for efficient performance'.[61] This provision covers both international civilians and temporary personnel,[62] whereas no similar obligation is set out in the Regulations with respect to consultants.

A special regime governs staff members to be deployed in a Council approved mission or operation. According to Article 6 of Annex XIV of the NCPR, this personnel 'must be prepared to use special equipment, to wear protective clothing, to undergo training … and to comply with other preparatory measures established by SACEUR'.

Since 2007, civilian personnel has to attend a five day-long mandatory course organized in Vyškov, Czech Republic.[63] The aim of the training is 'to provide NATO civilians with the knowledge and practical skills needed to deploy safely and successfully in support of NATO operations and missions, wherever they may be.'[64] The attendees have to possess a 'good level of fitness' and be ready to engage in field exercise scenarios.[65]

The 2007 Allied Joint Doctrine for Force Protection[66] provides a wide range of 'measures and means to minimize the vulnerability of personnel, facilities,

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[61] NCPR, Article 16bis.

[62] However, according to Article 81 of the NCPR the provision on training may be derogated from in the contract.

[63] See NATO (2012) NATO Civilian pre-deployment training marks 5th anniversary. https://www.nato.int/cps/en/natolive/news_87928.htm. Accessed 21 December 2017.

[64] NATO Civilian Pre-Deployment Courses. http://www.predeploymentcourse.com/. Accessed 21 December 2017.

[65] The topics include first aid, orientation, negotiation and meditation, cultural awareness, international law, radio procedures and psychological aspects of missions, see Smith S (2007) Civilians get dirty too. https://www.nato.int/fchd/fchdold/news/2007/n070619b.htm. Accessed 21 December 2017.

[66] NATO (2015) Standard AJP-3.14 Allied Joint Doctrine for Force Protection Edition A version 1 with UK national elements. https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/454616/20150804-AJP_3_14_Force_Protection_Secured.pdf. Accessed 21 February 2018.

equipment, materiel, operations, and activities from threats and hazards in order to preserve freedom of action and operational effectiveness thereby contributing to mission success'.[67] In addition to the pre-deployment training, the Doctrine requires as a minimum standard that all personnel are briefed on the threats, hazards, procedures and alarms which are typical to the location where they are deployed and encourages the deploying forces to undergo cultural awareness training.[68] It further provides for in-theatre training[69] and additional or refresher training in case of a changing operational environment. Importantly, these measures apply not only to *staff members* but also contractors and to some extent to locally recruited personnel.[70]

Several STANAGs address search and rescues matters, whether they are in connection with combat activities or not,[71] including recovery of isolated individuals in hostile environments.[72] Search and rescue training for civilian units, also by means of field exercises, are organized by NATO Supreme Headquarters Allied Powers Europe (SHAPE).[73]

9.4.5 *Prohibition of Discrimination and Protection of Dignity*

Provision against discrimination is made for in Article 12, para 1.4 of the NCPR in quite comprehensive terms since it is prohibited to discriminate on the grounds of gender, race or ethnic origin, religion or belief, age or sexual orientation.[74] It was also later spelt out in the 2003 NATO Policy on Protection against Discrimination and Harassment at Work,[75] which remarkably also establishes a Prevention and

[67] Ibid., Chapter 1, para 2.

[68] Ibid., Chapter 4, para 0420(c).

[69] Ibid., Chapter 4, para 0420(d).

[70] Ibid., Preface, para 0006.

[71] STANAG on Search and Rescue (SAR) and Combat Search and Rescue (CSAR) 2005.

[72] NATO Allied Joint Doctrine for Recovery of Personnel in a Hostile Environment 2016, AJP-3.7. https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/511240/20160315-NATO_Pers_Recovery_AJP_3_7.pdf. Accessed 21 December 2017.

[73] See https://shape.nato.int/2016/nato-helps-promote-search-and-rescue-training. Accessed 13 January 2018.

[74] According to Article 12, para 1.4. of the NCPR; 'Members of the staff shall treat their colleagues and others, with whom they come into contact in the course of their duties, with respect and courtesy at all times. (a) They shall not discriminate against them on the grounds of gender, race or ethnic origin, religion or belief, age or sexual orientation. (b) They shall not harass, bully or otherwise abuse another staff member'.

[75] NATO (2003) Protection against discrimination and harassment at work. http://www.ficsa.org/component/sobipro/?task=download.file&fid=37.1564&sid=1266&Itemid=0. Accessed 11 December 2017.

Mediation Panel Against Harassment and Discrimination that includes members of staff and a representative of the Staff Association.

For the international civilian staff assisting a Council-approved mission or operation, Article 7 of Annex XIV of the NCPR requires the Head of the NATO body to make 'adequate support arrangements' during pre-deployment and post-deployment, while during the operation the responsibility lies with the Senior NATO Military Commander. In 2010 the Family Support Center was opened with the aim to assist the families of deployed staff both for ordinary and emergency matters.[76]

Moreover, NATO is concerned specifically about gender equality issues. In 2014 the organization approved its policy for the implementation of the UN Security Council Resolution 1325 on Women, Peace and Security of 31 October 2000.[77] The organization has recognised 'the important role of women in conflict and post-conflict situations' and 'urges all actors to increase the participation of women and to incorporate gender perspectives in peace and security efforts.'[78] Accordingly, NATO has established a Committee on Gender Perspectives, which 'promotes gender mainstreaming as a strategy for making the concerns and experiences of both women and men an integral dimension of the design, implementation, monitoring and evaluation of policies, programs and military operations'[79] and provides ongoing training and programmes to *staff members* related to the prevention of sexual harassment.[80]

By contrast, no specific provisions have been found concerning the prohibition of discrimination and the protection of dignity for contractors.

[76] Details on this Center can be found at https://www.nato.int/fchd/contact/fscindex.html. Accessed 11 December 2017.

[77] NATO/EAPC Policy for the implementation of UNSCR 1325 on Women, Peace and Security and related resolutions 2014. http://www.nato.int/cps/en/natohq/official_texts_109830.htm?selectedLocale=en. Accessed 11 December 2017.

[78] Ibid.

[79] See Gender perspectives in NATO Armed Forces. http://www.nato.int/cps/en/natohq/topics_101372.htm. Accessed 11 December 2017.

[80] More than 90% of NATO member States include gender in pre-deployment training and exercises and more than 73% include gender in operational planning (2015 Summary of the National Reports of NATO Member and Partner Nations to the NATO Committee on Gender Perspectives. http://www.nato.int/nato_static_fl2014/assets/pdf/pdf_2017_01/20170113_2015_NCGP_National_Reports_Summary.pdf. Accessed 1 December 2017, p. 35). In addition, 63% of the member nations have trained gender advisors and 30.8% have set up gender focal points (Ibid.).

9.4.6 Administrative Procedures

Annex IX to the NCPR titled 'Regulations governing administrative review, mediation, complaints and appeals' is the reference document for all NATO staff members except for the civilian component of a NATO force.[81]

The Annex sets forth a four-step procedure starting from referral of the contested decision, within 30 days from issuance and through the immediate supervisor, to the official who took it (Article 2). Within 21 days the immediate supervisor shall respond. If the individual is unsatisfied by the supervisor's decision, the matter can be referred to the Head of NATO Body who, within 21 days, shall either confirm, rescind or modify the contested decision.

Article 3 of the Annex offers the opportunity for mediation, failing which the individual may submit a written complaint to the Head of the NATO body. This procedure provides for the establishment of a Complaints Committee in each NATO body that should consist of a chair and up to six other members (Article 5). Both sides have an opportunity to refer to the Complaints Committee, which shall issue its findings of facts, views and recommendations in a written report to the Head of the NATO body concerned within 45 days. The Head of the NATO body shall take a decision and notify the claimant within 30 days of receipt of the Committee's report. Where these remedies have been exhausted, within 60 days an appeal can be submitted to the Administrative Tribunal (Article 6, para 3(2)).[82] If the Tribunal finds that the appeal is well founded, it may grant, in whole or in part, the remedies sought by the appellant, including annulment of the decision of the Head of the NATO body that is contrary to the contract or other terms of appointment of the staff member concerned or to the relevant provisions of the NCPR.[83] The judgments, that are taken by majority vote and are final, shall be delivered in writing and motivated (Article 6, para 8).

For the civilian component of a NATO force, the NATO SOFA or supplementary agreements usually provide for the share of liability between the host and sending state for damage claims as well as an administrative system for adjudicating them.

Contractors are not entitled to file a claim according to the NCPR procedures or bring a case before the Tribunal.[84] Disputes between a contractor and NATO may

[81] NCPR, Annex IX, Article 1, para 1 specifies the principles set out in Article 61 of the NCPR.

[82] According to Article 6 of the Annex, the Administrative Tribunal is composed of five members, including the President, who shall be of different nationalities. Each member must be of the nationality of one of the Member states of NATO, may not be staff members or members of the retired NATO staff or of the national delegations to the Council.

[83] The Tribunal may also order specific performance such as a pay increase, promotion, transfer or reinstatement of employment, and the payment of a monetary relief or of compensation for the injury resulting from any irregularity committed by the Head of the NATO body.

[84] NATO Legal Deskbook 2010, p. 166.

be solved through all the means available, i.e. negotiation, mediation, arbitration or litigation, as specified in the employment contract.[85]

9.4.7 *Exercise of Functional Protection*

Article 14 of Part One of the NCPR is devoted to 'Assistance and compensation' to which a staff member[86] may be entitled if subject to 'insult, threat, defamation or attack on their persons and property'. The wide-ranging provision requiring that the organization 'provide assistance', 'in particular in taking action against the author of any such act',[87] is substantially limited by the specification that the relevant NATO authorities enjoy 'a discretionary power' to decide not only whether 'there is a direct link between the injury suffered and the staff members' and whether 'they have wilfully or through serious negligence provoked the injury', but also 'what form any assistance should take'.[88]

By and large, the fact that the host State grants diplomatic privileges and immunities to a wide range of individuals with whom it has a working relationship can be interpreted as a way to afford protection to these categories of people, thus contributing to the implementation of the duty of care of NATO. This practice dates back to 1951, when the Agreement on the Status of NATO granted 'the immunities and privileges accorded to diplomatic representatives and their official staff of comparable rank' not only, as it might have been expected, to the 'principal permanent representative to the Organization in the territory of another Member States' (Article XII), but also to the 'international staff' of the organization and the 'experts employed on missions on behalf of the Organization' (Articles XVII–XXIII).

Diplomatic status possibly increases the level of duty of care protection, especially in view of the fact that to the above personnel are granted, *inter alia*, immunity from legal process for official acts, and the same repatriation facilities in time of international crisis as are accorded to diplomatic personnel of comparable rank.[89]

For the civilian component of a NATO force, Article VII of the 1951 NATO SOFA sets forth a complex mechanism composed of exclusive jurisdiction of the sending State and concurrent jurisdiction between the sending and receiving State. While a detailed examination of this regime is beyond the scope of this paper,[90] suffice it here to indicate that as far as jurisdiction is concerned the

[85] Ibid.

[86] Or a former staff member, or member of the staff family.

[87] NCPR, Part One, Article 14, para 1.

[88] NCPR, Part One, Article 14, para 4.

[89] Agreement on the Status of NATO, Articles 12–13.

[90] See Draper 1966, esp. pp. 47–70.

members of the civilian component are largely assimilated to those of the armed forces.

These SOFA provisions have often been modified or enriched by supplementary bilateral agreements between the organization and the host nation. For example, the SOFA between NATO and Afghanistan grants to the sending State or to the State of which the *staff member* is a national an exclusive right to exercise jurisdiction over such a person in respect of any crime committed in the territory of Afghanistan.[91] Interestingly, the Agreement makes explicit reference to NATO contractors, in respect to which the Afghan authorities have the right to exercise jurisdiction.[92]

9.5 The Obligations Incumbent upon NATO Civilian Personnel

In general terms, NATO *staff members* have to maintain the conditions underlying the security and medical clearance certificate that was issued by their country of nationality as a prerequisite for employment with the organization.[93]

The NCPR sets out in very clear terms the obligation that *staff members* keep themselves informed about security policies and regulations in the field and abide by the rules concerning the wearing of protective clothing and restrictions on movement.[94] In addition *staff members* 'shall not carry a weapon or wear military clothing for any reason', nor may they wear clothing 'which may result in their being mistaken for military personnel'.[95]

It is remarkable that in 2004, before the adoption of the NCPR, NATO adopted a Policy[96] and Implementing Guidelines on Combatting Trafficking in Human Beings[97] applicable also to civilian personnel. What is most interesting for this study is that the Policy requires States contributing forces to NATO-led operations 'to incorporate contractual provisions that prohibit contractors from engaging in

[91] Article 11, para 1, of the 2014 NATO SOFA with Afghanistan.

[92] Ibid., Article 11, para 5.

[93] NCPR, Part One, Article 3(d) and (g).

[94] NCPR, Annex XIV, Article 10, para 1. The NCPR contain detailed provisions on the duties of the staff members (Article 12, para 1), which are supplemented by several Council Memoranda (e.g. the Council Memorandum CM(2002)49 on Security within North Atlantic Treaty Organization, 17 June 2002, which specifies what are the obligations of the staff members in respect to the security of NATO information. The document is available at: http://www.freedominfo.org/documents/C-M(2002)49.pdf. Accessed 1 December 2017).

[95] NCPR, Annex XIV, Article 8, para 4.

[96] NATO (2004) Policy on Combating Trafficking in Human Beings. http://www.nato.int/docu/comm/2004/06-istanbul/docu-traffic.htm. Accessed 15 December 2017.

[97] NATO (2004) Guidelines on Combating Trafficking in Human Beings for Military Forces and Civilian Personnel Deployed in NATO-led Operations. https://www.nato.int/docu/comm/2004/06-istanbul/docu-traffic-app1.htm. Accessed 15 December 2017.

trafficking in human beings or facilitating it and impose penalties on contractors who fail to fulfil their obligations'.[98]

Also the Code of Conduct for all NATO staff, including civilian members, adopted in 2013 by the Council, though not a legally binding document, provides guidelines for staff concerning five distinct areas, namely integrity, impartiality, loyalty, accountability, and professionalism.[99]

9.6 Concluding Remarks

Initially founded as a purely military defence organization, since the early 1990s NATO has evolved in one of the main protagonists of the new global trend of crisis management and peace maintenance. In 2009, NATO deployed the second highest number of personnel to peace operations after the United Nations.[100] This new dimension of NATO has been clearly spelt out in the *2010 Strategic Concept*, where the Council has expressed its resolve not only to respond to an armed attack but also 'to prevent crises, manage crises, stabilize post-conflict situations and support reconstruction.'[101] In order to be effective across the crisis management spectrum, the organization underlined the necessity to 'identify and train civilian specialists from member states, made available for rapid deployment by Allies for selected missions, able to work alongside military personnel and civilian specialists from partner countries and institutions'.[102]

On account of these developments, the number of civilians deployed by NATO is significant and the question of the duty of care towards the civilian personnel sent either in support of a Council-approved operation or mission or independently of any military field presence in third countries has become a common occurrence for the organization.

NATO has been a pioneering organization in terms of the safeguards it has afforded, since 1951, to the civilian component of a NATO armed force and the civilian members of NATO military headquarters, with respect to the provision of the exclusive jurisdiction of the sending State, the granting of immunities and privileges and repatriation measures.

That system worked quite efficiently until the late 1990s, when the need for a more detailed discipline specifically devoted to all categories of civilians hired by the organization led the Council to the adoption of the NCPR in 2005.

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[98] NATO Policy on Combating Trafficking in Human Beings, Article 5(f).

[99] NATO (2013) Code of Conduct. https://www.nato.int/structur/recruit/info-doc/code-of-conduct.pdf. Accessed 7 January 2018 (Only an abridged version of the document is publicly available).

[100] Soder K (2009) Multilateral Peace Operations: Personnel, 2009. https://www.sipri.org/sites/default/files/files/FS/SIPRIFS1007Personnel.pdf. Accessed 3 December 2017.

[101] NATO 2010a.

[102] Ibid.

The present study shows that the duty of care that NATO exercises towards staff members, which in this paper have been defined as including international civilians, temporary staff, consultantss, civilian component of the armed forces and seconded staff, appears to be quite homogenous since the NCPR applies to all these categories of personnel. Should departure from the NCPR be required by specific circumstances, this has to be clearly established in the agreement between NATO and the host or sending State.

The main point of criticism that emerges from this analysis concerns the exercise of functional protection on the part of NATO. Not only does the NCPR provide for the discretionary power of the Head of the NATO body titled to exercise this form of protection, but the degree of discretion that the latter enjoys is quite wide since it covers the identification of the causal link between the event and the staff member and the form the assistance might eventually take.

Some weak points concerning discipline for a specific category of staff members, namely consultants, have been highlighted in our study. For example, it seems that no compulsory training is required for consultants irrespective of the type of activity they have to perform and the country of service.

In addition, the status of civilians sent on mission independently of a NATO military presence in the field is not clear. In principle, Part One of the NCPR applies to them but the question remains open whether other types of legal sources, e.g. Annex XIV to the NCPR may become equally applicable in specific circumstances.

In general terms, the fact that no concrete cases of alleged violations of the duty of care obligations by NATO have been found during this research seems to confirm the good level of implementation of the duty of care that is achieved by the organization.

A partially different picture emerges from the examination of the duty of care obligations that NATO discharges towards contractors. While it is clear that the NCPR does not apply to this category of civilians, NATO has recently become very concerned about the status of contractors sent on mission abroad and in 2007 elaborated a policy that seems to be sensitive to the specificities of this category of personnel. Nevertheless, it has not been possible to establish conclusively the extent to which NATO protects this category of civilians, in particular with respect to the training and health spheres, because of the *renvoi* that the policy makes to the agreements that the organization may conclude with the host State. This leads to fragmented regulation that, in some respects, substantially departs from that in force for NATO staff members. For instance, it is not clear what legal remedies are available for contractors in case NATO infringes its duty of care obligations.

Finally, the local wage rates employees are totally under the patronage of the State of which they are nationals, so NATO does not seem to have any responsibility towards them with respect to the duty of care. Although this is a common feature of international organizations, the question remains whether minimum common duty of care standards should not be applied by the recruiting organization, at least when the dangers that these employees face are the same as those of

the staff. In addition, no information could be found about the legal remedies against violations of the duty of care on the part of NATO vis-à-vis the local employees. In principle, for this category of civilians the remedies appear to be barred by the immunity from local jurisdiction enjoyed by the organization.

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Chapter 10
Implementation of the Duty of Care by the OSCE

Deborah Russo

Contents

Annex II—the Table of Cases—can be accessed online here: http://extras.springer.com/.

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Abstract This chapter offers a comprehensive overview on the implementation of the duty of care within the OSCE. Stepping into the debate concerning the international legal personality of international organizations, the author discusses recent practice and argues that, especially in the 2014 and 2017 cases of injuries involving officials, the OSCE reacted in the international arena as an independent subject. Starting with this premise, this chapter analyses how the OSCE, as an international subject, complies with the duty of care. To this end, the internal rules defining the status of staff and the correlating mechanisms of enforcement are illustrated. Special attention is paid to Staff Regulation 2.07—which entitles OSCE officials to functional protection in the external relations of the organization—and to its implementation in the recent practice of the organization. The chapter concludes that, in addition to the development of the international standing of the OSCE, the proper realisation of the duty of care requires that the OSCE and its participating States take a further step toward recognising the legal personality of the organization and its officials within their domestic legal order.

Keywords OSCE · duty of care · International Civil Service · Staff Regulations and Staff Rules · legal personality of international organizations · soft organizations

10.1 Introduction

The Organization for Security and Co-operation in Europe (OSCE) is the largest regional organization in the world in the field of security, with multidimensional tasks: political-military, economic-environmental and human rights and democracy. Currently, 57 States participate in the organization, with its personnel being composed of 550 persons working in the institutions and approximately 2230 persons engaged in 17 field missions in South-Eastern Europe, Eastern Europe, the South Caucasus and Central Asia.[1]

The OSCE missions are often undertaken in conflict or post-conflict situations where security challenges are at stake, and address a wide range of security-related issues from democratisation to counter-terrorism, including arms control and economic and environmental concerns. While building security within the territory of its participating States remains the main goal of the OSCE, providing a safe workplace for its personnel is a major precondition for furthering its global mission. To this end, training personnel for preventing incidents and protecting its personnel in danger is a major responsibility for the OSCE.

As will be illustrated in this chapter, the duty of care to civilian personnel employed in potentially hazardous environments is a growing concern for the

[1] Statistics are available on the official website http://www.osce.org/. See also Pisillo Mazzeschi 2016, p. 57.

OSCE, which has been paying attention to this question.[2] The serious incidents occurring during the ongoing mission in Ukraine—in particular the kidnapping of OSCE officials, in 2014 (2014 kidnapping case), and the landmine explosion which killed one official and injured two others, in 2017 (2017 landmine explosion case)—give an indication of how it is urgent for the OSCE to implement a strong strategy for the duty of care of its personnel.

The main obstacle to doing so is the uncertain legal status of the organization, due to it having been created as an intergovernmental political forum, devoid of independence from its participating States.[3] For this reason, it was not considered a holder of rights and obligations under international law. If this qualification was valid today, it would question the very existence of a duty of care of the organization itself, with the consequence that the duty of care would rest on States only. However, as this chapter will attempt to show, this conclusion does not reflect the current practice of the organization. Since demonstrating that the OSCE has become an international legal subject is preliminary to discussing any duty of care which it owes, the first part of this chapter will attempt to solve this preliminary question.

The legal status of the OSCE has been discussed for more than 40 years. The debate has been revitalized recently due to the increasing number of OSCE officials employed in hazardous areas. Lisa Tabassi, head of the legal service of the OSCE, has pointed out that the clarification of the legal status of the organization is a priority for the Secretariat. As she has explained, 'a clear legal status also enables a clear line of accountability and liability. When the legal status is ambiguous, it is also unclear who will be held responsible in the case of injury or damages'.[4] In addition, there are other practical reasons for defining the organization's legal status, such as the need to establish the power to exercise the functional protection and the privileges and immunities to which the OSCE personnel should be entitled in the territory of the host States.[5] The answer to all these questions depends on whether or not the OSCE is an international subject. This is why the very substance of the duty of care requires the Secretariat to strive for a clarification of the legal status of the organization. At the same time, the OSCE shares this challenge with its participating States, which, to use the words of a prominent author, 'have a legal and moral duty to protect those working on the OSCE's behalf, often risking their personal integrity'.[6]

As the duty of care frames an ambit of responsibility, which includes the exercise of powers on the international plane, the question of the legal personality

[2] In 2009 the OSCE established an open-ended Informal Working Group on Strengthening the Legal Framework of the OSCE that in its meeting of July 2017 addressed the topic 'Duty of Care: Safety and Security', SEC.GAL/145/17, dated 5 October 2017.

[3] Panel of Eminent Persons on European Security as a Common Project (2015), Recommendation 3.

[4] Tabassi 2015, para 6.3.

[5] Brander 2009, pp. 19 ff.

[6] See, *inter alia*, Tomuschat 2016, who argued that 'participating States have a legal and moral duty to protect those working on the OSCE's behalf, often risking their personal integrity'.

of the OSCE needs to be addressed by first exploring the theoretical foundations of the international legal personality of international organizations.

In its advisory opinion on *Reparation for Injuries Suffered in the Service of the United Nations*, where the International Court of Justice (ICJ) had to assess whether the UN had the power to bring an international claim against another State, the ICJ qualified the expression 'international personality' as a doctrinal and controversial notion.[7] According to its view, among the subjects of the international community only States enjoy the totality of rights and duties recognised by international law, while the rights and duties of an international organization 'must depend upon its purposes and functions as specified or implied in its constituent *documents* (emphasis added) and developed in practice'.[8] The use of the word 'documents' in this passage implies that the absence of a founding treaty would not exclude per se international personality, but other documents would be considered. It also entails that the extent of the legal capacity of the OSCE should be assessed taking into account not only the expressed or implied wording of its founding documents, but also its practice.[9]

In literature, two theories have been developed to explain how international organizations acquire international legal personality: the so-called will theory and the objective theory. The will theory stipulates that international personality strictly depends on the intention of the founders of the organization to create a new subject of international law.[10] Such intention may be expressed in—or inferred by—the constituent instrument of the organization.[11]

However, some commentators have criticised the will theory for giving too much value to the original intention of the founders, rather than examining the actual practice of the organization, which may have evolved differently from what was originally assumed.[12] In practice, even if the founding instrument reflects the intention of the States parties to confer international personality to the organization, it well may be the case that the organization does not in fact engage in international relations with third States.[13] In this scenario, it is evident that the international

[7] ICJ, Reparation for Injuries Suffered in the Service of the United Nations, 11 April 1949, I.C.J. Rep. 1949, p. 174, p. 178.

[8] Ibid., p. 180.

[9] For the interpretation according to which the ICJ case law supports the theory of the 'objective personality', see Blokker and Wessel 2017, p. 9.

[10] Jenks 1945.

[11] Moving from such assumption, Tichy and Köhler, for example, have argued that 'the question as to whether the OSCE is indeed an international organization in the sense of an intergovernmental organization enjoying international legal personality has to be answered in the negative' (Tichy and Köhler 2008, p. 459). Note that the position taken evolved over time and the same author has taken an updated view: Tichy and Quidenus 2017, pp. 403 ff.

[12] Gazzini 2011, p. 35.

[13] Klabbers 2015, p. 54. On this point, see also Gaja 2003, p. 111: 'Even if a treaty provision were intended to confer international personality on a particular organization, the acquisition of legal personality would depend on the actual establishment of the organization. It is clear that an organization merely existing on paper cannot be considered a subject of international law'.

personality claim would not be sufficiently justified by relying on the wording of the constituent instrument only.

This objection has been met by the advocates of the objective theory who consider that international personality ultimately rests on the objective role and functions of an international organization, particularly on the capacity to be perceived on the international stage as an entity independent from its members.[14] In other words, according to the objective theory, the international personality of both States and international organizations is a matter of fact and depends on their effective power to engage in international relations, by performing functions and powers independently from other international subjects.[15] Departing from this theory, some commentators consider that international organizations acquire international personality by an evolutionary process, which leads the organization to develop its status in international relations.[16] Consequently, the interpreter should ascertain the status of an international organization following a pragmatic approach, which gives weight to certain evidentiary elements, such as the conclusion by the organization of international treaties or the acceptance of responsibility for acts committed by its organs. At the same time, while the absence of a founding treaty does not exclude per se the international personality of an organization,[17] any consistent interpretation should not totally disregard the intention of the founders. For this reason, one author has elaborated the theory of 'presumptive personality', according to which an organization should be presumed to be in possession of international personality when it performs acts that can be explained only on this basis, in so far as the founding States do not object to it.[18]

In fact, it is not entirely clear when the position of a State may be qualified as an objection. If one considers that even the intention of the founders may evolve, only current objections should be taken into consideration. Moreover, the position of the members of an organization may appear ambiguous and inconsistent. When certain States affirm the international personality and others deny it, what view should prevail? Given these challenges, the assessment of the international personality should follow a symptomatic global approach, which considers both the actions of the organization and that of its members as relevant elements for an overall assessment.

This method will be taken into account in the next section where the question of the legal personality of the OSCE will be analysed further, while offering a general review of the internal legal sources of the organization. The three subsequent sections (Sects. 10.3, 10.4 and 10.5) will deal with the content, the scope of application and the consequences of violations of the duty of care. The final section will contain conclusions and recommendations for furthering the law and policy on the duty of care.

[14] Seyersted 1963, p. 47.

[15] Verdirame 2011, p. 60.

[16] Gazzini 2011, p. 36.

[17] Seidl-Hohenveldern 1995, p. 233.

[18] Klabbers 2015, p. 56; Verdirame 2011.

10.2 Review of the Relevant Internal Legal Sources

As the OSCE has no founding treaty, the internal legal sources of the organization have been considered a soft system of law, whose effects derive from the political commitments entered into by the participating States. While this feature still distinguishes the functioning of the OSCE from that of the more structured organizations, the OSCE has nonetheless undergone an important process of institutionalisation, which, since 1990, has strengthened its decision-making power.[19]

The OSCE was originally created as a Conference on Security and Co-operation in Europe (CSCE), which was founded on the Final Act of the Conference on Security and Co-operation in Europe, better known as the Helsinki Final Act. This Act, adopted in 1975 and signed by 35 States, is considered to be the founding document which sets out the basic commitments assumed by the States in the fields of maintenance of security, cooperation in economics, science and technology and respect for human rights and self-determination of people.

A relevant step in the process of institutionalisation dates back to 1990 when the participating States signed the Charter of Paris for a New Europe. The Charter extended the common values enshrined in the Helsinki Final Act, including human rights, democratic governance and free market economy. It also established the CSCE Parliamentary Assembly, the Secretariat and a Council composed of the Ministers for Foreign Affairs, who would meet regularly at least once a year. The institutional process developed in the subsequent years, by strengthening the Conference and preparing the field for its evolution to a fully-fledged organization.[20]

At the Budapest Summit in 1994, the CSCE changed its name to OSCE in order to reflect its transformation to a structured, permanent entity. However, the Budapest document also stated that 'the change in name from CSCE to OSCE alter [s] neither the character of our CSCE commitments nor the status of the CSCE and its institutions'.[21] In this way, the participating States intended to preserve the political nature of their commitments.

It is interesting to note that the alternative proposals to legalise the CSCE on the basis of a constitutional treaty were refused on the ground that the organization possessed sufficient legal capacity to exercise its competences and functions. As to the question of granting immunity to the organization and its officials, at the Rome Council of 1993 the Ministers of Foreign Affairs decided that 'the CSCE participating States will, subject to their constitutional, legislative and related requirements, confer privileges and immunities on CSCE institutions, permanent missions

[19] For an insight on this process see Odello 2006, p. 351.

[20] Sapiro 1995, p. 631.

[21] https://www.osce.org/mc/39554?download=true, para 29. Accessed 3 January 2018. According to one view, despite its statement, the acquisition of legal personality was inherent in the Budapest decisions (Bertrand 1998, pp. 366–406).

of the participating States, representatives of participating States, CSCE officials and members of the CSCE missions in accordance with the provisions adopted by the Ministers'.[22] This statement expressed the commitment of participating States to recognise the organization's legal personality under their internal law. If domestic legal personality is in principle independent from international legal personality, the recognition of the former may play a role in the assessment of the latter.[23]

Unfortunately, only 10 States recognised the domestic legal personality of the OSCE and the majority of States still do not provide any general protection.[24]

This explains why in most cases the legal protection of OSCE personnel on mission has been provided by special agreements, called 'Memoranda of Understanding' (MoU), concluded between the OSCE and the State hosting the mission, in order to grant rights, privileges and immunities to the OSCE staff in the territory of the host State.[25] Regulation 2.03, titled 'Privileges and Immunities', of the OSCE Staff Regulations and Rules—a source of law which will be dealt with in the next section—reflects this state of play, by affirming that 'the Secretary General, the heads of institution and heads of mission, as well as staff members and international mission members shall enjoy the privileges and immunities to which they may be entitled by national legislation or by virtue of bilateral agreements concluded by the OSCE relating to this matter'.[26]

The negotiation of MoUs requires time and care considering that each agreement should cover the status of all the people involved in each mission, and any security arrangement by the host State, including privileges and immunities. Unfortunately, in certain cases there have been differences in treatment—with certain agreements providing privileges solely to the particular structure and officials based there. In

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[22] Final Document of the Fourth Meeting of the CSCE Council of Ministers, Rome, 1993, decision 2, p. 17.

[23] As has been argued: 'Legal personality under international law does not necessarily imply legal personality under domestic law. On the other hand, the absence of legal personality under domestic law does not affect its status under international law, and hence the possibility that the organization incurs international responsibility' Gaja 2003, p. 111, para 18.

[24] According to the information notified by the respective authorities of the OSCE participating States, those States are: Italy, Hungary, Norway, Sweden, Switzerland, United Kingdom of Great Britain and Northern Ireland, United States of America, Denmark and Germany (https://www.oscepa.org/documents/all-documents/helsinki-40/seminar-4-diid/2814-helsinki-40-food-for-thought-paper-the-osce-s-lack-of-an-agreed-legal-status-challenges-in-crisi-situation/file).

[25] Bilateral MOUs have been concluded between the OSCE and Armenia, Kazakhstan, Kyrgyzstan, Montenegro, Serbia, Tajikistan, Turkmenistan, 2 with Ukraine and Uzbekistan and there are also agreements between the specific OSCE mission and the host government (i.e. Albania, Bosnia and Herzegovina; Moldova and the former Yugoslav Republic of Macedonia). See for reference Tabassi 2017, p. 7. The Memorandum of Understanding concluded between the Government of Ukraine and the OSCE, in 1999, which *inter alia* binds the former to grant rights, privileges and immunities to the OSCE staff in the territory of Ukraine provides an example. See, in particular, Memorandum of understanding between the Government of Ukraine and the OSCE (1999). http://www.osce.org/ukraine/37928. Accessed 28 February 2018, Article 6.

[26] See OSCE Staff Regulations and Staff Rules, Regulation 2.03, https://jobs.osce.org/resources/document/osce-staff-regulations-and-staff-rules. Accessed 28 February 2018.

general, this case by case negotiation process does not grant an efficient and comprehensive answer to the issue of legal protection of OSCE officials.[27] This is even more dramatic where the host government loses effective control over a part of its territory and the Memorandum of Understanding cannot be applied.[28]

Against this background, in recent times the debate on the international legal personality of the OSCE has been rekindled and the Parliamentary Assembly has been particularly active in claiming the need for new negotiations on the legal status of the OSCE. In 2005, a Panel of Eminent Persons was charged with reviewing the consequences of the uncertain legal capacity of the OSCE. In its final report, the Panel recommended that participating States should negotiate a convention on the privileges and immunities of the organization.[29]

Pursuant to the Ministerial Council decision taken in 2006 in response to that report,[30] the draft Convention on the international legal personality, legal capacity, and privileges and immunities of the OSCE was finally prepared in 2007 by the Informal Working Group on Strengthening the Legal Framework of the OSCE.[31] Unfortunately, its adoption was made conditional by some States to the prior enactment of a constituent treaty of the OSCE.[32] As this condition was not accepted by other States, concerned that the OSCE would lose its flexibility, the 2007 draft Convention has not yet entered into force, despite continuing to enjoy broad support among the participating States.[33] This is a disappointing impasse, which *inter alia* seriously affects the legal protection for the safety and security of thousands of officials deployed in field operations and, also undermines the effectiveness of those OSCE field operations.

Since 2009 the open-ended Informal Working Group on Strengthening the Legal Framework of the OSCE has been attempting to find solutions. One option under

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[27] See the considerations of Tabassi 2015.

[28] Tabassi 2017, p. 13.

[29] Panel of Eminent Persons on Strengthening the Effectiveness of the OSCE 2005.

[30] Decision of the December 2006 Ministerial Council n. 16/06, MC.DEC/16/06. http://www.osce.org/mc/23203?download=true. Accessed 18 January 2018.

[31] OSCE document CIO.GAL/48/07/Rev.6, 23 October 2007.

[32] The interpretative statement by the Russian Federation to the Decision of the December 2006 Ministerial Council n. 16/06, MC.DEC/16/06, says that 'while it has joined the consensus on the Ministerial Council decision on the legal status and privileges and immunities of the OSCE, the Russian delegation continues to insist that the only way of settling this matter in accordance with the norms of international law is to devise a founding OSCE document in the form of a charter or statute. Without a charter, the OSCE cannot be regarded as a fully-fledged international organization. We believe it is necessary to proceed from the recommendation made in that connection in the report of the Panel of Eminent Persons, pursuant to which the participating States should devise a concise statute or charter of the OSCE containing its basic goals and principles along with reference to existing commitments and the structure of its main decision-making bodies. In any case, the entry into force of a convention on privileges and immunities, if and when there is agreement on a draft, will be possible only in conjunction with the entry into force of a statute or charter of the OSCE […]' (Ibid.).

[33] See, *inter alia*, Blokker and Wessel 2017, p. 3.

consideration concerns the adoption of the 2007 draft Convention among those States which are ready to ratify it. At the same time, the option of the 'constitutionalisation' of the organization is still on the table, given the alternative proposals of adopting a constituent document or incorporating some basic constitutional principles within the 2007 Draft Convention.[34]

While negotiations for a final clarification of the OSCE legal status are continuing, the legal value of the internal sources of the OSCE is still debated. One of the reasons explaining States' reluctance to conclude a founding treaty is their interest in preserving the assumed soft, merely political nature, of the commitments undertaken by the participating States, since the adoption of the Final Act of Helsinki and thereafter. The document contains the note clause according to which the Act is 'not eligible for registration under Art 102 of the Charter of the United Nations'. As Article 102 refers to 'every treaty and every international agreement', the exclusion of the Final Act of Helsinki from its scope of application means that the Act does not have the force of a treaty. The clause was repeated in the 1990 Charter of Paris for a New Europe and the 1999 Istanbul Charter for European Security. The same concept has also been spelt out by several declarations of participating States.

Notwithstanding this position, the Final Act of Helsinki itself, like other documents of the OSCE, does not lie outside the international legal framework. In spite of their assumed political nature, OSCE commitments produce relevant legal effects.

First, in many passages, the OSCE acts recall the rights and duties stemming from general international law and the legal agreements ratified by the participating States.[35] When OSCE commitments correspond to international obligations, they also share the same legal nature, which certainly includes all the consequences of international responsibility in case of their violation.[36] OSCE commitments could also work as circumstances precluding wrongfulness in the internal relationship between the OSCE participating States, pursuant to Article 20 of the Draft Articles on the Responsibility of International Organizations (DARIO).[37] According to this rule, the commitments of participating States may derogate from international obligations applicable in their mutual relationship.[38] Furthermore, OSCE

[34] OSCE 2017, para 6.

[35] Point I of the Final Act of Helsinki, for instance, declares that 'within the framework of international law, all participating States have equal rights and duties'. Similar assertions may be found in other declarations and decisions taken by its organs, showing that the OSCE commitments are considered part of international law and often reproduce its content.

[36] Condorelli 1994, pp. 47 ff.

[37] This provision states that 'valid consent by a State to the commission of a given act by another State precludes the wrongfulness of that act in relation to the former State to the extent that the act remains within the limits of that consent'.

[38] Ibid., p. 52.

commitments contribute to the international customary law making process, by reinforcing principles and rules that are under consolidation in international practice.[39]

Beyond these general considerations, the practice concerning the duty of care is also particularly enlightening on the legal value of the OSCE acts and commitments. In this regard it is worth noting that these acts and commitments have resulted in the adoption of internal rules governing the employment relationship between the OSCE and its personnel, namely the OSCE Staff Regulations and Staff Rules (SRSR). These rules, whose content will be examined in the next section, indisputably have legal nature. They give rise to reciprocal rights and obligations between the OSCE and its officials, with relevant implications from an international point of view. This point will be discussed further in Sect. 10.5.7 on functional protection.

Other international legal consequences may be inferred from the fact that, in the application of 'political commitments', the OSCE has concluded several international agreements, which indisputably produce legal effects, such as the above mentioned MoU between the OSCE and the States hosting a mission.

Recent developments strengthen the view that OSCE commitments are by now legally binding and that the organization has acquired international personality.

On 14 June 2017, Austria signed a Headquarters Agreement with the OSCE, which grants the privileges and immunities already extended under Austrian federal law[40] that incorporated by reference the 1995 Headquarters Agreement between Austria and the UN.[41] While this agreement does not change the legal characterisation of the OSCE in the domestic legal system, in Austria's view its conclusion should contribute to the general recognition that the OSCE has acquired international legal personality.[42] Similar considerations need now to be extended to the Headquarters Agreement between the OSCE and Poland, signed on 28 June 2017 and entered into force on 2 February 2018.[43]

The OSCE has also concluded several agreements with other international organizations, such as the EU and INTERPOL.[44] On 20 September 2017, the UN Secretariat and the OSCE Secretariat signed Letters of Understanding to deepen their cooperation in the field of access to UN Systems Contracts and technical trainings.[45]

[39] Ibid., p. 50.

[40] Federal law on the legal status of the OSCE Institutions in Austria, OSCE Law, Federal Gazette (BGBl.) N. 511/1993, as amended.

[41] Tichy and Quidenus 2017, pp. 403–413 ff.

[42] OSCE 2017, para 29; Tichy and Quidenus 2017, p. 412.

[43] See Arsić-Đapo 2017, pp. 414 ff.

[44] OSCE 2017, paras 38 and 39.

[45] Ibid.

This practice suggests that OSCE acts and commitments have evolved into legally binding obligations, or at least produce legally binding effects, which are needed in order to realise the goals of the organization.[46]

This evolution in turn reinforces the claim that the OSCE has acquired international personality. Beyond the above mentioned Headquarters Agreements with Austria and Poland, giving particular strength to this conclusion is the OSCE reaction to the 2014 kidnapping case and to the 2017 landmine explosion case. As will be discussed, in both cases, the Secretary General activated a complex internal process in order to investigate the incidents and to take care of the officials concerned. All the relevant actions were conducted by the OSCE independently and without objection and interference from participating States, including the State of nationality of the victims. This practice is the most reliable manifestation of international accountability by the organization and, as such, of legal personality.[47] The practice has also been followed by what may be defined as the 'opinio iuris' of the organization. Given that for many years the OSCE has claimed the status, privileges and immunities of an international subject (regardless of the existence of specific agreements) without any sign of disavowal from the participating States, the Secretariat has now asserted that the OSCE has acquired international personality 'as a matter of fact'.[48]

10.3 Sources of the Duty of Care

Once it is established that the OSCE may operate on the international scene as an independent subject in possession of international personality, the main consequence is that the first legal source of the duty of care becomes customary international law, including human rights law.

The SRSR then constitute the special source of the duty of care within the OSCE system and embody the fundamental conditions of service, duties, obligations and rights of OSCE officials.[49] They constitute the main point of reference for the policy and practice of the organization in this matter, following the principles governing

[46] As it has been argued, qualifying this force as legally, or merely politically, binding is not significant, considering that 'violation of politically but non-legally binding agreements is as inadmissible as any violation of norms of international law' (Berger 1996, p. 38). Another prominent author questioned the very existence of politically, non-legally, binding obligations. In particular, he wrote: 'law is the normative order governing political behaviour: our political agreements become law, whether we intend them to or not, precisely because "politics" is not (and can hardly be) a separate normative order' (Klabbers 2001, p. 412).

[47] According to one view, 'international personality is to be inferred from international responsibility, not the other way round' (Gazzini 2011, p. 38).

[48] Tabassi 2017, p. 23.

[49] See Regulation 1.03, https://jobs.osce.org/resources/document/osce-staff-regulations-and-staff-rules.

international civil service. In this regard, Staff Regulation 2.01, for example, enshrines the principle of independence of OSCE officials. This rule provides that they shall discharge their functions in the interest of the OSCE only and shall not seek instructions from any Government. More specifically, all officials shall be subject to the authority of the Secretary General and their respective head of institution or head of mission, who are responsible and accountable to the Permanent Council for the respect of all regulations and rules governing the employment relationship.

In the framework of the SRSR, the pivotal source of the duty of care is Staff Regulation 2.07, titled 'functional protection'. This provision enshrines that 'OSCE officials shall be entitled to the protection of the OSCE in the performance of their duties within the limits specified in the Staff Rules'. Therefore, the scope of protection accorded to the OSCE staff depends on the content of the SRSR, which define both the duties of the staff and the limits of the related protection.

While the content of protection will be described in Sect. 10.4, at this point it is relevant to stress that the OSCE SRSR are complemented by the Operational Guidelines for Working in a Potentially Hazardous Environment (Operational Guidelines).[50]

The Operational Guidelines provide for the duty of care of the OSCE, stating that 'the OSCE has a duty of care towards its staff. Stated simply, it means that the organization must take reasonable steps to ensure actions undertaken on its behalf do not knowingly cause harm to its employees, but also other individuals'.[51]

The same concept has been spelt out in the Deployee Guide of the UK Stabilization Unit, according to which: 'Once you have deployed, the OSCE will be responsible for your safety and security'.[52]

None of these sources provides a comprehensive definition of the duty of care. The guidelines simply affirm that the 'duty of care is a broad ranging and complex legal principle that includes elements of whether an incident resulting in harm was reasonably foreseeable and the proximity and casual connection between one person's conduct and the other person's injury'.[53]

Finally, it is worth mentioning that the OSCE has actively contributed to the elaboration of the Voluntary Guidelines on the Duty of Care to Seconded Civilian Personnel.[54] This source of soft law, drafted by the expert Maarten Merkelbach under the direction of the German Center for International Peace Operations (ZIF),

[50] OSCE Operational Guidelines for Working in a Potentially Hazardous Environment. http://www.osce.org/secretariat/74739?download=true. Accessed 23 January 2018.

[51] Ibid., p. 15.

[52] UK Stabilisation Unit (2014) Deployee Guide: Working in a mission for the Organisation for Security and Cooperation in Europe (OSCE). http://www.sclr.stabilisationunit.gov.uk/publications/deployee-guide-series. Accessed 23 January 2018, p. 18.

[53] OSCE Operational Guidelines, p. 15.

[54] Voluntary Guidelines on the Duty of Care to Seconded Civilian Personnel (2017). http://www.zif-berlin.org/fileadmin/uploads/experten-einsaetze/Voluntary_Guidelines_on_the_Duty_of_Care_to_Seconded_Civilian_Personnel_Final_170420.pdf. Accessed 29 January 2018.

the Swiss Expert Pool for Civilian Peacebuilding and the UK's Stabilisation Unit, makes a significant contribution to the conceptualisation of the duty of care. The guidelines assume that the duty of care is a legal obligation that seconding and receiving organizations are bound to comply with. They reconstruct the concept around five basic standards concerning the respect of essential requirements relating to the health, safety and security of seconded personnel, the putting in place of a security risk management framework, the provision of information to personnel, the employment of a competent workforce and the establishment of a quality management system. The guidelines aim at harmonising the main requirements of the duty of care without having binding effects. However, they may be useful for the developing of the OSCE approach and could provide a tool for interpreting the current legal standards deriving from SRSR.

10.4 Scope of Application of Duty of Care Policies

Before analysing the content of the OSCE policy and practice, it is useful to briefly clarify the scope of application of the duty of care.

In order to do so, two questions need to be answered. The first question concerns the identification of the parties who benefit from the OSCE legal system. The second relates to the territorial scope of application of policies and practice concerned.

A straightforward answer to the first question is provided by the OSCE SRSR. Staff Regulation 1.03, titled 'applicability', explains that all the regulations and rules apply to the Secretary General, the heads of institution and the heads of mission, staff members and mission members 'excluding those employed on an hourly or daily basis'. More specifically, the above mentioned Staff Regulation 2.07 on functional protection refers to the beneficiaries of care as all 'OSCE officials'. This expression finds a precise definition in the terminology included at the beginning of the SRSR (in Regulation 1.01). According to this definition, the term 'OSCE official' refers to 'any person subject to the Staff Regulations in accordance with Regulation 1.03, including the Secretary General, the heads of institution and the heads of mission and all international or local, contracted or seconded, fixed-term and short-term staff/mission members'. This is a very comprehensive definition, which does not allow for any doubt concerning the inclusion within the scope of protection of any personnel employed in an OSCE mission. Therefore, in principle, the duty of care should be granted to all officials, regardless of the form of their legal relationship with the OSCE and of their nationality, unless provision is made to the contrary.

Certain specific elements of the duty of care are regulated differently on the basis of the employment relationship with the OSCE. For example, as will be examined in detail in the next section, contracted and seconded OSCE officials benefit from different health insurance coverage. These are the two main categories of OSCE officials. While contracted members are appointed to the Secretariat (or an

institution or a mission) through a letter of appointment, seconded officials are seconded through a participating State for an assignment to the Secretariat (or an institution or a mission) at no cost to the OSCE.

In most cases, however, the guarantees included within the duty of care are addressed to all OSCE 'officials', i.e. the broadest category, as is the case, for example, in Regulations 2.03 and 2.07 addressing privileges and immunities and functional protection. Since the above mentioned Regulation 1.03 establishes the general rule defining the scope of the personal applicability of the duty of care, any case of doubt should be interpreted in the light of the former. This also reflects the broad interpretation of the word 'staff' adopted by the ICJ, including 'any person who, whether a paid official or not, has been charged by an organ of the organization with carrying out, or helping to carry out, one of its functions—in short, any person through whom its acts'.[55]

As to the territorial applicability of the duty of care, no limitations can be inferred from the terms of the SRSR. Moreover, in the definition mentioned above, the treatment of local and international staff members seems to imply that the protection applies wherever the functions are performed and wherever the OSCE structure is located. Given the general formulation of Regulation 2.07, restrictions based on the geographic zone where the functions are performed cannot be presumed.

At the same time, for the reasons explained above, the territorial application of privileges and immunities in most cases depends on the terms of the MoU signed by the host State. This uncertainty on the legal status of the OSCE staff could be solved by the entry into force of the 2007 draft Convention on the international legal personality, legal capacity, and privileges and immunities of the OSCE, or any other comprehensive legal framework which may be adopted and brought into force by the OSCE.

10.5 Content of the Duty of Care: Analysis of Policies and Practices

10.5.1 Provide a Working Environment Conducive to the Health and Safety of the Personnel and Effective Medical Services to the Personnel Should an Emergency Occur

This section is dedicated to a brief review of the content of the duty of care within the OSCE legal framework. This overview will be articulated in eight main points reflecting the different aspects of the concept.

[55] ICJ, Reparation for Injuries Suffered in the Service of the United Nations, p. 177.

The first point includes two main elements of the duty of care which, albeit autonomous, are conceptually connected to each other: the duty to provide a working environment conducive to the health and safety of personnel and the duty to provide an effective medical service in case of emergency.

To begin with the duty to provide a working environment conducive to the health and safety of personnel is a shared responsibility between the host State, which has the primary responsibility for the security of mission members, and the OSCE, which holds this duty toward its personnel. In order to comply with this duty, the OSCE, through its Secretary General, has to make efforts to ensure that the territory of the mission constitutes a safe environment for the mission members. This includes the duty of the OSCE to conclude any appropriate arrangements for securing safety of the Staff entrusted by the OSCE to official tasks. In the practice of the OSCE, this duty can be fulfilled by the adoption of MoUs, which include guarantees analogous to those contained in the 1999 Convention on the Safety of United Nations and Associated Personnel and in the related 2010 Protocol. In particular, should the host State be unable or unwilling to protect personnel, the OSCE must adopt all the necessary measures to make sure that the life and health of its personnel is not at risk.

Moving to the duty to provide effective medical services to personnel, the main responsibility for this element rests on the OSCE Department of Human Resources. The general point of reference for this goal is OSCE Staff Regulation 3.06, which grants the respect of medical standards to personnel. In particular, the Secretary General has the power to issue and update the medical standards to be met in each duty station. The respect for these standards is a precondition for appointment or assignment and must be certified by a medical practitioner recognised by the organization. The OSCE ascertains that all officials complete a medical examination prior to commencing employment. Furthermore, at any time during their employment, officials may be requested to undergo an examination by a medical practitioner designated by the organization, in order to determine continued fitness for work. Where necessary, and practicable, adjustments are made in line with medical recommendations in order to facilitate an official's continued presence or reintegration into the working environment.

OSCE Staff Regulation 6.5 provides for an emergency medical evacuation service, which ensures that officials may be evacuated in the case of medical emergency. The Secretary General is vested with the responsibility to establish the emergency medical evaluation scheme for international mission members and officials travelling on official business. Appendix 11 of the OSCE SRSR summarises terms and conditions of this relevant scheme, which is based on the Agreement signed between the OSCE and the insurance company SOS

Assistance SA (International SOS).[56] This scheme provides that the cost of this service is entirely paid by the OSCE. The insurance coverage is valid worldwide, 24 hours per day, and includes expenses up to a maximum of 500,000 euros per person per event for hospitalisation, evacuation, and any cost related to the possible death of an OSCE official.

10.5.2 Actively Protect the Officials Facing Specific Challenges and Threats

An important element of the duty of care is the implementation of a security management system. The Operational Guidelines for Working in a Potentially Hazardous Environment illustrate briefly how the OSCE answers this challenge.[57] The OSCE Security Management System enacted by the Secretary General on 21 December 2004 provides that the head of the mission is responsible and accountable for the security of all OSCE personnel assigned to the mission and refers also to the responsibility of the host State for security and protection of the mission.[58]

According to the Guidelines, for each field operation the head of mission should establish a security management team, to assist him/her on security matters. In each duty station a security plan should be set up and continuously updated, in order to establish the procedures and rules to be followed according to the needs of each particular emergency context. In particular, the plan usually provides a brief summary of the situation, a list of officials responsible for the implementation of the plan, an updated list of all OSCE staff, all details concerning the mission, emergency communication procedures, selection of concentration points, safe havens, an estimate of requirements for supplies and an evacuation plan.

The Guidelines also include the adoption of a contingency plan, which should inform all officials on the procedures to be followed in case of particular threat scenarios, such as attacks, fire, road ambush or other.[59] This plan should identify the potential threat and risks for each field operation, indicate the measures to be adopted and the people charged with their implementation.

[56] OSCE Staff Regulations and Staff Rules.

[57] OSCE Operational Guidelines, pp. 23 ff.

[58] OSCE 2004.

[59] OSCE Operational Guidelines, p. 25, para 3.3.

10.5.3 *Protect Personnel's Private Property and Offer Labour Contracts Which Are Fair and Which Take into Due Consideration the Peculiar Nature of the Risks Associated with the Specific Work Place/ Tasks*

According to Article VI of the OSCE SRSR, insurance entitlements are provided depending on the employment category. In particular, the organization contributes to the health insurance of contracted OSCE officials.[60] This insurance is compulsory for all fixed-term and short-term contracted staff/mission members and is paid by OSCE at 50%. It is also mandatory for seconded staff/mission members but should be paid entirely by them. However, according to Rule 6.02.3, should the OSCE consider that the health insurance coverage of a seconded OSCE official is not valid worldwide, including war-risk areas, the OSCE shall enroll the official into the OSCE health insurance scheme.

For all officials, regardless of their legal relationship, the OSCE pays the entire premium for 'accident and life insurance scheme' the purpose of which is to pay benefits to the officials in case of injury, illness, death or disability attributable to the performance of their duties.[61]

Furthermore, the OSCE pays the entire cost of the 'Emergency Evacuation Insurance Scheme' for officials on duty travel.[62]

As to the preservation of an official's private property, Regulation 2.06 provides for compensation in case of loss and damage occurring to the officials' personal effects caused by the performance of their official duties. As a rule, compensation for any one incident is granted to a maximum of 6,500 euros, but when the loss or damage occurs in an emergency caused by war, civil commotion or natural calamity, the maximum sum is 12,000 euros.[63]

There are elements of the contractual relationship which take into account the risk associated with the tasks to be performed, such as 'hazard pay' which is a form of compensation granted to OSCE officials who are assigned, appointed, or undertake official travel to duty stations characterised by particularly hazardous conditions, such as war or active hostilities. The Secretary General, in consultation with the heads of institution and the heads of mission, has the responsibility to determine the hardship/hazard status of all OSCE duty stations, taking into consideration the United Nations determinations.[64] Consequently, the Permanent

[60] OSCE Staff Regulations and Staff Rules, Rule 6.02.2.

[61] OSCE Staff Regulations and Staff Rules, Regulation 6.4, https://jobs.osce.org/resources/document/osce-staff-regulations-and-staff-rules.

[62] Ibid., Regulation 6.5.

[63] Ibid., Rule 2.06.1.

[64] Ibid., Regulation 2.08.

Council has the power to authorise any related implication for the budget of the organization.

Furthermore, by virtue of Rule 2.07.1, should an OSCE official be arrested for reasons connected with the performance of her/his functions, he or she will be put on special leave with full salary and all benefits and entitlements preserved.

10.5.4 Make Adequate Information Available to the Personnel About the Potential Dangers They Might Face

The Operational Guidelines for Working in a Potentially Hazardous Environment offer important information to OSCE personnel on the potential hazards they face whilst on mission.[65] They underline that members of the mission are often considered a target for criminals in areas of conflict and poverty. To avoid accidents, they stress the importance of adherence to security rules and precautions, such as learning about the law and the political situation of the host region.

A particular set of information relates to the recommended behaviour in case of arrest during the performance of the duties, such as avoiding arguments with officials or bribes. Analogous information is provided for their possible involvement in crime scenes, war crimes or natural disasters.

According to the Deployee Guide to Working in a Mission of the Organisation for Security and Co-operation in Europe, prepared in 2014 by the United Kingdom Stabilisation Unit for its deployees to the OSCE, the principle of informed consent is applied throughout an OSCE mission.[66] Officials will receive a 'security briefing' prior to the deployment on assessed risks, on the measures used by OSCE to face them and a field security briefing on arrival. They have the right to withdraw from a particular activity if they assess that the assignment is endangering their life or the lives of other officials.

Furthermore, the security plans and contingency plans mentioned in Sect. 10.5.2 above are delivered to all OSCE officials, in order to keep them aware of the specific risks of the mission and of the precautionary measures to be adopted.

[65] OSCE Operational Guidelines.

[66] UK Stabilisation Unit 2014.

10.5.5 Treat the Work Force in Good Faith, with Due Consideration, with no Discrimination, to Preserve Their Dignity and to Avoid Causing Them Unnecessary Injury

The fair treatment of personnel is a main concern of the organization. The Code of Conduct of OSCE officials provides that 'all OSCE officials are treated equally and with respect, regardless of gender, race, religion or belief, nationality, ethnic or social origin, age, sexual orientation, marital status or other aspects of personal status'.[67]

The SRSR provide also for a right of political representation of personnel in the institutional framework of the OSCE. This entitlement is a precondition for raising claims on staff needs and for according them fair treatment within the institutional framework of the organization. In particular, Regulation 8.02 recognises that staff and mission members have the right to elect staff representatives, according to principles of equitable representation of all members. For this purpose, a Staff Committee is established at the Secretariat and in the institutions as well as in field operations which have at least 20 mission members. These bodies have the right to participate in 'identifying, examining and resolving issues relating to staff welfare including conditions of work and other personnel policies, and shall be entitled to make proposals on behalf of the staff […]'. Complaints may be brought to the attention of the Department of Human Resources, which is responsible for the professional working environment of OSCE personnel.

10.5.6 Have Sound Internal Administrative Procedures, Act in Good Faith and Have Proper Functioning Internal Investigation Mechanism to Address Requests and Complaints by Their Personnel Within a Reasonable Time

The OSCE has an Office of Internal Oversight, which is an independent body providing objective evaluation, investigative functions and advisory support on the activities of the organization.[68] It assists the Secretary General and the heads of institutions or of missions in discharging their functions, including those regarding the security and safety of officials. It exercises its activities in coordination with the External Auditors of the organization.

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[67] See Appendix 1 to SRSR.

[68] The OSCE Office for Internal Oversight was established in 2000 by the OSCE Permanent Council. For more information see http://www.osce.org/resources/factsheets/office-of-internal-oversight?download=true. Accessed 14 January 2018.

The mandate of the Office incorporates the full range of internal audit, evaluation, investigation and management advice, including investigations on possible allegations concerning the duty of care.[69] In order to exercise these functions, the Office shall have unrestricted access to documents and records of the organization. Before submitting any report, the Office shall present the draft report together with any recommendation to the heads of institutions or missions concerned, in order to receive their response on the actions they intend to take. The results of investigations and appraisal are reported to the Secretary General, who has the discretion to follow the recommendations, counsel and information from the Office. Then the Office shall undertake periodic follow-ups to appraise whether and how recommendations and audit findings have been implemented. The results of this review activity are communicated to the Secretary General for the necessary determinations, including possible disciplinary procedures.

There is no public database of the Office's findings in order to assess to what extent it deals with claims related to the duty of care. This is a challenging aspect from the point of view of transparency as well as regarding the right to defence.

However, there is some documentation on how the Office was involved in the investigation following the 2017 landmine explosion case. In order to investigate this case, on 28 April 2017 the Secretariat entrusted the Office to conduct

> an administrative internal fact-finding investigation in order to (1) review the incident from the applicable security procedures to determine whether internal individual responsibility could be identified in its occurrence; (2) establish the sequence of events which led the patrol to be in that place at that time and whether and how relevant OSCE and local policies, rules, regulations, procedures, instructions and practices were followed; and (3) establish what happened in the immediate aftermath of the incident, toward assessing whether the handling of the incident aftermath was appropriate.[70]

On 31 August 2017, the Office issued an Interim Report and, on 20 October 2017, a summary of the Office's Final Report was distributed to the Participating States.[71] The involvement of the Office in this case shows that, in case of incidents, the organization is directly concerned and has the primary duty to investigate not only any external responsibility for the incidence, but also the internal conduct of the organization in preventing and reacting to it. This is a clear indication of accountability from the organization regarding the appropriateness of internal procedures for protecting the life and health of personnel.

[69] See the Internal Oversight Mandate (2000) OSCE doc PC.DEC/399, Annex 6.

[70] Tabassi 2018, para 3.2.

[71] Unfortunately, the content of these documents is not public.

10.5.7 Exercise 'Functional (or Diplomatic) Protection'

The exercise of functional protection lies at the heart of the international component of the duty of care. The OSCE has included the right to functional protection in Staff Regulation 2.07, which establishes that 'OSCE officials shall be entitled to the protection of the OSCE in the performance of their duties within the limits specified in the Staff Rules'.

The effective exercise of functional protection is particularly important considering that OSCE officials normally operate in highly volatile environments and may be subject to detention, arrest, abduction or suffer injuries and damages in the performance of their duties. Should an incident occur, the OSCE has the duty to react at the diplomatic level by condemning the wrong, protesting against it, searching for the responsible subjects, calling for cessation and reparation of the wrong or adopting countermeasures to achieve this.

The extent to which the OSCE is entitled to exercise this power must be evaluated in the light of important principles expressed by the ICJ in its advisory opinion on *Reparation for Injuries Suffered in the Service of the United Nations.*[72] In this case, the ICJ considered two possible claims of the UN. The first one was aimed at seeking compensation for any cost suffered *by the Organization* as a consequence of the injury suffered by one of its agents (such as the cost to compensate the agent or to replace him in case of death or disability). Alternatively, under the second claim, namely functional protection *strictu senso*, the organization sought compensation for damage suffered *by the person* who was operating as an agent for the organization. The latter is the kind of claim covered by Staff Regulation 2.07 of the OSCE. In this regard, it is worth emphasising that the ICJ recognised the legitimacy of this power by making reference to the doctrine of implied powers, specifying that 'under international law, the Organization must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties'.[73] Following this reasoning, the ICJ has considered that the UN entrusts its agents with important missions and tasks to be performed efficiently, in total independence from States. Hence, to ensure the independence of the organization, an agent must not be reliant on protection other than that of the organization, so that 'the Organization must provide them adequate protection'.[74]

The power of functional protection of the OSCE can be established by analogy, applying the doctrine of implied powers. The sole difference is the source providing for tasks, independence and protection of agents, which is respectively the UN Charter for the UN and the SRSR for the OSCE. From the above quotation of the ICJ it may be also inferred that the organization is bound ('must') to exercise functional protection. From this point of view, the drafting of Staff Regulation 2.07,

[72] ICJ, Reparation for Injuries Suffered in the Service of the United Nations, p. 182.
[73] Ibid.
[74] Ibid., p. 183.

which reads 'OSCE officials shall be *entitled* to the protection […]' (emphasis added) entails the existence of a right to functional protection.

Moving from theory to practice, it may be argued that certain measures taken by the Secretariat in the 2014 kidnapping case and 2017 landmine explosion case are relevant preliminary steps of functional protection.[75]

In the former case, two groups of OSCE monitors, who were seconded nationals of Denmark, Estonia, Germany, the Netherlands, the Russian Federation, Spain, Switzerland and Turkey, were detained for weeks during the Special Monitoring Mission (SMM) in Ukraine.[76] The first reaction by the Secretary General was to establish a Task Force composed of representatives of the Office of the Secretary General, Department of human resources, Department of management and finance, including also senior management, operational staff and mission members. The OSCE also supported to the extent possible the investigation on the case and granted limited waivers to immunity in order to let some OSCE officials contribute to the investigation procedure conducted by Ukraine. The main purpose of these actions by the Secretariat was to shed light on the causes and responsibilities for the abduction as a preliminary component of functional protection. Following the investigations, a group of terrorists was found responsible for the abduction and the OSCE made arrangements to conduct negotiations for the release. At this point, the question arises whether this conduct may be qualified as functional protection notwithstanding the fact that in this case the responsibility lay with non-State actors.

Similar steps were adopted to react to the tragic landmine explosion, which, on 23 April 2017, killed an OSCE official and injured two other officials of the SMM while they were driving in a non-government controlled region in eastern Ukraine. This case represents the first service-incurred death in the history of OSCE missions.[77] On 28 April 2017, the OSCE Permanent Council condemned the murder and called for investigation to find those responsible.[78]

The Secretariat took several steps, beginning with the establishment of a task force.[79] At the request of the Chairmanship, the Secretariat concluded an agreement with the International Humanitarian Fact-Finding Commission (IHFFC) to establish an independent team entrusted to conduct a forensic post-blast investigation of the incident (IFI). The IFI report—based on reviewed documents, interviewed witnesses, site inspections and collection of materials—was then submitted to the

[75] For all the relevant information concerning the exercise of functional protection in these cases, see Tabassi 2018, paras 2.1 ff.

[76] This mission was decided by the Permanent Council with the decision n. 1117 of 21 March 2014. Reference to this case of abduction of OSCE officials may be found in: OSCE (2014) Permanent Council Decision No. 1117. http://www.osce.org/pc/116747. Accessed 23 January 2018.

[77] Tabassi 2018, para 3.2.

[78] OSCE Secretariat (2017) OSCE Permanent Council expresses support for Special Monitoring Mission to Ukraine, calls for swift investigation. http://www.osce.org/chairmanship/314331. Accessed 16 February 2018.

[79] Ibid.

Secretary General on 9 June 2017 and was presented to the OSCE Permanent Council on 7 September 2017.[80] The report concluded that the SMM was not the intended target of the explosion, given that it was not a usual route for the Mission and the road was highly used by civilians.[81] The Secretary welcomed the report, condemned the unlawful usage of an anti-vehicle mine, which endangers civilians and SMM monitors and took time to study the report. Furthermore, the Secretary General is currently considering limited waivers to OSCE officials who are called to cooperate with the Ukrainian criminal investigations. During the entire procedure, the Secretariat has maintained contact with the families of the victims of the incident and with the States of nationality of the victims, cooperated with the host State in the criminal investigation and conducted independent research on the causes of the incident.

The practice of the organization therefore corroborates the conclusion that the OSCE considers itself accountable for any failure of the duty of care, including the failure to exercise functional protection in favour of the victims.

10.5.8 Duty to Provide Adequate Training

The duty to provide adequate training to personnel is a fundamental one for effectively protecting the life and health of mission staff. This responsibility rests on the sending international organization, the OSCE, which entrusts each member with specific tasks. At the normative level, specific guidelines on training activities are provided by Decisions 12/2000 and 20/2002 issued by the OSCE Secretary General.[82] The first phase, namely the pre-mission training, is conducted by Participating States. They normally establish a partnership with certain national training institutions, which provide expert advice on curricula and methodology; training material and experts; a set of common training standards and best practices; and regular information exchange among training and human resource specialists.[83]

The second phase is conducted in Vienna and managed by the Training Unit of the OSCE. Here, the Learning and Development Unit offers a 5 day General Orientation Programme together with the delivering of specific lessons on operational skills and of a package containing practical information.[84]

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[80] Ibid.

[81] Ibid.

[82] For detailed information on training in the OSCE see: SIDA (2004) Training for Service in OSCE Missions. https://www.sida.se/contentassets/83c2ff01b65c48d5bd9029b893cede09/training-for-service-in-osce-missions_1024.pdf. Accessed 16 February 2018.

[83] The list is available here: https://jobs.osce.org/resources/document/partner-institutions. Accessed 16 February 2018.

[84] The content is available here: OSCE, Pre-arrival information package for new OSCE staff/mission members https://jobs.osce.org/resources/document/pre-arrival-information-package-new-osce-staffmission-members. Accessed 16 February 2018.

Lastly, in the third training phase, personnel follow the 6-month training programme within each OSCE mission, under the responsibility of the head of mission and its devoted structure. However, the training opportunities tend to vary according to the size of the mission and there is not a consistent standard for all personnel.

As the Operational Guidelines for Working in a Potentially Hazardous Environment explain, in some areas the risk threshold is so high that personal protection equipment, such as body armour and armoured vehicles, are required. To face this challenge, the assigned OSCE security officers must provide a briefing to all the mission members on the level of protection required and on the use of the necessary security equipment and, for some field operations, require them to undergo hazardous environment awareness training (HEAT) as a condition of employment.[85]

10.6 Consequences of Violations

The OSCE SRSR do not specifically establish the right to access to a remedy for victims of violations of the duty of care. However, there are general procedures designed to detect and manage possible administrative and disciplinary abuses. Complaints for violations may be raised either by an OSCE official or by the Staff Committee representing the personnel and should be addressed to the heads of institutions or missions or to the Department of Human Resources. They may also be investigated by the Office of the Internal Oversight and brought to the attention of the Secretary General.

Violations of the duty of care ascertained by the Secretary General might provoke a disciplinary procedure. This procedure is regulated by Article IX of the SRSR and must be conducted in consultation with the officials concerned. According to this procedure, any administrative decision imposing disciplinary measures on those officials who are found responsible for a breach of care should be proportionate to the gravity of the violation and is subject to the appeal procedures described in Article X of the SRSR.

The appeal is submitted to the Internal Review Board in the first instance, whose composition assures staff representation and is conducted in consultation with the officials involved in the case. However, this procedure has a mere persuasive nature, resulting in a recommendation and leaving the ultimate determination to the Secretary General.[86]

The fixed term contracted officials (i.e., those employed for six months or more) also have the right to appeal to an external appeal body, the OSCE Panel of Adjudications, which works in accordance with Article X and Appendix 2 to the

[85] OSCE Operational Guidelines.

[86] See Article VIII of Appendix 12 to the OSCE Staff Regulations and Staff Rules.

SRSR. If the case is brought to it on appeal, the Panel has the ultimate authority to decide what measures should have been adopted in the circumstances of the case and its decision is binding on the organization.[87]

Should a breach of care be ascertained, Staff Regulation 2.06 provides that 'OSCE officials may be entitled to compensation' in case of injuries due to the performance of official duties. However, the use of term 'may' seems to leave a margin of discretion, which is hardly compatible with the fundamental right to access to justice. In any case, this provision is to be read in conjunction with the terms of the applicable insurance policy, which covers the more serious damages.

In this regard, Appendix 10 to the OSCE SRSR regulates compensation for termination of appointment for medical reasons attributable to performance of official duties. According to the OSCE Staff rule 4.02.4 'staff/mission member's appointment or assignment shall be terminated for medical reasons if he/she is unable to perform his/her functions as a consequence of an infirmity or a diminution of his/her physical or mental faculties'. In this case, compensation shall be equal to 12 times the eligible OSCE official's last monthly net base salary and 'shall' be paid in addition to termination indemnity and compensation for permanent disability under Appendix 9, if applicable.

Compensation in the event of death or disability resulting from the performance of official duties is also provided in accordance with Appendix 9 of the OSCE SRSR. This provides that the amount of compensation varies in the event of death or disability (permanent or partial) depending upon the employment contract of the OSCE official concerned.

10.7 Conclusions: Containing Recommendations for the OSCE

In concluding this survey, it is fascinating to observe that the increasing engagement of the OSCE in the duty of care is also contributing to the consolidation of its standing as a legal subject independent from its participating States. At the same time, while international legal personality is essential to the effectiveness of protection, it does not automatically imply the full legal capacity of the organization within the domestic legal orders of participation States.[88] For this reason, the entry into force of the 2007 Convention or the adoption of other measures to this end

[87] According to Article VIII of Appendix 2 to the OSCE Staff Regulations and Staff Rules: 'If the Panel finds that the application is well founded it shall recommend the rescission of the impugned decision or the performance by the OSCE of the obligation invoked'.

[88] See above footnote 24.

remain essential objectives, not only of the organization but also of the participating States themselves, which have a 'legal and moral duty' to converge on one of the several alternatives under discussion.[89]

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[89] See the quotation of Tomuschat 2016 in footnote 6. See also Klabbers, who attributes an 'indirect responsibility' to the member States of an international organization for the accomplishment of the objectives of the organization (Klabbers 2002, p. 313).

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Chapter 11
Implementation of the Duty of Care by the Council of Europe

Laura Magi

Contents

Abstract The aim of this chapter is to evaluate how and to what extent the Council of Europe (CoE) protects its personnel sent on mission, that is to say—as accepted in this publication—personnel who, under different kinds of contractual arrangements, act on behalf of the CoE outside the organization's headquarters or of its usual place of activity. This implies that the protection this study will be investigating is that afforded while personnel are on duty, including during an official journey. This chapter, therefore, deals with the activity the CoE carries out in order to protect its personnel performing tasks on its behalf, with the aim to clarify whether either the CoE legal order or the practice of the organization itself may contribute to the

Annex II—the Table of Cases—can be accessed online here: http://extras.springer.com/.

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creation of a customary rule requiring all international organizations to take care of their personnel sent on mission. The chapter also examines the different degree of protection the organization grants to different kinds of CoE workers.

Keywords Council of Europe · duty of care · staff members · consultants · external offices · electoral observers

11.1 Introduction

The aim of this chapter is to evaluate how and to what extent the CoE protects its personnel sent on mission, that is to say—as accepted in this publication—personnel who, under different kinds of contractual arrangements, act on behalf of the CoE outside the organization's headquarters or of its usual place of activity. This implies that the protection this study will be investigating is that afforded while personnel are on duty, including during an official journey.

At the time of writing the CoE has 384 staff members employed in the external offices of the CoE. No statistics exist either on the number of electoral observers employed per year or on the average number of staff members sent on official journeys per year.

As far as the methodology used is concerned, this chapter is based on publicly available information and interviews conducted with CoE officials.[1] Several useful documents, e.g. threat-specific guidelines and Standard Operating Procedures in case of hostage taking or riots, are classified as internal documents and are not freely accessible.

11.2 Legal Sources

In the legal order of the CoE, the rules providing for the protection of personnel are mainly binding in nature.

The Statute of the CoE does not contain references to the rules providing for the protection of personnel. They essentially stem from the Staff Regulations, other specific regulations (e.g. the Regulation on the medical and social insurance scheme —Appendix XII to Staff Regulations) and various instructions (e.g. Instruction No. 64 of 26 February 2016 on long-term official journeys; Rule No. 1389 of 27 April 2017 on the organization of official journeys; Instruction No. 37 of 23

[1] Part of the information this chapter contains has been obtained by interviews with officials of the Council of Europe. The analysis of this information and views set out in the chapter are those of the author and do not reflect the views of the CoE. Neither the CoE nor any person acting on its behalf may be held responsible for the use which may be made of the information contained herein.

September 1998 on the operation of the medical service and medical examinations of staff members, and others).[2] As for soft law documents, it is worth mentioning the threat-specific guidelines and Standard Operating Procedures adopted by the Safety and Security Department.

11.3 The Duty of Care—Scope of Application

As will be shown below, the organization adopts protective measures not only in favour of its workers when they perform the CoE's functions in the Headquarters (HQ), that is to say in the country where the CoE's HQ is set up, but also outside it, in geographical areas where the missions are to take place. It means that in the CoE's practice the scope of application *ratione loci* of the duty of care is extra-territorial.

As regards the scope of application *ratione personae* of the duty of care, it embraces staff members, seconded personnel, consultants and electoral observers, but with a different degree of coverage.

Staff members are persons who have been appointed in accordance with the conditions laid down in the Staff Regulations.[3]

Consultants are third parties that can enter into contracts with the Secretariat when the latter, in carrying out the organization's activities, is in need of services involving tasks that are essentially non-recurrent and of such a specialised nature that they cannot be performed by staff members.[4] The Staff Regulations and rules concerning temporary staff members do not apply to consultants.

Secondment consists in the placement of a State official at the CoE's disposal. A seconded official continues to be an official of his or her State while acting on behalf of the CoE.[5]

Electoral observers are members of the electoral observers missions set up by the CoE Parliamentary Assembly (PACE) and the Congress of local and regional authorities. It means that electoral observers are members of PACE's national delegations and representatives of local and regional authorities of the CoE's 47 Member States acting as CoE's officials.

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[2] Some documents relevant for this survey are accessible and consultable through the CoE database: https://wcd.coe.int/search.jsp?ShowCrit=yes&Lang=en&CritTitle=Council%20of%20Europe%20-%20Documents%20database. Accessed 26 January 2018.

[3] See Article 1 of the Staff Regulations. The CoE's Staff Regulations was adopted by Resolution Res(81)20 of the Committee of Ministers on 25 September 1981, and since then it has been amended many times. It is accessible online: https://www.coe.int/t/administrativetribunal/WCD/staff_en.asp.

[4] See Instruction No. 59 of 21 December 2007 on Consultants' Contracts, Introduction.

[5] See Resolution CM/Res (2012)2 Establishing Regulations for Secondments to the Council of Europe, adopted by the Committee of Ministers on 15 February 2012, Article 1(c).

11.4 Duty Holder

As an employer, the CoE acknowledges that it has a duty of care towards its employees.

It is worth noting that while the organization has several external field offices and has regular contacts with host States on security matters when needed (e.g. in situations involving the preparation of large-scale events and visits by high-level national/international officials), it has never concluded agreements with host States concerning the protection of CoE field offices/officers. It is the understanding of this author that in the view of the organization, this does not mean that host States do not have any role as regards the CoE's activity developed by its external offices within their borders. On the other hand, what kind of role the CoE assigns to host States is far from clear. It seems to be limited to the classical customary international law obligation to protect foreign individuals under their jurisdiction.

As regards its internal responsibility for infringements of the duty of care, the CoE has adopted Rule n. 1388 on the Framework of Accountability in Matters of Security. This Rule defines the responsibilities of all actors in the CoE Security Management System. It provides that the CoE's Secretary General is responsible and accountable for all aspects of security and safety of CoE Secretariat members (including their eligible dependents), and the CoE premises and assets, while the Heads of External Offices are responsible and accountable to the Secretary General for the security and safety of Secretariat members, CoE premises and assets at the respective external duty stations.

As for the components of the duty of care other than security, the Secretary General is the organ responsible for taking appropriate measures to ensure the safety and hygiene of the work premises (Article 49 of the Staff Regulations). To this end the Secretary General makes use of the Committee for Health and Safety that ensures compliance with the CoE's rules on health and safety.

According to Article 53, para 1, of the Staff Regulations the Secretary General is also in charge of providing staff training on the basis of an annual plan drawn up in consultation with the Staff Committee.

11.5 Content of the Duty of Care

11.5.1 Staff Members

The elements characterising the duty of care as identified in Chap. 2, will be applied here in order to verify to what extent the CoE protects its personnel sent on mission. The analysis will take into account both legal provisions and the organization's practice.

11.5.1.1 Working Environment Conducive to Health and Safety

The first element defining the content of the duty of care is the obligation to provide a working environment conducive to the health and safety of staff members.

To this end a Committee for Health and Safety has been established to monitor health and safety conditions on the premises of the CoE.[6] The Committee has mainly consultative and inspective functions. It gives opinions to the Secretary General on matters concerning working conditions as they relate to health and safety. It adopts an annual work programme, addressing professional risk prevention and conducts enquiries into work-related diseases and any accident that has or might have had serious consequences, and makes appropriate proposals on how to avoid accidents. It also conducts regular inspections of CoE premises, external offices included.[7]

From the medical assistance point of view, services the CoE grants to staff members working in the external offices are not completely satisfactory.

The CoE has a contract with an international company to provide security and medical services to its external offices and staff members travelling worldwide both on official missions and on personal trips. According to the contract, the company provides:

(1) evacuation for medical and security reasons;
(2) a comprehensive travel security advisory service for all countries, providing information including environmental threats, relevant security and cultural advice, health and hygiene information and advice, information about recommended medical facilities and embassies; this service is accessible through a dedicated website and phone application;
(3) ad-hoc security alerts and accident-specific security advice for every country in the world;
(4) access (by phone or email) to the company's centres worldwide to acquire information, advice and assistance on country-specific security, medical and travel issues.

However, external offices do not have an internal dedicated medical assistance (unlike HQ). Indeed the above mentioned private company only provides advice on recommended medical facilities and transportation services in case of emergencies, not an internal and permanent medical service. While this may be explained by reason of the different numbers of staff members operating in HQ compared with those operating in a single external office, the absence of assistance is a shortcoming. A reasonable compromise might be found, e.g. offering on-site medical assistance at least for some hours of the week and/or granting a transport service to a private medical centre paid for by the CoE, not only for emergency use.

[6] See Article 1 of Rule No. 1338 of 29 September 2011 on the Committee for Health and Safety.
[7] Ibid., Article 2.

All staff members are affiliated to the CoE's Medical and Social Insurance Scheme (CEMSIS). It covers medical expenses incurred as the result of an accident, irrespective of the category to which the staff member belongs and his or her place of assignment (HQ or external offices), and irrespective of whether the accident occurred in private life or at work. The level of reimbursement is the same for all.

With regard to life insurance, Article 6, para 1, of the Regulations on the Medical and Social Insurance Scheme provides that benefits must be guaranteed for all deaths, including those resulting from an industrial disease covered by French social security legislation. However, in wartime, life insurance cover is subject to the conditions applying to life insurance in wartime specified in the law of the country where the staff member is serving. It may result in a limitation of protection according to what is provided in the internal law of some countries. Finally, pursuant to Article 6, para 2(e), life insurance does not cover illnesses or accidents affecting beneficiaries residing in countries which obstruct the lawful verifications that the organization is entitled to carry out.

Staff members contribute one-third of the cost of cover for benefits provided by the Scheme, with the exception of benefits for accidents at work (or industrial diseases),[8] the burden of which is borne by the organization.

The notion of accident at work includes accidents occurring when staff members are travelling to or from an official destination or performing duties connected with an official journey (unless the journey has been interrupted for personal reasons unconnected with the staff member's duties).[9] In this way, the organization extends the protection to staff members that could suffer particular risks because of the mission they are required to perform in specific unsafe countries.

In the event of an accident at work causing permanent invalidity, any staff member affiliated to CEMSIS who cannot recover his/her former capacity for work will be entitled to an allowance calculated on the basis of the beneficiary's annual salary and the degree of disability, according to the criteria and within the limits applied by the French social security scheme. Moreover, if the beneficiary needs the assistance of another person to carry out ordinary everyday activities, the allowance will be increased by 40%.[10]

The CoE provides insurance cover for risks officials may be exposed to in the course of official journeys (illness or injury, death, and total or partial permanent invalidity).[11] The Business Travel Insurance includes coverage for damage suffered because of terrorist attacks or acts of war. However, as far as war is concerned, the level of protection might be limited. Indeed some countries may be excluded from coverage at the discretion of the travel insurer. The latter does not inform the CoE of its exclusion criteria. The CoE may choose to ask for additional coverage at an

[8] See Articles 1 and 15 of the Regulation on the Medical and Social Insurance Scheme.

[9] Ibid., Article 14.

[10] Rule No. 1387 of 20 December 2016 on Benefits in the Event of Death, Permanent and Total Disability, Permanent and Partial Disability or Long-Term Care, Article 34.

[11] Rule No. 1389 of 27 April 2017 on the Organization of Official Journeys, Article 17.

additional cost if staff members go on a mission to such countries and in some cases the CoE has actually paid for extra coverage.

If staff members are sent on a mission in a non-excluded country, and a war begins there during the mission itself, staff members will be covered only for 14 days. Nuclear risk is always excluded from coverage. This is again an unsatisfactory lack of protection in one of the most dangerous situation a staff member may face.

11.5.1.2 Protection Against Specific Threats: Risk Assessment and Other Measures

From the institutional framework perspective the apparatus the CoE has established for risk assessment and prevention seems to be adequate.

In this regard, the first aspect that should be taken into account is that the CoE has a Safety and Security Department (SSD) which deals with all operational security and safety management concerns (Security Management System).

Measures adopted to assess and prevent the risks that CoE personnel might be exposed to when operating in external offices or sent on mission appear to be proportionate to the level of risk. Indeed the SSD carries out country-specific security risk assessments and planning before deciding where to establish an office and throughout the execution of the office's functions. They are directly conducted by CoE security officers and include threat and vulnerability assessments for the country/area in which the office is located, as well as the proposal and implementation of risk-mitigating measures (i.e. reinforcement of physical security at CoE offices).

The SSD has also developed contingency plans which include: building evacuation plans for CoE offices, plans for the relocation of offices within a city or country/area and plans for evacuation from the country/area in which the office is located.

As stressed by the CoE Administrative Tribunal in the case *Zikmund (I and II) v. Secretary General*, 'the policy for implementing protection for staff of the CoE required the Organisation *to react quickly* and take decisions about the protection to be given to the appellant.'[12]

The SSD has also issued various threat-specific guidelines and Standard Operating Procedures to be followed in the event of hostage taking, riots, natural disasters, etc. They are classified as internal documents and are not open-access resources.

CoE external offices are mainly located in multi-tenant business centres. CoE selection criteria for office space include the presence of security guards and access

[12] Administrative Tribunal, Renate Zikmund (I and II) v. Secretary General, 30 October 2009, Appeals Nos. 414/2008 and 459/2009, para 56, emphasis added (see Annex II, Case 5). Decisions adopted by the CoE Administrative Tribunal can be consulted on the CoE website, www.coe.int/T/AdministrativeTribunal/WCD/judg_merits_en.asp. Accessed 26 January 2018.

control. However, the CoE hires its own security guards for some of its external offices. The latter are also equipped with access control and surveillance systems and emergency alert and anti-intrusion systems. Communication tools such as VHF radios and satellite phones are also placed at the disposal of staff members so that they may be used in acute emergencies.

The Head of each external office has an important role in monitoring and preventing the risks staff members may face. He/she must collaborate with the respective host country authorities on matters relating to the security and safety of Secretariat members and visitors, premises and assets and provide Secretariat members and their eligible dependents with information on specific measures to be taken in particular safety/security situations, organize appropriate security training and designate a Security Focal Point for the office.

An External Office Security Focal Point has been established in each external office in order to ensure a constant liaison with the Safety and Security Department on security and safety matters. It manages the day-to-day security-related matters of the office and takes part in the preparation, implementation and revision of country-specific security plans. It is also responsible for reporting all security-related accidents involving Secretariat members and their eligible dependents.

11.5.1.3 Independent Contractors

As far as the use of independent contractors is concerned, Instruction No. 60 of 21 December 2007 on Outsourcing Contracts provides that the greatest care must be used in selecting service providers in order to ensure impartiality among suitable persons (or institutions or commercial organizations) having sufficient qualifications and experience for the work to be performed.[13]

In practice, the organization has either not extended or terminated contracts with service providers that failed to satisfy CoE quality standards. In one specific case, the organization asked for the replacement of an employee of a private security company providing transportation services because of unsatisfactory performance.

11.5.1.4 Protection of Private Property

With respect to the obligation to protect the private property of personnel, the CoE seems to offer some degree of protection. In the case of an official journey, travel insurance covers the loss or theft of luggage and personal belongings.[14] Moreover, it is a well-established practice of the organization to assess any environmental

[13] *Instruction No. 60 of 21 December 2007 on Outsourcing Contracts*, Article 7.

[14] Ibid., Article 18.

threats that might exist in the areas where private residences of international staff are located and to propose mitigating measures.

11.5.1.5 Fair Labour Contracts

Another component of the duty of care is the obligation to offer fair labour contracts, which take into due consideration the peculiar nature of the risks associated with the specific workplace/tasks. The author was unable to find any data that would enable an evaluation as to whether the CoE has fulfilled its duty in this regard. Standardised models of contracts are not accessible for consultation.

11.5.1.6 Information About Potential Dangers

The relevance of this obligation for the CoE is clear in view of the observation of the CoE Administrative Tribunal that

> [a]s far as information is concerned, the Tribunal takes the view that, in any internal competition procedure, staff need information concerning the post to be filled and any special features of it, particularly when the post is not at the Organisation's headquarters in Strasbourg but outside France. *Sufficiently precise information must be provided to enable staff to regulate their conduct, not only at the time of applying for the post but also, as the case may be, on taking up their duties.*[15]

The CoE is in compliance with this obligation. As already noted (see para 11.5.1.1 above) the CoE has a contract with an international company to provide travel advisory services for all countries. It provides relevant security and cultural advice (gender issues included), health and hygiene information and advice, information about environmental threats and recommended medical facilities and embassies.

11.5.1.7 No Discriminating and Abusive Treatment

The importance of treating the work force without discrimination, preserving their dignity and avoiding causing them unnecessary injury is well established in the law and practice of the CoE. Article 3 of the Staff Regulations states that staff members have the right to be treated equally without direct or indirect discrimination, in particular on grounds of racial, ethnic or social origin, colour, nationality, disability, age, marital or parental status, sex or sexual orientation, and political, philosophical or religious opinions.

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[15] Administrative Tribunal, Tonna v. Secretary General, 9 November 1998, Appeal No. 241/1998, para 68 (emphasis added).

In the *Pagani* case the Administrative Tribunal held that 'the principle of non-discrimination is one of the general principles of law which must be respected in the CoE.'[16]

In the case *Devaux v. Secretary General* the Tribunal also added that:

> the aim of the Council of Europe is to safeguard human rights, democracy and the rule of law. It must not only perform that role in an outward direction, vis-à-vis the member states, but also inside the Organisation, vis-à-vis its staff. The Tribunal stresses therefore in this context that the Administration, which is responsible for "human resources" questions, must treat staff in a manner that respects their human dimension.[17]

The CoE also adopted Rule No. 1292 of 3 September 2010 on the protection of human dignity at the Council of Europe,[18] which deals with sexual and psychological harassment in the workplace and provides for a form of inquiry and several methods of settlement of disputes between the complainant and the defendant, such as mediation, conciliation and friendly settlement, as well as measures of counselling for staff members who fall victim to such conducts. As a last resort, persons who complain of being victims of sexual or psychological harassment may lodge an administrative complaint with the Secretary General under Article 59 of the Staff Regulations. If the alleged perpetrator of the sexual or psychological harassment has the status of staff member the administrative complaint can result in disciplinary proceedings initiated by the Secretary General under Article 54 of the Staff Regulations and in the imposition of disciplinary measures. Where the alleged perpetrator does not have staff member status and, consequently, Staff Regulations cannot be applied, the Secretary General has the responsibility to decide how to solve the problem.

11.5.1.8 Internal Investigation Mechanisms

Another component of the duty of care is the obligation to have a properly functioning internal investigation mechanism to address requests and complaints by personnel within a reasonable time. In this regard, the role played by the CoE Administrative Tribunal is of great importance. Indeed, it examines appeals by staff members against the decisions of the Secretary General concerning complaints against any administrative act adversely affecting them. The expression 'administrative act' means any individual or general decision or measure taken by the Secretary General or any official acting by delegation from the Secretary General.[19]

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[16] Administrative Tribunal, Pagani v. Secretary General, 21 April 1982, Appeal No. 76/1981, para 31.

[17] Administrative Tribunal, Jannick Devaux v. Secretary General, 30 January 2015, Appeal No. 546/2014, para 22 (see Annex II, Case 4). See, *mutatis mutandis*, Cucchetti Rondanini and Others v. Secretary General, 28 April 2015, Appeal No. 548-553/2014, para 71.

[18] It replaces Instruction No. 44 of 7 March 2002 on the same topic.

[19] See Articles 59 and 60 of the Staff Regulations.

No appeal is admitted against the decisions of the Administrative Tribunal. During the proceeding before it, the Tribunal may arrange for any kind of inquiry it deems necessary.[20]

It is worth noting that in order to grant a higher level of protection to staff members in January 2018 the Parliamentary Assembly of the Council of Europe provisionally adopted Recommendation 2122 (2018) which calls on the Committee of Ministers to initiate reflecting on ways to ensure that the Administrative Tribunal of the Council of Europe is accessible to trade unions (para 1.4.1) and to evaluate whether the Administrative Tribunal of the Council of Europe should be complemented by an appellate judicial body, either within the Council of Europe itself or by pooling resources with other international organizations in order to create a joint appeals body for several administrative tribunals (para 1.4.2).[21]

11.5.1.9 Functional Protection

According to customary international law the CoE has a right to exercise 'functional protection.' In this regard, it is important to remember that in the case *Zikmund (I and II) v. Secretary General* [Case 5], the CoE Administrative Tribunal, referring to Article 40 of the *Staff Regulations*, stated that

> the protection in one's official capacity, as understood in the system of international organisations (and borne out by international case-law), *is both a form of assistance to staff members and a guarantee of the Organisation's interests against acts by third parties outside the Organisation*.[22]

Therefore, the Tribunal admits that behind the protection the organization offers to its staff, there is the interest of the organization itself to protect its functions against third parties. It may be seen as a clear recognition of the CoE's right to exercise functional protection.

On the other hand, whether in the CoE's legal order the duty of care also includes the organization's obligation to act in 'functional protection' is far from clear.

Under Article 40 of the Staff Regulations:

> staff members may seek the assistance of the Secretary General to protect their material or non-material interests and those of their family where these interests have been harmed without fault or negligence on their part *by actions directed against them by reason of their being a staff member of the Council*.[23]

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[20] See Rule 32 of the Rule of Procedure of the Administrative Tribunal of the Council of Europe.

[21] Recommendation 2122 (2018), Jurisdictional Immunity of International Organisations and Rights of their Staff, http://assembly.coe.int. Accessed 22 February 2018.

[22] Administrative Tribunal, Zikmund (I and II), para 31.

[23] Emphasis added.

According to para 2, where the Secretary General deems that harm has occurred,

> he or she shall decide what form such assistance may take and the amount up to which the Council shall pay the costs incurred in the defence of the interests referred to in paragraph 1, including the costs of any legal action taken.[24]

However the Secretary General may consider that legal action may harm the interests of the Council and ask the staff concerned not to take such action. In such a case, the Council will repair the material damage suffered by the persons concerned, 'provided that they assign their rights to the Council'.[25]

From a conceptual point of view the text of Article 40 does not preclude interpreting it as providing for an obligation of the CoE to assist staff members claiming a prejudice suffered while on mission because of the conduct of one or more States. On the other hand the CoE's practice concerning the application of this provision does not support such an interpretation.

Comprehensive data on the application of Article 40 has never been collected by the organization. Information this author has been able to collect shows that in the last few years there have been no more than three requests for the assistance of the Secretary General per year. They have not concerned the organization's duty of care. Requests according to Article 40 usually have concerned financial support in judicial proceedings (e.g. to uphold privileges and immunities vis-a-vis national tax authorities). Moreover, although the Secretary General has never asked staff members not to take legal action because it would harm the interests of the CoE, the organization has not acted directly against a State to protect its staff (protesting, adopting retaliations or countermeasures, instituting arbitral proceedings, etc.). It has only provided direct (usually monetary) assistance to staff who have autonomously acted against a State to defend their rights. Whether such conduct may be considered an action in functional protection is, in this author's view, questionable.

11.5.1.10 Training

As for the obligation to provide personnel with adequate training and the necessary equipment to carry out their tasks safely, Article 53, para 1, of the Staff Regulations provides that

> the Secretary General shall take the necessary steps to promote staff training on the basis of an annual plan drawn up in consultation with the Staff Committee, within the limits of available resources. The plan shall cover the kinds of training provided and the arrangements for its implementation.

To this end the CoE organises several safety and security training courses. They include first aid for all staff in CoE offices, defensive and winter driving for official drivers of CoE offices, UN online basic and advanced security awareness training

[24] Ibid.

[25] Article 40, para 2.

for all staff, security management training for security focal points in CoE external offices, hostile environment awareness training for staff members implementing projects in high security risk areas; and security induction/briefing for all newly-appointed Heads and Deputy Heads of Office.

Training courses are obligatory for certain categories of staff members if they are listed as risk-mitigating measures in country security plans elaborated by the organization as well as in CoE travel instructions for different countries. Under the CoE's new travel security policy, a security awareness training is obligatory for all travellers.

The activities the CoE carries out are significant and seem to make the staff members adequately aware of the risks they may face.

11.5.2 Consultants and Seconded Personnel

As for the protection the CoE offers to consultants and seconded officials, a distinction must be made between the protection they benefit from as a result of the risk assessment and environmental securitisation activity the CoE develops within/outside its headquarters as well as within/outside its external offices, and the protection granted against accidents at work by the organization's insurance scheme.

All workers, irrespective of their status, benefit from the daily monitoring and risk-mitigating activity carried out by the CoE Safety and Security Department while they are performing their duties in the external offices.

Moreover, the DSS provides practical assistance for all CoE official travellers (staff members, consultants, seconded personnel); e.g. the Department issues travel instructions and security alerts for certain high risk countries/areas addressed to all CoE official travellers.

As far as training is concerned, all CoE official travellers, consultants included, have access to online security training. The CoE also provides on-site training for some of its long-term consultants who have been deployed to areas with a high security risk.

Seconded staff are regularly involved in safety and security training.

However, consultants do not benefit from any insurance cover granted by the CoE. Indeed, they have to arrange for their own health and social insurance to cover the entire period of the performance of work under the contract, including the official journey and the duration of their stay.[26]

Only if a consultant travels at the expense of the organization's budget will the CoE provide him/her with official journey insurance covering specific risks related to travel and stay (in particular medical costs related to unforeseen illness or accident, death and theft or loss of personal possessions), and only on condition that

[26] See, in similar terms, the Model Letter-Contract, Appendix II to Instruction No. 59.

the travel has been approved by the Secretary General.[27] The same applies for consultants who are not travelling at the expense of the organization's budget, but whose duties are connected with activities monitored by the organization.[28]

Moreover, as Instruction No. 59 on Consultants' Contracts makes clear, the CoE 'shall not be responsible for any health or social risks concerning illness, maternity or accident that might occur during the performance of work under the contract' (Article 11(a)).

The treatment reserved for seconded personnel is more favourable. Indeed, although the CoE does not provide any social or medical cover for them,[29] they are nonetheless affiliated to an accident insurance scheme and the CoE pays for it.[30]

In light of the treatment just mentioned, it is clear that the CoE fulfils its duty of care mainly towards its staff members, while consultants and seconded officials benefit only in part from the protection granted by the organization to staff members, and only to the extent described above.

11.5.3 Electoral Observers

The degree of protection that members of the CoE's election observation missions are provided by the organization is not sufficient to conclude that the CoE abides by its obligation of care towards them. Notwithstanding that the electoral observers are State officials, they act on behalf of the organization, performing its functions when they are sent to perform election observations. For this reason the CoE should have the same care it has towards its staff members sent on official journeys. This is not what really happens.

Electoral observers benefit from insurance for the risks they may encounter during the mission. It is the same cover as given to all staff members on official journeys and in case of emergencies they may call the same private company offering services for all CoE travellers.

On the other hand specific training is not provided for them before the missions. They have access only to online security training at the disposal of all CoE travellers.

Moreover the CoE has never put at the observers' disposal any private security companies to escort them to the polling stations. No particular equipment is furnished to them in case of emergencies; the only exception has been observers sent on mission to Kosovo who had to wear a bulletproof vest.

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[27] Instruction No. 59, Article 11(b).

[28] Ibid., Article 11(c).

[29] On the other hand, the CoE asks the sending State to certify that throughout the relevant period of secondment the administration will guarantee social and medical cover for the seconded official.

[30] Ibid., Article 16 of the Regulations for Secondments to the Council of Europe.

11.6 Consequences of Duty of Care Violations

Staff members may bring an action before the Administrative Tribunal, claiming that they have suffered a prejudice while sent on mission. As regards the forms of reparation, the Tribunal may annul the act complained of. It may also order the Council to pay the appellant compensation for any damage resulting therefrom.

Seconded officials who wish to challenge an administrative act adopted by the CoE that affects them while they are performing their functions on behalf of the latter may bring a case before the CoE Administrative Tribunal.

It is worth nothing that until now no complaints concerning injuries to staff members or seconded personnel performing their functions in the external offices have been brought to the Tribunal. Whether this may be considered as a positive result in terms of the organization's duty of care compliance is not clear. Although the organization does not have internal extra-judicial mechanisms to address personnel's complaints against the organization (except in case of harassment in the workplace)—so that complaints for injuries suffered by its staff members are obviously filed before the Tribunal—it cannot be excluded that complaints concerning injuries suffered by CoE staff members have been filed with the Secretary General and the latter has rejected them. The decisions of the Secretary General are not public. Nevertheless, the open-access surveys of the activity of the Administrative Tribunal reveal that in at least two cases the Secretary General has rejected requests to annul the decisions not to recognize the CoE's responsibility in the accident in which the appellant was a victim and a request for compensation.[31] To sum up, the absence of complaints before the Tribunal concerning the violation of the duty of care by the CoE does not necessarily prove that it abides by it.

Electoral observers are not staff members nor seconded personnel. For this reason they cannot bring an action against the organization before the CoE Administrative Tribunal to claim a prejudice they have suffered during an election observation mission.

No internal judicial procedure has been established to deal with extra-contractual disputes between the Council and hired consultants, whereas according to the provisions of Article 21 of the General Agreement on Privileges and Immunities of the Council of Europe, all disputes between the Council and a consultant regarding the application of the contract can be submitted, if a mutual agreement cannot be reached between the parties, to arbitration as laid down in Rule No 481.[32]

[31] See Administrative Tribunal, Staff Disputes in 2012 and Staff Disputes in 2013, https://www.coe.int/T/AdministrativeTribunal/ActivityReports/default_en.asp. Accessed 26 January 2018.

[32] Rule No 481 of 27 February 1976 Laying Down the Arbitration Procedure for Disputes between the Council and Private Persons Concerning Goods Provided, Services Rendered or Purchases of Immovable Property on Behalf of the Council.

11.7 Conclusions and Recommendations

From the analysis carried out in this chapter two main conclusions may be drawn. The first is that the CoE's practice, at least that concerning staff members, may contribute to the creation of a customary norm obliging all organizations to take care of their personnel.

The second concerns the different degree of protection the organization grants to different kinds of CoE's workers. Indeed the analysis allows that the conclusion that the activities the CoE has put in place in order perform the duty of care is proportional to the degree of attachment with the organization or its member States.

A high level of protection is granted to staff members because of the organic link existing between the CoE and its officials.

In case of seconded personnel and consultants the functional link with the CoE explains why the organization also protects them, but the level of protection is lower than that afforded to staff members. It is higher for seconded personnel because they are officials of the member States, and lower for consultants because they are private individuals/entities that do not have any organic link either with the CoE or the member States. This graduation in the level of protection does not seem to be completely convincing since consultants perform functions on behalf of the organization and for this reason a higher level of protection would be desirable for them.

The peculiar status of electoral observers (officials of member States participating in the CoE's organs) does not permit qualifying them either as staff members or as seconded personnel. However the CoE confers important institutional functions to them and for this reason it should grant them a higher level of protection when sent on mission than actually offered.

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Chapter 12
Implementation of the Duty of Care by the Organization of American States

Leonardo Soares Nader and Samila Inácio Dutra

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Annex II—the Table of Cases—can be accessed online here: http://extras.springer.com/.

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A. de Guttry et al. (eds.), *The Duty of Care of International Organizations Towards Their Civilian Personnel*, https://doi.org/10.1007/978-94-6265-258-3_12

Abstract The Organization of American States (OAS) does not have specific rules pertaining to a duty of care in its normative framework. The organization's charter does not clearly define its responsibility towards staff, but certain Staff Rules and internal bulletins create systems to deal with harassment, gender discrimination, disaster risk management, social security, absence from work in special cases, and logistics. Although it has redress mechanisms, 'reconsideration by the Secretary-General' and the 'Administrative Tribunal', these mechanisms are yet to deal with a clear-cut case of a staff member sent on mission. There are contractual differences between career and continuous service personnel stationed at Headquarters (HQ) and country representation offices on official travel, and 'Mission Staff' hired under Special Observer and Performance Contracts. It seems that a substantial part of the OAS exposure to mission situations is its Human Rights and Electoral missions, which use overwhelmingly the latter forms of contract for its staff.

Keywords Organization of American States · duty of care · General Standards · Staff Rules · parity with United Nations · Special Missions

12.1 Introduction

The Organization of American States (OAS) is the world's oldest regional organization, tracing its history to the first International Conference of American States in 1889, which approved the establishment of the International Union of American Republics.[1] The modern format of the organization dates back to the 1948 signing

[1] Organization of American States, Who We Are. http://www.oas.org/en/about/who_we_are.asp. Accessed 9 October 2017.

of the OAS Charter in Bogotá, Colombia; which has subsequently been amended by several protocols, the last of which was the Protocol of Washington, signed in 1992 and entering into force in 1997; giving the organization the format it has today. The OAS brings together the hemisphere's 35 States, as well as over 69 observer-States, in the common goal of achieving 'an order of peace and justice, to promote their solidarity, to strengthen their collaboration, and to defend their sovereignty, their territorial integrity, and their independence.'[2]

According to its Charter, the organization has eight organs, each with a specialised function in its governance. The General Assembly is composed of diplomatic delegations from each member State, and serves as the supreme organ, convening annually to decide, among other tasks, on matters of policy and action, as well as the organization's budget. It also may decide to create other entities. The organization also has a mechanism for a 'Meeting of Consultation of Ministers of Foreign Affairs' to be called upon by any member State to consider problems of an urgent nature. The organization has two Councils, directly responsible to the General Assembly: The Permanent Council has specially designated representatives, meeting constantly in Washington DC to supervise the organization's activities and goals. The Inter-American Council for Integral Development meets at least annually at ministerial level to discuss development-related matters. The Inter-American Juridical Committee serves as an advisory body to the organization on juridical matters and promotes the development of regional international law; while the Inter-American Commission on Human Rights acts as one of the two main organs of the Inter-American Human Rights System. The Charter also provides for General Conferences dealing with special technical matters or to develop specific aspects of cooperation, as well as Specialized Organizations to deal with technical matters of common interest. The final organ is the General Secretariat, a collection of international civil servants that performs functions mandated by the Charter, the Consultation Meeting of Ministers of Foreign Affairs, the General Assembly and the Councils.

The OAS has a history of field engagement in both long-term and short-term engagements. It has conducted several field missions, either independently or in conjunction with the United Nations (UN). It worked with the UN in creating an International Commission for Support and Verification in Nicaragua, disarming combatants and assisting in mine-clearing up to 1997;[3] while in Suriname and Guatemala it acted as a mediator in its pacification process, helping to reach and implement peace accords.[4]

Currently, besides shorter term electoral observation missions, it has three active longer-term missions: The Mission to Support the Peace Process in Colombia (MAPP), the Mission of Support Against Corruption and Impunity in Honduras

[2] Ibid.

[3] See Rosande and Beltrand 1997.

[4] For more a more detailed account, see http://www.oas.org/sap/peacefund/peacemissions/. Accessed 1 February 2018.

(MACCIH), and the Mission in Haiti (MIH). These missions will be referenced throughout the chapter as examples of OAS fieldwork and its practice towards civilian personnel sent on mission.

Addressing the duty of care in the OAS context poses a few formidable challenges, considering the system's complexity, the multilingual nature of the work done, and the lack of legal clarity in the norms regulating the organizations' duties towards their staff members. To accomplish this, the authors relied on a desk review of OAS documentation, as well as interviews with several OAS staff.[5]

Although very aptly defined in this book's introductory chapter, the concept of a 'duty of care' in Spanish has multiple translations with diverging connotations, and all three may lack explicit recognition in the organization's administrative structures. The task ahead, therefore, may be to find care-like practices in the actual *praxis* of the organization's work and structure. To do so, the chapter will analyse the legal sources, the scope of application, their content and mechanisms of redress, attempting to infer duty-like practices in areas where no explicit rule exists.

12.2 Legal Sources

12.2.1 Finding the Duty of Care in Inter-American Documents: What to Look For?

The OAS has four official languages: English, Spanish, Portuguese and French. A very large proportion of OAS members speak Spanish, with the language being mandatory in most General Secretariat job advertisements, *de facto* acting as lingua franca even in its Washington DC headquarters. Translating 'duty of care' into Spanish may bring a few linguistic challenges, yielding four terms that could have different connotations.

The more semantically-connected term, '*Deber de Cuidado*', translates word-by-word into *Duty of Care*. Although Dahl's legal Spanish-English dictionary translates the term back to 'non-delegable duties of master', it defines '*Deber de Cuidado Non-Delegable del Empleador*' as 'the employer's responsibility when not taking reasonable care in providing its employees with adequate, safe working conditions'.[6] Sometimes referred to as '*Deber de Cuidado Debido*' *(Duty of Due Care),* the term is also often associated with negligent or imprudent offences, like a parent or guardian's failure to care for a child, elderly person or persons with disabilities; or related to harm caused by the failure to take due care in performing

[5] Between 05 September and 05 October 2017, the authors interviewed a total of 13 OAS staff and consultants, of varied rank, departments and contractual conditions, on condition of anonymity. This work was supplemented by OAS mission reports and materials, as well as OAS Administrative Tribunal case law when relevant.

[6] Dahl 1999, 'non-delegable duties of master' entry.

an activity with dangerous potential; related to the *homicidio culposo* analogue to the common law concept of manslaughter.[7] Searching the OAS document database for the term '*deber de cuidado*' only finds examples connected with the meaning given above.

The terms '*deber de diligencia*' or '*obligacíon de diligencia debida*' translate more closely to *duty* or *obligation* to *due diligence*; often associated with labour law or the responsibility of managers and office-holders in administrative contexts, essentially stating their obligation to fulfil their functions in good faith and to the best of their ability, and may denote an obligation to foresight.[8] It is closely related to *responsabilidad de cautela;* also used in these contexts. Also, within international human rights law '*deber de diligencia*' is used to denote the duty of due diligence by the States in adapting their internal norms to their human rights obligations, or the due diligence by State authorities in investigating human rights violations.[9] An OAS document search matches these terms mostly to human rights documents pertaining to due diligence of States in terms of fighting impunity, respecting freedom of expression or providing the right to information. It is telling that several duty of care-related service providers and foundations utilise '*deber de proteccíon*' as the direct Spanish translation, expanding the meaning from 'care' to 'protection', which denotes a wider array of positive actions.[10]

This chapter seeks to evaluate the OAS' duty of care practices according to the scope proposed by de Guttry in this volume.[11] As far as it could be ascertained by the authors' research, the term 'duty of care' and its possible Spanish cognates are not in themselves used in any of the OAS official documentation that usually deals with the organization's staff members and its relationship to them. Instead, several provisions refer to staff members' rights; which could infer organizational duties. This section will provide a brief overview of the types of norms where such duties may be found, before delineating examples of this relationship in further sections.

[7] For an example of the term applied in South American legal scholarship, see Mazuelos Coello 2003.

[8] An example can be found in Menendez 2015.

[9] A landmark example is the guide produced by CEJIL 2010.

[10] As examples, the insurance providers Chubb, Captio and International SOS have published guides in Spanish in which they use the 'deber de proteccion' translation. See: Chubb, 'Duty of Care': El deber de proteccíon de la empresa a sus empleados. El caso moral y legal. https://www2.chubb.com/es-es/_assets/documents/c1110_05-dutyofcare_brochure_spain-0817.pdf. Accessed 22 February 2018; Captio, Duty of care o deber de proteccíon: la seguridad del trabajador viajero. https://landing.captio.net/guia-gratuita-duty-of-care-la-seguridad-del-trabajador-viajero. Accessed 22 February 2018; International SOS, Deber de proteccíon. https://www.internationalsos.es/WEB_SOS/prensa_info_dutyofcare.aspx. Accessed 22 February 2018.

[11] See de Guttry, Chap. 2 of this volume.

12.2.2 OAS Norms Dealing with the Duty of Care

The highest point of the OAS norm hierarchy is its Charter. The OAS Charter is structured in such a way as to leave no room for 'implied powers',[12] akin to those granted to the UN by International Court of Justice jurisprudence.[13] Therefore, its Chapter XVI,[14] dealing with the General Secretariat, is constructed as a delineation of its duties. With the exception of a few mentioned prerogatives where the Secretary General *may* participate or speak at certain occasions, provisions are constructed by listing what the General Secretariat and the Secretary General *shall* and *shall not* do. Unlike other international organizations, the Charter does not make explicit any staff rights or duties that the organization has to them. It does, however, mention that the Secretary General 'shall exercise [the authority to establish offices, hire staff and regulate their functions] in accordance with such general standards and budgetary provisions as may be established by the General Assembly',[15] giving legal boundaries to the discretion afforded to the Secretary General in managing staff. Also, Articles 118 and 119 deal with the necessary independence required of General Secretariat staff, which is phrased both as a staff duty not to accept undue influence, and a pledge by member States to refrain from seeking this influence.[16] Article 120 imposes that recruitment will be based on efficiency, competence, integrity, and the need to have a wide geographic representation in staffing.[17]

The OAS General Standards provided for in Article 113 of the Charter are approved by the OAS General Assembly. In terms of duty of care provisions, the General Standards delineate the nature, functions and Structure of the General Secretariat, specifying the powers and responsibilities of the Secretary General and Assistant Secretary General, regulates the types of personnel, their status, obligations and limitations on their activities; salaries, classification and appointment; benefits and labour relations; discipline, separation from service, dispute resolution

[12] Charter of the Organization of American States, open for signature on 30 April 1948, entered into force 13 December 1951, subsequently amended by the Protocol of Buenos Aires on 27 February 1967, the Protocol of Cartagena on 5 December 1985, the Protocol of Washington on 14 December 1992, and the Protocol of Managua on 10 June 1993, OAS Document A-41. http://www.oas.org/en/sla/dil/docs/inter_american_treaties_A-41_charter_OAS.pdf. Accessed 9 October 2017, Article 1 [OAS Charter].

[13] ICJ, Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 11 April 1949, I.C.J. Rep. 1949, p. 174.

[14] OAS Charter, Chapter XVI, Articles 107–121.

[15] OAS Charter, Article 113(b).

[16] OAS Charter, Articles 118–119.

[17] OAS Charter, Article 120.

and indemnities. It also regulates matters of conflict of interest.[18] Several of these provisions are akin to duty of care categories identified in Chap. 2 of this volume, and will be detailed later on, but it is noteworthy that in Article 14 of the OAS Charter the Secretary General is held *responsible* for compliance with the General Standards, denoting his being a depositary of a duty.[19]

Next within the hierarchy of norms are the Executive Orders, developed by the Secretary General to take decisions on high administrative policy; on his own authority based on the responsibility to implement the General Standards. One such set of norms in this class is the Staff Rules, which are mentioned 20 times in the General Standards. These are the most detailed references to the contractual relationship between the staff member and the organization. They regulate the conduct of staff members in matters that include the prohibition against sexual harassment, liabilities and disciplinary measures, and also deal with the types of employment; including that of independent contractors, associate staff members, local professionals and temporary-support personnel. The Staff Rules crucially provide detailed rules on the social security available to staff members, including sick leave, health and life insurance, and workers' compensation for work-related injury and illness, as well as compensation for loss and damage of personal effects. They also regulate travel by staff members, including such travel classed as 'missions'. Lastly, the OAS Staff Rules also contain provisions on internal discipline and redress mechanisms.

Other Executive orders also may contain provisions relating to the duty of care. There are executive orders on alternative work arrangements; on disaster risk management; on gender equality, diversity and human rights; a policy and conflict resolution system for prevention and elimination of all forms of workplace harassment; a procedure for whistleblowers and protections against retaliation; a code of ethics for the General Secretariat; and rules pertaining to special observer and performance contracts. A manual on OAS Electoral Observation Missions is also issued via executive order.[20]

Following the hierarchy of norms within the OAS General Secretariat, 'directives' are instruments of a regulatory nature, whereby the Secretary General takes decisions, gives instructions, and establishes or adopts procedures for special or temporary situations.[21] Those further regulate issues such as performance contracts,

[18] General Standards to Govern the Operations of the General Secretariat of the Organization of American States, OAS document OEA/Ser.D/I.1.2 Rev. 18, first adopted by the General Assembly through resolution AG/RES. 123 (III-O/73) and subsequently amended. http://www.oas.org/legal/english/standards/genstindex.htm. Accessed 09 October 2017 [OAS General Standards].

[19] OAS General Standards, Article 14.

[20] The OAS lists all executive orders, both in effect and superseded, in its website. http://www.oas.org/legal/english/exindexall.htm. Accessed 28 October 2011. The examples cited in this paragraph can be found therein.

[21] The hierarchy of norms is defined by Executive Order 81-5 on Internal Regulatory Instruments of the General Secretariat: Executive Orders, Directives of the Secretary-General, and Administrative Memoranda, issued on 15 April 1981. http://www.oas.org/legal/english/gensec/EX-OR-81-5htm.htm. Accessed 9 October 2017.

travel arrangements to certain member States, and guidelines on redress mechanisms and on the investigation of staff members.

At the bottom of the hierarchy are administrative memoranda, regulatory instruments that communicate the introduction, amendment or elimination of administrative procedures; to explain, interpret or establish guidelines for the application of regulatory provisions, or to implement operations manuals having the force of regulations. Important provisions are included, such as the organizations' travel policies, information security policy, ethics and accountability, and rules on contracting local staff and temporary assistance.[22]

There are two other important sources of norms from which information about the duty of care can be derived: decisions of the OAS Administrative Tribunal in contentious cases, where the tribunal interprets the organization's norms to infer a duty of care; and the principle of parity with the UN, which could be used to transfer UN practices and administrative decisions to the OAS realm. While the former is still underutilised, with no cases of death, personal injury or discrimination amounting to a breach of the organizations' duty of care; the latter may provide a bridge to the UN system, where duty of care practices are increasingly recognised.[23] The organization officially had a policy of UN salary parity from 1969, which it unilaterally abandoned in 1976. For example, in Judgment 37 the OAS Administrative tribunal stated that 'parity with the United Nations in remuneration *and working conditions*[24] is a contractual stipulation that forms part of the contracts between the OAS and its employees'.[25] Although such interpretation has not yet come out of the OAS Administrative Tribunal, it may be the case that UN duty of care practices that are recognised as working condition obligations by its administrative structures may translate to the OAS via the parity provision.

In 1982, the General Assembly adopted resolution AG/RES.632 (XXII-O/82) calling for a review of salaries by the General Assembly based on a comparator index of three Washington-area institutions, after which the Administrative Tribunal confirmed in Judgment 64 the replacement of the parity system. The same judgment, however, ruled that:

> That the doctrine of acquired rights protects the employees of international organizations against unilateral modifications in working conditions when such modifications infringe the essential terms on the basis of which they accepted their appointments.[26]

The policy was again reversed in 1995, when resolution AG/RES.1319 implemented a policy of parity with UN salaries and job classification standards. The

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[22] See http://www.oas.org/legal/english/indxadmeall1.htm. Accessed 2 February 2018, for the current list of administrative memoranda still in effect.

[23] See Creta, Chap. 7.

[24] Emphasis added.

[25] OAS Administrative Tribunal, Sara Buchholz et al., Beatriz Perazzo et al., and Linda Poole et al. v. Secretary General of the Organization of American States, 3 November 1978, Judgment No. 37.

[26] OAS Administrative Tribunal, Anna Chisman et al. and George P. Montalván et al. v. Secretary General, 30 April 1982, Judgment No. 64 (See Annex II, Case 31).

system, however, only applies to salaries; leaving doubt whether the ruling on working conditions applied by the administrative tribunal in Judgment 37 continues to apply. In any case, UN Administrative Tribunal decisions, as well as those belonging to other international organizations, are admissible as supplementary sources at the OAS tribunal,[27] which makes it likely that the UN Tribunal's duty of care decisions may eventually influence the OAS practice. Although this possibility is mere conjecture at this point, it is likely that, once issues pertaining to a heretofore unrecognised 'duty of care' begin to appear at the OAS Staff Tribunal, the parties will have to look elsewhere for relevant jurisprudence. The admissibility of UN Administrative Tribunal judgments as supplementary argumentation, and the recognition of a certain level of parity with the UN by the OAS, make it likely that some UN duty of care concepts will be used in developing OAS obligations.

12.3 Scope of Application of the DoC Policies

12.3.1 Applicable Duty-Bearers

Insofar as the Secretary General is responsible for the implementation of OAS policy and compliance with the General Guidelines, he is the main duty bearer in terms of providing staff members with the necessary conditions to fulfil their mandate. Deriving from the general responsibilities, different departments within the General Secretariat perform different functions in discharging these duties. In comparison with the UN, the OAS General Secretariat has a fairly decentralised system of staff recruitment, travel and security; lacking centralised departments for this purpose. This often means the different departments have different practices in terms of mission planning and staff safeguards. The General Secretariat contains within it Secretariats for Hemispheric Affairs, Legal Affairs, Administration and Finance, Access to Rights and Equity, Strengthening of Democracy, Integral Development and Multisectorial Security; the latter dealing with international and public security issues, not staff safety. According to the interviewed sources, all departments have regular field missions, each with its own procedure or lack thereof.

Interviews with staff in different departments pointed to reliance on the destination country and the insurance provider as means to fulfil duty of care obligations while on mission. According to sources, the OAS has bilateral agreements with each member State it sends its staff to. This may mean simple agreements for national offices, or more elaborate, dynamic agreements to establish special missions, such as those in Colombia or Honduras. In all cases, these agreements typically deal with

[27] OAS Administrative Tribunal, Rules of Procedure, Chapter I, 3. This has been used in, among others, Brunetti et al. v. Secretary General of the Organization of American States, where both the complainant and the organization used decisions of UN and other international organizations to illustrate their points. See OAS Administrative Tribunal, Marilyn Brunetti et al. v. Secretary General of the Organization of American States, 31 October 1986, Judgment 95.

legal status, freedom of movement, functional privileges and immunities, and security provision. Often, this takes the form of police escort, although the kind of force made available varies country to country. The narrative established by interviewed sources is that, once in the mission area, the staff member is given to the host government's care and is covered by insurance, with the organization having very little control if a crisis emerges. Special missions may have arrangements for perimeter security in their own facilities, and different departments may include additional briefings and safeguards prior to travel, but in short-term missions home support is most often limited to periodic contact with one's immediate supervisor.

It is hardly likely, however, that the organization is exempt from its own share of the duty of care towards its personnel on mission, even if it holds agreements with countries or insurance providers placing on them the active duty to provide security or health services. For example, should these partners fail to protect or care for the staff; the OAS may still be held responsible for such failure. Lacking a clear 'duty of care' policy or liability strategy, therefore, may prove costly to the organization.

12.3.2 Ratione Personae *Scope of the Relevant Policies*

The General Regulations provide for several categories of personnel. To be considered a 'staff member', an employee must be part of the career service, be in a continuing or fixed-term contract, be trust personnel; Secretaries, Executive Secretaries or Directors of certain OAS bodies, managerial, local or associate personnel. The organization does not consider as staff members those that fall under the category of 'other human resources', including independent consultants and contractors, interns, volunteers and young professionals.[28] These categories are not understood to be employees of the organization. Only staff members receive the privileges and immunities granted to the organization's staff in the multilateral privileges and immunities agreement, with bilateral agreements sometimes extending this protection to additional experts on mission by covering all 'mission members'.[29] Also, only staff members have access to the rights to hearing, reconsideration and appeal to the administrative tribunal.[30]

[28] OAS General Standards, Article 17.

[29] The definition of 'staff member' is contained in Staff Rule 104.1, with 104.1a defining which category of personnel shall be deemed staff, and 104.1c listing those personnel that shall not. Article 10 of the Agreement on the Privileges and Immunities of the Organization of American States (C-13) confers privileges and immunities to 'officials and members of staff'. Several bilateral agreements, including the Headquarters Agreement with the United States of America, and the bilateral accords with Haiti and the Dominican Republic, provide immunities to 'officials (*fonctionaires, funcionários*), indicating staff members. The agreements made for special missions, however, extend the immunities to all international 'members' of the mission, thus extending to contractors.

[30] Articles 64 and 65 of the OAS General Standards restrict the rights of hearing and reconsideration to 'staff members'. The Statute of the OAS Administrative Tribunal provides, in its

Consultants are hired under a 'Performance Contract', often in an advisory role to a member government or the OAS mission in a member State. Under OAS norms, they are not considered staff members and as such are exempt from the exclusivity requirement of OAS staff members. Their salary is linked to the delivery of the product or service they provide, and they are not entitled to the welfare and social security rights afforded to staff members, although the OAS may provide access to some insurance schemes at the consultant's own expense.[31] The organization claims that it also exercises less supervision and control over the consultant's work, as they are governed by different rules regarding loyalty and conduct than staff members.[32] They are thus are not entitled to the status, privileges and immunities of staff members, but may acquire an OAS travel document if strictly required for the performance of the contract. Bilateral agreements in special missions may extend additional immunities to consultants, but in shorter deployments consultants are held responsible for their own travel arrangements, although the OAS might provide assistance for the sake of convenience. It is important to note that it can often be the case that the 'Performance Contract' is misused as a shortcut to keep on the payroll staff members that do not fit the above definition, with the labour relationship having all tenets of ordinary employment. Therefore, further administrative or judicial review of the labour relationship may impose additional duties upon the organization.

Since 1989, the General Secretariat began engaging in election and human rights observation, bringing new demands not anticipated in the Staff Rules. The original arrangements of hiring observers under performance contracts proved inadequate, as these deprived them of recognition as staff members, making them ineligible for the privileges and immunities essential to their function. This also made them ineligible for health insurance, social security, and other basic benefits required by their increased exposure in the field. Under Executive Order 95-2, therefore, the Secretary General instituted 'Special Observer' contracts, akin to their

Article II.2.a, that the Tribunal shall be open to 'any staff member of the organization, even after his employment or duties have ceased, and to any person who has succeeded to the staff member's rights upon his death'. Staff members are defined by Article II.3 as those 'connected to the Secretariat by an appointment, a contract of employment, or some other employer-employee relationship in accordance with the provisions of the General Standards'. The OAS administrative tribunal has in Judgment 60, *Carmen Mallarino v the Secretary General*, judged itself competent to look into the case's merits in order to ascertain whether a performance contract had been misused; ultimately dismissing the complaint altogether. The Tribunal did likewise in Judgment 111, hearing a case of someone hired using consultancy funds, but whose relationship to the organization had all the hallmarks of employment (OAS Administrative Tribunal, Carmen Mallarino v. Secretary General of the Organization of American States, 1981, Judgment No. 60).

[31] OAS Executive Order 05-04, Corrigendum No 1, Performance Contract Rules of the General Secretariat of the Organization of American States, 2005. http://www.oas.org/legal/english/gensec/EXOR-05-04-CORR1.htm. Accessed 9 October 2017.

[32] Ibid.

contemporary '300 series' contracts in the UN.[33] These contracts could be established for up to a year, and could not be renewed beyond that without at least a week's break in service. The Order recognises the special observer as a staff member, but facilitates the recruitment process and arranges for a special insurance regime. Under such regime, the special observer is not entitled to life and accidental death insurance subsidised by the General Secretariat; but the Secretary General has the discretionary option to provide health and worker compensation, also for the loss of personal effects, different from those provided to regular staff members under the Staff Rules. Special Observers are also not allowed to travel with their dependents at the organization's expense; and remain eligible to avail themselves of the hearing and reconsideration mechanisms available to other staff members.

Personnel circular No. 31-06 explains the policy on the type of contract to be afforded to those on missions. Special Observer Contracts are applicable solely to those on electoral or human rights missions, or in connection with democratic development and other activities, and whose service is likely to be required for more than 309 days. Otherwise, performance contracts are preferable.[34]

12.3.3 Ratione Loci *Scope of the Relevant Policies*

The OAS has representations in 31 member States, which vary in size and level of activity. Only Canada, Chile, Cuba and the United States have no independent country office, as Canada and the United States are covered by the OAS HQ and Cuba has not fully re-engaged with the OAS.[35] Brazil and Argentina have no country offices but have representatives of the Department of Sustainable Development operating in their countries. Colombia has a mission in support of its peace process in lieu of a country office. All other member States have country offices.[36]

Staff members operating in country offices are covered under the same rules as those working in HQ locations. Because the OAS has no specific duty of care rules, there is no discernable distinction between the protections afforded to those staff

[33] OAS Executive Order 92-05, Special Short Term Contracts for Special Observers and Other Special Democratic Development Personnel, 1995 (superceded by Annex C of the Staff Rules). http://www.oas.org/legal/english/gensec/EX-OR-95-2.htm. Accessed 9 October 2017.

[34] OAS Personnel Circular 36-01, Special Observer Contracts, 2006. www.oas.org/legal/english/Otheradministrativeinstruments/PERSCIRC3106.doc. Accessed 9 October 2017.

[35] In June 3, 2009, the Ministers of Foreign Affairs of the Americas adopted resolution AG/RES. 2438 (XXXIX-O/09), that resolves that the 1962 resolution, which excluded the Government of Cuba from its participation in the inter-American system, ceases to have effect in the Organization of American States (OAS). The 2009 resolution states that the participation of the Republic of Cuba in the OAS will be the result of a process of dialogue initiated at the request of the Government of Cuba, and in accordance with the practices, purposes, and principles of the OAS.

[36] Information derived from the OAS Website http://www.oas.org/en/about/offices.asp. Accessed 9 October 2017.

members in HQ locations and country offices, beyond the distinctions listed by contract type. 'Mission' rules apply to staff serving away from their active duty station, even if it means travel to an adjacent city; whereas serving in a hardship or dangerous duty station does not automatically configure one serving in a 'mission'.

The organization also conducts several missions, particularly in the area of electoral observation, where the OAS website lists electoral observation missions dating back to 1962, noting its deployment of over 5000 electoral observers and experts in more than 240 missions to 27 countries.[37] In the period between 2010 and 2017 there have been 63 missions[38] to observe elections in different countries. These are separate from, and often complimentary to, the longer term 'Special Missions', currently conducted in Colombia,[39] Honduras[40] and Haiti.

Much like the UN, the OAS engagement in Haiti has been continuing over the past two decades, with several iterations of special missions. In 1991, the most advanced instance of OAS/UN cooperation took place with the International Civilian Mission to Haiti (MICIVIH), collaborating in the areas of electoral observation, humanitarian aid, human rights monitoring, political negotiations,

[37] See http://www.oas.org/en/media_center/press_release.asp?sCodigo=S-015/16. Accessed 01 February 2018.

[38] Adding the listed missions for every year in the period.

[39] The Mission to Support the Peace Process in Colombia was created in 2004 via a bilateral agreement, which has since received 5 amendments via additional protocols, which renewed and broadened the functions of the mission. The current protocol foresees the mission's mandate until December 2018. The mission works on peacebuilding, transitional justice, and monitoring conditions of security, monitoring social conflicts that could constitute a threat to peace. It has around 45 civilian personnel, working in 17 field locations, some very remote. It has presented 21 reports with finding and recommendations to the Colombian State, and the mission claims that that 80% of its recommendations in the field of transitional justice have been incorporated into Colombian law. The mission is partly financed by the OAS regular budget, but receives economic and political support from several developed countries within and outside of the hemisphere. The work tasks include accompanying victims in exhumation processes, monitoring the implementation of laws regarding peace and transition justice and monitoring conditions of incarceration. For more details, see https://www.mapp-oea.org/mision/. Accessed 20 February 2018; http://www.oas.org/en/media_center/press_release.asp?sCodigo=S-017/16. Accessed 22 February 2018.

[40] The Mission to Support the Fight against Corruption and Impunity in Honduras (MACCIH) is a judicial system reform mission, focusing on the prevention and accountability of corruption in the country. It began in 2016, as the government of Honduras invited the OAS to facilitate a national dialogue on corruption and impunity, brought about by a large scandal involving the country's institute of social security. The mission advises on matters of corruption prevention, criminal justice system reform, political-electoral reform and public security. While working closely with the authorities and civil society, it provides international prosecutors and judges as advisors to Honduran justice system actors, and certifies those Honduran prosecutors and judges conducting investigations to dismantle corruption networks. Its 2017 work plan stated it had 50 personnel working in the field, representing 67% of total planned staffing. About half of its budget comes from a voluntary donation by the United States, with another 37% by Canada, 8% by Germany and 6% by the European Union. Chile, Italy, Peru and the United Kingdom donate less than 1% each. For more information, see http://www.oas.org/en/spa/dsdsm/maccih/new/mision.asp. Accessed 10 December 2017; and MACCIH 2017.

refugees, fuel supply and economic recovery.[41] Following failed elections in 2000, the OAS sent several shorter-term Special Missions, often in partnership with the CARICOM and the UN.[42] In 2002, a longer-term 'Special Mission for the Strengthening of Democracy in Haiti' was sent, which peaked at over 28 personnel, downsizing considerably once the UN mandated MINUSTAH was deployed in 2004, opting instead to cooperate with it in electoral matters, with additional electoral short-term missions deployed according to the electoral calendar. Around 6 staff remain in Haiti for that mission.[43]

The OAS lacks a strict definition of 'mission' that sets it apart from 'official travel'. For example, the OAS General Assembly takes place in a different country every year; and Inter-American Commission on Human Rights' commissioners travel to consultations and special country visits. Staff travelling to these locations will be on 'mission' nevertheless, although in a different sense than those serving in the semi-permanent contexts of Colombia, Haiti or Honduras. Due to a lack of official policy on the duty of care, however, there is no specific change in the regime of applicable rules and precautions taken in relation to both.

12.4 Content of the DoC: Analysis of Policies and Practices

This last section will attempt an analysis of policies and practices that amount to, or are comparable to, the duty of care by the OAS. Because of the lack of official recognition of the term, and the considerable variance in practice by different departments when sending their staff on missions, it may be difficult to generalise or present information uniformly, as descriptions of current practice might be dependent on the diligence of individual managers as well.

12.4.1 The Duty to Provide a Working Environment Conducive to the Health and Safety of Personnel

There is no official policy regarding a healthy and safe work environment in force for OAS staff in all duty stations. It may be down to individual departments or managers to institute office policies. For example, within the Electoral Observation Mission Manual, there is mention of health and safety as a logistical concern to be considered during the planning and execution of missions.[44]

[41] See Smith-Cannoy 2012.
[42] Ibid.
[43] Ibid.
[44] Organization of American States 2010, p. 36.

Nevertheless, there are policies in place that have ancillary impact on the work environment. The institutional policy on disaster risk management (DRM) requires OAS departments to mainstream DRM into all their activities, including those of an administrative nature.[45] The OAS also operates an alternative work arrangement scheme that may be conducive to staff health and safety by providing better adaptation to individual situations.[46] In addition, the OAS also has a policy for special events, emergency, or inclement weather excusal, in which it mimics the policy and guidance used by the United States Government on its employees affected by these special conditions.[47]

12.4.2 Actively Protect the Officers Facing Specific Challenges and Threats and, When Using Independent Contractors, Use Reasonable Care in Selecting Them and Maintain Sufficiently Close Supervision over Them to Make Sure That They too Fulfil All Contractual Obligations in a Timely Manner with Reasonable Care

As stated before, the OAS relies on host government provision of security to its staff members, and considers contractors under 'performance agreements' to be responsible for their own travel. The level of supervision and security planning is not subject to any overarching regulation, and may depend closely on departmental practice or managerial diligence. The OAS travel rules have provisions for emergency unplanned travel, and provide that all 'official travelers' are covered by Accidental Death and Dismemberment insurance while travelling.[48] This includes special coverage provided to non-staff members or those not covered by their statutory benefits. Other care practices include decedent repatriation upon staff members' deaths, and there are also restrictions on employees flying together, which give a maximum number of OAS Staff and employees that can travel together on a single aircraft.[49]

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[45] OAS Executive Order 16-4, Institutional Policy on Disaster Risk Management, 2016. http://www.oas.org/legal/english/gensec/EXOR1604.pdf. Accessed 9 October 2017.

[46] OAS Executive Order 16-8, Alternative Work Arrangements Policy, 2016. http://www.oas.org/legal/english/gensec/EXOR1608.pdf. Accessed 9 October 2017.

[47] OAS Personnel Circular 02/10, Secretariat Policy for Special Events, Emergency, or Inclement Weather Excusal, 2010. www.oas.org/legal/english/Otheradministrativeinstruments/PERSCIRC0210.doc. Accessed 9 October 2017.

[48] OAS Administrative Memorandum 122, Travel Policy, 2013. http://www.oas.org/legal/english/admmem/admmen122.pdf. Accessed 9 October 2017.

[49] Ibid.

12.4.3 Protect Personnel's Private Property

Staff member property is protected under OAS Staff rule 107.5, which entitles staff to reasonable compensation in the event of loss or damage to their personal effects determined to be attributable to the performance of official duties.[50] The article conditions the reimbursement, inter alia, to the staff member having taken proper precautions with respect to safeguarding his or her property. There is no rule compelling the organization into taking positive action to protect staff property. Also, in administrative memorandum 71, which implements the policy, there are compensation limits in amount, incident and types of property, which greatly restrict this potential.[51] With the exception of a maximum of US$ 5,000 for the loss of a motor vehicle, staff members may be compensated for no more than US$ 1,000 per incident; and the loss of any items which under the memorandum 'the Secretariat does not consider to have been reasonably required by the staff member while performing official duties' will not be covered.[52] The latter requirement has never been the subject of an OAS Administrative Tribunal decision.

12.4.4 Offer Labour Contracts Which Are Fair and Which Take into Due Consideration the Peculiar Nature of the Risks Associated with the Specific Working Place/Tasks

The issue of contract types has been discussed earlier in the chapter. However, it is worth mentioning the relationship between these contracts and field missions. The fact that the most dangerous locations are likely to elicit the least protective regime —performance contracts—is problematic for the duty of care. Interviewed sources estimate that, depending on the mission, it is likely that over half of all international

[50] Staff Rules of the General Secretariat, OEA/Ser.D/I.6 Rev. 5, 2008. http://www.oas.org/36ag/english/doc_referencia/reglamento_personal.pdf. Accessed 9 October 2017. [OAS Staff Rules] Staff Rule 107.5.

[51] The memorandum cites 'animals, motorcycles, boats, motors, jewelry, works of art, cash, financial instruments, securities, tickets, documents, or any article which the General Secretariat does not consider to have been reasonably required by the staff member while performing official duties'. See OAS Administrative Memorandum 71, Compensation for Loss or Damage of Personal Effects, 1985. http://www.oas.org/legal/english/admmem/admmem71.htm. Accessed 9 October 2017.

[52] Ibid.

professionals will be holding performance contracts. Project-related missions, for example, tend to be composed mostly of contractors.[53]

Although introduction of Special Observer contracts and the practice of contracting temporary health and life insurance somewhat bridges the most serious gaps for those sent on mission, the overreliance on contractors is likely to remain a problem.[54]

12.4.5 Make Adequate Information Available to Personnel About the Potential Dangers They Might Face

There are no specific rules about the type of information the organization is required to give staff before sending them on mission. There is no organization-wide practice or standardised information about the country's general situation, security threats, or logistic challenges, similar to UN DSS security advisories. All interviewed sources stated that each department adapts its own practice, and it may be up to the staff member to do research on the security conditions in their mission area. Different supervisors may adopt different practices. In the OAS Election Monitoring Manual, for example, there is the requirement of internal circulation of a 'country profile' containing, inter alia, security information and emergency contacts.[55]

Several staff members interviewed said that they have received invitations to join OAS missions and, after conducting research on security conditions, raised objections about going. One of those interviewed, for example, was exempted from going on mission after raising her family status. Others reported having gone on mission despite objections and justifications given. For those under performance contracts, refusing missions may be a difficult course of action, given the potential of lost employment.

[53] According to interviewed sources, some professionals have been engaged with the OAS for over a decade under performance contracts. This is also a sore point for the professionals working under these conditions—several were approached in the preparation for this research, and a significant number replied that they would not feel comfortable discussing duty of care issues, even anonymously. Some of the interviewed sources, speaking confidentially, noted that several consultants under performance contracts retain this unfavorable relationship because they rely on them to maintain their immigration status, allowing them to legally reside and work in the United States under G4 visas.

[54] See Chap. 7.

[55] OAS Staff Rules, Staff Rule 101.8.

12.4.6 *Treat the Workforce in Good Faith, with Due Consideration, with no Discrimination, to Preserve Their Dignity and to Avoid Causing Them Unnecessary Injury*

OAS Staff rule 101.8 directly prohibits any kind of workplace harassment, including sexual harassment. The rule applies in the workplace, on mission or official travel, and in other places that may directly impact the workplace. The rule provides for administrative disciplinary measures for those engaging in harassment.[56] This is the closest the organization comes to regulating its own duty to provide a 'clean and safe work environment,[57] although this is clearly limited to the harassment aspect of 'clean' and 'safe'.

The OAS General Secretariat has only recently created institutional policies on gender equality, diversity and human rights; as well as a conflict resolution system for prevention and elimination of all forms of workplace harassment. Instituted by Secretary General Luis Almagro in 2016, the policy on gender equality covers the full exercise of the human rights of women and men, independently of sexual orientation, gender identity, gender expression or bodily diversity. It aims to incorporate these values systematically in all OAS programs and activities, train and sensitise staff; and establish quotas and goals on gender parity, representation and fair compensation measures within the OAS. It establishes action plans and participation mechanisms to implement the mechanism system-wide.[58]

The policy on workplace harassment states:

> Personnel are expected to behave with tolerance, consideration, mindfulness and respect toward others. Discrimination is any unfair or unequal treatment or arbitrary distinction based on certain prohibited grounds (such as race, religion, color, creed, age, disability, ethnic origin, physical attributes, sexual orientation, or gender identity).[59]

The policy has extensive definitions and examples of workplace and sexual harassment, and establishes two types of measures to combat them. Preventive measures introduce safeguards; and proactive measures hold managers accountable to respond to cases which arise. The policy applies both to staff and non-staff personnel, and is one of the few instances where the General Secretariat's duty of care is explicitly expressed:

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[56] OAS Staff Rules, Staff Rule 101.8.

[57] See above discussion 12.4.1.

[58] OAS Executive Order 16-03, The General Secretariat's Institutional Policy on Gender Equality, Diversity, and Human Rights, 2016. http://www.oas.org/legal/english/gensec/EXOR1603.pdf. Accessed 9 October 2017.

[59] OAS Executive Order 15-02, Policy and Conflict Resolution System for Prevention and Elimination of All Forms of Workplace Harassment, 2015. http://www.oas.org/legal/english/gensec/EXOR1502.pdf. Accessed 01 February 2018.

> in the discharge of the duty of GS/OAS to take all appropriate measures towards ensuring a harmonious work environment and to protect its Staff Members and Non-staff Personnel from any form of Workplace Harassment […][60]

However, there are no cases in the jurisprudence of the administrative tribunal that granted claims for harassment. The only case where this was discussed was in the *Jane Hector* case, in which the complainant alleged severe harassment by her Director. However, in Judgment 114 the OAS administrative tribunal dismissed the complaint due to non-exhaustion of administrative measures.[61]

12.4.7 Have Sound Internal Administrative Procedures, Act in Good Faith and Have Proper Functioning Internal Investigation Mechanisms to Address Requests and Complaints by Personnel Within a Reasonable Time

The OAS General Standards and Staff Rules provide for a system of administrative review of complaints by staff members. These include the right to a hearing in case of administrative actions taken against the staff member; as well as a right to reconsideration by the Secretary General of any administrative decision taken. There is also the OAS Office of the Ombudsperson, which 'provides assistance to members of the OAS community, helping the management and resolution of work-related concerns and conflicts'. Created in 2015, this office supports the full range of OAS personnel, regardless of appointment type or duty station. After the exhaustion of the applicable measures, staff members of the organization have recourse to the OAS administrative tribunal.

The right to a hearing is provided under Article 64, and applies in cases of application of disciplinary measures or other administrative measures that affect staff member's interests. Staff rule 112.1 sets the applicable procedure, which gives staff members 15 days after notification to request the hearing in writing. The Secretary General will have 20 days to consider the measure and notify the staff member of the decision.

The right to reconsideration is provided by General Standard 65, which follows similar notification procedures for cases where the staff member alleges noncompliance with the conditions set forth in his/her appointment or with any pertinent provisions of general standards and Staff Rules.[62] An Advisory Committee on

[60] Ibid.

[61] OAS Administrative Tribunal, Janet Ector v. Secretary General of the Organization of American States, 7 June 1991, Judgment No. 114.

[62] OAS General Standards, Article 65.

Reconsideration, which has Staff Committee representation, advises the Secretary General on this process.

Article 67 of the General Standards foresees that after the exhaustion of these measures staff members have the right to appeal to the organization's Administrative Tribunal. The tribunal is a subordinate organ of the General Assembly, accessible to any member of the General Secretariat, even after his or her employment or duties have ceased, and to any person who has succeeded their rights after their death. Other persons who can prove they are entitled to rights derived from a contract of employment can also have recourse to the tribunal.[63]

It is also worth mentioning that the organization has a procedure to protect whistleblowers from retaliation,[64] and has general guidelines in place to protect staff members' privacy during administrative investigations related to the organization's code of ethics.[65]

12.4.8 Provide Effective Medical Services to Personnel Should an Emergency Occur

Health care provision in times of emergency is based on that locally available on a cost recovery basis. The organization will, according to Staff Rule 108.23, pay or reimburse reasonable hospital and medical expenses that are not covered by the health insurance plan.[66] Local offices may have established partnerships or references with health care providers; and the contact point in the host government may be activated to deal with emergencies; but the organization does not seem obligated to offer to staff members its own medical service in the field.

12.4.9 Exercise 'Functional (or 'Diplomatic') Protection'

The organization exercises functional or diplomatic protection with regards to its staff members through a combination of a multilateral conventions and bilateral agreements with member countries, by which country offices or special missions are established. While the Secretary General and other senior officials retain privileges and immunities akin to those reserved to diplomats, ordinary staff members retain

[63] OAS General Standards, Article 67.

[64] OAS Executive Order 14-03, Procedures for Whistleblowers and Protections Against Retaliation, 2013. http://www.oas.org/legal/english/gensec/EXOR1403.htm. Accessed 9 October 2017.

[65] OAS Secretary-General's Memorandum SG/58/83, General Guidelines on Investigation of Staff Members, 1983. http://www.oas.org/legal/english/Directives/SG581983.doc. Accessed 9 October 2017.

[66] OAS Staff Rules, rule 108.23.

functional protection in most cases. Such protections include immunity from legal process in respect of acts performed in their official capacity, exemption from taxation, national service obligations, immigration restrictions and alien registration. Bilateral agreements for electoral or human rights missions provide further functional protection for mandate-essential activities; such as freedom of movement, inviolability of correspondence and facilities; access to facilities and information relating to the mandate, etc. In Electoral missions, the Inter-American democratic charter leaves a clear responsibility to the requesting member State, which 'shall guarantee conditions of security, free access to information, and full cooperation with the electoral observation mission[…]'.[67] According to interviewed sources, 'the right to access information' is often invoked by Electoral Observation Missions against reluctant polling station officers denying access to observing the full voting process. This was reflected, for example, in the final report of Nicaragua's election observation mission.

The MAPP bilateral agreement determines a three-fold level of functional protection for personnel. First, it designates as mission 'members' all those accredited and approved with the Colombian government, including international and local staff, as well as local or international contractors. All mission members are to carry identification proving this membership. All mission members are extended the protection given in the multilateral convention, with international members, including those not classed as staff, also given the additional protections reserved to diplomats. In the agreement, the government of Colombia commits itself to provide 'the most optimal security' to the mission and its members, and to facilitate to the mission the 'means and installations' necessary to fulfil its functions.

The MACCIH bilateral agreement operates under the same designation of mission members, although it contains a clause restricting functional immunity from penal, administrative and civil suits only in relation to their official functions. The agreement lists only international members as having all the rights granted by the multilateral convention, specifying further immunity from detention, seizure of personal effects and immunity against all judicial, legislative and administrative procedures regarding their speaking, writing or actions in furtherance of their mandate. It further extends them the privileges granted to diplomats. The agreement imposes on the Honduran government the duty to take 'effective and adequate' measures to guarantee the security, defense and protection of MACCIH members, and those who collaborate with it; in particular witnesses. The agreement also allows the mission to arrange for its own security measures, foreseeing a separate agreement in this regard.

This approach begs the question of what the organizations' responsibilities will be if its counterparts fail to respect the terms of the agreements; or even if it fails to take all feasible measures to ensure such diplomatic protection. The lack of a

[67] Inter-American Democratic Charter, adopted 11 September 2001. http://www.oas.org/en/democratic-charter/pdf/demcharter_en.pdf. Accessed 05 February 2017, Article 24.

standard of timely response, and quality of efforts, leads to further legal insecurity for the organization and its staff.

12.4.10 Provide Personnel with Adequate Training and the Necessary Equipment to Carry out Safely the Task to Be Performed

There are no OAS rules regarding the organization's obligation to provide staff with adequate training and necessary equipment to carry out their tasks. The practice seems to change from department to department; with the electoral missions having the most developed practice. According to interviewed staff, assessment of the security situation is included in the mission planning stage, and all electoral observers selected are trained before deployment in issues such as security plans, procedures in case of emergencies, coordination between observers and their regional coordinators, and other financial and logistical aspects. Some departments engaged in field missions may have a country or local advisor that briefs staff members as they first deploy. Departments also may have supervisory monitoring arrangements that require managers to reasonably know the whereabouts of those he or she supervises.

It is interesting to note that missions which have European donors, such as the one in Colombia, entail a more stringent training requirement, with a mandatory formal lecture on local security conditions given by a security advisor. This may be due to more strict duty of care requirements in the European setting.

12.5 Consequences of Violations

In spite of the existence of *de facto* practices, administrative recourse, and the OAS Administrative Tribunal to adjudicate on these matters, there is very little noticeable practice in terms of the consequences of violations. Of about 165 Judgments rendered by the Tribunal in its lifetime there has not been a single case arising from a staff member injured or killed on mission, and not a single successful case where the organization's duty to prevent harassment was found lacking. There are no statistics on staff member security incidents in the field, and several interviewed staff members seemed unaware of any serious incidents involving death or injury. One such account involved a case from 1997, in which two observers in Colombia that were abducted for two days by ELN rebels, only to be released unharmed. The case is not featured in the Tribunal's roster and may have been solved by amicable means.

Nevertheless, that Tribunal has the power to rescind decisions, demand compliance with obligations, and provide for damages, indemnities and liabilities of up

to two years the basic salary of the injured staff member; with an additional year payable in exceptional cases.[68] The tribunal may also order the losing party to pay the prevailing party an indemnity for attorney's fees and costs.

It may be a telling sign that on 1 June 2017 the Administrative Tribunal decided to suspend all its functions 'until all funds necessary to its operations were credited'. The Staff Union protested vehemently what it called a 'unilateral decision', but acknowledged that the financial crisis faced by the OAS had led to across-the-board funding cuts, which included the Tribunal's budget and staffing.[69] The paralysis lasted at least a few months, but the tribunal has reportedly resumed its functions.

12.6 Conclusions and Recommendations

It has been seen that, while general practices akin to a duty of care have arisen in the OAS General Secretariat, rule of care norms are underdeveloped and under-implemented. As OAS field engagement grows, the organization could benefit from devoting resources to fleshing out what duties it has to the care of staff it sends on mission. This development could, in theory, begin with a Charter revision that would embed the duty of care in its Chapter XVI, similar to what is done in other regional organizations; cascading down to General Standards, Executive Orders and administrative memoranda on the topic. However, as the level of political will to achieve this is considerable, it is also possible to embed the duty of care by Executive Order, harmonising practice across all departments. OAS staff may also engage in this process by increasing the use of administrative mechanisms and the OAS Administrative tribunal to create precedents.

There is a trend of increased electoral observation deployments by the OAS, with Special Missions gaining traction since the end of the Cold War. The broad scope of the mandate in Honduras shows that OAS Special missions may materialise outside of immediate violent crisis, innovating to the nature of challenges faced in the region. However, the financing format of Special Missions is likely to restrict mission sizes and duration. With field missions being a recurrent tool, and growing complexity in field situations, updating its care practices may be essential for the OAS to adapt to its new challenges.

[68] Statute of the OAS Administrative Tribunal, adopted 16 July 1971, through resolution CP/RES 48 (I-O/71), subsequently amended. https://web.oas.org/tribadm/en/Pages/estatuto.aspx. Accessed 9 October 2017.

[69] OAS Staff Committee (2017) Preocupacíon del Comité Del Personal Ante La Decision del Tribunal Administrativo, Staff News 57.

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Chapter 13
Implementation of the Duty of Care by the African Union

Linda Akua Opongmaa Darkwa

Contents

Annex II—the Table of Cases—can be accessed online here: http://extras.springer.com/.

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A. de Guttry et al. (eds.), *The Duty of Care of International Organizations Towards Their Civilian Personnel*, https://doi.org/10.1007/978-94-6265-258-3_13

Abstract Most of the recruitment and deployment policies of the African Union Commission (AUC) guarantee a reasonable duty of care for the organization's civilian employees. Notwithstanding, an analysis of the implementation of the provisions reveals gaps between the rhetoric of a reasonable standard of care and the practice. In addition, the analysis reveals an uneven application of the organization's duty of care responsibilities to the different categories of its employees. Overall, non-AUC civilian staff deployed in various missions is guaranteed limited reasonable duty of care. While it is implausible to expect the same standard of care for all categories of civilians deployed in AUC missions, it is reasonable to expect that non-AUC civilian staff would at least have the requisite information to make informed decisions on the missions into which they are deployed. Given the increasing raft of challenges confronting deployments of various kinds and the fact that the AUC's deployment is often into extremely challenging situations, strengthening its duty of care framework and enhancing its implementation in practice is an urgent imperative.

Keywords African Union Commission · seconded personnel · Field Office · temporary assignment · safety · security · duty of care

13.1 Introduction

The AUC deploys civilians in a number of situations. These include on peace support operations; special political missions and in humanitarian emergencies and/or natural disaster situations. Civilians are also deployed as part of election monitoring and observation missions as well as investigative and fact-finding missions. The AUC deploys civilians under different contractual terms: employees with an AUC contract; employees in headquarters assigned on a temporary basis to a field office; political appointees heading field missions as Special Representatives; Special Envoys; special appointees; non-AUC seconded personnel and as consultants and contractors.

Using documentary review and expert discussions, this chapter examines the AUC's duty of care provisions for all its civilian personnel deployed to various

missions. In total, five expert discussions were held, four with AUC staff and one with a non-AUC staff member. The discussions do not constitute interviews under the applicable rules of the AUC and no attributions are made in the chapter. Notwithstanding the lack of direct attribution, the integrity of the data utilised for the chapter is guaranteed because the information provided is largely within the public domain and the discussions were merely for validation.

The chapter provides a review of the various employment documents that prescribe legal obligations for a standard of reasonable care for civilian personnel in missions; examines the scope of application; and the consequences of violations. Despite its focus on all civilian personnel, there is only very scant information on consultants because of the lack of readily available information. Finally, the chapter concludes with a set of recommendations for enhancing the AUC's duty of care to its civilian employees in missions.

13.2 The Relevant Internal Legal Sources of the AU's Duty of Care

The AUC's duty of care obligations are enshrined in the African Union Staff Regulations and Rules[1] (Staff Regulations and Rules), which serve as the pre-eminent framework document for all recruitment and employment related issues. According to Regulation 3.2(a) of the Staff Regulations and Rules,

> The Union shall protect fundamental human rights, dignity, worth and equal rights of all its staff members as set out in these regulations and other legally binding international legal instruments as well as other administrative instruments. No staff member shall be discriminated against in pursuit of his or her career with the Union. It shall be the Union's responsibility to provide assistance, protection and security for its staff members where appropriate against threats, abuse, harassment, violence, assault, insults or defamation to which they may be subjected by reason of, or in connection with, the performance of their duties.[2]

The Staff Regulations and Rules, which are the foremost rules governing the relations between the AUC and its employees are supplemented by a number of instruments. These instruments reinforce and provide detailed information on specific issues and the specific duty of care obligations that arise within various contexts. These include:

- Administrative Guidelines for the Recruitment, Selection, Deployment and Management of Civilian Personnel in Field Operations
- Standard Operating Procedures on Recruitment and Personnel Selection of Civilian Staff for a Field Operation

[1] Although the Assembly of Heads of State and Government approved the Staff Regulations and Rules in 2010, the available version still has draft on it. See African Union 2010.

[2] Draft African Union Staff Regulations and Rules 2010, Regulation 3.2(a).

- Wellness of Civilian and Other Staff in a Field Operation
- Onboarding and Orientation of Civilian Staff in a Field Operation
- Additional Compensation and Benefits Provided to Civilian Staff in a Field Operation
- Temporary Assignment of AUC Staff to the Civilian Component of a Field Operation
- Promotions and Transfers of Civilian Staff within a Field Operation, Between Field Operations and from the AUC to a Field Operation
- Secondment of Non-AUC Staff to the Civilian Component of a Field Operation
- Headquarters Agreement
- Host Nations Agreements

Paragraphs 70–74 of the Administrative Guidelines for Recruitment, Selection, Deployment, and Management of Civilian Personnel in Field Operations (Administrative Guidelines) provide extensive guidance on the operational parameters of the AU's duty of care to its employees. Even though there is no definition of the AU's duty of care per se, the Administrative Guidelines sets out the elements of the organization's obligations as follows:

> The AUC adheres to a standard of reasonable care for its personnel in the performance of their duties. Personnel are deployed in good faith, based on a risk assessment of an operationally acceptable level to health, security and safety in the FO area. The AUC is responsible for conducting regular risk assessments in areas where its personnel are deployed.[3]

The AUC's duty of care is presented as a shared responsibility and in this vein, sets out responsibilities for the organization as well as the deployed personnel. The AUC accepts responsibility 'to ensure that measures are taken to provide advice, training, mitigation, protection, and wellness programs for staff deployed in high risk areas.'[4] For their part, staff bear responsibility for adhering to security and safety advice, directives and guidelines to ensure that they are protected from harm as well as to guarantee that their actions and inactions do not place colleagues in danger.[5] The Administrative Guidelines also provide direction to guarantee the safety, security and welfare of staff.

In the event of trauma to an employee in a Field Office (FO), the AUC provides that '[T]rauma counselling may be provided for an individual employed in a FO when required and while the individual is employed with the AUC.'[6] It is however worthy of note that despite the recognition that Peace Support Operations (PSO) personnel are increasingly exposed to multiple stressors, the AUC only accepts a limited possibility of providing assistance to persons who may be

[3] Administrative Guidelines, para 70.

[4] Administrative Guidelines, para 71.

[5] Administrative Guidelines, paras 72–73; Standard Operating Procedure Onboarding and Orientation of Civilian Staff in a Field Operation, para 10.

[6] Administrative Guidelines, para 74.

traumatised through their work by using the verb 'may', which suggests possibility rather than 'shall' which imposes obligation.

13.3 The Scope of Application of the AU's Duty of Care Provisions

According to the Staff Regulations and Rules, '[the] Regulations shall apply to all employees of the Union, irrespective of their categories and/duration of their appointments.'[7] Using the definition of 'employees' provided in the Regulations, this means that the staff rules are applicable to all persons employed by the AUC either on a continuing regular, regular or temporary basis, irrespective of category or duration of employment. The duty of care obligations provided therein are therefore applicable to employees in headquarters as well as in the FOs and those deployed on short term or thematic missions. This position is further reinforced by the provision that '[U]nless otherwise specifically stated, every official and staff member of the Union shall be bound by these regulations and rules in the exercise of his or her duty.'[8]

Even though it is not explicitly written, the staff rules do not ordinarily apply to seconded personnel since they are generally not considered to be employees. Nevertheless, secondment agreements are required to *inter alia*, contain provisions 'requiring the secondee to abide by AU rules, regulations, policies, safety and security requirements, conduct and discipline requirements, AU code of conduct, and similar […]'[9] The staff Regulations and Rules are not applicable to consultants; rather, their conditions of service are provided for in the 'Rules Governing the Employment of Consultants and their Contracts.'[10]

The Administrative Guidelines on the other hand, are applicable only to civilian personnel serving in AU Field Operations. It covers all civilian personnel in an AU FO employed under an AU contract, civilian personnel from headquarters on temporary assignments to the FO, non-AUC seconded personnel and Volunteers employed under the AUC Volunteer program for the FO.[11]

It can be inferred that the Chairperson of the Commission is the duty bearer for the organization's duty of care obligations. This is because he/she is entrusted with the responsibility to

[7] Draft African Union Regulations and Rules 2010, Regulation 3.2.

[8] Ibid., Regulation 4(c).

[9] Standard Operating Procedure Secondment of Non-AUC Staff to the Civilian Component of a Field Operation, para 7(d).

[10] Draft African Union Regulations and Rules 2010, Regulation 2(3)(c).

[11] Administrative Guidelines, para 1.

> ensure that the provisions relating to the enforcement of, and respect for, the rights and duties of staff members, as set out in the Constitutive Act, the Staff Regulations and Rules and in the relevant Decisions, Declarations and Regulations of the Assembly and Executive Council, are strictly adhered to.'[12]

Operational level enforcement of the AUC's duty of care responsibilities is assigned to various line managers in the specific Standard Operating Procedures (SOP). For instance, Administration and Human Resource Management is responsible for pre-deployment onboarding, Field Office Administration is responsible for on-site orientation, the Field Office Security and Safety Office is responsible for safety and security training whilst the Field Office Conduct and Discipline Focal Person is responsible for ensuring that personnel receive appropriate conduct and discipline training.[13] Clear lines of responsibility for the enforcement of the AU's duty of care obligations are provided for in the Staff Regulations and Rules that stipulates that:

> Without prejudice to the basic managerial accountability of every Head of Department, Division or Unit, the Chairperson or the competent authority of any other organ has the overall responsibility for ensuring the proper implementation of human resources policies and practices in relation to the provisions of the Staff Regulations and Rules and any other relevant instrument.[14]

13.4 The Content of the AU's Duty of Care Provisions

13.4.1 The Provision of a Safe and Healthy Working Environment

Regulation 3.5 sets out the modalities for the provision of safety and security by stipulating that:

> A Union Security and Safety Service shall be established to safeguard premises, properties and staff members of the Union. The Security and Safety Service shall among other things:
>
> (a) Protect and safeguard the Union premises including the staff members, guests and assets.
> (b) Cooperate with host governments to ensure the protection and security of Union staff members and events.
> (c) Liaise with the host country and international law enforcement organizations and emergency response counterpart in ensuring the adoption of security and safety measures for the Union and its staff members.[15]

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[12] Draft African Union Regulations and Rules 2010, Regulation 3.4(a).

[13] Standard Operating Procedure Onboarding and Orientation of Civilian Staff in a Field Operation, paras 3, 5, 6, 7 and 8.

[14] Draft African Union Regulations and Rules 2010, Rule 3(h).

[15] Draft African Union Regulations and Rules 2010, Regulation 3.5.

In certain instances, accommodation may be provided to the civilian staff of a FO. In cases where staff has to procure their own accommodation, the FO in line with the AU's security officer must approve it. Headquarters staff visiting a FO temporarily are also expected to undertake the Basic Operating Safety Standards (BOSS), which is the Safety and Security Training for FOs. In addition, headquarters staff on assignment to FOs are expected to request and receive a Thuraya satellite mobile telephone, airtime and a Very High Frequency (VHF) radio.[16]

As part of the provision of a safe and secure working environment, it is imperative for personnel to be equipped with sufficient knowledge and skills on how to stay safe, avoid putting their lives and the lives of others in danger and to respond to situations of insecurity when they arise. All personnel must participate in and pass mandatory security and safety training prior to deployment or immediately upon arrival in the mission area. Without the successful completion of the safety and security training, staff will not be allowed to perform their substantive functions.[17] All deployed personnel must be taken through an orientation programme that addresses *inter alia* the Mission Area of Operation, health and safety, security and emergency protocols, mission wellness programmes as well as communication systems and protocol. The orientation programme is expected to be part of the pre-deployment training. In exceptional circumstances where it is impossible to orient personnel prior to deployment, the programme must be undertaken within 48 hours of deployment into the mission.[18]

Regulation 3.4(e)[19] and (f)[20] of the Staff Regulations and Rules obligates the AU to provide for the physical security of personnel. The obligation for this provision is reinforced in the SOP Establishment and Changes to the Role and Staffing Structure of the Civilian Component of a Field Operation, which stipulates that:

> Throughout the mission life cycle from inception to draw down/transition, the deploying department is responsible for ensuring the logistical support required by the civilian component is addressed in the integrated concept of operations (or equivalent) and that the logistics arm of the mission has the resources necessary to meet the needs of the civilian component along with the requirements of the police and military components. Such logistical support are FO-dependent and may include, but are not limited to, communications tools, computers, housing, office space, personal protective equipment, fuel for vehicles, etc.[21]

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[16] Information obtained by the Author through discussions, 21 July 2017.

[17] Administrative Guidelines, para 59.

[18] Administrative Guidelines, paras 62–63.

[19] 'In exercising his or her authority, the Chairperson or the competent authority of any other organ shall ensure that all necessary safety and security arrangements are made for the protection of staff members and the Union premises in collaboration with the authority of the host country.'

[20] 'The Union shall afford its staff members, where appropriate, every assistance, protection and security against threats, abuse, violence, discrimination, assault, insults or defamation to which they may be subjected by reason of, or in connection with, the performance of their official duties in the Union.'

[21] Standard Operating Procedure Establishment and Changes to the Role and Staffing Structure of the Civilian Component of a Field Operation, para 18.

The obligation to ensure the provision of the necessary facilities is reinforced by para 64 of the Administrative Guidelines that provides that '[a]ll facilities required for staff to assume duty should be ready prior to arrival.' In the mission, the Security Officer of the FO, who is the final authority on safety and security in the field, undertakes daily security assessments of the mission area and makes relevant safety and security decisions for personnel in the FO.[22]

13.4.2 The Active Protection of Officers Facing Specific Challenges and Threats

The AUC makes provision for the protection of personnel who may face specific challenges and threats by providing that:

> The Union shall afford its staff members, where appropriate, every assistance, protection and security against threats, abuse, violence, discrimination, assault, insults or defamation to which they may be subjected by reason of, or in connection with, the performance of their official duties in the Union.[23]

The use of the phrase 'where appropriate', suggests that the activation of this phrase is dependent on the presence of specific threats to employees. Furthermore, in field missions, the Chief Security Officer has the responsibility for moving any civilian personnel in the mission based on his/her security assessment.[24]

13.4.3 The Provision of Adequate Information Concerning the Specific Risks in the Mission and Commensurate Contracts

Generally, all AU FOs are classified according to health, safety and security considerations.[25]

This means that employees are sufficiently aware of the nature and character of an assignment prior to deployment. The conduct of daily security assessments allows for updates on the levels of risk and commensurate action to be developed and communicated to personnel in mission. Depending on the level of risk, a hazard allowance is paid in addition to the base salary of a civilian employee in an FO.[26] Information on the specific risks in a mission is also shared with personnel during

[22] Administrative Guidelines, para 76.

[23] Draft African Union Regulations and Rules 2010, Regulation 3.4(f).

[24] Administrative Guidelines, para 76.

[25] Ibid., para 75.

[26] Ibid., para 86.

pre-deployment and in-mission induction. Personnel are however not required to sign an informed consent form that attests to their having received such information.

13.4.4 Protect Personnel's Private Property

The extent of the AUC's obligations towards the protection of personnel's private property is set out in the Staff Regulations and Rules. The organization provides transportation for the property of staff members and eligible dependents on appointment, transfer, separation and death. Staff on regular contract who resign after having served the organization for a period of between one and five years are entitled to the transportation of 70% of their personal property. However, staff who resign in less than a year are ineligible for the transportation of their personal property. The Staff Regulations and Rules are silent on the organization's obligations with regards to the transportation of property of dismissed staff.[27] In death, the organization accepts responsibility for the transportation of the property of the deceased and eligible dependents.[28] While the AUC accepts responsibility for the transportation of staff members' properties, it does not accept responsibility for its protection. Instead, Rule 48.8 states that 'It shall be the responsibility of the staff members, not the Union, to sign a contract and follow up with his or her goods with the shipping agency selected among the three bids offering the cheapest prevailing shipping rates.'

Even though as already mentioned in preceding pages, the Staff Regulations and Rules are applicable to all staff; the provision on protection of personnel property is to a large extent, more relevant to personnel working in non-FOs. Although provision is made to cover the costs of 'emergency evacuation for safety and security reasons' there is no mention of coverage on the movement of the property of staff in times of emergency evacuation.[29] Although it can be assumed that the evacuation of staff will be done with their property, the rule is silent on the issue of property.

Juxtaposed against the detailed provisions in the Staff Rules on transportation of personal effects, the silence of the Administrative Guidelines is suggestive that although the organization does not necessarily deny responsibility for the evacuation of personnel property in times of emergency evacuation for safety and security, it also does not explicitly admit responsibility for the same. The attention given to the transportation of personnel property in the Staff Regulations and Rules raises questions on the omission on evacuation for safety and security.

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[27] Draft Staff Regulations and Rules 2010, Rule 48.

[28] Ibid., Rule 50.

[29] Ibid., Rule 46; Administrative Guidelines, para 80.

13.4.5 Treat the Workforce in Good Faith, with Due Consideration, with no Discrimination, to Preserve Their Dignity and to Avoid Causing Them Unnecessary Injury

The obligations of the AUC to its personnel is encapsulated in the following:

> The Union shall protect fundamental human rights, dignity, worth and equal rights of all its staff members as set out in these regulations and other legally binding international legal instruments as well as other administrative instruments. No staff member shall be discriminated against in pursuit of his or her career with the Union. It shall be the Union's responsibility to provide assistance, protection and security for its staff members where appropriate against threats, abuse, harassment, violence, assault, insults or defamation to which they may be subjected by reason of, or in connection with, the performance of their duties.[30]

These provisions are reinforced by the Administrative Guidelines, which stipulate that deployment into a FO is undertaken among others, 'in good faith, based on a risk assessment of an operationally acceptable level to health, security and safety in the FO area.'[31] The Staff Regulations and Rules as well as the Administrative Guidelines set out the repercussions for the violation of the Rules.

13.4.6 Procedures and Internal Investigation Mechanisms

The AUC has a number of internal accountability mechanisms for investigations and recourse to justice. Elected officials, directors, Heads of Mission, Heads of Divisions/Units and all those in positions of authority are required to set time aside to discuss staff concerns. This provision provides staff with the opportunity to discuss all issues of concern (work, career and personal) with their superiors.[32] A Staff Association, which among others, on behalf of an affected staff member, may engage with the relevant authority in the Union, is also provided.[33] In addition, the AU has an Office of Ethics and Compliance, which exercises oversight over compliance with the relevant instruments of the organization as well as provide advice to personnel who may allege infringement of their rights.

Provision for a Disciplinary Board,[34] which is mandated to advise the Chairperson of the Commission and other relevant authorities on disciplinary

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[30] Draft African Union Regulations and Rules 2010, Regulation 3.2(a).

[31] Administrative Guidelines, para 70.

[32] Draft African Union Regulations and Rules 2010, Rule 51.4.

[33] Ibid., Rule 51.1(a).

[34] According to Rule 58.1 a of the AU Draft Staff Regulations and Rules, 'The Disciplinary Board shall have jurisdiction over acts of misconduct violating the provisions of the Constitutive Act, Code of Conduct and Ethics, Staff Regulations and Rules, Financial Rules and any other

matters is made in Rule 57 of the Staff Regulations and Rules. It comprises five voting members, three of whom are appointed by the Chairperson of the Commission and two by the Staff Association. In consultation with the Staff Association, one of the Chairperson's appointees serves as the chair of the Board. The Disciplinary Board also includes the Director of Administration and Human Resources Development, who participates as a non-voting member and the Legal Counsel or his/her deputy who serves as a resource person to the Board. The Head of the Human Resources Development Division or his/her representative provides the Board's secretarial services without participation as a member in the Board's work.

Allegations of misconduct shall be communicated in writing to the affected staff, who will have the right to respond before being charged. Rule 59 sets out the detail of the disciplinary procedures of the Commission. It includes the establishment of a fact finding committee by the Director of Administration and Human Resources Development; informing the concerned staff member of the results of the fact finding within a period of six months, unless otherwise extended by the Chairperson or other relevant authority, clear timelines for a respondent to respond to charges in cases where a *prima facie* case is established and follow-up processes.

The AUC has an Administrative Tribunal that is established by the Executive Council and has jurisdiction to hear cases of alleged violations of employees' terms

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regulations or rules requiring honesty and integrity from a staff member in the performance of his or her duties and in his or her personal conduct, particularly including but not limited to the following acts or omissions: […] (i) Commission of unlawful acts irrespective of whether the staff member was on official duty or not; (ii) Misrepresentation or false certification in connection with any claim or benefit from the Union, including failure to disclose a fact material to that claim or benefit; (iii) Serious assault, verbal or physical, harassment, (including sexual harassment), or threats to other staff members; (iv) Misuse of office and/or abuse of authority; (v) Breach of confidentiality; (vi) Abuse of privileges and immunities; (vii) Insubordination or disobedience, whether alone or in combination with others, to any lawful and reasonable orders; (viii) Unauthorized habitual absence from duty without valid cause or absence without permission; (ix) Habitual tardiness in reporting for duty; (x) Refusal to carry out lawful instructions; (xi) Riotous or disorderly behaviour within the premises of the Union or acts subversive to good discipline; (xii) Negligence or neglect of duty; (xiii) Taking or giving bribes or any illegal gratification; (xiv) Negligence or omission to perform duties causing financial loss or damage to the Union's property or reputation; (xv) Theft, fraud, dishonesty, forgery, misappropriation or misuse of official funds, stores or property including electronic data, files, records and documents; (xvi) Reporting for duty drunk or drinking of intoxicating liquor, and/or prohibited intoxicating drugs during working hours; (xvii) Wilfully or negligently exposing others to psychological or physical danger, injury or torture; (xviii) Acts of intimidation; (xix) Immoral, indecent or disgraceful conduct; (xx) Aiding and abetting trespass with intent to commit a crime; (xxi) Knowingly withholding information on any staff member who is inefficient or incompetent or dangerous to the security of the Union; (xxii) Wilful, unfounded allegations or defamation against other staff members; (xxiii) Disclosure of official information without permission; (xxiv) Acts of violence; (xxv) Abscondment; (xxvi) Taking, communicating, possessing and photocopying official documents and information in all forms that pass through in the course of duty without authorization. (xxvii) All evidenced illegal acts outside official duties of a staff member 58.2 Any other charges may be proffered by the Chairperson or the competent authority of any other organ as justifiable reasons for instituting disciplinary measures against a staff member.

of appointment and/or violations of the Staff Regulations and Rules.[35] The Tribunal has jurisdiction over 'violation of relevant provisions of the Staff Rules and Regulations [*sic*]', 'Non-observance of contracts of employment and any other act of employment' and '[…] petitions, against disciplinary action if the Staff Council does not succeed in settling the difference amicably within 30 days reckoned from the date on which the disciplinary action was taken.'[36] Employees and their beneficiaries who may be dissatisfied with the decision of the Tribunal have a right of appeal to the African Court of Justice and Human Rights.[37]

13.4.7 The Provision of Effective Medical Services

Offers of appointment are conditioned on medical clearance by the appropriate AUC authorities.[38] In addition, deployed personnel (including non-AUC seconded personnel) are expected to complete a list of required vaccinations prior to deployment into the field. As part of its duty of care obligations, the AU provides life, disability and medical insurance to its Field Staff. The insurance provided takes cognisance of the unique needs of an FO. Provision for appropriate insurance for staff on temporary assignment to the field for the duration of their stay is covered in para 103 of the Administrative Guidelines.

The AU has a medical assistance plan to which its employees are enrolled. The organization's obligations in relation to medical assistance and beneficiaries are specified in Regulation 9 of the Staff Regulations and Rules. Full medical benefits are provided for all regular, continuing regular and fixed term staff. This includes medical evacuation to an appropriate medical facility outside the duty station where necessary. Short-term staff members however only receive medical assistance at the duty station unless other provisions are provided in their contracts of employment. Consultants are not entitled to AU-provided medical assistance and where they receive assistance, they are obliged to pay the full costs of the service. The Regulations also provide for the provision of some medical assistance to seconded staff, unless their contracts state otherwise.

The AU assumes a positive obligation to provide a working environment that promotes the emotional and psychological well-being of employers.[39] In recognition of the potential challenges in the field, counselling provision is made for employees who may become traumatised.[40]

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[35] Ibid., Rule 62.2.

[36] Statute of the Administrative Tribunal 1966, Article 2(i), (ii).

[37] Draft African Union Regulations and Rules 2010, Rule 62.3.

[38] Administrative Guidelines, para 57.

[39] Draft African Union Regulations and Rules 2010, Regulation 3(f).

[40] Standard Operating Procedure on Wellness of Civilian and other staff in a Field Operation, para 10.

In Rule 56.3 of the Staff Regulations and Rules, a Union Medical Panel is provided. The Panel, composed of medical officers working for the Union and/or other medical professionals who work with the Union regularly or in the capacity of consultants, exist to advise on a range of medical issues including the physical and mental well-being of personnel, including but not limited to persons to be appointed to the Commission, injury incurred in the service of the organization, resumption of duty after disability or protracted illness and medical evacuation among others. Employees who are dissatisfied with the conclusions of the Medical Panel have recourse to a Medical arbitration composed of an independent panel made up of a medical practitioner of their choice, a medical practitioner selected by the organization and a third medical practitioner selected jointly by both parties. The third medical practitioner cannot be a staff member of the AU.

13.4.8 The Provision of Functional/Diplomatic Protection

The AU exercises functional protection for its personnel through a variety of legal instruments that include the general customs relating to all international organizations that send out personnel into host States. For the purposes of its duty of care, the AU exercises its functional/diplomatic protection primarily through Host States' Agreements that are negotiated prior to the deployment of a mission. Generally, Status of Mission Agreements (SOMA) stipulate the functional protection accorded to personnel in peacekeeping environments. A host nation's agreement or SOMA regulates matters relating to or arising out of the establishment of a mission or an organ of the AU by establishing the rights and obligations of the Parties, namely the AU and its deployed personnel on the one hand, and the host nation on the other. Host Nations' Agreements/SOMAs vary from mission to mission and from one category of staff to the other. In addition, the exigencies of a mission dictate the provisions within an Agreement. Notwithstanding the specificities that are dictated by the peculiarities of a Mission and the categories of staff, a host nation agreement generally vests responsibility for the security and protection of mission personnel in the host State. Such Agreements also impose obligations on host governments to deal with breaches of the agreement, including of immunities and privileges of personnel.

Guaranteeing functional/diplomatic protection to deployed personnel is a collective responsibility between the AUC and member States. As sovereign entities, member States retain the primary responsibility for guaranteeing the protection and security of all those within their territory. In exercising functional protection, the AU's primary responsibility therefore rests with facilitating the accordance of the necessary protections to its deployed personnel. This does not absolve the AU from

fault in the event of breach, as Article 3.2(iv) of the Staff Regulations and Rules advise that 'The Union's institutions shall, where applicable, assume responsibility for any damage resulting from the violation of protected rights of staff members.'

13.4.9 Adequate Training

Even though employees are expected to have the requisite qualifications to be able to perform their duties in the field, para 71 of the Administrative Guidelines which form part of the AU's duty of care principles oblige it to ensure that deployed personnel receive requisite training. The need for relevant training is emphasised in paras 7, 8 and 9 of the SOP on Onboarding and Orientation of Civilian Staff in a Field Operation. The AU is obliged to provide three main mandatory trainings for deployed personnel. These are: safety and security training conduct and discipline training and job specific training tailored to the specific requirements of the FO.[41]

To ensure the physical security of civilians in the field, all civilians, including seconded staff, have to receive an orientation that includes safety and security prior to arrival in the FO. In the event that prior training is not possible, the safety and security training must be provided within three days of arrival in the mission area. Civilian staff of an AU FO that have not received the safety and security training are prohibited from leaving the mission headquarters. The training and safety training includes an overview of risk assessments, the mode of communicating risk assessments, the use of communication tools in the mission area, evacuation plans and procedures, availability of Personal Protection Equipment (PPE) and when they may be used and coordination mechanisms within the mission to promote security and safety. In addition, the training also covers cultural sensitivity training to promote an awareness and understanding of the environment within which the Mission operates. Finally, civilian staff of the mission receive relevant PPE.

13.5 Implementing the AU's Duty of Care: The State of Play

The AU acknowledges its duty of care obligations and provides a range of instruments that contain measures and recommendations for the effective enforcement of the organization's duty of care obligations. This section of the chapter examines the extent to which the enshrined provisions of a duty of care in the instruments of the AUC are implemented in the various contexts in which it deploys civilian personnel.

[41] Ibid., paras 7–9.

13.5.1 The State of Play in Field Missions

Prior to discussing the substantive issues of the implementation of the AUC's duty of care obligations, it is useful to outline a number of issues of relevance to the effective implementation of the duty of care provisions. First, even though the AU Staff Regulations and Rules contain useful duty of care provisions that are applicable to all staff of the AUC, it is clear that the provisions were designed primarily for use at headquarters rather than in missions. As a result, there is almost no reflection on the realities of the various missions into which the AUC deploys.

Second, notwithstanding the fact that the AUC deploys civilians into different contexts with varying degrees of threats, it is in the area of deployments for field operations that its measures for duty of care are most developed. However, the definition of field operations provided for in the Administrative Guidelines for Recruitment, Selection, Deployment, and Management of Civilian Personnel in Field Operations, is limited to Field Operations that are defined as '[e]ntities mandated by the relevant AU authorities in support of any emergency/crisis situation on the continent.' An analysis of the existing policy and institutional framework and practice of the AU in relation to its duty of care obligations points to a variance between the provisions for field operations and other AU missions that involve civilians.

Also, even though there has been significant improvement in the enforcement of the AU's duty of care obligations in the field, enforcement is not consistent and there is still a lot more that needs to be done. For instance, even though the Field Administration is expected to provide transportation from the airport (or port of disembarkation) to the FO office or accommodation, information obtained from discussions with AU staff revealed that no such arrangements were made for deployed civilian personnel to the Central African Republic in 2014. Deployed personnel had to rely on personal relations to travel to the FO offices.

Similarly, although the rules prescribe that safety and security training must be provided prior to deployment or within three days of arrival in the FO, this is not always adhered to and many civilians undertake the training in retrospect. This is particularly worrisome in high risk FOs because although there are provisions preventing deployed civilian personnel who have not undergone security and safety training from going out of the mission headquarters, experience has shown that mission headquarters are not necessarily insulated from the security threats in a mission area. The mission headquarters of the African Union Mission in Somalia (AMISOM) has for instance, come under attack several times from al-shabaab militants. This means that a civilian who has not undergone the security and safety training in AMISOM could be particularly vulnerable.

Despite the complexities that preceded the deployment of its human rights observers into Burundi and the challenges that have hindered the deployment of the planned military observers, the mission does not have an evacuation plan in place. There is therefore no predictable guidance in place to provide advice to relevant

decision-making bodies of the AUC on whether or not to evacuate personnel in the event of a deterioration of the security situation in the country.

Again, despite the requirement for the provision of PPE equipment for civilians, this is not always issued on time to deployed civilians. Given that most AU FOs are high risk operations, the failure to promptly provide PPE equipment is in clear breach of the organization's positive obligation of protection against threats.

Another area in which the AU needs to strengthen its duty of care obligations is in the area of the legal framework governing the presence of the mission in a host country. A host nation agreement or SOMA provides the general legal framework for the presence of a mission in a member State. The absence of an agreement or the expiration of one therefore leaves the mission and its personnel vulnerable. Despite having deployed into Burundi since 2016, there is still no written agreement between the government of Burundi and the AUC.

Again, due to the excessive dependence on external sources of funds, the AUC has sometimes been found wanting in the area of contract renewals as this can only be done with secure funding. As a result, some deployed civilians have continued to work at the expiration of their contracts, in the hope of a renewal. This affects employees' ability to work as in most instances the lack of contracts negatively affects their access to certain resources. The lack of valid contracts affects remuneration, leaving employees without salaries, sometimes for months. The absence of valid contracts in the field also has implications for insurance, diplomatic protection and other benefits which are required for the optimal performance of duties in the field.

There is also need for better enforcement of the AU's duty of care obligations in its ability to ensure compliance with its measures by employees. Despite the measures in place to provide a standard of reasonable care for personnel, the lack of effective oversight mechanism has meant that staff do not always respect the laid down mechanisms. For instance, not all headquarters staff travelling to the FOs request the necessary communication equipment from headquarters.[42]

The AUC does not have classifications of hotels in countries neighbouring its main FOs where deployed personnel travel for rest and recuperation. Yet, the duty of care responsibility of the organization does not end within a mission area. Part of the reason why staff are obliged to leave the mission area only with the permission of the relevant authority is because of the extension of protection outside the mission area. This notwithstanding, even though a lot of the civilian personnel of AU missions spend their rest and recuperation in countries neighbouring its missions, there are no designated hotels in these countries from which personnel may choose.

[42] Discussions with headquarters staff revealed that they had themselves not been consistent with adhering to the requirement to request and receive relevant communication equipment prior to travel to FOs.

13.5.2 The State of Play in Other Missions

The AU deploys missions in many different contexts. These include for example, election observation, special political missions and in health emergencies among others. The AU's duty of care provisions for such missions however appear to be limited to the Staff Regulations and Rules where applicable, and the contractual provisions. Yet, the scope and content of the Staff Regulations and Rules are limited and do not offer the standard of reasonable care required for all the situations into which the AU deploys. An examination of the enforcement of the AU's duty of care obligations in two non-FO situations reveals a lack of consistency.

In its deployment of the African Union Support to Ebola Outbreak in West Africa (ASEOWA), the organization's duty of care obligations were well enforced as volunteers received information on the potential threats they could encounter and the organization's obligations to them; pre-deployment training and requisite PPE, among others. This may have been due to the fact that the potential dangers of deploying into Ebola affected countries were evident.

The situation is however different with the AU's election observation missions. Notwithstanding the fact that elections have become a trigger of conflict in several countries in Africa, an analysis of the provisions made for AU election observers raises concerns. This is particularly true for the category of persons deployed for election observation. AUC staff deployed are of course, entitled, depending on their categorisation, to the AU's duty of care provisions. This is however not the case with long-term observers who are not classified as AUC staff. In the case of the latter, there is very minimal information on the potential dangers deployed personnel may be confronted with. Whilst admitting that elections are not necessarily violent events, the prevailing evidence shows that there are inherent risks to which deployed personnel may be subjected. Providing adequate information on the probable risks in an assignment is particularly important when deployed personnel are contracted as consultants—as in the case of the AU's long-term observers—which means that the organization does not provide them with full insurance coverage. Such information thus allows deployed personnel to make adequate preparations to safeguard their security and safety whilst in the field.

Unlike FOs, election observation personnel do not always have field security officers and no standardised safety and security briefings prior to deployment or upon arrival in the field. Generally, the security apparatus of the host State conducts security briefings for deployed personnel. Although the implementation of the AUC's duty of care obligation is a collective responsibility between the AUC and host States, the absence of security officials in the deployed observation mission teams means that the ability to have daily security reviews of the situation in the country and communication of these to the teams is limited. AU teams have to rely on the security briefs of other institutions such as the European Union. With the exception of an AU jacket provided for identification, deployed personnel do not receive any additional PPE. There is often no communication infrastructure and AU deployed personnel are dependent on local SIM cards provided by the organization.

This means that in the event of a shut-down of communications in the host State, deployed personnel could be left with no means of communication.

Notwithstanding the increase in soft targets such as hotels and recreational facilities in member States, the AUC does not have designated hotels and recreational facilities that are vetted by its safety and security division, for deployed civilians in non-FO missions such as election observation missions. In selecting accommodation for the AUC's staff on election monitoring and/or observation missions, the primary consideration has mainly been cost competitiveness. Yet, given the challenges that have characterised elections, this can no longer be the main consideration for the selection of accommodation. The situation with non-AUC staff is even more dire as long-term observers are only encouraged to procure secure accommodation. While this is useful information, the nature of contemporary security threats makes it difficult to make a decision on secure accommodation or recreational facilities without appropriate security information.

13.6 Conclusions

The AU recognises its duty of care obligations and has developed provisions and institutional mechanisms to guide the development of measures to ensure their enforcement. Most of the efforts on the enforcement have however focused on field operations. This may arguably be due to the fact that this is one of the areas in which non-enforcement of the duty of care obligations has caused the greatest harm. Notwithstanding the significant progress made since its early deployments, there are inconsistencies and a lot still remains to be done to enhance the enforcement of the AU's duty of care obligations in field operations and other non-FO missions.

Implementing an organization's duty of care responsibilities is complex and requires conceptual clarity, unambiguity and clearly laid out provisions for the various instances that may arise. This means that although the Chairperson of the Commission is procedurally the duty bearer for the organization's duty of care responsibilities, this is not enough. The preceding paragraphs reveal the need to enhance the duty of care responsibilities of the AUC. This will require assigning the AU's duty of care responsibility to a duty bearer with a specific mandate to ensure the implementation of the substantive elements of the organization's duty of care responsibilities.

Although efforts to enhance the enforcement of its duty of care obligations may require additional resources, it would be worthwhile if it enhances the security and safety of deployed civilians and saves the organization from lawsuits brought about as a result of a failure to provide an adequate standard of reasonable care.

13.6.1 Recommendations

The experiences of the AU in both FOs as well as non-FO missions provide invaluable lessons for the development of comprehensive measures for the enforcement of duty of care in all contexts. The AU should therefore undertake an assessment of the enforcement of its duty of care obligations in all its deployed missions with a view to distilling useful lessons for enhancing its duty of care responsibilities to all deployed civilians.

Using its provisions and practical experiences, the AU should develop an organization-wide duty of care policy that spells out the responsibilities of the various entities—the AUC, AUC staff, non-AUC staff, including consultants—towards the enforcement of the organization's duty of care responsibilities. In addition, the AU should appoint an officer with overall responsibility for exercising oversight over the enforcement of the organization's duty of care in all contexts.

As a matter of priority, the AUC, using its Safety and Security Division and the intelligence cell, must come up with guidance on secure accommodation and recreational facilities within member States that may be accessed by its deployed personnel. In particular, guidance on the procurement of accommodation for special political missions and election observation missions must be provided as a matter of urgency. As an interim measure, the AUC may consider adopting and where necessary adapting the United Nations' approved facilities until it develops its own list.

Provision must be made to include security advisors in all missions deployed by the AUC. The security advisor, who would have to liaise with the relevant national security institutions in the host country, would provide the necessary security information and advice to guide the mission and its deployed personnel. Related to this, the AUC must ensure that all its deployed missions have a safety and security evacuation plan.

While it may be too expensive to have separate structures for the enforcement of its duty of care obligations in all deployed missions, it is possible to constitute a standing team at headquarters that works in support of the Administrative and Human resource Management team to enforce the organization's duty of care obligations. The standing team could be constituted with designated duty of care focal persons from the various divisions who are selected and trained on the scope and content of the organization's duty of care obligations.

Part of the reason for the failure to enforce the organization's duty of care obligations is the lack of adequate resources. It is therefore critical that the AU provides the requisite logistics and equipment for the enforcement of its duty of care responsibilities. The development of coordination mechanisms that allow for the redeployment of resources for the enforcement of the organization's duty of care obligations could be useful especially in the mid-short term.

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Chapter 14
Implementation of the Duty of Care by the World Bank

Annamaria Viterbo

Contents

Abstract The objective of this chapter is to assess how the organizations of the World Bank Group implement the duty of care owed to personnel who are performing official tasks, or on assignment, outside the Washington DC headquarters.

Annex II—the Table of Cases—can be accessed online here: http://extras.springer.com/.

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The first section of this chapter analyzes the WB Group's internal law on rights and obligations of the Bank and its staff, as fashioned by the jurisprudence of the World Bank Administrative Tribunal, and its scope of application. The second section examines in more detail how the various aspects of the duty of care obligation are addressed within the WB Group, focusing in particular on: non-discrimination, health and safety of the personnel, information on potential dangers and adequate training, specific challenges and threats, effective medical services after an incident has occurred, and the exercise of functional protection. The final section gives a brief overview of the WB Group's internal administrative procedures established to address personnel's requests and complaints.

Keywords World Bank · duty of care · 1983 Principles of employment · Staff Rules · Administrative Manual Statements · World Bank Administrative Tribunal

14.1 Introductory Remarks

At the end of World War II, a rule-based multilateral framework was established to regulate monetary and economic relations among States. In 1944, the United Nations Monetary and Financial Conference was convened in Bretton Woods, New Hampshire, in the United States (US) to negotiate the Articles of Agreement of two International Organizations: the International Monetary Fund (IMF) and the International Bank for Reconstruction and Development (IBRD).

The original mission of the IBRD consisted of fostering economic development in member States, providing assistance for the reconstruction of war-torn Europe and favouring the transition to a peace-time economy.[1] Shortly after its foundation, though, due to the US bilateral aid programme for Western Europe, the IBRD essentially shifted its focus to providing project financing and adjustment loans to developing countries.

Soon it became clear that the poorest countries could not afford to borrow capital at the almost ordinary market conditions set by the IBRD. To overcome this problem, in 1960 the International Development Association (IDA) was established to provide long-term loans at no interest to poorer countries.

Together the IBRD and the IDA are officially referred to as the 'World Bank' (WB).[2] The 'World Bank Group' (WB Group) however also comprises three other legally and financially independent International Organizations: the International Finance Corporation (IFC), which was established in 1956 to finance and promote sustainable private sector investments in developing countries; the International

[1] On the history of the World Bank, see among many: Coffey and Riley 2006; Kapur et al. 1997; Mason and Asher 1973; Shihata 1991.

[2] Darrow 2006; Marshall 2008; Philips 2009.

Centre for Settlement of Investment Disputes (ICSID), set up in 1966 to provide the institutional and procedural framework for the conciliation and arbitration of disputes between foreign investors and States; and the Multilateral Investment Guarantee Agency (MIGA), created in 1988 with a mandate to promote foreign direct investment in developing countries, offering political risk insurance to investors and lenders.

The IBRD, IDA and IFC are specialised agencies of the United Nations (UN) and, as such, they are members of the UN System Chief Executives Board for Coordination (CEB).[3]

The origins of the CEB date back to 1946, when the ECOSOC requested the UN Secretary General to 'establish a standing committee of administrative officers of the specialized agencies'[4] to improve coordination within the UN System.

Nowadays, the CEB is the main UN inter-agency instrument for coordination and cooperation. In order to carry out effectively its mandate, three high-level committees have been created. Among these, the High-Level Committee on Management (HLCM) is mandated to promote staff safety and security and to administer the UN Security Management System (UNSMS).[5]

It has to be observed though that, while the Organizations of the WB Group participate in the CEB and the UNSMS,[6] they do not belong to the 'UN Common System of salaries, allowances and other conditions of service' managed by the International Civil Service Commission (ICSC).[7]

In fact, the relationship agreements concluded by the IBRD, IDA and IFC with the UN do not provide for the application of common personnel standards, nor do they oblige the WB Organizations to be part of the UN Common System.

For instance, pursuant to para 1 of Article X of the UN-IBRD Relationship agreement,

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[3] Its members include the Executive Heads of the UN, 15 specialized agencies (including the World Bank and the IMF), 12 Funds and Programmes created by the UN General Assembly and 3 related organizations (the WTO, UNOPS and IAEA).

[4] See UN Economic and Social Council, Resolution 13 (III) 'Co-ordination Committee', 21 September 1946 (document E/231). On 21 September 1946, at the request of ECOSOC, the Secretary General established the Administrative Committee on Coordination as a standing committee to supervise the implementation of the relationship agreements between the UN and the then existing three specialized agencies. In 2001 the Administrative Committee on Coordination was renamed UN System Chief Executives Board for Coordination (CEB).

[5] The UNSMS was officially established by UNGA Resolution 59/276 (23 December 2004), to unify all security mechanisms in place to protect civilians and military staff members within the UN System. Security policies of the UNSMS are initiated, developed and reviewed by the Inter-Agency Security Management Network (IASMN), a specialized network of the HLCM. The HLCM either directly decides on the recommendations made by the IASMN or recommends their endorsement and implementation to the CEB. Mandatory security policies are collected in the UNSMS 2017. On the UNSMS see also Creta, Chap. 7, Sect. 7.3.4.

[6] The legal basis for the IBRD's participation in CEB and HLCM activities is Article X, para 2 of the UN-IBRD Relationship Agreement.

[7] The ICSC is an independent expert body established in 1987 by the UN General Assembly to regulate and coordinate the conditions of service of staff for the UN common system. See ICSC 2013 as well as ICSC 2017.

> The UN and the Bank will consult *from time to time* concerning personnel and other administrative matters of mutual interest, *with a view to securing as much uniformity in these matters as they shall find practicable* and to assuring the most efficient use of the services and facilities of the two organizations [emphasis added].

The relationship agreements concluded between the UN and the majority of the other specialised agencies contain instead a provision on personnel arrangements with a view to develop common personnel standards and avoid serious discrepancies in terms and conditions of employment.[8]

The purpose of this chapter is to describe the WB Group's autonomous framework for employment relations with a view to assess how duty of care obligations owed to personnel performing official tasks, or on assignment, outside the Washington DC headquarters are implemented.

14.2 Legal Sources

14.2.1 Internal Sources

To determine the scope of the WB Group's duty of care, it is necessary to analyze the set of rules applicable to the conduct of staff members and their employment relationship with the Organization.[9]

As affirmed by the World Bank Administrative Tribunal (WBAT) in its first decision, the respective rights and duties of the WB Group and its staff are to be found in the 'internal law' of the Organization.[10]

This internal legal framework includes the Articles of Agreement of the different Organizations, the By-Laws, manuals, circulars, notes and statements issued by the management of the Bank.[11] Further elements of the World Bank's staff legal

[8] For instance, Article XII.1 of the Agreement between the UN and UNESCO reads: 'The United Nations and the United Nations Educational, Scientific and Cultural Organization recognise that the eventual development of a single unified international civil service is desirable from the standpoint of effective administrative coordination, and with this end in view agree to develop common personnel standards, methods and arrangements designed to avoid serious discrepancies in terms and conditions of employment, to avoid competition in recruitment of personnel, and to facilitate interchange of personnel in order to obtain the maximum benefit from their services'.

[9] On the law of the international civil service, see Jenks 1962; Balladore Pallieri 1969; Akehurst 1967; Amerasinghe 1987; Amerasinghe 1994; Amerasinghe 2005; Villalpando 2016a.

[10] WBAT, de Merode et al. v. the World Bank, 5 June 1981, Decision No. 1, para 36 (see Annex II, Case 44).

[11] WBAT, de Merode, para 18. See also Shihata 2000, p. 709. The legal basis for the adoption of these internal rules is to be found in Article V, Section 5, let. (b) of the IBRD Articles of Agreement, according to which 'The President shall be chief of the operating staff of the Bank and shall conduct, under the direction of the Executive Directors, the ordinary business of the Bank. Subject to the general control of the Executive Directors, he shall be responsible for the organisation, appointment and dismissal of the officers and staff'.

relationship may be found in the 'Personnel Manual, the Field Office Manual, various administrative circulars and in certain notes and statements of the management'.[12]

It has to be underlined, though, that the Tribunal also maintained that 'Not all the provisions of these manuals, notes, statements are included in the conditions of employment. Some of them have the character of simple statements of current policy or lay down certain practical or purely procedural methods of operation. It is, therefore, necessary to decide in each case whether the provision constitutes one of the conditions of employment'.[13] This distinction was subsequently applied by the WBAT in several judgments.

After the establishment of the WBAT, the adoption of a new, more comprehensive and detailed employment framework became necessary. In 1983 the Executive Directors of the IBRD and IDA adopted the Principles of Staff Employment, which embody 'the general conditions and terms of employment with the Organisation' and set forth 'the broad policies in accordance with which the President shall organise and manage the staff of the World Bank [IBRD and IDA] and the IFC'.[14]

The 1983 Principles, however, were far from being exhaustive and needed to be supplemented by more detailed rules. In fact, according to Principle 1, 'The President […] shall develop, provide, and maintain such programmes and Staff Rules consistent with these Principles, as he considers necessary to the efficient conduct of the Organisations' business'.

Nowadays, the most important internal legal source regulating the status of international civil servants within the WB Group is the 'Staff Manual', made up of over 50 Staff Rules. Based on the 1983 Principles, Staff Rules establish the basic rights and obligations of the Bank and its staff. They cover various aspects of the employment relationship, ranging from personnel management and organization, recruitment, appointment, probation, compensation, reassignment, termination and retirement, to health insurance schemes, tax allowances, misconduct and conflict resolution.

Staff Rules are accompanied by the WB Code of Conduct,[15] which provides general guidance and complements rules and policies of the WB Group. When there is a discrepancy between the Staff Rules and the Code of Conduct, the Staff Rules prevail.

Furthermore, Administrative Manual Statements (AMSs)—which contain policies, procedures and standards concerning the WB Group's management and administration[16]—and WB Group Procedures—which define the Organization's

[12] WBAT, de Merode, para 22.

[13] WBAT, de Merode, para 22.

[14] Preamble to the 1983 Principles.

[15] World Bank 2009.

[16] See Leroy 2011, p. 57.

decision-making processes and approval mechanisms[17]—might become relevant for employment relations when they define the procedures to be followed in certain circumstances (as in the case of the WB Group Procedure on official travel).

Over time, the evolving practice of the Organization made this body of law increase considerably, with employment rules constantly amended to adapt to new needs and challenges.

14.2.2 External Sources

In addition to the internal rules and regulations of the Organization, the WBAT has relied on external sources such as the 'general principles of law'[18] and 'solutions worked out in sufficiently comparable conditions by other administrative tribunals, particularly those of the UN family'.[19]

Among the general principles of law, the WBAT acknowledged the principles of non-discrimination[20] and non-retroactivity,[21] the duty to protect staff against sexual harassment,[22] as well as '*pacta sunt servanda*, good faith, due process, estoppel (including protection of legitimate expectations), and unjust enrichment'.[23]

For international rights and duties stemming from the WB's international legal personality, while the UNDT acknowledged that 'international administrative tribunals may rely on, among other sources, general principles of law – including international human rights law, international administrative law and labour law – which may be derived from, inter alia, international treaties and international case law',[24] no such explicit understanding can be found in WBAT case law.

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[17] The WB Group's Operational Policies and Procedures are collected in the so-called Operational Manual. They should be consistent with the Articles of Agreement.

[18] WBAT, de Merode, para 25.

[19] WBAT, de Merode, para 28. See also Seatzu 2015; Hansen 2012a, b; Hansen 2007.

[20] WBAT, Mendaro v. IBRD, 4 September 1985, Decision No. 26, para 20 (see Annex II, Case 45). The applicant claimed the non-observance of the conditions of her employment because of alleged discrimination on the basis of sex and sexual harassment, imputable to the respondent. It is worth noting that the Tribunal decided that the application was inadmissible because some of the events leading to the complaints had occurred before the establishment of the WB Tribunal and for those arising afterwards, the plaintiff's application was not filed in time. See also US Court of Appeals of the District of Columbia Circuit, Mendaro v. World Bank, 27 September 1983, 717 F.2d 610, where the Court affirmed the IBRD's immunity from suits in employment disputes.

[21] WBAT, de Merode, paras 34 and 47.

[22] Harassment, sexual harassment, discriminatory practices, retaliation (including for alleged whistleblowing) and abuse of authority amount to staff misconduct under Staff Rule 3.00 and constitute grounds for disciplinary action. The Office of Ethics and Business Conduct is competent to review these misconduct allegations.

[23] WBAT, C.L. v. IBRD, 26 September 2014, Decision No. 499, para 73.

[24] UNDT, Obdeijn v. UN Secretary-General, 10 February 2011, Judgment No. UNDT/2011/032, paras 30–31.

The only reference to the need to protect fundamental human rights is found in Sharpston v. IBRD,[25] where the applicant referred to the International Covenant on Civil and Political Rights, the European Convention on Human Rights and the American Convention on Human Rights. The Tribunal, however, limited itself to acknowledging that the right to be protected from inhuman or degrading treatment is 'entirely uncontroversial', but declared the application otherwise inadmissible.

This notwithstanding, it can be maintained that all International Organizations, as subjects of international law, are bound by customary international law rules. In fact, as already affirmed in 1980 by the ICJ in its Advisory Opinion concerning the Interpretation of the Agreement of 25th March 1951 between the WHO and Egypt, 'International organisations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law'.[26]

Due to the generalised reluctance of international financial institutions to acknowledge their human rights obligations, the way these are complied with in staff relations is surrounded by uncertainty, especially when the standards are not clearly 'restated' in the Organization's internal rules.

14.3 Scope of Application

14.3.1 Ratione Loci

Rules and regulations may apply differently to staff members based at headquarters, assigned to country offices or travelling.

For instance, Administrative Manual Statement (AMS) 6.40 'Global Security' concerns security measures adopted to protect staff, facilities, possessions and programmes 'overseas' and therefore it does not cover the Washington DC headquarters.

14.3.2 Ratione Personae

The 1983 Principles apply to all staff members, who are any person appointed by the President to perform services for the WB Group, 'except that, considering the particular characteristics of their appointments, the President may vary the application of the Principles to persons on Part Time, Temporary, Trainee, Consultant or Executive Director's Assistant appointments, or to any new types of appointment that may be established'.

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[25] WBAT, Sharpston v. IBRD, 23 July 2001, Decision No. 251, para 56 (see Annex II, Case 46).

[26] ICJ, Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, 20 December 1980, para 90. See also Seyersted 1967, p. 427; Herz 2010, p. 146.

The employment status reflects the type of contract signed by a staff member. To date, all appointment types including but not limited to Short Term Consultant (STC), Short Term Temporary (STT), Extended Term Consultant (ETC), Extended Term Temporary (ETT), Junior Professional Associate (JPA), Regular, Local Staff Regular,[27] Open-Ended, Term, Executive Director Assistant and Special Assignments are subject to Staff Rules and applicable WB Group policies.[28]

Usually, the letter of appointment of a staff member—even of a short-term consultant—explicitly states that the appointment 'is subject to the Staff Rules currently in effect and as they may be amended from time to time'.[29]

Positions in country offices, irrespective of level, are subject to local recruitment. This ensures depth of country knowledge and is considered a critical complement to international recruitment.

Benefits and pay applicable to locally recruited staff may vary according to the type of their appointments (Short Term Appointment, Temporary Appointment, Local Staff Regular Appointment and staff on Localisation Plus).[30]

Country office appointed staff members are eligible to receive hazard and fragility pay if they hold a Term, Local Staff Regular or an Open-Ended Appointment and if they are assigned to work indefinitely in a country classified as 'Fragile and Conflict Affected Situation (FCS)' or a 'Hazardous FCS location'.[31]

FCS locations include countries or territories with a low harmonized CPIA country rating,[32] and/or the presence of a UN and/or regional (for example EU, NATO, AU) peace-keeping or political/peace-building mission during the last three years.[33]

Hazardous FCS locations refers to duty stations designated by the UN as eligible for 'Danger Pay'.

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[27] Local Staff Regular is a full-time appointment of indefinite duration, made before July 1998, of a person recruited to serve at a WBG country office.

[28] In 2016, Staff Rule 4.01 was amended to reorganize and redefine the types of appointment of staff. Short and extended term consultants are included among the staff members of the WB Group.

[29] Source: samples of appointment letters (for Short Term and Extended Term Consultant positions) on file with Author.

[30] In general, internationally recruited staff working in country offices are paid in US Dollars, while locally recruited staff are paid in local currency (with some exceptions). See Das et al. 2017, 10.

[31] See Staff Rule 6.28 "Hazard and Fragility Pay", issued in October 2017, which outlines the non-pensionable compensation premium provided by the WB Group to extend reasonable assistance to eligible staff members indefinitely based in a country office designated as a Fragile and Conflict Affected Situation (FCS). For the purpose of Staff Rule 6.28 hazardous FCS locations are those duty stations designated by the UN eligible for danger pay. See also Chap. 7, Sect. 7.4.5.

[32] The Country Policy and Institutional Assessment—CPIA rating measures countries against a set of criteria related to economic management, structural policies, policies for social inclusion and equity, as well as public sector management and institutions.

[33] See http://www.worldbank.org/en/topic/fragilityconflictviolence/brief/harmonized-list-of-fragile-situations.

14.4 Content of the WB Group's Duty of Care Obligations

Neither the Articles of Agreement nor the Staff Manual contains a comprehensive definition of the duty of care, but various policies and directives cover the wide spectrum of the duties arising from it.

The 1983 Principles of Staff Employment identify the general obligations of the IBRD, IDA and IFC in their relations with staff members: the duty to act with fairness and impartiality, the duty to follow due process, the duty of non-discrimination and the duty to 'respect the essential rights of staff members that have been and may be identified by the WB Administrative Tribunal'.[34]

In particular, the WB Group's Organizations—and every personnel member according to their employment contract—have a duty to 'make all reasonable efforts to ensure appropriate protection and safety for staff members in the performance of their duties' and to 'take such measures as may be necessary to protect the international character of the staff in discharging their duties'.[35]

All WB Group offices are therefore responsible for taking operational and physical security measures to protect staff, facilities, and programmes. Likewise, individuals have a personal obligation to be conscientious and to reduce risks.[36]

Other rules relevant for the implementation of the duty of care are set forth in the Staff Manual, AMSs and other directives and procedures.

For overseas assignments, AMS 6.40 'Global Security' establishes a clear division of responsibility among the WB Group's Country Office Manager, the UN, and the host country for the implementation of security actions and programmes.

Looking at the specific obligations incumbent on the WB Group identified in the introductory chapter of the book, the following can be found.

14.4.1 Non-discrimination

Non-discrimination is one of the key tenets of international civil service law. It is enshrined in the 1983 Principles of Staff Employment: the Organizations 'shall not differentiate in an unjustifiable manner between individuals or groups within the staff and shall encourage diversity in staffing consistent with the nature and objectives of the Organisations'.[37]

In its first case the WBAT acknowledged non-discrimination as one of the general principles of law included in the conditions of employment.[38] It encompasses gender, racial/ethnic and age discrimination.

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[34] Principle 2.1.

[35] Principle 2.1(b) and (f).

[36] Principle 3.

[37] Principles 2.1 and 9.1.

[38] WBAT, de Merode, para 34.

14.4.2 Health and Safety of Personnel

As recognized by the WBAT in EI v. IBRD,[39] the Organizations of the WB Group have a duty to provide a safe and healthy work environment to their staff. This is consistent with Principle 2.1, let. (b) which provides that 'The organisations shall make all reasonable efforts to ensure appropriate protection and safety for staff members in the performance of their duties.'

Moreover, Principle 6, Section 6.2, let. (d) establishes that the Organizations have a duty to 'establish and maintain programmes to promote the health and wellbeing of staff members and to provide financial protection and assistance for staff members and their families, including but not limited to annual, maternity and sick leave, coverage for medical and hospitalization expenses, accidents and loss of life'.

Accordingly, Staff Rule 6.07 'Health Program and Services' sets forth provisions on health-related matters.[40] This rule applies to staff members assigned at headquarters and country offices of the IBRD, IDA, IFC, ICSID and MIGA. The purpose of the policy is to ensure a safe work environment and to protect the health of staff and of their immediate families. It includes provisions on inoculations and medications to staff when they engage in operational travel or when they relocate due to change of duty station, protocols on medical clearance for staff travelling to a country dealing with a public health emergency, as well as on medical evacuation and other general health and safety standards in the workplace.

In particular, Staff Rule 6.07 establishes that, to ensure adequate medical treatment in the event of acute illness or injury when appropriate treatment is not available locally, the WB Group evacuates staff and their dependents to the closest location where appropriate medical treatment can be provided. Persons who may be evacuated includes staff members (as defined above in Sect. 14.3.1) and their immediate families in duty stations outside the US, Australia, New Zealand, Japan and Western Europe as well as staff members and their spouse/domestic partner who are on operational travel outside the US.[41]

When a public health emergency is declared by the World Health Organization (WHO), the Centres for Disease Control and Prevention (CDC) or the European Centre for Disease Prevention and Control (ECDC), with travel restrictions issued,

[39] WBAT, E.I. v. IBRD, 25 October 2017, Decision No. 569, para 90. In this case the Tribunal found that the IBRD's duty of care includes the remediation of environmental hazards that may adversely affect the health of a staff member in the workplace and the subsequent proactive monitoring of the situation. Even the temporary reassignment of the staff member to a different location (while keeping almost the same duties and responsibilities) was deemed to satisfy the Bank's duty of care towards the applicant (para 103). Finally, the Tribunal found that requiring the applicant to undergo an independent medical evaluation prior to allowing her return to the original workplace amounts to a proper discharge of the Bank's duty of care (para 119).

[40] See also Principle 6.2(d).

[41] See also, *infra*, Sect. 14.4.4 on the duty to evacuate internationally and locally recruited staff according to AMS 6.40 'Global Security'.

a pre-departure briefing and post-travel monitoring 'may also be required' once the traveller has been medically cleared (para 3.05). These procedures are therefore left to the discretion of the Organization.

AMS 3.00 'Operational Travel' may apply, but the document is not disclosed other than to staff members.

14.4.3 Information on Potential Dangers and Adequate Training

An important aspect of the duty of care is the duty to adequately inform and prepare staff in the pre-deployment phase, to ensure their full awareness of the challenges to be faced. This is especially true for staff members that are to be dispatched in risk areas and in fragile and conflict affected countries.

While the Administrative Manual does not explicitly refer to the duty to inform staff on potential threats and dangers, according to AMS 6.40 on 'Global Security' (on which see also *infra*), Country Office Managers are responsible for familiarising resident and mission staff with the local security situation, security procedures and communications.

Furthermore, in country offices, Security Focal Points (SFPs) assist staff, dependents and benefit travellers by managing their safety and security on the ground and by providing security information and advice as well as training (for instance, on how to properly use alarm systems and on emergency communications and evacuations procedures). SFPs are staff members who, in addition to their regular duties, have volunteered for (or been appointed to) the position without having a professional security background. Therefore, in 2017, to ensure a more secure and safe environment for WB Group personnel, the Corporate Security Division of the General Services Department (GSDCS) decided to offer SFPs an e-learning training and certification programme.

Moreover, as far as adequate training is concerned, the WB Group Procedure on 'Official Travel' provides for a mandatory security responsiveness e-learning course for all staff members prior to official travel, in the absence of which trip requests cannot be approved.

In the end, it is worth highlighting that the duty to provide adequate information also concerns gender-based security threats which may result from a number of factors, including gender, gender identity, or sexual orientation. Acknowledging these security concerns, in 2016 the UNSMS promulgated a new policy according to which staff members should be duly informed on gender-based security risks. To date, however, it is not possible to establish whether the WB Group has implemented this policy or to what extent.[42]

[42] See UNSMS Security Policy Manual, Chapter IV Security Management, Section M 'Gender Considerations in Security Management', 2016.

According to the LGBTI staff group 'UN Globe', in order to enable an informed decision as to whether or not to accept an assignment to a particular duty station, complete information on the following circumstances should be disclosed: possibility to obtain residence visas or employment permits for legal same-sex partners of staff in the country of destination; high-levels of recorded incidents of homophobia or transphobia; as well as access to medical care also in the case of STD medical conditions (like HIV/AIDS).[43]

At the time of writing, the GSDCS of the WB Group is updating its policy on 'Non-Family Duty Station Designations' and might decide to take into account the concerns mentioned above.

14.4.4 Specific Challenges and Threats

Due to challenges and threats posed by worldwide increasing political and criminal violence, the AMS 6.40 on 'Global Security' addresses the WB Group's responsibility 'to protect its staff, facilities, and programmes overseas, and the mechanisms whereby that is accomplished', setting out guiding principles, decision-making procedures and the responsibilities of key stakeholders.

The AMS 6.40 is an excellent and accurately drafted policy which applies to staff members of the WB Group and eligible dependents as well as to consultants hired under direct contract, that is, having staff appointments with the Group, but not to employees of companies contracted by the WB Group through corporate procurement even if deployed to work in dangerous environments. No distinction is made between protection provided to staff recruited internationally or locally, except as regards to evacuation and residential security guards. As for evacuations, internationally recruited staff are evacuated from the country, whereas locally recruited staff (be they foreigners or nationals of the host State) are relocated within the country if this is feasible.[44]

A clear division of responsibility for the implementation of security actions and programmes is set forth and different roles are attributed to the host country, the United Nations, and the WB Group's Country Office Manager. At the same time, individuals are required to take personal security measures to reduce risk against them, their families and belongings.[45]

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[43] UN Globe 2015.

[44] This provision should be compared with the UNSMS Security Policy Manual, Chapter IV, Section D, para 13, according to which "locally-recruited personnel and/or their eligible family member may be evacuated from a duty station *only in the most exceptional cases* in which their security is endangered as a direct consequence of their employment by organizations of the United Nations common system" [emphasis added]. On the duty to provide functional protection on an equal basis to internationally and locally recruited personnel see Ruzié 1999, p. 435.

[45] AMS 6.40 'Global Security', para 1. According to the UNSMS Security Policy Manual 'Personnel employed by the organizations of the UN System are accountable to their respective

The host country is primarily responsible for the security of WB Group staff, their dependents and property. The WB Group, however, should put in place separate planning and emergency reaction mechanisms independent from the host government actions or its response capacity.

The UN is responsible for interagency arrangements for the protection of UN organizations and specialized agencies, including the WB Group, against hazardous situations out of the host government control.

In countries where the WB Group maintains an office (either IBRD or IFC), the Country Office Manager remains responsible for the security and safety of WB Group's resident staff and visitors, as well as travelling staff. In locations where neither the WB nor IFC have an office, the local UN office undertakes responsibility for security matters.

Country Office Managers ensure that the security and crisis management programmes are correctly implemented, monitor local security conditions, report significant developments and incidents, and brief resident and mission staff on the local security situation and relevant procedures. They are responsible for the safety of staff and consultants while they are at their residences, at hotels, or in their vehicles either on duty or non-duty travel.

The Country Office Manager is assisted by Security Champions who serve as SFPs, providing assistance to staff, dependents and benefit travellers.

Preventive and crisis management procedures should be put in place for various incidents, including but not limited to: bomb threats and bombings, social unrest, civil war, insurrection or *coup d'état*, fire, kidnapping or hostage taking, medical emergencies, multiple cases of injury or death, natural disasters, terrorist threats or attacks and major public transport accidents.[46]

The AMS 6.40 also establishes security guidelines for medical emergencies and evacuations which apply in combination with Staff Rule 6.07 (see *supra*).

Notably, in 2017 the GSDCS developed a roadmap for the development of a new WB Group Global Security Management Strategy, building upon the AMS 6.40.[47] The new Global Security Management Strategy is going to comprise: a new Framework of Accountability for the Bank Group Security Management System; an updated Security Risk Management framework; new or updated policies and procedures on 'Country Evacuation and Relocation', 'Travel/Road Safety', 'Operating Status', 'Non-Family Duty Station Designations'; as well as a newly developed Critical Incident Review Process in the event of death or serious injury of a WB Group employee.[48]

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organizations. All such personnel, regardless of their rank or level, have the responsibility to abide by security policies, guidelines, directives, plans and procedures of the UNSMS and its organizations' (UNSMS, Security Policy Manual, Chapter II, Section B, para 28).

[46] See also AMS 6.30C, Incident Categories; the WB Group (1999) Crisis Management Manual and the WB Group (2001) Crisis Action Plan Template.

[47] The AMS 6.40 dates back to 2007.

[48] See WB Group Internal Audit (2017) Special Review of the Formulation of the New WBG Global Security Management Strategy, WBG FY17-07.

14.4.5 *Effective Medical Services After an Incident Has Occurred*

The WB Group's duty to provide staff members with effective medical services to fully recover from any physical injury or mental health condition came under scrutiny for the first time when the WBAT was called to adjudicate the Lansky case.[49]

At the end of 2005, Tamara Lansky, an IFC Senior Investment Officer, left her hotel in Kinshasa (Democratic Republic of Congo (DRC)) on a pickup truck with a driver heading towards the airport. They did not know that the road they were travelling on was under the control of paramilitary forces opposed to the government and, apparently, they did not know either that a heightened security level had been recently declared. Ms. Lansky's car was stopped and surrounded by men trying to open the vehicle doors, while the occupants of another car were forced out and assaulted before them. Ms. Lansky managed to escape and reached the airport without physical injuries. Back in the US, however, she was diagnosed with severe Post Traumatic Stress Disorder (PTSD) and was subsequently granted long term disability.[50]

In 2009, upon termination of her employment, the applicant and the WB entered a Memorandum of Understanding (MoU), whereby Ms. Lansky agreed to settle and release any and all claims or causes of action alleging negligence or breach of contract arising from the security incident in the DRC.[51]

Because of the MoU, the Lansky case could not concern the WB Group's poor implementation of safety and security standards in a high-risk environment such as the fragile and conflict affected DRC. Instead, the claim focused on the entire process of administration of the Workers' Compensation and Disability Programmes.[52]

Ms. Lansky maintained that she had to deal with new retroactive reimbursement policies and procedures, with claim adjustors continuously changing, delays, requests for additional information and negligence (she was referred to a medical practitioner without experience in PTSD). As admitted by the WBAT, this 'would commonly result in arbitrariness, and denial of due process on the part of the administrator'.[53]

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[49] WBAT, Tamara Lansky (No. 1 and No. 2) v. IFC and IBRD, 9 December 2009, Decision No. 425 and WBAT, Tamara Lansky (No. 3) v. IFC and IBRD, 29 October 2010, Decision No. 442 (see Annex II, Case 47).

[50] WBAT, Lansky (No. 1 and No. 2), paras 5–19.

[51] WBAT, Lansky (No. 1 and No. 2), para 15.

[52] WBAT, Lansky (No. 1 and No. 2), para 36. The administration of the programme was (and it is) outsourced to a third-party administrator contracted by the WB Group which in turn contracted out some of its responsibilities to a subcontractor.

[53] WBAT, Lansky (No. 1 and No. 2), para 45.

The Tribunal noted that Principle 2.1 applied: 'The Organizations shall at all times act with fairness and impartiality and shall follow a proper process in their relations with staff members'. However, the Tribunal also considered that the applicant had waived her right to file claims arising from the alleged failure of the Bank to comply with said standards.[54] This notwithstanding, in the light of the exceptional circumstances of the case and in a rather unorthodox way, the WBAT recommended the WB to develop—in cooperation with the Staff Association—appropriate procedures to process payment or reimbursement claims under the Workers' Compensation and Disability Programmes, although without specifying what duty of care standards had to be met.

Eventually, Staff Rule 6.11 'Workers' Compensation Program' on compensation and benefits in the event of service-incurred illness, injury or death and Staff Rule 6.22 'Disability Insurance Program' were revised taking into account the WBAT's recommendations. This outcome can be considered illustrative of the learning culture of the WB Group.

Lastly, it is worth noting that Ms. Lansky was not covered by the Malicious Acts Insurance Policy (MAIP), which, since 1990, is typically offered by the Organizations of the UN Common System to their internationally and locally recruited staff members, consultants as well as official visitors while travelling or on mission.[55]

The MAIP is particularly important for the discharge of duty of care obligations as it covers accidents resulting in death or disability (including PTSD) caused by war, invasion, hostilities, acts of foreign enemies, civil war, revolution, rebellion, insurrection, military or usurped power, riots or civil commotion, sabotage, explosion of war weapons and terrorist activities.

Initially the MAIP was applied by the UN only in designated duty stations classified as dangerous, but nowadays the policy applies worldwide. Coverage for death or disability under the MAIP is in addition to compensation that may be awarded in the event of death, injury or illness of a staff member while on official duty (which is payable under Appendix D to the UN Staff Rules or comparable compensation schemes). Moreover, the MAIP has a broader coverage as it applies to all international and locally recruited staff and consultants. The policy is without cost to insured individuals and the Organization bears the full premium.

Strict adherence to security measures by insured individuals is imperative as failure to do so could result not only in tragic incidents, but also in denial of related insurance claims.

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[54] See WBAT, Lansky (No. 1 and No. 2), para 52.

[55] In the area of insurance, a stock-taking exercise carried out by CEB in 2010–2012 identified broad differences of coverage and compensation between international staff, local staff and non-staff personnel. See HLCM, 'Comprehensive Mapping of Benefits, Entitlements, Insurance Related to Service Incurred Injury, Illness, Death and Disability in the UN System', CEB/2010/HLCM/21/Add. 1, 17 September 2010 as well as the undisclosed document CEB/2012/HLCM/17 the content of which is summarized in CEB, 'Conclusions of the 24th Session of the High-Level Committee on Management', CEB/2012/5, 22 October 2012, paras 28–48.

To date, the WB Group does not maintain a MAIP. However, under its staff benefits programme, it provides life insurance, accidental death and dismemberment, survivorship and workers compensation benefits. These are provided on a 24 hour/7 day basis as a staff benefit, or a 'while on official duty' benefit.[56] Certain benefits, though, are provided under commercial insurance policies which have open market based conditions and exclude, for example, coverage for war. Staff members of the WB are therefore generally covered only in conflict situations which are less extreme than those faced by UN personnel. Because of the increasing involvement of the WB Group's Organizations in fragile and conflict affected countries, however, the insurance policy of the WB Group may need to be updated soon.

14.4.6 Exercise of Functional Protection

The WB has the right to provide functional protection to its agents to ensure the efficient and independent performance of their duties. The exercise of functional protection should be considered an implied power necessary for the fulfilment of the Organization's mandate, flowing from its international legal personality. The protection, therefore, extends only to activities carried out in the agent's official capacity, whereas private acts are not covered.

The existence of a duty to exercise functional protection for the denial of a visa by the State of the seat was discussed in the Alrayes case.[57] The US G4 visa of Mr. Alrayes, a Saudi Arabian national who worked as IFC Senior Officer on a Term contract, was cancelled for alleged terrorist activities while he was on a routine mission to the Gulf States. It took more than 4 years for Mr. Alrayes to obtain a visitor's visa for the US after being interviewed twice by the FBI. During all this time, he was forced to live abroad, away from his family and children, in the uncertainty of when he would be eventually cleared of accusations and experiencing financial difficulties.[58] The IFC provided assistance, also offering Mr. Alrayes new terms of appointment, but refused to take legal action against the US, resorting only to diplomatic channels.

[56] Flex or temporary staff members may receive lower (institution paid) benefits than regular staff as reflected in their different compensation or remuneration arrangements.

[57] WBAT, Alrayes v. IFC, 13 November 2015, Decisions No. 520 (Preliminary Objection) and WBAT, Alrayes v. IFC, 8 April 2016, Decisions No. 529 (Merits) (see Annex II, Case 43).

[58] On these grounds, the WBAT recognized the existence of exceptional circumstances to excuse Mr. Alrayes's delays in filing his claims (WBAT, Alrayes (Preliminary Objection), para 104). At the same time, however, the WBAT affirmed that Mr. Alrayes should have filed his claims at least within 120 days of his return to the US. Only some of the applicant's claims were therefore deemed admissible.

Upon his return to the US, Mr. Alrayes filed an application against the IFC before the WBAT, contending that the IFC had 'failed in its duty of care'.[59] He challenged a number of IFC decisions, including his placement on a Short-Term Assignment and the termination of his employment under a Memorandum of Understanding, and asked for the reimbursement of the legal and travel costs he had incurred as well as for separation payments.

The WBAT dismissed the majority of his claims, only awarding the applicant a small compensation. The claim concerning the IFC's decision not to seek a mandamus writ was ruled inadmissible for lack of exhaustion of internal remedies.

It should be underlined, though, that in a similar situation the UN Dispute Tribunal reached a different conclusion. The Hassouna case[60] concerned a UN staff member placed on *persona non grata* (PNG) status by the government of Sudan. The UNDT recognized that the Secretary General is entitled to request the host country information on the reasons leading to the PNG decision to determine whether or not the staff member was acting in his/her official capacity. The Tribunal also affirmed that 'in the case the host country is not forthcoming with information as to the basis for his/her expulsion or the reasons, if any, do not justify a PNG decision, […] a change in the terms and conditions of the staff member's contract or non-renewal is not an option open to the Secretary-General.'[61] In fact, under such circumstances, 'it is the duty of the Organization to take steps to alleviate the predicament in which the staff member finds himself/herself following his/her expulsion from the host country.'[62]

Despite the fact that the Hassouna case concerned a host State while the Alrayes case concerned the State of the seat, we can contend that the IFC erred, first, in placing Mr. Alrayes on a short-term assignment and, then, in terminating his employment contract.

14.5 Administrative Procedures

According to Principle 9.1, staff members have the right to fair treatment in matters concerning their employment and, when disputes arise, they have a right to file their case.

To this end, different mechanisms have been established over time. The WB conflict resolution system offers, in fact, a wide range of services to assist staff in the resolution of disputes.

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[59] WBAT, Alrayes (Merits), para 41.

[60] UNDT, Hassouna v. Secretary General of the United Nations, 10 July 2014, Judgement No. UNDT/2014/094 (see Annex II, Case 40).

[61] UNDT, Hassouna, para 51.

[62] Ibid.

Mediation services are offered to facilitate communication among staff members and assist in reaching mutually acceptable solutions to workplace related conflict.[63]

The Ombudsman office has a broad mandate to act as an impartial source of assistance for the informal resolution of staff-related issues.[64] The Respectful Workplace Advisors (RWAs) are coordinated by the Ombuds Services Office. They are a network of volunteer peers who serve as an informal and confidential source of assistance to staff facing challenging workplace problems.

The Peer Review Services facilitate the resolution of employment-related issues through a confidential process conducted before an impartial panel of peers (that is, volunteer staff members both at managerial and non-managerial level).[65]

The WBAT was set up in 1980,[66] its Statute last being amended in 2009. The explanatory report of the IBRD President on the establishment of the WBAT referred to a principle accepted in many national legal systems and reaffirmed in the Universal Declaration of Human Rights which requires that, when administrative power is exercised and in the event of a dispute, a machinery should be available to accord a fair hearing and due process to the aggrieved party.[67]

The Convention on Privileges and Immunities of Specialized Agencies also requires international organizations to 'make provision for appropriate modes of settlement of […] disputes arising out of contracts or other disputes of private character to which the specialized agency is a party'.[68]

The WBAT is called to decide on applications submitted by staff members of the IBRD, IDA and IFC alleging 'non-observance of their contracts of employment or terms of appointment',[69] therefore including the 1983 Principles and all the applicable Staff Rules of the Organizations.[70]

It is worth noting that the WBAT's jurisdiction covers staff members only. The expression 'staff member', as defined by Article II(3) of the WBAT Statute, refers to an individual currently or formerly employed by the IBRD, IDA or IFC, as well

[63] See Staff Rule 9.01.

[64] See Staff Rule 9.02.

[65] See Staff Rule 9.03.

[66] The Board of Governors acted on the basis of Article V, Section 2, let. (f) of the IBRD Articles, according to which: 'The Board of Governors, and the Executive Directors to the extent authorized, may adopt such rules and regulations as may be necessary or appropriate to conduct the business of the Bank'. On the WBAT, see among others Elias 2012; Villalpando 2016b.

[67] Memorandum to the Executive Directors from the President of the World Bank, 14 January 1980, Doc. R80-8, IDA/R80-8 and IFC/R80-6, paras 1–2. See Amerasinghe 2014, p. 319.

[68] Article IX, Section 31 of the Convention on Privileges and Immunities of Specialised Agencies, adopted by the General Assembly of the United Nations on 21 November 1947, entered into force on 2 December 1948, UN Treaty Series vol. 33, p. 261. See Martha 2012; Okeke 2016; Reinisch 2016.

[69] WBAT Statute Article II.

[70] In its first decision, the WBAT held that a right to file a petition with the Tribunal is 'an integral part of the relationship between the Bank and its staff members' (WBAT, de Merode, para 21).

as to anyone filing a claim on behalf of an incapacitated or deceased staff member or claiming a pension payment.

The Staff Association has no standing to file an application with the Tribunal either as an institution or on behalf of staff members. However, it may file *amicus curiae* briefs under WBAT Rule 23(2).[71]

Non-staff personnel—a very broad category which comprises individual contractors, individuals under service contracts, interns, trainees, job applicants and volunteers—have no standing to lodge a complaint before the WBAT.[72] Therefore, the question concerning the level of protection guaranteed to non-staff members remains unanswered.[73]

In a few cases, national courts and the European Court of Human Rights ruled that an International Organization may be denied immunity from jurisdiction when the applicants have no other reasonable alternative means to protect their fundamental rights.[74]

Indeed, it can be advocated that, if the internal justice system of the relevant Organization is manifestly lacking, and no alternative means to protect individual fundamental rights are offered, national courts may exercise their jurisdiction.[75]

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[71] See WBAT, The World Bank Staff Association vs. IBRD, IDA, IFC, 27 October 1987, Decision No. 40, paras 78–89.

[72] As for the UN justice system, proposals were put forward to create simplified mechanisms of dispute settlement for these individuals (see A/65/373 paras 165–183).

[73] In 1999, the IMF Administrative Tribunal held that it did not have jurisdiction to hear the claim of a former contractual employee of the Fund since his letter of appointment clearly stated that he would not become a staff member (IMFAT, A. v. IMF, 12 August 1999, Judgment No. 1999-1, para 9 (see Annex II, Case 28)). Notably, the IMFAT also declared that 'Equitable or other consideration do not enable the Administrative Tribunal to extend its jurisdiction to claims falling outside the express language of Article II of its Statute' (para 100).

[74] ECtHR, Waite and Kennedy v. Germany, Decision of 18 February 1999, App. No. 26083/94, paras 63–68. More recently reference should be made to ECtHR, Klausecker v. Germany, Decision of 6 January 2015, App. No. 415/07, paras 67–76 where the claimant was a job applicant at the European Patent Office as well as to ECtHR, Perez v. Germany, Decision of 6 January 2015, App. No. 15521/08, paras 65–66 on the shortcomings of the UN internal justice system before the 2009 reform. See also: ICJ, Effects of Awards of Compensation Made by the United Nations Administrative Tribunal, Advisory Opinion, 13 July 1954, para 57.

[75] The Morgan case is illustrative. In 1990, Morgan, an employee of a temporary employment agency who worked for two and a half years in a secretarial position at the IBRD brought a suit against the Bank before US courts. He claimed that IBRD officials and security guards had forcibly detained him against his will, denied him access to an attorney, accused him of stealing money without presenting evidence and harassed him. He sought compensatory and punitive damages for intentional infliction of emotional distress, false imprisonment, libel and slander. The US District Court of the District of Columbia dismissed his action acknowledging the IBRD's immunity (US District Court of the District of Columbia, Morgan v. IBRD, 13 September 1990,752 F. Supp. 492). More recently, however, it has been argued that, given the absence of an alternative means of tort redress, the outcome of a similar dispute might be different and immunity eventually denied by national judges (Dominicé 2001). See also Amerasinghe 2010; Hammerschlag 1992, p. 279; Reinisch and Wurm 2010, p. 114.

Additionally, in order to apply to the WBAT, the applicant should have previously exhausted 'all other remedies available within the Bank Group', acting within the time limits set, save under exceptional circumstances.[76]

According to the WBAT case-law, exceptional circumstances are to be determined on a case-by-case basis taking into account the particular facts of each case.[77]

The exhaustion of internal remedies requirement has constantly been interpreted in the sense of referring to 'formal remedies' (which include recourse to the Peer Review Services[78] and the Pension Benefits Administration Committee), as opposed to 'informal remedies' (like the Ombudsman Services and Mediation, which are considered purely voluntary remedies).

Ultimately, compensation (in the amount that is reasonably necessary to compensate the applicant for the actual damage suffered) can only be awarded by the WBAT when the rescission of the contested decision or the performance of the obligation invoked would 'not be practicable or in the institution's interest'.[79]

WBAT judgments are final and without appeal.

14.6 Conclusions and Recommendations

Recent developments within the UN System require careful consideration as they might impact on the WB Group's implementation of its duty of care obligations in the near future.

In 2014, the HLCM established the High-Level Working Group on the Duty of Care with the objective of identifying key duty of care concerns within the UN System.

The Working Group identified the main shortcomings of the UN System and four cross-cutting issues related to the need to: (a) design and implement a pre-deployment resilience briefing, mandatory for all staff assigned to high risk duty stations and their families; (b) enhance communication tools to overcome the staff's lack of awareness and understanding of duty of care obligations; (c) strengthen medical and psychological services also at a preventive level in order to allow personnel to take informed decisions on the risks they may face; (d) review the significant difference in allowances, benefits and entitlements for internationally-recruited versus locally-recruited staff, including danger pay.[80]

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[76] Article II(2) WBAT Statute. See also Staff Rule 11.01 'Claims'.

[77] See, for instance, WBAT, Alrayes (Preliminary Objection), paras 99–111.

[78] See Staff Rule 9.03 Peer Review Services, para 7.02. As of July 2009, the Peer Review Services replaced the Appeals Committee.

[79] Article XII(2) WBAT Statute. On this point, Sheed 2012, p. 233.

[80] See Final Report of the HLCM Working Group on 'Reconciling Duty of Care for UN personnel while operating in high-risk environments', CEB/2016/HLCM/11, 15 March 2016.

See also the eleven common principles adopted in 2014 by the CEB to guide the UN System in supporting the implementation of the 2030 Agenda for sustainable development. Among these, Common Principle n. 11, entitled 'Duty of Care', establishes that: 'The organizations of the UN

A number of detailed recommendations covering the different aspects of the duty of care (psycho-social aspects; health and medical aspects; safety and security issues; human resources and administration) during the pre-deployment, deployment and post-deployment phases were also put forward, together with a proposed checklist to guide managers in high-risk environments.[81]

These recommendations are addressed to all the members of the UN System, including the Organizations of the WB Group. To date, however, the WB Group has failed to engage proactively in the activities of the Working Group on the Duty of Care. Hopefully, the positive momentum generated within the UN System will prompt the WB Group to further improve and consolidate its duty of care framework.

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[81] See HLCM Committee on Management, Duty of Care Task Force—Interim Report, CEB/2017/HLCM/16, 14 September 2017.

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Chapter 15
Practical Measures in the Implementation of the Duty of Care by International Organizations

David Gold

Contents

Abstract This chapter provides practical advice aimed at guiding international organizations in the implementation of the duty of care principles emerging from this book. It underscores the importance of international organizations having competent individuals capable of carrying out on-going risk assessments that will

Annex II—the Table of Cases—can be accessed online here: http://extras.springer.com/.

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need to be taken into consideration in building and modifying policies and setting up control measures to eliminate or mitigate risks. With a view towards prevention and protecting the traveller or assignee, the chapter explores health and medical risks, safety and security risks, road traffic safety as well as hotel safety. The section on pre-travel arrangements addresses activities which need to be carried out prior to departure and underscores the importance of the traveller's briefing. The section on incident management focuses on the importance of an emergency plan, and the identification of headquarters and site-level emergency management teams within the organization. The need for an organization's comprehensive ability to deal with medical emergencies is explored and the final section addresses the training and equipment necessary to support the provision of an adequate level of duty of care.

Keywords Travel risk assessment · policy · directives · health and medical · security · hotel safety · road safety · pre-travel arrangements · arrival considerations · incident management · emergency medical arrangements · training and equipment

15.1 Introduction

When personnel are travelling or on assignment, as attested to in previous chapters, there is a range of incidents that can disturb, disrupt or even terminate a mission, and reduce the effectiveness of the organization. These incidents range from near misses and minor annoyances, to serious safety, health and security issues with potentially life-threatening consequences.

The very nature of the work of international organizations may put the individual traveller or assignee in harm's way. This chapter addresses five of the ten points listed in Chap. 2, Sect. 2.4, corresponding to five of the ten Guiding Principles illustrated in Annex I of the present volume.[1] These include the international organizations' duty to:

- Provide a working environment conducive to the health and safety of its personnel (Principle 1);
- Actively protect the officers facing specific challenges and threats and, when using independent contractors, use reasonable care in selecting them and maintain a sufficiently close supervision over them to make sure that they use reasonable care (Principle 2);
- Make adequate information available to personnel about the potential dangers they might face and about the specific situation in the country of destination (Principle 5);

[1] See Annex I, Guiding Principles on the Implementation by International Organizations of their Duty of Care Obligations towards their Civilian Personnel.

- Provide effective medical services to personnel should an emergency occur (Principle 8);
- Provide personnel with adequate training and the necessary equipment to carry out safely the task to be performed (Principle 10).

With a view to addressing the above six points, international organizations need to have practical measures in place to:

- Prevent the incident from occurring
- Provide measures of protection if prevention efforts fail
- Identify and implement measures to mitigate the impact of potential harm
- Be able to respond to an incident locally, regionally or internationally with a view to protecting the safety, health and security of the traveller or assignee.

15.2 Practical Measures in the Implementation of the Duty of Care

15.2.1 Provide a Working Environment Conducive to the Health and Safety of Its Personnel

15.2.1.1 Risk Assessment

Risk assessment in the United Nations (UN) is an integral aspect of the security risk management concept. In the UN Security Management System's Security Policy Manual,[2] risk management is defined:

> Security Risk Management is the process of identifying future harmful events ('threats') that may affect the achievement of United Nations objectives. It involves assessing the likelihood and impact of these threats to determine the assessed level of risk to the United Nations and identifying an appropriate response. Security Risk Management involves four key strategies: controlling, avoiding, transferring and accepting security risk. Security risks are controlled through prevention (lowering the likelihood) and mitigation (lowering the impact).
> Risk is the combination of the likelihood of a threat being carried out and the subsequent impact to the United Nations. Security measures can either be used to prevent vulnerability from being exploited or mitigate the impact of exploitation, or both.

The same definitions apply to travel safety, health and security with a slight alteration of vocabulary. *Security measures* noted above become *control measures* and *impact* becomes *severity*. The process noted above of *assessing the likelihood and impact* and *identifying an appropriate response* becomes risk assessment.

In order to provide a safe and healthy and secure working environment during travel or assignment, an organization needs, as a first step, to understand the risks

[2] UN Security Management System (UNSMS), Security Policy Manual Chap. 4, Sect. A, 2016.

the traveller or assignee faces. Understanding of the risks (and their associated control measures) needs to be in place to ensure that the working environment is conducive to the health and safety of its personnel. To accomplish this, competent individuals[3] need to undertake and continue the process of risk assessment. Within the scope of the UN system cited above, under the roles and responsibilities in the SRM Process it states that, 'Security professionals are responsible for initiating, conducting and monitoring all phases of the SRM process.'[4] At duty stations this would be the responsibility of the designated official.[5]

As the United Nations Security Management System only addresses security risks, and this chapter has a broader scope, that is travel safety, health and security, this chapter suggests a straight-forward approach to risk assessment used by the UK Health and Safety Executive which is relevant to international organizations and can be used at multiple levels in an organization.[6]

According to the (UK) Health and Safety Executive, there are five steps to carrying out a risk assessment which include:[7]

1. Determine the threat or hazard.
2. Determine who is at risk.
3. Calculate the risk, determine control measures and calculate the residual risk.
   - 3.1. Calculate the risk by multiplying a likelihood score × a severity score (a likelihood score of 5 × a severity score of 3 would provide a risk score of 15).
   - 3.2. Determine control measures.
   - 3.3. Recalculate the risk score with control measures in place leading to a residual risk score.
4. Report on the risk, provide information and training to either remove or mitigate the risk.
5. Schedule a follow-up assessment.

[3] Competence is defined by the UK Health and Safety Executive as the combination of training, skills, experience and knowledge that a person has and their ability to apply them to perform a task safely. Other factors, such as attitude and physical ability, can also affect someone's competence. See http://www.hse.gov.uk/competence/what-is-competence.htm. Accessed 23 March 2017. This definition would equally apply to the individual carrying out risk assessments for international organizations.

[4] UNSMS 2016, Chap. 4, Sect. A, para G.19.a.

[5] Ibid., Chap. 4, Sect. B, Annex F.

[6] The author has used this methodology in different parts of the world from training workers to initially assess risks in their workplace to training senior managers. As a former Senior UN Official his opinion is that the HSE method is relevant and effective for international organizations.

[7] Based on the (UK) Health and Safety Executive 2017.

Based on continuous or periodic risk assessments, the organization would be more capable of deciding whether to take one of the following actions:

- Treat the risk-take measures to reduce the risk;
- Tolerate the risk-accept the risk as it is and carry on with activities;
- Transfer the risk-allow the risk to be assumed by other agencies or organizations;
- Terminate the activity-stop all activity associated with the risk.

More information on conducting risk assessments can be found in the Code of Practice on Workplace Safety and Health.[8]

15.2.1.2 Policy Framework

A clear and coherent written policy framework supports the effective, efficient and accountable management of travel and assignment safety, health and security. The policy framework is comprised of a formal policy, directives, procedures and protocols. It may also include guidance material that explains principles, responsibilities and procedures to all affected staff.[9]

- *Policy*

Once the risks are understood and control measures have been determined and evaluated, whether an organization is independent or is integrated into a larger institution, a policy should be in place that sets the framework for travel safety, health and security. It is interesting to note that the International Labour Organization (ILO), a UN Specialised Agency, spells out in the Occupational Safety and Health Convention, 1981 (C155) the stipulation that member States that have ratified the Convention must have an occupational safety and health policy.[10]

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[8] Ministry of Manpower, Singapore (2012) Workplace Safety and Health Council. https://www.wshc.sg/files/wshc/upload/cms/file/2014/RMCP_2012.pdf. Accessed 17 March 2018.

[9] Adapted from UNSMS 2016, Chap. 4, p. 5.

[10] The ILO sets the stage within its Convention on Occupational Safety and Health: ILO (1981) The Occupational Safety and Health Convention (C155). www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312300:NO. Accessed 10 March 2017. In Part 2, Principles of National Policy Article 4 it states:

1. Each Member shall, in the light of national conditions and practice, and in consultation with the most representative organisations of employers and workers, formulate, implement and periodically review a coherent national policy on occupational safety, occupational health and the working environment.
2. The aim of the policy shall be to prevent accidents and injury to health arising out of, linked with or occurring in the course of work, by minimising, so far as is reasonably practicable, the causes of hazards inherent in the working environment.

The policy should contain four elements: a statement of intent, a section on the organization of travel safety, health and security and a section on arrangements and a section describing the review and updating procedure for the policy.

The statement of intent is a statement by the most senior executive of the organization such as the director general or secretary general. It should stress the organization's commitment to travel safety, health and security as well as the overall responsibility of all individuals to maintain travel safety, health and security at a level of priority equal to any other programme component of the organization. It may suggest continued vigilance, the requirement to stay out of harm's way and the requirement for all staff to immediately report any threat or hazard to their immediate supervisor that is seen to carry significant risk to the traveller's safety, health and security. It may also make a statement regarding the right of an official to refuse dangerous work (addressed in the ILO C155).[11] The statement of intent should also make reference to both international law and national law and practice where the organization is functioning.

The organizational structure section of the policy details who has overall responsibility and who is assigned specific tasks. This section frequently includes an organizational table. As travel safety, health and security is multidisciplinary, different parts of the organization are frequently involved.

The arrangements section of the policy describes what needs to be done. This section is often seen in a tabular format including the position of who is responsible. This section should also include the relationships with external providers such as assistance centres. The policy should also enable the establishment of more detailed mandatory directives.

The review section of the policy should detail conditions and timeframes for the review and possibly updating of the policy.

- *Directives*

While the policy sets the framework, mandatory **directives** provide more detailed information at all levels. While one set of travel safety, health and security directives may be global and apply to all travellers, another set may address the organization's needs locally with destination-specific information that may not be relevant to other locations.

Directives may include topics such as health considerations, knowing where travellers are located at any given time, medical treatment, gender issues, cultural issues, communications, incident reporting, hotel safety, fire safety and food safety, as well as vacation and holiday activities while on station.

If an area is prone to natural disasters, there may be specific directives indicating conduct and procedures if an event should occur. The deployment of officials serving as neighbourhood wardens may also be covered in directives.

[11] ILO C155.

- *Protocols and procedures*

The policy should enable the establishment of protocols and procedures. While the directives clearly provide requirements on what must be done, the protocols and procedures outline how to do it.

Here is a good practice put into place by a number of international organizations: A local directive (see above) states that a system will be in place that travellers will check in at regular intervals from a safe location. The procedure, based on that directive will state the definition of what locally constitutes a safe location, the reporting interval, how the traveller will report and to whom. The same procedural document will list step-by-step procedures should the traveller miss one or more calls and how action to track the traveller will escalate.

A protocol is a set of procedures for a given incident or a given type of incident. Protocols are usually drafted based on control measures determined during the risk assessment process and refined through documented experiences, for example, in incident reports.

As a good practice, organizations should have arrangements for a 24-hour emergency line (either direct, through an assistance provider, or both). Protocols for action based on the type of incident and the level of severity should be established with step-by-step procedures. When a call comes into the emergency line or the assistance centre, the protocols indicate, based on the situation, who should be called and what should be done.

The establishment of policy, directives, protocols and procedures should be considered a practical imperative. They should be developed and modified as necessary taking into account risk assessments, information gleaned from incident reports, the advice from experienced professionals in the field, experienced professionals who have travelled in the destination countries as well as information from assistance centres, foreign service offices, the media and other intelligence sources.

15.2.1.3 Incident Management

No matter how well an organization focuses on the prevention of incidents, situations do occur and they need to be effectively managed by the organization itself. Each organization, dictated by policy, directives procedures and protocols should have the capacity to manage an incident. The organization can increase its effectiveness in incident management by working closely with an assistance provider.

To adequately manage incidents there should be a number of elements in place:

- *The incident management plan*

1. There should be a written incident management plan (emergency action plan) that describes how the organization will respond to an incident. It should address the four stages of emergency management: Preparation, Mitigation, Response and Recovery.

2. It should detail various levels of escalation describing, for example what constitutes a routine situation, a serious situation and a crisis situation.
3. At the various levels of escalation, the plan should describe who is going to do what and where. It may describe the need for the establishment of a local incident management team that will coordinate arrangements in close proximity to the incident feeding back information to the incident management team at headquarters enabling informed decisions to be made where possible.
4. At each level, depending on the type of incident, there should be specific protocols to follow developed from lessons learned from prior incidents, risk assessments, and reports from other agencies. Human as well as physical resources may be required at each level of escalation. Coordination with local emergency services will also need to be assured.
5. A section of the incident management plan should address communications, within each team, between teams, with travellers, and with families. This section should also describe measures to be taken should the traditional lines of communications fail. It is also essential for the organization to know where travellers are at the time of an incident so that the incident management team can organise assistance if needed.
6. The assistance provider, as mentioned above, has an important role, bringing their expert resources and their knowledge and expertise to assist in a crisis. After discussion with the assistance provider their role should also be detailed in the Incident Management Plan.
7. Finally, the Incident Management Plan should call for regular drills and rehearsals to exercise and evaluate the plan.

- *The incident management team*

1. When an incident does occur, the Incident Management Team(s) will follow pre-established protocols, where possible.
2. There may be a pre-established core team of several individuals and others who will be called upon depending on the nature of an incident.
3. It is also extremely important that continuous risk assessments are carried out by teams at the site of the incident to determine and re-evaluate risks, control measures and residual risks with a view to mitigate losses.
4. During the incident management phase coordination among the various players is essential as it ensures smoother operations and a more rapid conclusion to the incident.

15.2.1.4 Exercises and Drills

Medical, health and security situations in a country or a region are normally dynamic, that is to say they are constantly changing. Politically, there may be a peaceful or violent change of government. Medically disease patterns may change,

for example, as a result of climate change. The relation of the host government to the international organization may also change for a number of different reasons. Therefore the status quo should never be taken for granted.

As a result of these changes, the above-mentioned policies, directives, protocols and procedures may need updating with major or minor changes. Although it may be difficult to detect all changes needed on a regular basis, exercises and drills can uncover whether what is in place is effectively meeting the need.

An organization should go through exercises with realistic scenarios with a view to evaluate its effectiveness. Exercises should range from pre-announced table-top exercises (where all the variables are known) to realistic unannounced exercises that approach the complexities and realities of true-to-life situations. As with real incidents, the lessons learned should be incorporated into policies, directives, protocols and procedures.

A headquarters-based exercise should involve simulation elements from the field, incorporating scenarios and complications and visa-versa. It should also involve, from time-to-time other players such as assistance centres, insurance companies, airline companies and government agencies that might be involved.

15.2.2 The International Organizations' Duty to Protect Their Civilian Personnel

This section examines the practical implementation of one component of the duty of care identified by de Guttry in Chap. 2, namely:

> (2) Actively protect the officers facing specific challenges and threats and, when using independent contractors, use reasonable care in selecting them and maintain a sufficiently close supervision over them to make sure that they use reasonable care[12]

15.2.2.1 Health and Medical Issues[13]

It is quite important the organization and the traveller fully understand the health and medical risks associated with travel, especially to destinations where the medical infrastructure may be at a very different level from where the traveller is used to. From this perspective, this subchapter begins with what an international organization should know about its travellers (who is travelling) and what measures the organization should take to mitigate the health/medical risks. Often a health/medical screening before departure can uncover vital medical information and can

[12] See Chap. 2, Sects. 2.4.2 and 2.4.4.

[13] This section is based, in part, on Gold et al. 2016.

be an opportunity to suggest measures that could minimise or eliminate the possibility of an abandoned mission due to medical issues.[14]

The health status of the individual travelling may depend on a number of different variables. Age, gender, medical history, disabilities, physical fitness and being mentally prepared for the mission are examples of these variables.

Diseases can be generally divided into two categories, chronic or non-communicable diseases and communicable diseases.

Non-communicable diseases are generally not infectious. They may be medical conditions that an individual develops due to certain lifestyles or they may be conditions that the individual has carried since birth. The risk of acquiring a lifestyle-related non-communicable disease can be reduced by regular exercise, avoidance of smoking and alcohol abuse and healthy nutritional habits.

Heart disease, cancers, lung disease, diabetes, certain neurological disorders and mental illness are examples of non-communicable diseases. As the person ages, the risk of acquiring a non-communicable disease increases making the older traveller more susceptible.

However, there are many different conditions associated with non-communicable diseases that can be exacerbated during travel, here are a few examples:

- Many persons travelling with non-communicable diseases are regularly on medication. Fatigue, changing time zones and changing sleep patterns may negatively impact on an individual's ability to follow a normal medication pattern. Travellers may lose their medication and have difficulty obtaining the correct medication in the correct dosage while away from their home country.
- A common disease for travellers is travellers' diarrhoea which can lower an individual's immunity and can put them at a higher risk of infection, which can further complicate the non-communicable disease. For an individual with diabetes, for example, travellers' diarrhoea can cause life-threatening variations in blood sugar levels.
- Changes in temperature or altitude can also have an effect on both the respiratory system and cardiovascular system of an individual with non-communicable diseases. Even persons without non-communicable diseases may need to acclimatise when arriving at these destinations.

Practical measures concerning non-communicable disease during travel include ensuring that:

- Depending on the destination, the traveller completes a pre-travel medical evaluation determining fitness to travel.
- The traveller carries an adequate supply of medication for the trip and a signed prescription in case the medication is lost.

[14] A cost benefit ratio was calculated on the cost of pre-travel health checks. For every dollar spent invested in the programme there was a benefit that ranges from $1.60 to $2.53. See Prevent 2014, Sect. 7.4, p. 37.

- The traveller is aware of the changes of scheduling of medication due to time zones or sleeping patterns.
- The traveller is informed about measures to avoid travellers' diarrhoea and provided with instructions and medication should this occur.
- The traveller is informed and adheres to advice about adjusting to altitude prior to embarking on strenuous work.

Communicable diseases are diseases that are transmitted from one source to another.

Practical measures concerning communicable diseases during travel include ensuring that:

- insect bites are avoided using repellent and netting where appropriate.
- when travelling to malaria-prone areas, seek and follow medical advice about malaria prophylactic medication.
- the risk of animal bites is avoided by being cautious around animals.
- proper measures are taken to avoid the risk of contaminated food and water.
- the risks associated with unsafe sexual activities are avoided.
- depending on the location, certain vaccinations are given that may provide protection against certain communicable diseases. Seeking advice from a medical practitioner well before the traveller's departure date can afford the traveller sufficient time to acquire the necessary immunisations.

Travel related stress has strong correlations with work-related stress which is defined by the World Health Organization as the response people may have when presented with work demands and pressures that are not matched to their knowledge and abilities and which challenge their ability to cope.[15] Many times, the lack of situational awareness combined with a lack of knowledge about the destination will place high demands on the traveller who may have little or no knowledge of how to cope with these demands. An international organization should share with travellers the signs of stress which include: depression, mood swings, increased emotional reactions such as feeling easily angered or being more sensitive, difficulty sleeping, being withdrawn, having low energy, as well as increased alcohol and other substance abuse, most of which many people associate with long air travel.

Post-traumatic stress disorder (PTSD) is a range of symptoms that occur in some people who have experienced or witnessed a shocking or a dangerous event. Officials of international organizations, especially those engaged in humanitarian situations, may have seen such events and may have experienced or may still be experiencing PTSD years after the event took place. This stimulation may re-evoke the frightening experiences for the individual concerned.

[15] WHO, Stress at the workplace. http://www.who.int/occupational_health/topics/stressatwp/en/. Accessed 21 February 2018.

Some resilience factors that may reduce the risk of PTSD include:

- seeking out support from other people, such as friends and family,
- finding a support group after a traumatic event,
- learning to feel good about one's own actions in the face of danger,
- having a positive coping strategy, or a way of getting through the bad event and learning from it, and
- being able to act and respond effectively despite feeling fear.

Medical practitioners with mental health experience are best positioned to assist an individual with PTSD.

The final medical topic is **travel and sleep**. During travel, especially over long distance across time zones, changing schedules and lack of adequate sleep, may lead to errors or decrease one's situational awareness resulting in a higher potential for incidents. Alhola and Polo-Kantola describe the impact of sleep deprivation (SD) on cognitive performance: 'First and foremost, total [SD] impairs attention and working memory, but it also affects other functions, such as long-term memory and decision-making. Partial SD is found to influence attention, especially vigilance'.[16]

Accounting for SD during travel should be considered an important part of travel planning and therefore should be included in an organization's health and safety policies. As suggested in the previous paragraph SD leads to a lack of vigilance that could put the traveller or assignee at risk. An organization's policy or directives should stipulate that travel arrangements should avoid wherever possible flights that would result in severe sleep disruption without allowing sufficient time for adjustment. If these flight(s) are unavoidable the policy should call for sufficient rest before driving or engaging in activities that could put the traveller at risk.[17]

15.2.2.2 Safety and Security

It is important to build both organizational resilience and individual awareness about security issues. Strengthening personal situational awareness through adequate briefings prior to and during travel can guide the traveller to take actions to protect themselves.

Situational awareness is being aware of what is going on in one's surroundings and whether anyone or anything is a threat to one's health, safety and security. An individual's situational awareness depends on many variables such as one's culture, education, experience, social support and access to up-to-date information on what individual or collective action one can take to build resilience.

[16] Alhola and Polo-Kantola 2007, pp. 553–567.

[17] This issue has been studied in the case of private companies, showing how SD leads to decreased efficiency and rising risks, and that this can largely apply to the personnel of an international organization (as SD joins with other stress factors such as deployment to high-risk areas). See Fryer 2006.

From a practical perspective, there are four different ways of viewing situations that can lead to security threats:

1. Direct, specific threats targeted towards an individual.
2. Direct, generic threats targeted towards a group of people, such as ethnic, racial, or national origin.
3. Incidental risks, targeted at a specific location where certain groups may be found.
4. Threats relating to a large-scale event impacting on individual security such as man-made or natural disasters.

There is rarely a medical incident without a security component and there is rarely a security incident that is not linked to medical issues. This also holds true for man-made and natural disasters.

Two important components of security treated below are road traffic safety and hotel safety.

- *Road Traffic Safety*

Practically, road use laws and customs vary from country-to-country and region-to-region. It is therefore highly advisable for a traveller to avoid road use whenever possible.

In a number of countries taxis and shuttle busses are, at times, driven by individuals that may or may not possess a valid driver's licence. The vehicle may be in a serious state of disrepair and not roadworthy. Often seat belts may have been removed or tucked below the rear passenger seat.

It is therefore highly advisable that an organization audit taxi and transportation services in countries where the organization operates and determine if it is safer to use a private transportation service rather than public taxis. The service can then, under contractual terms, be controlled and audited concerning the condition of vehicles, the qualifications of the driver, the sobriety of the driver, whether driving is carried out safely and how the security of passengers is being treated.

Using taxis or car services can also present certain risks. An international organization could issue a Directive to travelling officials in certain countries providing specific guidance. For example, in the manual, Managing the Safety, Health and Security of the Mobile Worker, cited above,[18] the following advice is given for basic security for using taxis or other car services:

– Always use a vehicle that is traceable.
– Be aware of the model/make of the vehicle, the licence plate and the name of the driver coming to pick you up. If it is not readily available, reconfirm the driver details by calling the operator's helpline number.
– It is preferable to be aware of the potential journey route in advance.
– Do not get into a vehicle until you have confirmed that it is yours.

[18] Gold et al. 2016.

- Always sit in the back of the vehicle and wear a seatbelt.
- If you are feeling drowsy or unwell prior to boarding the vehicle, it is preferable to have a trusted contact accompany you.
- Firmly reject any attempt by the driver to pick up more passengers or acquaintances.
- If you feel uneasy with the driving, the route or the driver, instruct the driver to stop at the first secure or busy place.
- Do not discuss personal details or be over-familiar with your driver; keep the conversation on a professional level.
- If using a ride share service, ensure that there is not an existing taxi rank in the vicinity of the pick-up location and keep a low profile when getting into the vehicle.

- *Hotel safety*

Whether the traveller stays in small, independent hotels or in large multi-national hotel chains, there are elements of hotel safety that should be considered at both the organizational and individual traveller levels.

From the organizational level, it is beneficial to carry out audits of hotels to be considered as approved by the organization. The audit should address issues such as whether the hotel has:

- an adequate safety policy
- a functioning sprinkler system
- a functioning evacuation alarm, unobstructed exits and emergency assembly points at an area of safety outside of the building
- safe transportation arrangements to and from the hotel
- CCTV in the hotel corridors
- lift access by key card only
- well-lighted corridors
- telephone and Wi-Fi access 24 hours a day
- the ability to make an external phone call 24 hours a day
- a reception desk that is staffed 24 hours a day
- 24-hour security
- guest room doors with two independent locks
- secure safes for documents
- adequate food and water hygiene standards

From an individual perspective, it is best to have a room above the first floor but below the sixth floor in case of fire (most fire ladders cannot reach above the fifth floor). It is also desirable to be in the main building in rooms that can be locked with two independent locking mechanisms.

During briefing, the traveller should be advised on certain practical measures[19] such as ensuring that:

[19] The list is drawn from Gold et al. 2016, p. 37.

- the room is locked both when in residence and when leaving the room
- the hotel telephone functions and that one can get an outside line when needed
- the name and location of the hotel is not discussed in public
- the room number is not mentioned out loud during check in
- fire doors and escape paths are unobstructed
- the food and water are both safe and hygienic
- at check-in, the traveller does not openly expose their credit card by laying it on the hotel counter (several incidents have occurred when a traveller's credit card number is copied by a perpetrator with a cell phone)
- the hotel provides a business card in local language
- the traveller has a flashlight to be kept by the bed in case of power failures
- passport and valuables are locked in the room or hotel safe.

15.2.3 Pre-travel Arrangements

As mentioned earlier, an organization should gather intelligence and practical information, based on risk assessments, incident reports, information from assistance providers and other organizations on the ground, as well as from different sources such as government foreign offices, and news feeds. Using the most up-to-date information, including control measures determined through risk assessment, arrangements should be made and briefings should be held, prior to travel, to protect the traveller.

Even issues such as the need for a tailored medical kit, the need for a satellite phone, specialised vehicles, additional security moving around the destination and for specific clothing and footwear should be established long before the traveller is briefed.

A practical example of the importance of pre-travel information follows: a mission was being carried out in sub-Saharan Africa, where the insect borne Trypanosomiasis (sleeping sickness) is transmitted by bites from the tsetse fly. It has been found that certain shades of blue attract the tsetse fly.[20] Similar shades of blue can be found in commercially available wilderness clothing. By informing a traveller in advance of going to that area potentially prevents a serious incident or exposure from occurring.

[20] Lindh et al. 2012, pp. 1–9.

15.2.4 Make Adequate Information Available to Personnel About the Potential Dangers They Might Face and About the Specific Situation in the Country of Destination

The section of this chapter on risk assessment (see Sect. 15.2.1.1 above) describes control measures as a step to be completed after the risk has been calculated with a view to eliminate or moderate the risk. These control measures form the basis of policies, directives, procedures and protocols and as well the basis of pre-travel arrangement and traveller's briefings. They should also form the underlying foundation of information provided to the individual travelling. The ILO stipulates in Recommendation 164, para 14, that:

> Employers should, where the nature of the operations in their undertakings warrants it, be required to set out in writing their policy and arrangements in the field of occupational safety and health, and the various responsibilities exercised under these arrangements, and to bring this information to the notice of every worker, in a language or medium the worker readily understands.[21]

This is also stipulated in Directive 89/391/EEC, Article 6 which requests the employer to ensure that workers and their representatives receive all the necessary information on, '(a) the safety and health risks and protective and preventive measures and activities in respect of both the undertaking and/ or establishment in general and each type of workstation and/ or job.'[22]

However, in previous chapters, while some authors pointed to the practice of providing information in different circumstances,[23] several authors pointed out that there are no stipulations for the provision of information or that it is done on a unit by unit basis or through 'security champions.'[24]

Considering the destination, different means of information dissemination should be considered and different levels of information should be provided to the traveller.

15.2.4.1 Travellers' Briefings

Travellers' briefings should be considered part of an integrated element of informing individuals about safety, health and security issues while travelling. In certain international organizations officials can only travel if they have completed a generic travel safety and health course (see Sect. 15.2.6.1), which, by its nature, is not destination specific. Depending on the destination and intermediate stops and the risks involved, different organizations will brief travellers in different ways.

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[21] ILO R164.

[22] Directive 89/391/EEC, Article 6.

[23] See Chap. 8, Chap. 10, Sect. 10.5.4, Chap. 11, Sect. 11.5.1.6 and Chap. 13, Sect. 13.4.3.

[24] See Chap. 12, Sect. 12.4.5 and Chap. 14, Sect. 14.4.

For example, while a traveller travelling from London to Paris or from New York to Sydney would not normally need a one-to-one briefing, a young, inexperienced traveller going alone from Geneva to a non-European destination for the first time may lack situational awareness and need a briefing after completing the above-mentioned training.

Travellers' briefings are normally used for a determined medium-to-high-risk destination and are destination-specific.

As a rule, for a traveller going to a medium-to-high-risk country an in-depth briefing should be considered. The briefing should be carried out by (a) competent person(s) with knowledge about the destination, the skills to deliver the briefing and experience in having travelled to the destination or similar locations. Additional elements to the briefing will depend on who is travelling, the destination, the risks the traveller may encounter both on route to the destination and at the destination and on specific procedures to implement should an incident occur. Individual travellers or groups of travellers may face certain risks. Young, older, inexperienced, experienced, male, female, a particular sexual orientation, disabled, alone or in a group, the profile of the traveller needs to be taken into consideration when preparing the briefing.

This briefing should include but not be limited to destination-specific:

1. Generalities about the destination including behavioural and cultural considerations.
2. Legal considerations about the destination (including gender-specific or sexual orientation issues where appropriate).
3. Significant health/medical risks and control measures (including stress and mental health).
4. Significant security risks and control measures.
5. Destination-specific arrival considerations including immigration formalities, customs formalities, meet and greet arrangements, transportation arrangements and procedures for missing or delayed luggage.
6. Safe transportation considerations.
7. Hotel security considerations.
8. Procedures to follow if there is an incident.
9. Communications equipment and procedures.
10. Medical equipment and procedures.
11. Destination-specific emergency contact modalities (both locally and internationally).
12. Contact information for the embassy or consulate of the traveller.
13. Contact modalities for the assistance provider.
14. Requirements for continuous situational assessment and reporting of hazards and threats.

The entire briefing should be summarised in a document which should be signed and dated by the traveller acknowledging that they have read and understood the briefing.

15.2.4.2 Arrival Considerations

Arrival in a foreign country can be stressful. Informing the traveller of arrival considerations during pre-travel briefing can make the make the arrival less difficult.

1. The traveller should know, based on their nationality or travel identity document if there are special formalities. For example, if the person is travelling under diplomatic status are there specific procedures on arrival, or if the person is not travelling under a passport but has a special identity card, are there special considerations?
2. Are there customs formalities on what can be brought into the country? Certain medications, for example, may be banned. Individuals under prescribed medication should not only have a copy of the prescription but also a letter for a medical practitioner explaining why the medication is prescribed.
3. There may also be restrictions on exchanging money. Knowing which currency is easier to exchange and carrying a limited amount into the country may be easier than spending hours at a bank trying to exchange money that is not easily exchanged in the country.
4. Once clearing customs, if someone is meeting the traveller, the sign should carry neither the travellers name nor that of the organization. An agreed upon code word is a good practice. It is also helpful if the traveller has the name and telephone number of the driver and, where feasible, the number plate of the car and a photograph of the driver.
5. It's also helpful if the traveller is aware of procedures to follow should the driver not be present at the airport.
6. Different countries have different customs clearance modalities should luggage not arrive with the flight. In some countries, the bag is cleared and delivered to the hotel. In other countries, the traveller may have to return to the airport to clear customs. Sharing this information in advance will considerably reduce the stress if a bag is delayed.

15.2.4.3 At the Destination

Gold et al.[25] suggest measures that an employer should take to help discharge their duty of care. Among the nine measures listed, three address information:

- Prepare and educate their workers about the locations they will be working in.
- Establish systems so that they stay informed of changing risks and can relay such information to their workers while they are working remotely.
- Refer to medical and security travel assistance providers and institutions such as the UK Foreign & Commonwealth Office, which offers up-to-date travel alerts.

[25] The list is drawn from Gold et al. 2016, p. 3.

A number of organizations use electronic messaging over cellular phones to continually update the traveller with essential information regarding potential risks the traveller might face at a given destination. As the risks change due to changing situations, the control measures may also change and the traveller needs to be made continually aware of these changes.

An example of a good practice was when a traveller who was working in the location of a pneumococcal outbreak received an automated alert from the organization's assistance provider that was linked to his travel itinerary. Part of the guidance was a specific caution to individuals who were more predisposed to contracting pneumococcal infections, including people like this individual who had had their spleen removed (which was picked up in his pre-travel medical assessment). This, along with his recent exposure, significantly increased the risk of infection. Thanks to this alert he was able to contact the organization's assistance provider, who made arrangements for an immediate medical review in order to commence treatment.[26]

As noted above, significant medical and security risks and their appropriate control measures covered during the traveller's briefing should be documented in a summary, along with other essential information, which the traveller should acknowledge having understood by signing and dating the summary. The traveller should be provided with a copy.

The traveller should be encouraged through directives or procedures to not only carry with them their travel documents but also have a paper copy, an electronic copy and leave a copy with a trusted individual of all essential medical and legal documents. Security professionals frequently suggest leaving original documents such as passports, tickets, insurance information, a copy of emergency contact names and phone numbers, a copy of medical prescriptions (for prescribed medications the traveller is carrying) and a copy of credit card numbers and credit card hotlines in the hotel safe and carrying a photocopy of essential pages, where legal to do so. The traveller should also have a copy of emergency contact names and phone numbers as well as the organization's representative office in country and the consulate or embassy based on the traveller's nationality.

15.2.5 (8) Provide Effective Medical Services to Personnel Should an Emergency Occur

Most international organizations have a medical officer or medical department at their headquarters or their regional offices. Some organizations share medical services at specific duty stations. The UN Systems, Chief Executive Board for Coordination, High Level Committee on Management stated in the introductory

[26] Gold et al. 2016, p. 23.

paragraphs of its paper, Health Support Plans for Field Duty stations Briefing Note by UNMDWG:

> Following decades of experience in providing care to employees at duty stations, it is clear that the existing UN Clinic model can no longer be considered as the only possibility for healthcare support addressing the wide spectrum of health risks at all duty stations. Risk varies in level and in nature (e.g. Ebola, Pandemic Influenza, natural disasters, varying levels of conflict such as the wars in Somalia, Yemen and Syria, different levels of local healthcare availability and quality.
>
> The actual needs for health support to employees at duty stations should be individually assessed, taking account of varying needs using a consistent and validated health risk methodology. The UNMDWG is currently developing such methodology.[27]

From an organizational perspective, the organization needs to have arrangements in place to deal with medical emergencies. Prior to any incident, the capacities of local providers needs to be assessed as to their competency to deal with medical emergencies, which not only includes hospitals, clinics and medical practitioners, but also the ability to rapidly respond to, assess, stabilise and treat a medical emergency in the field, prior to moving the individual affected to a medical facility. Additionally, as suggested by Gold et al.,[28] workers should be provided with access to a 24-hour helpline, which may be able to provide support for medical or security questions or facilitate the provision of emergency assistance at a time when a worker's usual points of contact would not be available. As noted above, this can only be accomplished taking into account the assessment of health risks. If it is determined that an organization cannot provide this level of care, arrangements should be in place to provide this through an assistance provider.

15.2.6 (10) Provide Personnel with Adequate Training and the Necessary Equipment to Carry out Safely the Task to Be Performed

15.2.6.1 Training

An organization should have different types of training programmes to address travel safety, health and security.

All training courses should be based on goals and objectives that embrace the scope of risks the organization faces and respective control measures (determined through on-going risk assessments, incident reports and travellers' observations). Competent trainers who have the knowledge of work-related travel safety, health and security should conduct the courses. There should also be a mechanism to evaluate, assess and certify whether the participant has developed the necessary

[27] UN Systems 2016, pp. 1–2.

[28] Gold et al. 2016, p. 23.

competencies for travel and assignment safety and appropriate refresher training is provided as appropriate.[29] Although most organizations may consider an E-Learning format as convenient and wide-reaching, participative face-to-face learning is often seen by participants as more effective, therefore organizations should consider blended learning where the individual has a portion of the training electronically and a portion in a face-to-face learning environment. In the conclusions of a review of learning studies by the US Department of Education, one of its conclusions stated,

> In recent experimental and quasi-experimental studies contrasting blends of online and face-to-face instruction with conventional face-to-face classes, blended instruction has been more effective, providing a rationale for the effort required to design and implement blended approaches. When used by itself, online learning appears to be as effective as conventional classroom instruction, but not more so.[30]

The UN requires all individuals undertaking official travel to complete required security training including a course on basic security. It further requires advanced security training for individuals travelling to field locations.[31] Although not required in the Administrative Instruction, it would be strongly advised to include some basic medical / health information as outlined above on communicable and non-communicable diseases as well as issues such as recognising and managing stress and sleep deprivation.

For low-risk destinations subjects should cover topics including but not limited to:[32]

- The importance of vigilance and situational awareness and avoiding dangerous situations.
- Travellers' profiles including gender, sexual orientation, age, disabilities, pre-existing health problems and potential discrimination based on travellers' nationality.
- The knowledge and skills necessary for the employee to carry out their work in a safe, healthy and secure manner.
- Understanding security risks and control measures.
- Cyber security.
- Understanding medical/health risks and control measures including traveller's stress.
- The obligation and means of reporting threats, hazards and risks.
- Communications and check in requirements.

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[29] Gold 2013.

[30] US Department of Education 2010, p. xviii.

[31] UN Secretariat (2013) Administrative Instruction: Official Travel ST/AI/2013/3, Sect. 3, para 3.10.

[32] Although many of the subjects are similar to those covered in the previous section on Travellers' briefing (See Sect. 13.2.3.1 above) the training component sets the foundation for both the briefing and the more advanced courses by as providing generic information to all travelling officials whereas the briefing is destination and potentially situation-specific.

- Hotel and residential fire safety.
- Road and transportation safety.
- Knowledge of communications procedures and protocols including emergency communications).
- Procedures to follow if travel is interrupted.

As noted above, a modular approach or a follow-on course for travel to medium-to-high-risk destinations should be designed addressing certain issues in more depth, as well as additional issues. A good practice, carried out by the UN, is two levels of security training, one for all travellers and an additional course for those travelling to the field.[33]

The length of time for the course would depend on the organization. For example, the course could be carried out in a blended style with several case studies presented on each major element as part of the E-learning component followed by face-to-face discussion:[34]

Additional types of training will be needed if workers will be travelling to and working in high-risk locations. This may include activities such as security briefings and hostile environment awareness training.[35] An excellent example of a more in-depth advance course is the Hostile Environment Awareness Training (HEAT) Course that was designed by Scuola Superiore Sant'Anna, Pisa, Italy in the frame of the ENTRi project (sponsored by the EU). Its five-day programme includes:

- Threat awareness, associated risk and personal security (theoretical);
- EU risk management process Mobile security (theoretical);
- Management of threats related to gatherings, protest, demonstrations and riots (theoretical);
- Hostage taking and hostage survival (theoretical);
- Weapons, mines, IEDs and UXOs (theoretical);
- Protection of sensitive and classified information (theoretical);
- Minefields, UXOs and IEDs (practice and demonstration);
- Hostage survival (practice and demonstration);
- Team under attack (practice and demonstration);
- Basic life support in difficult field on mission (theoretical);
- Basic life support in difficult field on mission (practice and demonstration);
- Basic life support in difficult field on mission (practice and demonstration);
- Map reading and navigation (theoretical);
- Means of communication and communication procedures (theoretical);

[33] UN Secretariat 2013.

[34] This list is designed by the author based on his experience working in medium-to-high-risk countries for a UN Specialized Agency and subsequently working with an assistance provider. Additional detail has been provided to the topics which would be further expanded into a curriculum and could be discussed in more detail.

[35] Gold et al. 2016, p. 23.

- Characteristics and capabilities of 4 × 4 vehicles (demonstration);
- Introduction to four-wheel driving techniques (demonstration);
- Convoys: navigations through hostile environments (practice and demonstration).

15.2.6.2 Equipment

Certain missions by international organizations will require equipment provided by the organization to do their job safely and effectively. The ILO within the Occupational Safety and Health Convention, 1981 (C155)[36] puts certain stipulations on employers within member States that have ratified this Convention regarding equipment. Under Part IV. Action at the Level of the Undertaking, in Article 16, the following is stated:

1. Employers shall be required to ensure that, so far as is reasonably practicable, the workplaces, machinery, equipment and processes under their control are safe and without risk to health.
2. Employers shall be required to ensure that, so far as is reasonably practicable, the chemical, physical and biological substances and agents under their control are without risk to health when the appropriate measures of protection are taken.
3. Employers shall be required to provide, where necessary, adequate protective clothing and protective equipment to prevent, so far as is reasonably practicable, risk of accidents or of adverse effects on health.

Equipment will vary depending on a number of different factors such as from an environmental perspective, from a fire safety perspective, from a physical security perspective, from a travel perspective, etc.

15.3 Conclusions

Considering the previous chapters, it can be noted that different organizations address the different elements of duty of care in different ways. The lack of consistency across international organizations suggests the need to strengthen coordination as, it has been pointed out, the UN is attempting to do. As this chapter suggests there is rarely a medical incident without a security component and rarely a security incident without a medical component. Therefore international organizations should attempt to bring together the elements of travel safety, health and security under one administrative function.

This chapter suggests practical advice at various levels. It stresses the need for a coherent policy framework, based on international and national law, on-going risk assessments and information gleaned from experience and incident reports. It

[36] ILO C155.

focuses on a structure that risk control measures determined by the assessment of various medical and security risks (the) traveller(s) face are the basis of generic basic, advanced and hostile environment training programmes that would be supplemented as appropriate by face-to-face briefings prior to departure. It also briefly touches on a number of risks that organizations need to focus on prior to, during and after official travel such as PTSD, travellers' stress and SD as well as the important ability of all travellers in all destinations to maintain situational awareness.

The chapter suggests that organizations need to have mechanisms in place to ensure an adequate level of emergency medical care for all duty stations from the scene of an incident through to an appropriate intervention that will address the patient's needs.

There is a great deal of travel being undertaken by international organizations as travelling in within the nature of such organizations' work. Most missions are free from incidents, which leads the individual traveller and the organization to become complacent. The organization's implementation and continuous reinforcement of practical measures to strengthen duty of care is one of the most effective ways to combat complacency and protect the health, safety and security of the traveller.

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Part III
The Duty of Care as a Corollary of States' Duty to Protect Human Rights and Its Implications for International Organizations

Chapter 16
The Duty of Care as a Corollary of International Organizations' Human Rights Obligations

Ludovica Poli

Contents

Abstract The duty of care can be considered a corollary of positive obligations, requiring international organizations not only to refrain from the intentional and unlawful taking of life (or from the violation of physical and moral integrity) of their civilian personnel, but also to take appropriate steps to safeguard their lives, as well as their health and safety. This chapter explores the different sources of human

Annex II—the Table of Cases—can be accessed online here: http://extras.springer.com/.

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rights obligations for international organizations, with reference to both treaty law and customary law. It is argued then that human rights obligations bearing upon international organizations include a positive dimension as well. Positive obligations are in fact addressed as inherent in the nature of substantial human rights rules, rather than as the outcome of the interpretation of human rights treaties by regional courts or UN Committees. Finally, after a tentative definition of the main features and content of duty of care, the chapter clarifies to what extent the principle of specialty might affect international organizations' human rights positive obligations.

Keywords international organizations · duty of care · human rights · positive obligations · due diligence · duty to prevent · duty to investigate · duty to punish · duty to provide reparation

16.1 Introduction

The duty of care can be considered a corollary of positive obligations, requiring international organizations not only to refrain from the intentional and unlawful taking of life (or from the violation of physical and moral integrity) of their civilian personnel sent on mission, but also to take appropriate steps to safeguard their lives, as well as their health and safety.[1]

A major problem with this construction is that positive obligations commonly refer to the duty of States over people under their 'jurisdiction'. While international tribunals, and primarily the European Court of Human Rights (ECtHR) in its case law concerning the extraterritorial application of the European Convention on Human Rights (ECHR), contributed to defining the scope and meaning of 'jurisdiction' and to elaborating on the contents of positive obligations, more uncertainty surrounds the likelihood to attribute similar obligations to international organizations.

The present chapter explores this possibility in detail.

It begins with a preliminary issue, namely whether—and to what extent—international organizations are bound by international human rights law. Once it has been argued that the evolution of international organizations, on the one hand, and the progressive 'humanization' of international law, on the other, explain the relevance of human rights with regard to the international organizations' scope of action (Sect. 16.2), the chapter will explore the different sources of human rights obligations for international organizations, with reference to both treaty law and customary law (Sect. 16.3). Positive obligations—as developed in the case law of regional human rights courts and in the Human Rights Committee's jurisprudence—are then analysed and their applicability to international organizations is

[1] de Guttry 2012, p. 276.

explained (Sect. 16.4). Finally, after having provided a tentative definition of the main features and content of duty of care as a corollary of human rights positive obligations to protect life, health and safety (Sect. 16.5), the chapter clarifies to what extent the principle of specialty might affect international organizations' positive human rights obligations (Sect. 16.6).

16.2 Humanization, Institutionalisation and the Relevance of International Organizations in the Protection of Human Rights

Some scholars voice a certain hesitation in identifying a framework of human rights binding for international organizations stressing the 'difficulties in thinking of human rights as owed by anything but sovereign states'.[2] Indeed, it is true that the same idea of fundamental rights is traditionally tangled with the concept of State and that rights have historically described the relationship between the sovereign and the citizens.[3] However, a more attentive analysis explains how human rights are currently pivotal in any organization's scope of action.

Since the end of World War II, the international legal order has undergone two major developments: first, a constantly growing process of permeation of international law by human rights and, second, an increasing institutionalisation of the cooperation among States.

The mainstreaming of human rights into all the aspects and dynamics of the international community is now undeniable. Not only has international law gradually become a catalyst for the protection of individuals from governments,[4] fuelled by a phenomenon identified by some Scholars as 'human-rightism',[5] but, in a more macroscopic perspective, human rights have exercised and continuously sustain a profound transformation on general international law.[6] As Meron stresses, 'humanization of public international law under the impact of human rights has shifted its focus above all from State-centered to individual-centered'.[7]

On the other hand, international law has also moved from being a law of 'co-existence', i.e. a body of rules pursuing the main aim of bounding spheres of influence between States,[8] to representing the legal foundation of an intense and growing cooperation among States. Such international cooperation has gradually assumed an institutionalised nature, with international organizations being

[2] Mégret and Hoffmann 2003, p. 320.

[3] Ibid.

[4] Cogan 2011, p. 323, quoting Higgins 1994, p. 105.

[5] Pronto 2007, p. 754; see for an argument *a contrario*, Pellet 2000.

[6] Tzevelekos 2013, p. 62. See also Pisillo-Mazzeschi 2008, pp. 199 ff.

[7] Meron 2006, Introduction.

[8] Klabbers 2015, p. 16.

established for different purposes and accredited with competencies adequate to perform specific functions. Over time international organizations—originally tasked with managing problems common to many States, working as 'purely "vehicles" of their member states' interests in narrowly determined areas'[9]—have become multifunctional entities assigned with functions and competencies affecting vital interests for the entire community of States.

As a result of the interaction of these two processes, 'humanization' and 'institutionalisation' of public international law, international organizations are constantly gaining broader competences and increased ability to directly impact individuals and their legal position. In fact, not only are human rights at the top of the agenda of many international organizations[10]—entitled, as they are, to promote, encourage and sometimes even monitor the protection of fundamental rights by their member States—but also international organizations themselves are urged to guarantee human rights in performing their functions.

There is no doubt, therefore, that international organizations can breach human rights in their operational actions,[11] as well as in their normative activity.[12] Unsurprisingly, then, scholars have focused on issues of responsibility of international organizations for violations of human rights law, sometimes denouncing a disturbing lack of accountability.[13] The present chapter, however, will focus exclusively on the sources and the nature of human rights binding international organizations, with the intention to explore the duty of care as a corollary of positive obligations, requiring international organizations to take appropriate steps to safeguard the lives, health and security of civilian personnel sent on mission.

16.3 Sources of Human Rights Obligations for International Organizations

As stated by the International Court of Justice (ICJ), in the advisory opinion on the *Interpretation of the Agreement of 25 March 1951 Between the WHO and Egypt*,[14] international organizations enjoy an international legal personality. Sources of law

[9] Faix 2014, p. 273.

[10] Faix 2014, p. 274.

[11] As underlined by Mégret and Hoffmann 2003, pp. 316 ff., this is patently evident in the case of the UN international transitional civil administration in East Timor or in Kosovo.

[12] Le Floch 2015, p. 381, referring to the side effects over the population of UN sanctions against Iraq in the '90s.

[13] Le Floch 2015, p. 383.

[14] ICJ, Interpretation of the Agreement of 25 March 1951 Between the WHO and Egypt, Advisory Opinion, 20 December 1980, I.C.J. Rep. 1980, p. 90, para 37: 'International organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties'. The same principle was implied in the Court's argument in the

applicable to international organizations can be classified in three categories: (1) treaty law, including constitutive instruments and human rights treaties; (2) general law, comprising customary law and general principles of law; (3) and, finally, internal acts.

16.3.1 Treaty Law

Human rights obligations may arise either from the treaty establishing the organization, defining its aims and regulating its functioning and main activities, or from other human rights treaties.

16.3.1.1 Constitutive Instruments

International organizations are certainly bound by obligations arising under their constituent instrument, notwithstanding the fact that they are not a party to it.[15] However, it is not always easy to define how obligations to respect human rights can be distilled from their founding treaties, since these constitutive instruments very rarely impose in explicit terms on the organizations themselves an obligation to respect human rights.

The Constitution of the International Criminal Police Organization (Interpol) represents an exception.[16] Article 2, para 1 states that the action of Interpol—and in particular, the promotion of 'the widest possible mutual assistance between all criminal police authorities'—is carried out, not only within the limits of the law existing in the different countries, but also 'in the spirit of the Universal Declaration of Human Rights'. The respect of human rights is thus considered a clear parameter for the activity of the organization. While it is clear that the Declaration remains a non-binding document, the reference to its spirit as a guidance for Interpol activities, signifies the intention to bind the organization to human rights.

Nevertheless, constitutive instruments do not usually include the respect of human rights among the principles governing the action of the international organization, even when they insert the promotion of these fundamental rights within the aims or activities of the organization. In the case of the United Nations (UN), for example, Article 1, para 3 of the San Francisco Charter lists the promotion of 'respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion' among the main aims of the organization,

Reparation for injury case, where it stated that, being a subject of international law, any international organization is 'capable of possessing international rights and duties': ICJ, Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 11 April 1949, I.C.J. Rep. 1949, p. 179.

[15] Verdirame 2011, p. 73.

[16] On the qualification of Interpol as an International Governmental Organization, see Runavot 2015, pp. 26 ff.

while Article 55 imposes on the UN a duty to promote 'universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion'.

However, as argued by Verdirame, human rights obligations can be always derived implicitly by constitutive instruments, once it is accepted that these documents could accommodate implied terms. In fact, 'there is no reason in principle why only terms that confer powers on the organisations should be susceptible to implication. Obligations can be implied too'.[17] In this perspective, implied obligations are a mirror of implied powers.[18]

This conclusion finds a corroboration in the advisory opinion of the ICJ on the *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal.* According to the Court,

> it would […] hardly be consistent with the expressed aim of the Charter to promote freedom and justice for individuals and with the constant preoccupation of the United Nations Organization to promote this aim that it should afford no judicial or arbitral remedy to its own staff for the settlement of any disputes which may arise between it and them.[19]

While the Court, in justifying the establishment of an Administrative Tribunal by the General Assembly, did not explicitly declare that the UN had the implied duty to provide its personnel with a remedy of dispute settlement, it did admit that failure to offer such remedy would be incompatible with the Charter.[20] It thus derived from the general engagement in the field of human rights of the organization a clear guidance for its activity.

16.3.1.2 Human Rights Treaties

Some authors consider that human rights obligations bearing upon international organizations might derive from the pre-existing treaty-based duties of their member States.[21] This idea is alternatively developed referring to the derivative or secondary nature of the international legal personality of international organizations, or to the rules governing succession of States in respect of treaties.

It has been asserted that, since the legal personality of international organizations is derivative (as they are established by other subjects of law), they would necessarily be bound by the obligations of the member States, at least according to a due diligence obligation, impeding them from hindering their member States from fulfilling their treaty obligations.[22] While this position might seem appealing, it

[17] Verdirame 2011, p. 81.

[18] Verdirame 2011, p. 75.

[19] ICJ, Effect of awards of compensation made by the UN Administrative Tribunal, Advisory Opinion, 13 July 1954, I.C.J. Rep. 1954, p. 47.

[20] Verdirame 2011, p. 71.

[21] Le Floch 2015, p. 389.

[22] Ibid, quoting Forteau 2009.

encounters a number of practical problems. First, it would cover only obligations existing before the transfer of powers from States to the international organization, excluding any agreement concluded after it.[23] Second, the definition of extension of the obligations bearing upon international organizations could potentially lead to an untenable situation, with some members not accepting that the organization is bound by treaties ratified by other States parties but not by themselves.[24]

Other scholars consider that international organizations are called to respect human rights treaties in the areas in which they replace States' activity, in view of the competences attributed to them.[25] An analogy with the rules of State succession with respect to treaties has been suggested to substantiate this conclusion.[26] Such analogy, however, is highly problematic, since international organizations do not entirely replace their member States 'in the responsibility for the international relations', as provided by Article 1 para 2(b) of the Vienna Convention 1978 on succession of States in regard to treaties.[27] More generally, this idea is not convincing: first, only rarely is there a real transfer of powers, rather than the creation of new ones[28] and, even more rarely, States confer exclusive competences to international organizations. Additionally, as explained by Faix, the transfer of powers does not necessarily imply the transfer of human rights obligations.[29]

It is worth noting that the main reason why attempts are made to extend to international organizations the duties in the field of human rights protection bearing upon States is to avoid the circumvention by the States of their own treaty obligations. However, this goal is better enforced through mechanisms relying on State responsibility.[30]

Any international organization, therefore, needs to explicitly adhere to human rights treaties to be bound by the obligations envisaged in them. It is true that human rights treaties are generally and traditionally open to States only. In fact, the same idea of human rights protection comes from the urgency to preserve some basic needs and interests of individuals from interferences and even breaches

[23] Naert 2010, p. 134.

[24] Naert 2010, p. 134.

[25] Le Floch 2015, p. 390, quoting Pescatore 2000.

[26] Klein 1998, pp. 331 ff., mainly referring to the case law of the European Court of Justice.

[27] Naert 2010, p. 132; Le Floch 2015, p. 390.

[28] Naert 2010, p. 132.

[29] Faix 2014, p. 283.

[30] Article 61 of the Draft Articles on the Responsibility of International Organizations makes it clear, stating that any State member of an international organization incurs international responsibility if, by taking advantage of the fact that the organization has competence in relation to the subject-matter of one of the State's international obligations, it circumvents that obligation by causing the organization to commit an act that, if committed by the State, would have constituted a breach of the obligation (Draft Articles on the Responsibility of International Organizations, with commentaries 2011, adopted by the International Law Commission at its sixty-third session, in 2011, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/66/10)). This rule, as the commentary well explains, derives from the case law of the ECtHR on equivalent protection (De Schutter 2010, pp. 78–86). See Spagnolo, Chap. 3.

committed by the State in the exercise of its sovereign powers. However, the situation might change in future, since the enlargement of international organizations' competences, on the one hand, and their voluntary acceptance of certain human rights obligations in the fields of their activities[31] might encourage greater participation of international organizations in human rights treaties. This would probably require some time, as most of the treaties would need to be modified to make accession by international organizations concretely achievable.[32] For the time being, the only example of an organization party to a human rights treaty is represented by the European Union's (EU) accession to the UN Convention on Person with Disabilities, while—as is well known—the more ambitious project of the EU accession to the ECHR has definitely failed.[33]

16.3.2 General Law

Most of the human rights obligations bearing upon international organizations have their legal foundation in general law, namely customary law and/or general principles of law.

16.3.2.1 Customary Law

Custom requires both a general practice among States and the belief that a rule of law requires it.[34] One may wonder whether international organizations are bound by any rule of customary international law, or if there is the need for a specific institutional practice and an assessed *opinio juris* in respect of each customary rule.[35] According to the already mentioned advisory opinion of the International Court of Justice on the *WHO-Egypt Agreement*, the fact of being subjects of international law implies that international organizations would be 'bound by any obligations incumbent upon them under general rules of international law'.[36]

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[31] De Schutter 2010, p. 110.

[32] See, for a different opinion: Poretto and Vitè 2006, pp. 43–44.

[33] With the Opinion no. 2/13, delivered on 18 December 2014, the Court of Justice of the European Union excluded the compatibility with EU law of the draft agreement on the accession of the European Union to the European Convention on Human Rights. While noticing that the lack of a legal basis for the EU's accession—previously stressed in the Opinion no. 2/94 of 28 March 1996—has been resolved by the Treaty of Lisbon, the Court insisted on the special features of the EU referring, in particular to the autonomy of the EU legal order.

[34] ICJ, North Sea Continental Shell (Federal Republic of Germany v. Netherlands and Federal Republic of Germany v. Denmark), Judgement 20 February 1969, I.C.J. Rep. 1969, p. 44, para 77.

[35] Verdirame 2011, p. 56.

[36] ICJ, Interpretation of the Agreement of 25 March 1951 Between the WHO and Egypt, pp. 89–90.

Therefore, neither ascertaining the specific adherence to a certain practice by each international organization, nor determining its *opinio juris* are necessary steps. This is consistent with the approach taken towards new independent States in the 1950s and 1960s.[37] It would not be acceptable, and 'extremely disruptive for the international system',[38] to admit the presence on the international plane of subjects enjoying a legal personality, but exempt from generally accepted rules.

Worth mentioning is also the role that international organizations play in the emergence and consolidation of customary law rules. In fact, they represent incredibly fecund fora where States can develop a '*usus*', while the practice of international organizations themselves might also be relevant for customary law. This is in particular evident considering the contribution provided by international organizations in the codification of general international law or in its improvement, through the adoption of soft law documents that might guide, legitimate and reinforce States' behaviour.

16.3.2.2 General Principles

Some scholars consider it more appropriate to refer to general principles of law as the main source of human rights obligations for international organizations.[39] The reference would be, therefore, to the 'general principles of law recognized by civilized nations' mentioned under Article 38 ICJ Statute, namely principles common to the main legal traditions, enshrined in domestic legal orders and absorbed into international law. General principles had (and still play) a fundamental role in the formulation of human rights standards, as well as in their interpretation and application.[40]

According to Le Floch, it is even possible to argue—at least in the field of human rights protection—a new understanding of the general principles of law and to identify them in the principles common to the various international conventions on human rights.[41] This interpretation is closer to a different notion of general principles, covering autonomous principles of international law, expressing the essence of the international legal system. In this sense, the advantage of positing general principles as sources of human rights obligations would consist in encouraging a profitable interpretation of human rights, insisting on the existing connections between various conventional systems.[42]

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[37] Verdirame 2011, p. 71.

[38] Ibid.

[39] De Schutter 2010, p. 68. Amerasinghe, as well, considers that the respect of human rights is founded on general principles (Amerasinghe 2010, pp. 528–529).

[40] O'Boyle and Lafferty 2013, p. 195.

[41] Le Floch 2015, p. 392.

[42] Ibid.

16.3.3 Internal Acts and Self-regulation

A further possible source of human rights obligations for international organizations is represented by internal acts as a form of self-regulation. As De Schutter notes, many international organizations are currently developing procedures to ensure compliance with human rights standards in their specific fields of activity.[43]

While many documents are prescriptive in nature, at least considering the internal legal order of the organization, not all institutional or internal acts have the explicit effect of binding the international organization on the international level.[44] The principles concerning unilateral acts adopted by States—which have been detailed by the International Court of Justice in its case law—appear certainly applicable by analogy to those internal acts binding the organization on the international plane.

Therefore, the form in which the statement is made is not essentially relevant. As the Court underlined in its Judgment on the preliminary objections in the case concerning the *Temple of Preah Vihear*, international law 'places the principal emphasis on the intentions of the parties' and therefore 'the law prescribes no particular form, [and] parties are free to choose what form they please provided their intention clearly results from it'.[45]

In fact, exactly as with unilateral acts of States, the principle of good faith explains the binding nature of internal acts:

> trust and confidence are inherent in international cooperation, in particular in an age when this cooperation in many fields is becoming increasingly essential. Just as the very rule of *pacta sunt servanda* in the law of treaties is based on good faith, so also is the binding character of an international obligation assumed by unilateral declaration. Thus interested States may take cognizance of unilateral declarations and place confidence in them, and are entitled to require that the obligation thus created be respected.[46]

In other words, even if these rules appear to be internal, to the extent they make clear the intention of the international organization to respect human rights and—as a consequence—generate legitimate expectations at the international level, they are sources of human rights obligations for the organization.

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[43] De Schutter 2010, p. 104, referring, on the one hand, to the operational policies integrating human rights issues developed by the World Bank and the International Monetary Fund, along with mechanisms for monitoring compliance and, on the other, to UNIMIK accession to monitoring mechanisms established within the Council of Europe.

[44] Verdirame 2011, p. 84, mentioning some standard-setting resolutions of the General Assembly, including UNGA Resolution 45/111 (1990) Basic Principles for the Treatment of Prisoners; UNGA Resolution 45/113 (1990) UN Rules for the Protection of Juveniles Deprived of their Liberty; UNGA Resolution 45/110 (1991) UN Standard Minimum Rules for non-Custodial Measures; UNGA Resolution 40/33 (1985) UN Standard Minimum Rules for the Administration of Juvenile Justice.

[45] ICJ, Temple of Preah Vihear (Cambodia v. Thailand), 26 May 1961, I.C.J. Rep. 1961, p. 31.

[46] ICJ, Nuclear Tests (Australia v. France), 20 December 1974, I.C.J. Rep. 1974, p. 268.

16.4 Positive Obligations and the Duty of Care

It has been ascertained that human rights obligations for international organizations might derive from treaties, as well as from general law, and can also be enshrined in institutional acts having the same nature and effect as States' unilateral declarations. It is now necessary to consider in more detail positive obligations as they have been developed in the case law of regional courts as well as by the Human Rights Committee. The aim of the present section is to assess whether positive obligations can also bind international organizations.

The duty of care can be described as a corollary of human rights positive obligations to protect life, health and safety of staff members. While the right to life is explicitly envisaged in numerous treaties,[47] the protection of health and safety derives from different provisions. Along with a specific provision on the right to the enjoyment of the highest attainable standard of physical and mental health, envisaged under Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR),[48] it derives also from the prohibition of torture and inhuman degrading treatments[49] and the right to private life,[50] to the extent that these provisions protect the physical and moral integrity of individuals. Additionally, relevance is to be attributed to the right to the enjoyment of just and favourable conditions of work, envisaged by Article 7 ICESCR, explicitly referring to the right to safe and healthy working conditions.

It is commonly accepted that the effective exercise of freedoms and the genuine enjoyment of rights do not depend merely on the State's duty not to interfere, but may rather require positive measures of protection, even in the sphere of the relations between individuals. In particular, international law rules protecting life and/or physical and moral integrity imply not only that States have to refrain from intentional and unlawful deprivation of life, from committing torture, inhuman or degrading treatments, or from arbitrarily interfering in the private life of people, but also that they must take appropriate steps to safeguard the lives and the integrity of those within their jurisdiction.[51] In fact, protection of human rights needs to be 'practical and effective'.[52]

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[47] International Covenant on Civil and Political Rights, opened for signature 16 December 1966, UN Treaty Series vol 999, p. 171, entered into force 23 March 1976 (ICCPR), Article 6; European Convention on Human Rights opened for signature 4 November 1950, ETS no 005, entered into force 3 September 1953 (ECHR), Article 2; American Convention on Human Rights, opened for signature 22 November 1969, OAS, Treaty Series no 36, entered into force 18 July 1978 (ACHR), Article 4; African Charter on Human and Peoples Rights opened for signature 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, entered into force 21 October 1986 (AfrCHR), Article 4.

[48] International Covenant on Economic, Social and Cultural Rights, opened for signature 16 December 1966, UN Treaty Series vol 993, p. 3, entered into force 3 January 1976 (ICESCR).

[49] ICCPR, Article 7; ECHR, Article 3; ACHR, Article 5; AfrCHR, Article 5.

[50] ICCPR, Article 17; ECHR, Article 8; ACHR, Article 11.

[51] See Macchi, Chap. 17.

[52] van Dijk and van Hoof 1998, p. 74.

As is well known, a large contribution to the definition and regulation of positive obligations comes from the case law of the ECtHR. While some provisions of the ECHR might appear *per se* as setting a positive action by the State,[53] the legal basis of positive obligations is more properly identified in the provision contained in Article 1 ECHR.[54] To the extent that this provision requires States to ensure the concrete and effective enjoyment of the rights and freedoms enshrined in the Convention, it enlarges its scope to include positive obligations. Positive obligations also underpin the so-called 'horizontal effect' of the Convention, which permits the extension of its guarantees to interpersonal relationships. Any State might be held responsible by the EctHR whenever it fails to (legally or materially) prevent or punish a violation of the ECHR committed by individuals. As such, the emergence and the development of the horizontal effect of the Convention derives from and is a consequence of the theory of positive obligations,[55] but it is not extraneous to other instruments. Moreover, its relevance needs to be understood in view of its meaning and impact on human rights protection: as Pisillo-Mazzeschi explains, the effective enjoyment of a large number of human rights would be seriously threatened if States were not obliged to prevent and respond to abuses committed in the sphere of relations between private individuals.[56]

While the major contribution on the development of the notion of positive obligations is laid down in the case law of the EctHR, positive obligations might be derived from other human rights instruments, including the American Convention on Human Rights (ACHR), the African Charter on Human and Peoples Rights (AfrCHR), the International Covenant on Civil and Political Rights (ICCPR) and the ICESCR.

In particular, the Inter-American Court of Human Rights (IACtHR) has described the obligations contained in Article 1 of the ACHR—namely the duty to 'respect' the rights and freedoms recognised in the Convention and the duty to 'ensure' to all persons the free and full exercise of these rights and freedoms—as 'the prism through which [recognizing] concrete obligations under specific human rights'.[57] Therefore, these two duties, read in conjunction with specific rights, might generate positive obligations, whose content depends upon the circumstances and features of each case, but in general involve the duty to prevent, investigate and punish any violation of the rights and, furthermore, restore the right violated providing compensation.[58] Additionally, the obligation contained in Article 2 ACHR, according to which States Parties 'undertake to adopt, […] such legislative or other

[53] For example, the first sentence of the first paragraph of Article 2 ECHR, stating that 'everyone's right to life shall be protected by law', clearly requires a positive intervention by the State to protect the right to life.

[54] Article 1 ECHR: 'the High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention'.

[55] Akandji-Kombe 2007, p. 15.

[56] Pisillo-Mazzeschi 2008, p. 227.

[57] Lavrysen 2014, p. 95.

[58] ACtHR, Velásquez-Rodríguez v. Honduras, 29 July 1988, App. No 7920, para 166.

measures as may be necessary to give effect to those rights or freedom', implies the obligation to refrain from enacting norms or practices that violate human rights, but also the positive obligation for the State to 'adopt all measures so that the provisions of the Convention are effectively fulfilled in its domestic legal system'.[59]

Article 1 of the AfrCHR is perfectly in line with the approach of the ACHR, as it stresses the need for the States parties not only to recognise the rights, duties and freedoms enshrined in the instrument, but also 'to undertake to adopt legislative or other measures to give effect to them'. In its general comment no. 3 on the on the right to life, guaranteed by Article 4 of the AfrCHR, the African Commission on Human and Peoples' Rights (ACmHPR) affirmed that 'the right to life should be interpreted broadly. The State has a positive duty to protect individuals and groups from real and immediate risks to their lives caused either by actions or inactions of third parties'.[60] Unsurprisingly, the ACmHPR has derived positive obligations from Article 1 of the AfrCHR in a number of cases,[61] in particular, in the cases SERAC *v. Nigeria*,[62] and *Zimbabwe Human Rights NGO Forum v. Zimbabwe*.[63]

Finally, positive obligations derive also from the ICCPR and ICESCR provisions, as confirmed by the Human Rights Committee and the Committee on Economic, Social and Cultural Rights in their general comments and jurisprudence.

In particular, the Human Rights Committee's General Comment no. 3 on the nature of States parties obligations clarified that the obligation to respect and ensure the rights recognised in the ICCPR 'is both negative and positive in nature', as States parties not only have to refrain from violation of the rights recognised by the Covenant, but they are also called to 'adopt legislative, judicial, administrative, educative and other appropriate measures in order to fulfil their legal obligations'.[64] In the same document, the Committee underlined that some articles of the Covenant envisage 'areas where there are positive obligations on States Parties to address the

[59] ACtHR, Olmedo-Bustos et al. v. Chile ("The Last Temptation of Christ"), 5 February 2001, App. No. 11803, para 87.

[60] ACmHPR 2015, para 41.

[61] Mba 2009.

[62] ACmHPR, The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria, Decision 27 October 2001, Communication no 155/96, para 44: 'internationally accepted ideas of the various obligations engendered by human rights indicate that all rights - both civil and political rights and social and economic - generate at least four levels of duties for a State that undertakes to adhere to a rights regime, namely the duty to respect, protect, promote, and fulfil these rights. These obligations universally apply to all rights and entail a combination of negative and positive duties. As a human rights instrument, the African Charter is not alien to these concepts'.

[63] ACmHPR, Zimbabwe Human Rights NGO Forum v. Zimbabwe, Decision 15 May 2006, Comm. No. 245/2002, para 143: '[…] human rights standards do not contain merely limitations on State's authority or organs of State. They also impose positive obligations on States to prevent and sanction private violations of human rights. Indeed, human rights law imposes obligations on States to protect citizens or individuals under their jurisdiction from the harmful acts of other'.

[64] Human Rights Committee 1981, paras 6–7.

activities of private persons or entities:'[65] reference is made in particular to Article 7, stating that 'States Parties have to take positive measures to ensure that private persons or entities do not inflict torture or cruel, inhuman or degrading treatment or punishment on others within their power'.[66] The point is also stressed in General Comment no. 20 on the prohibition of torture and other ill-treatment.[67]

Additionally, dealing with the right to life, enshrined in Article 6 of the ICCPR, the Human Rights Committee has clarified, in its General Comment no. 6, that: 'the right to life has been too often narrowly interpreted. The expression "inherent right to life" cannot properly be understood in a restrictive manner, and the protection of this right requires that States adopt positive measures'.[68] Lastly, positive obligations and the 'horizontal effect' of the Covenant have been recognised with reference to right to liberty and security guaranteed under Article 9 of the ICCPR[69] and the right to privacy envisaged under Article 17 of the ICCPR.[70]

Similarly, the Committee on Economic, Social and Cultural Rights has stressed the positive dimension of the right to health[71] and of the right to enjoy just and favourable conditions of work.[72]

The Human Rights Committee has also been called many times to decide on positive obligations deriving from the ICCPR, in its jurisprudence on individual communications.[73] From its views, it clearly emerges that the right to life, the prohibition of torture, and other cruel, inhuman or degrading treatment, as well as the right to liberty and security of person require positive measures of protection 'irrespective of whether the actual atrocity is connected to the State party'.[74]

While the analysis of regional human rights courts' case law, as well as the Human Rights Committee's jurisprudence, might suggest that positive obligations are a 'judge-made opus or structure',[75] it is maintained here that they are rather

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[65] Ibid., para 8.

[66] Ibid.

[67] Human Rights Committee 1992, para 2: 'it is the duty of the State party to afford everyone protection through legislative and other measures as may be necessary against the acts prohibited by Art 7, whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity'.

[68] Human Rights Committee 1982, para 6.

[69] Human Rights Committee 2014.

[70] Human Rights Committee 1988, para 9.

[71] CESCR 2000, para 33.

[72] CESCR 2016, para 61.

[73] Human Rights Committee, Abubakar Amirov v. Russian Federation, 2 April 2009, Comm. No. 1447/2006.

[74] Human Rights Committee, Individual concurring opinion by the Committee member Anja Seibert-Fohr, Nura Hamulić and Halima Hodžić v. Bosnia and Herzegovina, 30 March 2015, Comm. No. 2022/2011.

[75] Akandji-Kombe 2007, p. 6. The first two cases in which the Court developed the notion are *Marckx* and *Airey*, both adopted in 1979, where—dealing with Article 8 ECHR—the Court stated that, although the object of such provision 'is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from

inherent in the nature of substantial human rights rules. As such, these obligations have not been conceived and designed by regional courts or the Human Rights Committee, but they have rather found a clear identification under their impetus, driven by the need to provide an effective guarantee to treaty-based rights. Therefore, even if the trigger for their emergence within the regional human rights systems has been the existence of an explicit treaty-based duty to assure these rights, positive obligations are not necessarily conditioned by such a provision, since this positive dimension describes the content of the rights to life and to physical and moral integrity *per se*. It is therefore possible to argue that, as long as the fundamental rights to life and to physical and moral integrity are customary law —and, as such, binding on international organizations as well—they necessarily imply a positive dimension.

In line with this argument, it has also been stressed that the horizontal effects of human rights treaties, traditionally considered to derive from the judicial activism of human rights courts, should be rather considered as an application, to human rights, of principles governing State responsibility with regard to acts of individuals, widely developed in other fields of international law, such as the treatment of aliens.[76]

16.5 Positive Obligations and Due Diligence: A Tentative Definition of the Contents of International Organizations' Duty of Care

Exactly as with States, the scope of positive obligations bearing upon international organizations can vary significantly, not only with reference to different rights, but also in view of 'the diversity of situations […], the difficulties involved in policing

such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private or family life' (ECtHR, Marckx v. Belgium, 13 June 1979, App. No. 6833/74, para 31; Airey v. Ireland, 9 October 1979, App. No. 6289/73, para 32).

[76] Pisillo-Mazzeschi 2008, p. 228: '[…] les actes des particuliers ne sont pas attribués à l'Etat, mais peuvent seulement représenter l'occasion extérieure pour un fait illicite différent, commis par les organes étatiques qui n'ont pas prévenu ou réprimé ces actes. En substance, l'Etat répond seulement si ses propres organes ont violé, par leur conduite d'omission, leur devoir de protection. […] [C]ette orientation doit être étendue du secteur de la protection des étrangers au secteur des droits de l'homme et elle constitue la base théorique pour justifier la théorie des effets horizontaux des droits de l'homme. Lorsque certains droits de l'homme imposent, explicitement ou implicitement, des obligations positives à effets horizontaux à la charge de l'Etat, la responsabilité de ce dernier ne naît que lorsqu'on démontre que les organes étatiques n'ont pas rempli leur devoir de protéger, par le biais de mesures de prévention ou de répression, les individus destinataires de ces obligations contre des immixtions arbitraires de la part d'autres individus privés'.

modern societies and the choices which must be made in terms of priorities and resources'.[77]

This section will tentatively provide some guidelines in defining the contents of the duty of care of international organizations as a corollary of positive obligations to protect the right to life, health and safety of civilian personnel sent on mission.

In line with what the IACtHR has stressed in the case *Velásquez-Rodríguez v. Honduras*, we assume here that international organizations' positive obligations to protect the life, health and safety of their personnel imply four separate dimensions. First, the duty to prevent harmful acts by individuals against personnel; second, the duty to investigate harmful acts; third, the duty to punish persons responsible for harmful acts; and fourth, the duty to provide reparation.[78] Worth noting is that each of these duties includes an obligation of result (possessing the necessary legal/administrative apparatus to prevent, investigate, punish and provide reparation) and an obligation of conduct (i.e. use this apparatus with due diligence).[79]

The duty to prevent certainly plays a central role, as it is a prerequisite to successfully accomplish other obligations of investigation, punishment and reparation.[80] For this reason, 'the general protection offered by the legal and administrative framework must be "integral": it requires both the prevention of risk factors and the strengthening of institutions that could provide an effective response to human rights violations'.[81]

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[77] Council of Europe/European Court of Human Rights, Research Report: Positive obligations on member States under Article 10 to protect journalists and prevent impunity, December 2011, p. 4.

[78] A similar detailed list is contained under Article 5.2 of the Istanbul Convention on preventing and combating violence against women (opened for signature on 11 May 2011, CETS no 210, entered into force on 1 August 2014), which distinguishes between negative and positive obligations and connects positive obligations with due diligence.

[79] This distinction is drawn—*mutatis mutandis*—from the work of Pisillo-Mazzeschi (1992) on the State's duty to protect aliens and foreign States representatives from harmful acts committed by private individuals. The Author explains that this duty includes two dimensions (the duty to prevent harmful acts and the duty to punish those responsible whenever a harmful act has occurred), stressing that each of them includes an obligation of conduct and an obligation of result. In particular, the duty to prevent is divided into the obligation to possess the necessary legal and administrative apparatus 'normally able to guarantee respect for the international norm on prevention' (p. 26), namely an obligation of result, and into the obligation to use such apparatus with due diligence, an obligation of conduct. The duty to punish also includes the duty to possess a minimum apparatus, which is not conditioned by due diligence requirement, and the duty to use it this enforcement mechanism, which depends only in part on due diligence. In fact, Pisillo-Mazzeschi additionally distinguishes between the duty to investigate, pursue and apprehend persons responsible for the harmful acts (which is subjected to due diligence) and the duty to try such persons, inflict a penalty and make sure this is properly carried out, which he considers an obligation of result (pp. 28–29). See also Pisillo-Mazzeschi 2008, pp. 390 ff.

[80] Lavrysen 2014, p. 100.

[81] Ibid., p. 99, quoting Ferrer Mac-Gregor and Möller 2012.

It is therefore pivotal to underline that the duty to possess the necessary legal and administrative apparatus to prevent (which is clearly confirmed by the ECtHR[82] and the ACtHR[83] case law) is derived from human rights law as a comprehensive set of rules, since it is necessary to achieve the general purpose of the respect and protection of fundamental rights.[84]

The fourfold structure sketched by the ACtHR in *Velásquez-Rodríguez v. Honduras*, is certainly useful to identify the different components of the positive obligations bearing upon international organizations. However, it is obvious that none of these components (the duty to prevent, the duty to investigate, the duty to punish and the duty to provide reparation) has exactly the same content as the similar obligations bearing upon the State. This is particularly evident in the case of investigation and punishment, where the apparatus and the activity required by an international organization is not comparable to that which is expected from a State. However, this should not be understood as preventing the organization from having a role in investigating and/or punishing the harmful acts. This will simply imply that the organization is expected to perform different actions from the territorial and sending States, but still in the same direction, namely with the aim of ascertaining the facts, finding those responsible and ensuring they are properly sanctioned.

This conclusion is also consistent with a principle clearly outlined in international case law, and in particular by the ECtHR in the case *Osman v. United Kingdom*.[85] The so-called 'Osman test' was formulated by the Court at para 117, when it stated that, to determine whether the British government had violated its duty to prevent violations of the right to life committed by an individual,

> it must be established to its satisfaction that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.[86]

As explained by Ebert and Sijniensky, this simple formula implies a set of criteria.[87] A first step consists in assessing whether the State (but this is certainly applicable to international organizations by analogy) had any preventative duties with reference to the violation of the right to life at issue. The answer might be in the affirmative, as long as there was a risk of a violation of the right to life, which could be considered 'real', 'immediate', 'against identifiable individuals' and that

[82] ECtHR (GC), Osman v. UK, 28 October 1998, App. No. 23452/94; Mahmut Kaya v. Turkey, 28 March 2000, App. No. 22535/93; Akkoç v. Turkey, 10 October 2000, App. No. 22947-22948/93.

[83] IACtHR, Velásquez-Rodríguez v. Honduras; Godínez Cruz v. Honduras, 20 January 1989, App. No. 8097.

[84] Pisillo-Mazzeschi 2008, p. 334.

[85] ECtHR, Osman.

[86] Ibid., para 117.

[87] Ebert and Sijniensky 2015, p. 347.

State knew or, given the circumstances of the case, was expected to know. A second step is to understand the scope of the duty to prevent. The ECtHR considers that the measures to be adopted by the State, first, have to remain within the scope of its powers[88] and, second, need to be reasonably useful to avoid the risk of a violation of the right to life. In any case, positive obligations could not be interpreted to impose an impossible or disproportionate burden on the domestic authorities.[89] The same approach was adopted by the IACtHR in the judgment on the case *Pueblo Bello massacre v. Colombia*, when the Court held that the State's 'obligations to adopt prevention and protection measures for individuals in their relationships with each other are conditioned by the awareness of a situation of real and imminent danger for a specific individual or group of individuals and to the reasonable possibilities of preventing or avoiding that danger'.[90] Again, this step is applicable by analogy to international organizations, as the analysis on the principle of specialty in the next section clearly confirms.

16.6 The Principle of Specialty and the Distinction Between Negative and Positive Obligations

We have ascertained that international organizations are bound by human rights obligations as far as these are also enshrined in customary law (unless the organization accedes to a human rights treaty). We have also argued that human rights obligations concerning the right to life and to physical and moral integrity do imply an inherent positive dimension, which does not necessarily depend on a provision in a convention. A last crucial issue concerns how the peculiarities of the legal personality of international organizations may affect an international organization's human rights obligations.

In fact, since any international organization enjoys a functional legal personality, i.e. delimited by the powers it has been granted to achieve its objectives,[91] it is clear that international organizations do not possess the whole set of rights and duties recognised by international law, but only those deriving from their purposes and functions 'as specified or implied in [their] constituent documents and developed in practice'[92] (so-called principle of specialty). In other words, human rights rules bind an international organization only if (and to the extent which) they are relevant to the organization's purposes and functions.[93]

[88] See the following section for a focus on the principle of specialty.

[89] ECtHR, Osman, para 116. See Macchi, Chap. 17, Sect. 17.3.2.

[90] ACtHR, Pueblo Bello Massacre v. Colombia, 31 January 2006, App. No. 10566, 11748.

[91] Frid 1995, p. 16.

[92] ICJ, Reparation for Injuries Suffered in the Service of the United Nations, p. 180.

[93] Le Floch 2015, p. 393.

In this regard, one may first wonder whether the principle of specialty limits the accession of each international organization to those treaties strictly coming within its domain. However, as explained by De Schutter, the two different issues at stake, accession to treaties, on the one hand, and attribution of competences, on the other, need to be kept separated. Indeed, an international organization does not need to have competences in the specific domain of a human rights treaty, in order to accede to it.[94] Rather, its competences will affect the way the organization might accomplish the obligations contained in the treaty, as will be explained.

A similar doubt may arise in assessing which customary rules concretely bind each international organization, in view of its legal capacities and the sphere of its competences. Since international organizations have a 'functional' legal capacity, are they bound only by human rights obligations coming under their domain of functions? To answer the question, again, a distinction is needed. In particular, we need to distinguish between specific activities to be performed in the field of human rights protection and promotion, on the one hand, and the need to respect human rights standards in completing other tasks, on the other. No doubt the activity of any organization depends on the principle of specialty (therefore they can set up activities to ensure human rights protection, only if such action fits with their purposes and functions). In achieving their mission, though, international organizations 'have their freedom of action limited by certain rules of international law other than their own legal systems'.[95]

This argument helps us to properly frame the problem. In fact, the distinction between competences attributed to the organization and constraints to its activity deriving from international law does not exhaustively solve the issue. Rather, a more accurate analysis focusing on the nature (negative or positive) of each obligation is deemed necessary to fully understand the impact of the specialty principle on human rights duties. In particular, the principle of specialty does not affect negative obligations, but it has a relevance only with regard to the positive ones. As stated by De Schutter 'insofar as the undertaking is purely negative […], it is irrelevant whether or not the Party has the competence to take measures which implement the given standard. It is only where the undertaking is also to adopt certain measures – to fulfil positive obligations (to act) – that the question of competences may play a role'.[96]

Indeed, international organizations do not exist in a legal vacuum, and, consequently, they are bound by international law rules—requiring abstaining from directly violating human rights—in pursuing their mandate, also when they have very limited (or, even, completely lack) competencies in human rights protection and promotion. At the same time, though, whenever the organization is called by

[94] De Schutter 2010, p. 116.

[95] Le Floch 2015, p. 394. According to this author, 'with respect to human rights, all IOs have a duty of vigilance. Thus international financial institutions must ensure that their actions do not have an effect on the human rights situation in their borrowing members' (ibid.).

[96] De Schutter 2010, p. 114.

human right norms to adopt certain positive measures, it would have to respect the principle of specialty,[97] which will in particular affect obligations of conduct and due diligence, as a variable standard, required by the organization.

This is a key point in our reconstruction, as the main aim of this chapter is to explore the possibility of considering the duty of care as a corollary of positive obligations. In other words, concluding that positive obligations can bind an international organization strictly depending on its competences would be tantamount to circumscribing the possibility of tracing the origins of the duty of care only in those cases in which the international organization has been attributed specific competences in the field of human rights protection.

However, it is argued here that the principle of specialty does not affect, in the same way, the international organizations' activity on the international plane, on the one hand, and its relationship with staff, on the other. While the principle of specialty explains the (limited) powers and competences of each organization within the international community, according to the common interest it is called to pursue, the relationship between the organization and its staff does not strictly depend upon the functions attributed by the States to the organization. Here lies one of the main differences between positive obligations bearing upon States and those bearing upon international organizations. While there is no distinction between what States are called to (positively) do to respect the human rights of one of their organs or agents, and what they are called to do for the benefit of other individuals under their jurisdiction, on the contrary, in the case of international organizations, the principle of specialty might limit positive obligations, but only with reference to the possible role of the organization in guaranteeing fundamental rights to individuals other than its personnel. It is true, obviously, that some activities might not be immediately practicable even for the benefit of staff members (in particular, civilian personnel sent on mission), but this would not depend on the competences attributed by States in the founding treaty, but rather on the material instruments available to each international organization.[98]

Macchi in the following chapter provides a detailed analysis of the relationship that brings an international organization's personnel within its human rights jurisdiction.[99] For the purposes of this chapter, it is sufficient to recall some of the arguments Eagleton developed in identifying the bases for a UN claim for reparation in case of injuries suffered by UN agents.[100] According to this author, 'the Charter creates a bond between itself and its agents which, is superior to, and exclusive of, the bond of nationality between the agent and his own state'.[101] More

[97] Ibid.

[98] See Gasbarri, Chap. 4 and Buscemi, Chap. 5.

[99] See Macchi, Chap. 17.

[100] See Capone, Chap. 18, Sect. 18.3.2.

[101] In particular, the author refers to Article 100 of the UN Charter. Such provision 'not only requires the agent to reject instructions from his state and to accept only those from the United Nations, but it also requires States Members to exercise no control over their nationals in their work as officials of the United Nations': Eagleton 1950, p. 356.

precisely, 'the United Nations exercises a control over the individual (agent) which the state of which he is a national does not have; the individual is independent of his own state so far as his work and official actions are concerned, and the usual considerations based on national character are excluded'.[102] Such an advantaged relationship between the international organization and its personnel is further confirmed by the law on immunities and diplomatic privileges,[103] attesting the existence of a special duty to protect international organizations' agents and a corresponding right of staff protection enjoyed by the organization itself. Eagleton derives from these premises that 'the relationship of control and protection which the United Nations exercises over its agents furnishes a more sound basis for claims than does national character; and, likewise, a sound basis for responsibility on the part of the United Nations for acts done by its agents'.[104] We argue here that this can be pushed further to stress that, since the capacity to impact human rights is connected to the control over individuals, considering that such control 'simultaneously creates a potential for, and a duty to avoid, human rights abuse',[105] international organizations have positive obligations to guarantee some basic human rights (life, health and security) to their staff, irrespective of their functions.

16.7 Concluding Remarks

The analysis demonstrates that the duty of care can be correctly considered a corollary of positive obligations, requiring international organizations to take appropriate steps to safeguard the life of their staff members, as well as their health and safety. While positive obligations commonly refer to the duty of States over people under their 'jurisdiction', international organizations are also bound by customary law human rights obligations requiring concrete measures of protection. Actually, human rights obligations concerning the right to life and to physical and moral integrity imply an inherent positive dimension, which does not depend on a convention provision.

The principle of specialty, which moulds the legal personality of international organizations, does not undermine this reconstruction, as it does not affect the positive human rights obligations of the organization towards its personnel: in fact, the relationship between the organization and its staff does not strictly depend upon the functions attributed by the States to the organization.

[102] Ibid., p. 357.

[103] See, *mutatis mutandis*, Ibid., p. 357.

[104] Ibid., p. 358.

[105] Mégret and Hoffmann 2003, p. 323.

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Chapter 17
The Transnational Dimension of International Organizations' Duty of Care Towards Their Civilian Personnel: Lessons from the Case Law on States' Extraterritorial Human Rights Obligations

Chiara Macchi

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Annex II—the Table of Cases—can be accessed online here: http://extras.springer.com/.

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Abstract The purpose of this chapter is to establish under which conditions the civilian personnel sent on mission fall within the human rights jurisdiction of the sending international organization, and the extent of the positive human rights obligations that the latter, consequently, owes to the former. Section 17.2 reviews the existing jurisprudence on the extraterritorial human rights obligations (ETOs) of States with a view to assessing whether the so-called 'spatial' model and 'personal' model of jurisdiction can provide adequate conceptual bases for the grounding of international organizations' human rights obligations towards their civilian personnel sent on mission. Section 17.3, building upon the tripartite definition of jurisdiction elaborated by King and taking stock of the available ETO jurisprudence, distills the principles that ground the human rights jurisdiction of an international organization and delimit the extent of its positive human rights obligations towards its personnel. The conclusions of this analysis support the existence of a duty of care anchored in international human rights law that places on the sending international organization positive obligations towards its civilian personnel wherever the latter carries out its tasks, the existence of which does not depend on the formal nature of the employment relationship between the international organization and the individual.

Keywords due diligence · duty of care · European Court of Human Rights · extraterritorial human rights obligations · functional protection · international organizations

17.1 Introduction

As discussed previously in this Volume,[1] the duty of care of international organizations towards their civilian personnel can be framed in terms of human rights obligations binding upon the international organization as an entity with international legal personality. Once it is established that international organizations can be bearers of human rights obligations however, the question arises as to the extent to which an international organization owes positive obligations to a civilian that is sent to a given country in the framework of an employment relationship with the international organization. Whether or not the host country is a member of that particular international organization, and whether or not it is the country where the international organization's headquarters are located, that State bears, under international law, the primary responsibility to protect the human rights of the individuals which are in its territory or under its jurisdiction—including the civilian personnel of international organizations in the exercise of their tasks. This being the case, does the international organization retain human rights obligations towards those individuals wherever they are located?

[1] See Chap. 16.

Although some of its premises enjoy special status,[2] the international organization, by its nature, does not hold sovereignty or exercise public powers on a territory it controls in the same way States do. As the 'territory of the international organization', as a general rule, does not exist in the same way as a State's territory does, the civilian personnel of an international organization will not normally be located 'in the territory of the international organization'.[3] It would, therefore, not make sense, strictly speaking, to refer to the 'extraterritorial human rights obligations' (known by the acronym 'ETOs') of an international organization. This does not exclude, however, that civilian personnel can be brought within the international organization's jurisdiction for human rights purposes based on territorial or non-territorial factors. It should be stressed that the notion of 'jurisdiction' serves a different function under international human rights law than it does under general international law.[4] In particular, 'jurisdiction under human rights law is not about whether a State is entitled to act, but primarily about delineating as appropriately as possible the pool of persons to which a State ought to secure human rights'.[5] In other words, while jurisdiction as a function of state sovereignty establishes 'whether a state has legal authority to act extra-territorially', human rights 'jurisdiction' determines 'whether a state incurs extra-territorial obligations towards individuals over whom it exercises factual power'.[6] The existing jurisprudence on the ETOs of States can help identify the principles that ground an international organization's human rights jurisdiction.

The purpose of this chapter, in particular, is to establish under which conditions civilian personnel sent on mission fall within the human rights jurisdiction of the sending international organization, and the extent of the positive human rights obligations that the latter, consequently, owes to the former. Taking stock of the analysis carried out by Poli in Chap. 16, the present contribution does not delve into the question of the human rights obligations that bind international organizations, assuming that, despite scholarly disagreement on the matter, *jus cogens* and, to some extent, international customary law applies to these subjects.[7] Relevant norms would include, for instance, the right to life, the prohibition of torture and at least the minimum core obligations deriving from economic, social and cultural rights (e.g. the right to health). Another issue that the present chapter does not address is the allocation of international responsibility between the sending international organization and its member States, as this aspect is dealt with in depth by Spagnolo in Chap. 3 of this Volume.

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[2] Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character 1975, Articles 23, 29; Muller 1995, Ch. 6.

[3] See Sect. 17.2.1 for exceptions to this general rule.

[4] Augenstein and Kinley 2013, pp. 280–281; den Heijer and Lawson 2013, p. 163.

[5] Den Heijer and Lawson 2013, p. 163.

[6] Augenstein and Kinley 2013, p. 281.

[7] Reinisch 2001, p. 136; Daugirdas 2016, pp. 331–335; Ryngaert et al. 2016, pp. 233–234.

Section 17.2 reviews the existing jurisprudence on the ETOs of States with a view to assessing whether the so-called 'spatial' model and 'personal' model of jurisdiction can provide adequate conceptual bases for the grounding of international organizations' human rights obligations towards their civilian personnel sent on mission. Section 17.3, building upon the tripartite definition of jurisdiction elaborated by King[8] and taking stock of the available ETO jurisprudence, distills the principles that ground the human rights jurisdiction of an international organization and delimit the extent of its positive human rights obligations towards its personnel. The conclusions of this analysis supports the existence of a duty of care anchored in international human rights law that places on the sending international organization positive obligations towards its civilian personnel wherever the latter carries out its tasks and whose existence does not depend on the formal nature of the employment relationship between the international organization and the individual.

17.2 Exploring the Relevance of the 'Spatial' and 'Personal' Models of Jurisdiction for the Purpose of Establishing the Human Rights Jurisdiction of an International Organization

Under international law, a State's exercise of effective control or authority over a territory or person outside its own territory triggers the existence of ETOs. International and regional courts and treaty bodies have recognised the extraterritorial applicability of human rights instruments when a State exercises effective control over foreign territory, for instance by virtue of military occupation (the so-called 'spatial model' of jurisdiction),[9] and when a State exercises authority or control over an individual outside its own territory, as in the case of arrest or detention by State officials (the so-called 'personal model' of jurisdiction).[10] The 'spatial' model of human rights jurisdiction is now well consolidated under international law.[11]

As a matter of fact, human rights courts and treaty bodies have also recognised a State's ETOs towards individuals that were under its authority or control despite the

[8] King 2009.

[9] Milanovic 2012, p. 122.

[10] Ibid.

[11] Human Rights Committee 2004, para 10; Human Rights Committee 2003, para 11; ICJ, Legal Consequences on the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 9 July 2004, I.C.J. Rep. 2004, p. 136, para 111; ECtHR, Loizidou v. Turkey, 23 March 1995, App. No. 15318/89, para 62; ECtHR (GC), Loizidou v. Turkey, 18 December 1996, App. No. 15318/89, para 52; ICJ, Democratic Republic of Congo (DRC) v. Uganda, 19 December 2005, I.C.J. Rep. 2005, p. 168, para 216; Cerone 2006, p. 6; Narula 2013, p. 124.

absence of effective control over foreign territory, applying—albeit with nuances—a 'personal' model of jurisdiction.[12] This is the case for the Human Rights Committee[13] and for the Inter-American Commission on Human Rights.[14] The approach of the European Court of Human Rights (ECtHR), although it has varied over time, has converged with that of these two treaty bodies[15] and has arguably reached further with some of its post-*Bankovic*[16] jurisprudence.[17] In sum, both the 'spatial' and the 'personal' model of jurisdiction find solid support in existing jurisprudence.[18]

The question that the present section needs to address is whether these models are relevant for the finding of human rights obligations owed by an international organization towards its civilian personnel sent on mission. The task is carried out in the next two Sub-sections, analysing separately the relevance of the spatial model and of the personal model of human rights jurisdiction.

17.2.1 The 'Spatial Model' of Human Rights Jurisdiction

The introduction to this chapter clarified that, when dealing with the human rights obligations of international organizations, the element of territory and, therefore, the concept of extra-territoriality do not hold the same legal weight they hold in the case of the human rights obligations of States. However, an exception to this general consideration arises when an international organization, through its agents,

[12] Milanovic 2012, p. 122.

[13] Human Rights Committee, Burgos/Delia Saldias de Lopez v. Uruguay, 29 July 1981, Comm. 52/1979, CCPR/C/13/D/52/1979; Cerone 2005, 2006, p. 5.

[14] Cerone 2006, p. 8; McCorquodale and Simons 2007, p. 603; Narula 2013, pp. 122–123. See, for example, IACmHR, Coard et al. v. the United States, 29 September 1999, Case 10.951, Report No. 109/99; Alejandre et al. v. Cuba, 29 September 1999, Case 11.589, Report No. 86/99.

[15] Cerone 2005, 2006, p. 14.

[16] The Grand Chamber found that the victims of the bombing carried out by NATO forces could not come within the jurisdiction of respondent States for the purposes of Article 1 solely by virtue of being 'adversely affected by an act imputable to a Contracting State' (ECtHR (GC), Bankovic et al. v. Belgium et al., 12 December 2001, App. No. 52207/99, para 75). The Court held that extraterritorial application of the ECHR required an exercise of public powers through the effective control of the relevant territory and of its inhabitants as a consequence of military occupation or through the consent, invitation or acquiescence of the territorial State (Ibid., para 71).

[17] ECtHR (GC), Al-Skeini et al. v. United Kingdom, 7 July 2011, App. No. 55721/07, paras 137, 149; ECtHR (GC), Hassan v. United Kingdom, 16 September 2014, App. No. 29750/09, paras 75–76; ECtHR, Isaak et al. v. Turkey, 28 September 2006, App. No. 44587/98; ECtHR, Issa et al. v. Turkey, 16 November 2004, App. No. 31821/96; ECtHR, Pad et al. v. Turkey, 28 June 2007, App. No. 60167/00; ECtHR, Öçalan v. Turkey, 12 March 2003, App. No. 46221/99; ECtHR (GC), Öçalan v. Turkey, 12 May 2005, App. No. 46221/99.

[18] De Schutter 2005, p. 10. See also: ICJ, Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia v. Russian Federation), Provisional Measures, 15 October 2008, I.C.J. Rep. 2008, p. 353, paras 109, 149; CAT 2008, para 16.

exercises effective control over a territory. As explained above, effective control over foreign territory triggers the (extraterritorial) human rights jurisdiction of States,[19] but can the same be said for international organizations? First of all, can an international organization exercise a level of control over a territory that satisfies the effective control test? The ICRC answers this second question in the affirmative, clarifying that a similar exercise of jurisdiction is more than a theoretical possibility, having already materialised in the context of several UN missions.[20] Although United Nations (UN) administration of territory will not always imply the satisfaction of the effective control test, missions such as UNTAES, KFOR/UNMIK and UNTAET did 'exercise governmental authority to the effective exclusion of the territorial sovereign', despite not patrolling the whole territory of the host State.[21]

In cases of this sort, effective control over a territory constitutes a crucial element in determining the scope of the international organization's human rights jurisdiction, and brings the persons who find themselves in that territory within the human rights jurisdiction of the international organization.[22] This also includes, naturally, the civilian personnel working for that international organization that are present in that territory. It is important to underline that what triggers the international organization's jurisdiction for the purpose of human rights obligations is the factual control it exercises over the concerned area, regardless of whether such control has been established through lawful or unlawful means,[23] and of whether or not it is exercised over the territory of a State that is a member of that international organization. As concerns the international organization's civilian personnel, the international organization bears human rights obligations towards them for the mere fact that they are present in the controlled area,[24] regardless of their level of integration into that specific mission or of whether they are or not in the exercise of their official functions.

As King put it, 'it is the factual control over territory which results in the occupier's acquiring a degree of legal competence; the extent of legal competence

[19] King 2009, p. 532.

[20] ICRC 2012, p. 98.

[21] Ibid., pp. 98–99.

[22] This chapter does not dig into the possibly controversial issue of the allocation of responsibility between the international organization and the member States taking part in the mission, as this aspect is dealt with in depth by Spagnolo in Chap. 3 of this Volume.

[23] De Schutter 2005, p. 7; ECtHR, Loizidou 1995, para 62; Milanovic 2011, p. 61; US Military Tribunals at Nuremberg, USA v. Wilhelm List et al., 1950, Trials of War Criminals before the Nuremberg Military Tribunals Under Control Council Law No. 10, Vol. 11, p. 1247. See also: ICJ, Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276, Advisory Opinion, 21 June 1971, I.C.J. Rep. 1971, p. 16, para 118 ('[p]hysical control of a territory, and not sovereignty or legitimacy of title, is the basis of State liability for acts affecting other States').

[24] King 2009, p. 543.

then informs the level of human rights obligations owed'.[25] When an international organization has effective control of a territory and exercises governmental powers, its obligations might coincide with the whole set of internationally recognised human rights binding on it by virtue of treaty or customary law.[26] The extent of the international organization's positive obligations, however, finds its limit in the international organization's lawful competence, i.e. in what the international organization is allowed to do under international law.[27] In the case of occupation, for instance, the occupying international organization would have to respect the relevant rules of international humanitarian law,[28] which, among other things, limits its entitlement to modify the local legal system.[29] The international organization exercising effective territorial control cannot be required under international human rights law to take actions that are beyond its lawful competence.[30] As concerns the civilian personnel deployed by the international organization in that territory, assuming they are not nationals of that country, they will be excluded from certain rights connected with citizenship—for instance, they will most likely not be entitled to vote in local elections. However, the international organization will have a clear obligation to respect their fundamental rights, including their right to life, and to protect them from third-party abuse. This duty to protect will entail a positive obligation to exercise due diligence, the exact content of which will depend on many factors, including the context and the risks inherent to the tasks the personnel is required to carry out.[31]

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[25] Ibid., pp. 543–544. It must be noted that applicable norms may not always coincide with the human rights law paradigm. The ICRC study on occupation law expressed the prevailing view that occupation law might, in some circumstances, apply *de jure* to UN administration of foreign territory, although this would not be a likely scenario. In the situation of an international organization administration deployed without the consent of the host State, occupation law 'would serve as the default regime supplementing the Security Council resolution setting out the UN mandate' (ICRC 2012, pp. 78–84).

[26] ECtHR (GC), Cyprus v. Turkey, 10 May 2001, App. No. 25781/94, para 77; ECtHR, Bankovic et al., para 75 ('the wording of article 1 does not provide any support for the applicants' suggestion that the positive obligation in article 1 to secure "the rights and freedoms defined in Section I of this Convention" can be divided and tailored in accordance with the particular circumstances of the extra-territorial act in question'); ECtHR, Al-Skeini et al., paras 138–139 ('The controlling State has the responsibility under Article 1 to secure, within the area under its control, the entire range of substantive rights set out in the Convention and those additional Protocols which it has ratified').

[27] King 2009, pp. 542–544.

[28] Regulations Respecting the Laws and Customs of War on Land, annexed to Convention Respecting the Laws and Customs of War on Land 1907, 36 Stat. 2277; Convention Relative to the Protection of Civilian Persons in Time of War 1949, 75 UNTS 287; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts 1977, 1125 UNTS 3.

[29] Pictet (ed) 1958, p. 336; ICRC 2012, p. 57.

[30] King 2009, p. 544 ('a state should not be held responsible for failing to take certain actions that, lawfully, it cannot take').

[31] Askin 2017.

It is to be noted, however, that if we assume that the civilian personnel is brought within the international organization's human rights jurisdiction solely by virtue of its presence in a territory effectively controlled by the international organization (an occurrence that concerns a narrow minority of missions), then it is difficult to argue that the international organization bears a due diligence obligation to provide such personnel, for instance, with pre-deployment training, information or even insurance. In fact, such preventative steps would have to be taken before the individuals are sent on mission in the relevant territory, that is, before there is any jurisdictional link—if we stick to a purely spatial model—between the individuals and the international organization. Nor can such cases, it is argued, be equated to refoulement cases *à la Soering*,[32] in that the civilian personnel, before being sent on mission, are not technically within 'the territory of the sending international organization', nor under the level of authority required by a narrow reading of the personal model of jurisdiction.[33] We shall return to this aspect in the following sections.

17.2.2 The 'Personal Model' of Human Rights Jurisdiction Interpreted as 'Effective Control or Authority' over a Person and Recent Developments in the Strasbourg Jurisprudence

As anticipated in the opening of this section, a State's exercise of authority or control over an individual outside its own territory has been accepted by several courts and treaty bodies as a jurisdiction trigger for the purpose of human rights. The personal model of jurisdiction does not require the exercise of effective control over a territory, so it could apply in all situations that do not entail occupation or territorial administration on the part of the international organization. Whether this model bears relevance for the particular case of the civilian personnel sent on mission by international organizations depends on the definition and on the weight that courts have given to the notion of control or authority over an individual.

In this respect, it must be noted that the prevailing jurisprudence refers to the level of control or authority that a State's officials exercise in the event of arrest, detention[34] or abduction[35] of an individual. The ECtHR, which has produced much

[32] ECtHR, Soering v. United Kingdom, 7 July 1989, App. No. 14038/88. Mr. Soering was not only in the territory of the UK, but also detained in an English prison pending extradition to the US to face murder charges for killing his girlfriend's parents.

[33] See below, Section 2(b).

[34] ECtHR, Al-Skeini et al.; IACmHR, Coard et al. v. the United States 1999, para 37; ECtHR, Öçalan 2005; EComHR, Sanchez Ramirez v. France, 24 June 1996, App. No. 28780/95; ECtHR, Al-Saadoon and Mufdhi v United Kingdom, 30 June 2009, App. No. 61498/08; ECtHR, Al-Jedda v. the United Kingdom, 7 July 2011, App. No. 27021/08.

[35] Human Rights Committee, Burgos/Delia Saldias de Lopez.

of the relevant jurisprudence on ETOs, has not always been consistent in accepting a pure 'personal model' of jurisdiction.[36] In *Al Skeini*, for instance, the Court based the finding of jurisdiction not on the mere control over the applicants (one of whom was held in custody),[37] but also on the 'exceptional circumstances' existing at the relevant time, that is, the fact that the UK had assumed authority and responsibility for the maintenance of security in South-East Iraq, in the context of the exercise of some 'public powers' by the UK and the US.[38] The personal model was instead adopted in a purer form in the *Hassan v UK*[39] judgment, in which the element of factual control over the person was the basis for the finding of jurisdiction.[40] In the decisions *Medvedyev* and *Al-Saadoon and Mufdhi*, as noted by Milanovic, the Court did not clearly spell out whether the finding of jurisdiction was based pre-eminently on the State's control over the individuals concerned or on the control over the premises (respectively, a ship,[41] and a detention facility[42]) in which they were located at the relevant time.[43] The Grand Chamber, in subsequent decisions, held the view that, in those cases, the decisive element was 'the exercise of physical power and control over the person', confirming that the Court is ready to adopt a personal model of jurisdiction.[44]

The question to be addressed is whether the personal model of jurisdiction interpreted as effective control or authority over a person can help establish the existence of human rights obligations on the part of an international organization towards its civilian personnel sent on mission in geographical areas where the international organization does not exercise any territorial control. While an individual (whether or not belonging to the civilian personnel of the international organization) placed under a level of control by an international organization akin

[36] Milanovic 2012, p. 131; Milanovic 2016; Ryngaert 2012, pp. 58–60.

[37] Ryngaert 2012, p. 59.

[38] ECtHR, Al-Skeini et al., paras 137, 149; Miko 2013, p. 76. See also: ECtHR, Al-Jedda.

[39] ECtHR, Hassan.

[40] Ibid., para 80.

[41] ECtHR (GC), Medvedyev et al. v. France, 29 March 2010, App. No. 3394/03, paras 66–67.

[42] ECtHR, Al-Saadoon and Mufdhi, para 88.

[43] Milanovic 2012, p. 124.

[44] ECtHR (GC), Jaloud v. Netherlands, 20 November 2014, App. No. 47708/08, para 136; ECtHR, Al-Skeini et al., para 136. In the case *Hirsi Jamaa et al.*, concerning the transport to Libya of migrants that had been intercepted at sea by Italian authorities, the Grand Chamber found that 'the continuous and exclusive *de jure* and *de facto* control of the Italian authorities' could be inferred from the fact that the events took place entirely on board ships of the Italian armed forces, the crews of which were composed exclusively of Italian military personnel. It was not necessary, therefore, to assess the nature and scope of the actions carried out by the Italian military. On the contrary, assessing the level of control and coercion exercised over the individuals had been relevant in the case *Medvedyev* because the events had unfolded on board a vessel flying the flag of a third State but whose crew had been placed under the control of French military personnel (ECtHR, Hirsi Jamaa et al. v. Italy, 23 February 2012, App. No. 27765/09, paras 76–82).

to custody would most likely fall within its jurisdiction,[45] this interpretation of the personal model would not apply to most situations, in which such threshold of control is not reached. There are, admittedly, instances in which the international organization imposes considerable limitations to the freedom of movement of its civilian personnel, for instance in the case of deployment in high-risk areas where the mission's staff is required by contract to live in a compound and respect curfew. Although restrictive of individual freedom, however, these situations fall short of the level of coercion inherent in custody,[46] including because they do not normally entail physical restraint of the personnel, who are free to disregard the contractual clauses—for instance breaching curfew—at their own risk.[47]

Notably, the Strasbourg jurisprudence has undergone important developments in recent years, accepting a gradually more expansive approach to the matter of ETOs, particularly in the context of military operations.[48] The *Jaloud* case concerns an Iraqi national who was shot dead in Iraq while passing in a vehicle through a checkpoint manned by personnel under the command and direct supervision of a Dutch army officer.[49] In finding that the victim fell within the human rights jurisdiction of the Netherlands, the ECtHR was satisfied that 'the Netherlands exercised its 'jurisdiction' within the limits of its SFIR mission and for the purpose of asserting authority and control over persons passing through the checkpoint'.[50] Thus, what was relevant was not any form of territorial control or of custody over the person, but rather the authority that the State exercised, within the boundaries of its lawful competence, over the individual passing through the checkpoint.[51] Clearly, *Jaloud* differs from cases of arrest and detention because it does not require the same degree of control over the person.[52] This paves the way to a more expansive interpretation of the concept of human rights jurisdiction, one that could also apply to an international organization exercising some form of 'authority' not amounting to effective control over its civilian personnel sent on mission.

Importantly, the ECtHR jurisprudence indicates that, in the absence of effective territorial or personal control, jurisdiction can be triggered not only by the exercise of a lawful competence, but also by the commission of an unlawful act. In *Pad et al. v Turkey*, seven Iranian men on horseback were killed by the Turkish security forces in an area that could be either inside Iran or inside Turkey—the exact

[45] This was the case, according to a much-criticised decision of the ECtHR, for the detention of Mr. Saramati: ECtHR (GC), Behrami and Behrami v. France, 2 May 2007, App. No. 71412/01 and Saramati v. France, Germany and Norway, App. No. 78166/01, para 141. For a critical reading of the decision: Sari 2008.

[46] ECtHR, Al-Skeini et al., para 136 ('physical power and control').

[47] See below, Sect. 17.3.2.

[48] De Koker 2014; Sari 2014; Milanovic 2014.

[49] ECtHR, Jaloud, para 152.

[50] Ibid.

[51] Sari 2014.

[52] De Koker 2014.

location was disputed.[53] Although the case was dismissed for the applicants' failure to exhaust domestic remedies, the ECtHR found that establishing the exact location of the impugned events was not necessary, as the applicants' relatives had been brought within Turkish jurisdiction by the mere fact, admitted by the Turkish authorities, that fire from the helicopters had caused their killing.[54] A similar approach that is in striking contrast with the conclusions in *Bankovic*,[55] was adopted by the Court in the case *Isaak*.[56] These two cases show that when States act abroad beyond their lawful competence affecting human rights, the ECtHR seems prepared to embrace a 'cause and effect' model of jurisdiction.[57]

As Sect. 17.3 shows, these developments allow conclusions to be drawn for a grounding of international organizations' human rights obligations towards their personnel sent on mission. To this aim, two crucial elements deserve consideration. First, the jurisprudence presented shows that human rights jurisdiction can be detached from the exercise of effective control or authority over a territory or person and can in principle arise when a *de facto* power relationship[58] is established between the State and an individual who is not in the custody of the former, either as a result of a 'lawful competence to act based on non-territorial factors'[59] (e.g. the setting up of a legal checkpoint), or as a result of an unlawful act perpetrated by agents of the State (e.g. killings from helicopters).[60]

The second aspect concerns the inescapable question of the extent of a State's positive human rights obligations once jurisdiction has been established based on non-territorial elements. The issue is whether a State that exercises some degree of control or authority over a person owes, *ipso facto*, to that individual the whole range of human rights that the State itself is bound to respect under international law, including the related positive obligations. On this point also, the Strasbourg jurisprudence has undergone an evolution since the 'all or nothing' approach adopted in *Bankovic*, in which it had held that the positive obligation to secure the rights enshrined in the Convention could not be 'divided and tailored' according to the circumstances of the extraterritorial act at issue.[61] In *Al Skeini*, the Court stated:

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[53] ECtHR, Pad et al.

[54] Ibid., paras 54–55.

[55] Milanovic 2012, p. 124.

[56] When Mr. Isaak was beaten to death by the police of the Turkish Republic of Northern Cyprus (TRNC), he was in the UN buffer zone between the TRNC and the Republic of Cyprus, therefore in an area over which Turkey did not exercise effective territorial control. Nevertheless, the Court found the fact that the Turkish-Cypriot policemen had actively taken part in the beating to death of Isaak sufficient to bring the individual within Turkish jurisdiction (ECtHR, Isaak et al., p. 21).

[57] King 2009, p. 530; Sari 2014.

[58] Augenstein and Kinley 2013, p. 281.

[59] King 2009, p. 538.

[60] King underlines that questions of attribution and of human rights jurisdiction are fundamentally intertwined, and thus, 'to the extent persons or their property are affected by acts attributable to a state, "jurisdiction" is triggered' and the relevant human rights norms apply' (ibid., p. 530).

[61] ECtHR, Bankovic et al., para 75.

> It is clear that, whenever the State through its agents exercises control and authority over an individual, and thus jurisdiction, the State is under an obligation under Article 1 to secure to that individual the rights and freedoms under Section 1 of the Convention *that are relevant to the situation of that individual*. In this sense, therefore, the Convention rights can be 'divided and tailored' (compare Banković, cited above, § 75).[62]

If we accept the principle that a State's positive human rights obligations might vary according to the nature of the power relationship it has with the individual, then it could also be argued that the due diligence required of an international organization in order to protect the health or life of its civilian personnel sent on mission will vary according to similar criteria. This brings us back to the question, already raised in Sect. 17.2.1, of identifying the moment in which the individual is brought within the jurisdiction of the international organization. In the case of an individual who is held in custody, for instance, this could be the moment when he/she is apprehended by the international organization's authorities,[63] whereas in cases like *Jaloud* identifying the moment when a person passing through a checkpoint is brought within the State's jurisdiction might be less straightforward. Section 17.3, reasoning partly *de lege lata* and partly *de lege ferenda*, will attempt to identify the principle that brings civilian personnel within the international organization's jurisdiction and, consequently, the moment when the international organization begins to have positive human rights obligations towards these individuals.

17.3 Human Rights Jurisdiction as a Result of the International Organization's *De Facto* Power Relationship with Its Civilian Personnel Sent on Mission

This section takes stock of the jurisprudence reviewed in previous sections and of further recent developments in the field of ETOs to answer the following interrelated questions: what element(s) trigger the human rights jurisdiction of an international organization over the civilian personnel it sends on mission; whether it is possible to identify the moment when the international organization begins to have positive obligations towards its civilian personnel sent on mission; and what is the extent of such positive obligations, if they exist.

[62] ECtHR, Al-Skeini et al., para 137 (emphasis added). See also: ECtHR, Hirsi Jamaa et al., para 74.

[63] ECtHR, Hassan, para 80.

17.3.1 *Human Rights Jurisdiction as a Result of a* De Facto *Power Relationship Between the International Organization and Its Civilian Personnel*

This analysis starts from the consideration that, as Augenstein and Kinley put it,

> while the concrete prerequisites of extra-territorial human rights obligations remain subject to debate, it seems widely accepted that what is decisive is not a state's *de jure* authority, but its exercise of *de facto* power or control over individuals outside its territory.[64]

Some of the most recent case law cited in Sect. 17.2.2 corroborates this observation, which is consistent with scholarly condemnation of the absurdities that would result from limiting human rights jurisdiction to cases in which the State acts within the boundaries of its legal competence under public international law.[65] Both the case law on the spatial model and that on the personal model of jurisdiction indicate that what triggers a State's human rights jurisdiction is the existence of a relationship of *de facto* power between the State and the individual,[66] a relationship that might take the shape of effective territorial control or of other forms of control or authority exercised over the individual. This factual relationship, in turn, can arise either as a result of a State's legal competence to act extraterritorially under public international law[67] (e.g. a lawful arrest on the territory of another State; the legal competence acquired by becoming an occupying power, etc.), or from an unlawful extraterritorial act perpetrated by its agents and affecting human rights abroad (see *Isaak* and *Pad*).[68] This section does not focus on instances in which the international organization exercises effective territorial control or has the individual concerned in custody. In these instances, the prevailing case law corroborates the existence of human rights jurisdiction. It addresses, instead, the question whether in the most common scenario, that is, in the absence of such an element of control, the international organization can be said to bear positive human rights obligations towards the civilian personnel it sends on mission. It concludes that some of the existing jurisprudence already supports an affirmative answer.

Based on a review of existing ETO jurisprudence, King suggests that jurisdiction can be broken down into three separate categories:

> (i) 'jurisdiction' understood as a state's lawful competence to act (under international law) arising from control over territory; (ii) 'jurisdiction' understood as a state's lawful competence to act based on non-territorial factors; and (iii) 'jurisdiction' understood as

[64] Augenstein and Kinley 2013, p. 281.
[65] Ibid., p. 280; King 2009, p. 536; Lawson 2004, p. 120.
[66] Augenstein and Kinley 2013, p. 281.
[67] Augenstein and Kinley 2013, p. 285; King 2009, p. 538.
[68] King 2009, p. 538.

> acts of a state going beyond what is allowed by international law that affect an individual's person or property.[69]

An example of category (ii) is the above-mentioned case *Jaloud*, in which the lawful authority exercised by the Dutch military through the setting up and operation of a checkpoint brought the victim within Dutch human rights jurisdiction. The *de facto* power relationship triggering human rights jurisdiction was found to have come into being notwithstanding the absence of 'effective control' over a portion of territory or over the individual.[70] The contention of this paragraph is that, when it comes to the specific case of the civilian personnel of an international organization sent on mission, the relationship of *de facto* power that triggers the international organization's human rights jurisdiction always derives *at least* from the *de jure* relationship established between the international organization and the personnel—that is, resorting to King's categories, from the international organization's 'lawful competence to act based on non-territorial factors' affecting the situation of its personnel.

To be clear, this does not exclude that, in specific situations, an international organization acting beyond its lawful competence in a way that affects the person or property of its personnel might bring the latter within its human rights jurisdiction also by virtue of such unlawful acts. However, while the killing by Turkish police of the Iranian men on horseback in *Pad* was the only (factual) element bringing the individuals within Turkish jurisdiction,[71] it is submitted that the civilian personnel of an international organization, even in the absence of an unlawful act by the international organization affecting their rights, will always fall within the latter's human rights jurisdiction by virtue of the particular relationship they enjoy with it.[72] This contention must be justified by clarifying what kind of relationship is relevant and why it gives rise to a *de facto* power relationship capable of triggering human rights jurisdiction.

Civilian personnel work for an international organization under a variety of arrangements, all implying a particular kind of employment relationship, as well as specific duties and rights.[73] Albeit with significant variations, all these forms allow the international organization to lawfully regulate or otherwise influence the conduct and conditions of the personnel going on mission in pursuit of this

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[69] Ibid.

[70] This case differs from *Hirsi Jamaa et al. v. Italy*. In *Hirsi*, the *de facto* control exercised over the Italian-flagged vessel by the Italian military was one of the elements noted by the Court in finding Italian jurisdiction for the purpose of Article 1 ECHR. In *Jaloud*, the 'spatial' element is arguably weaker (see *supra*, note 44).

[71] In this case it might be said, using Milanovic's wording, that the jurisdiction-establishing conduct and the violation-establishing conduct coincided (Milanovic 2016, pp. 10–11).

[72] In the absence of any sort of employment relationship, either with a staff member or with a contractor, we would not be speaking of 'civilian personnel' of an international organization in the first place.

[73] See Chap. 6 by Brino.

employment relationship.[74] What is relevant here, recalling King's second category of jurisdiction, is the legal competence that the international organization has under public international law to regulate, influence and sanction, to some extent, the conduct of its personnel sent on mission.[75] This lawful competence creates a *de facto* power relationship bringing the civilian personnel within the human rights jurisdiction of the international organization. The specific moment when this relationship first arises might vary, but it will generally coincide with the moment when the individual establishes an employment relationship with the international organization. From the moment the employment relationship arises, the international organization has a legal competence, for instance, to impose certain contractual obligations on its personnel, to assign it to particular tasks, to organize its repatriation from a dangerous area, to impose a code of conduct to be followed in the field and sanction its breach, etc. This competence has a transnational scope that finds its upper limit in international public law, and its breadth in each specific case will vary according to factors such as the SOMA and other agreements concluded with the host State, as well as to the factual circumstances of the case.[76]

Although the employment relationship is by nature different from the nationality status of a State's citizen, a parallel can be drawn.[77] King notes that 'insofar as states have the lawful and factual ability to affect their nationals who are resident abroad and outside of their physical control, those nationals fall within the state's 'jurisdiction'.[78] It is submitted that the sovereign nature of a State's acts (e.g. the issuing of passports) as opposed to the private law nature of a contract concluded between an individual and the employer international organization is not what is relevant for the purpose of triggering human rights jurisdiction. What matters is not the nature of the specific act creating the bond between the international organization and the personnel, but the *de facto* power relationship it engenders. In this respect, it is relevant to recall that international organizations claim the right to exercise functional protection towards their organs and agents based on the

[74] Seyersted 2008, pp. 137–138.

[75] King 2009, p. 538.

[76] For an in-depth discussion of the relationship between the sending international organization and the host State, see Gasbarri, Chap. 4.

[77] The UK Supreme Court has also addressed the question of whether a State's armed forces, by reason of their personal status, fall within the jurisdiction of the State for the purposes of Article 1 of the ECHR. The Court has decided in the negative, pending *Al Skeini* before the Grand Chamber (UK Supreme Court, R (on the application of Smith) (FC) (Respondent) v. Secretary of State for Defence, 30 June 2010, UKSC 29).

[78] King 2009, p. 537. See: Human Rights Committee, Montero v. Uruguay, 31 March 1983, Comm. 106/81, CCPR/C/18/D/106/1981; Human Rights Committee, Lichtensztejn v. Uruguay, 31 March 1983, Comm. 77/1980, CCPR/C/18/D/77/1980; EComHR, X. v. United Kingdom, 15 December 1977, 12 DR. The nationals will fall under the State's jurisdiction not for the whole range of human rights, but only 'in certain respects' (EComHR, X. v. Federal Republic of Germany, 25 September 1965, 17 HRCD 42, para 47).

functional link existing between the international organization and those subjects.[79] The UN, for instance, has filed claims for reparations 'not merely with regard to regular staff members, but also with regard to ad hoc agents' and 'extended its protection also to matters which are not directly related to the official functions'.[80] It is submitted that the same functional link giving rise to the international organization's right of functional protection also determines the existence of human rights obligations owed by the international organization to its personnel.[81] In fact, like the State with its own nationals abroad, the international organization has the legal competence (under international law) and the factual capacity to affect its own civilian personnel sent on mission, and therefore, in the relevant respects and within the boundaries of such lawful competence, it has human rights obligations towards those individuals.

This approach to ETOs increasingly finds validation in the work of the UN treaty bodies concerning corporate activities causing harm in foreign countries. The treaty bodies' position is that States have an obligation to protect human rights in other countries from the activities of third parties '*if they are able to influence* these third parties by way of legal or political means, in accordance with the Charter of the United Nations and applicable international law'.[82] The CRC, in its General Comment 16, holds that States retain their obligations to respect, protect and fulfil children's rights in the context of business extraterritorial activities 'provided that there is a reasonable link between the State and the conduct concerned'.[83] Such reasonable link exists 'when a business enterprise has its centre of activity, is registered or domiciled or has its main place of business or substantial business activities in the State concerned'.[84] Again, what matters is the State's lawful and factual ability to affect individuals in the territory of another country (in this case, by regulating or otherwise influencing the conduct of business entities).[85] The

[79] ICJ, Reparations for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 11 April 1949, I.C.J. Rep. 1949, p. 174.

[80] Seyersted 2008, pp. 141–142. OSCE's Staff Regulation 2.07 explicitly extends the exercise of functional protection to all categories of personnel (see Chap. 10, Sect. 10.5.7).

[81] Interestingly, as discussed by Russo in Chap. 10 of this Volume, the OSCE seems to have included in its Staff Regulation 2.07 a duty to exercise functional protection expressed in terms of its personnel's entitlement to such protection (Ibid.).

[82] CESCR 2000, para 39 (emphasis added); CESCR 2002, para 33; CESCR 2008, para 54. Other treaty bodies seem to be converging with this approach to ETOs: Human Rights Committee 2012, para 16; Human Rights Committee 2015 (Canada); Human Rights Committee 2015 (Korea), paras 10–11; CERD 2011, para 29; CRC 2012, para 28(a); CRC 2013 (United States), para 26(d); CRC 2014, paras 22, 23(c).

[83] CRC 2013, para 43.

[84] Ibid.

[85] CESCR 2017, para 28 ('Extraterritorial obligations arise when a State party may influence situations located outside its territory, consistent with the limits imposed by international law, by controlling the activities of corporations domiciled in its territory and/or under its jurisdiction, and thus may contribute to the effective enjoyment of economic, social and cultural rights outside its national territory'); ETO Consortium 2011, Principles 9, 26.

ECtHR dealt with a similar case in *Kovačić et al.*, recognising that Slovenian responsibility under the European Convention on Human Rights (ECHR) could be engaged by Slovenian banking legislation affecting the rights of the applicants in Croatia.[86]

17.3.2 The Extent of the International Organization's Positive Human Rights Obligations Towards Its Civilian Personnel Sent on Mission

Grounding an international organization's human rights obligations in its lawful competence under international law to affect its civilian personnel has two corollary implications. Firstly, no employment relationship, as permanent or temporary it may be, excludes *per se* the human rights jurisdiction of the international organization—it follows that the international organization cannot escape its obligations under international human rights law by increasingly relying on non-staff members.[87] In this respect, it must be noted that international organizations' relevant policies often apply differently to distinct categories of employees, affording uneven levels of protection. For instance, the African Union's policies concerning the provision of medical services in the field and medical evacuation confer full benefits only to regular staff, offering inferior guarantees for short-term staff and consultants.[88] While some form of differentiated treatment based on the type of employment is common in the policies of international organizations,[89] from the perspective of international human rights law the temporary or permanent nature of the contract is not decisive for a grounding of the international organization's jurisdiction.

Secondly, the extent of the international organization's legal competence[90] directly affects the extent of its positive human rights obligations towards civilian personnel and defines the upper limit of such obligations.[91] From what has been

[86] Slovenian banking legislation allowed the Croatian branches of a Slovenian bank to prevent the Croatian applicants from withdrawing their savings in their home country. Although the case was struck out on the merits, the Court affirmed that 'the responsibility of [the High] Contracting Parties can be involved by acts and omissions of their authorities which produce effects outside their own territory' (ECtHR (GC), Kovačić et al. v. Slovenia, 1 April 2004, App. Nos. 44574/98, 45133/98 and 48316/9).

[87] This is the trend highlighted by Brino in Chap. 6 of this Volume.

[88] See Chap. 13, Sect. 13.4.7.

[89] See, for instance, NATO (Chap. 9, Sect. 9.6), World Bank (Chap. 14, Sects. 14.3.1, 14.4.2), Council of Europe (Chap. 11, Sect. 11.3.1), Organization of American States (Chap. 12, Sect. 12.3.2).

[90] The breadth of the international organization's legal competence might vary according to factors such as the SOMA and other agreements made with the host State.

[91] King 2009, p. 544.

discussed so far, it is clear that the 'whole package' approach[92] to human rights obligations is here rejected in favour of a 'gradual approach to jurisdiction'.[93] Thus, while the negative obligation not to infringe on human rights will in principle always stand,[94] the positive obligations of an international organization administering a territory (as per the examples provided in Sect. 17.2) will differ, for instance, from those of an international organization contracting a civilian consultant to be sent on a mission in a dangerous country, as the extent of their lawful and factual ability to affect the civilian personnel will be different in the two situations.

A relevant case in point, as anticipated above, is the international organization's right to exercise functional protection towards its agents suffering injury in circumstances involving the responsibility of a State.[95] The fact that functional protection is an international organization's discretionary right under public international law does not exclude that its exercise might be an international organization's positive obligation under international human rights law. Consistently with what has been argued in Sect. 17.3, as long as the international organization has a lawful competence (under public international law) to affect the right to reparation of its civilian personnel, then the latter is brought within its jurisdiction for that purpose, and the international organization has a positive obligation to ensure that right.[96]

The international organization's positive duty to protect the right to life and the right to health of its civilian personnel will arguably be engaged every time an employee is sent on mission,[97] but the due diligence obligations of the international organization may vary considerably depending on the factual circumstances of each case.[98] The due diligence steps required to prevent violations of these rights could begin as early as the selection phase of the personnel to be sent on mission (e.g. by assessing the health status and the skills of the person) and entail measures such as the provision of adequate training, information and equipment, an insurance policy covering the costs of emergency healthcare and repatriation, etc. They could also

[92] UK House of Lords, R (Al-Skeini) v. Secretary of State for Defence, 13 June 2007, UKHL 26, para 79.

[93] Lawson 2004, p. 120; King 2009, p. 542; ECtHR, Al-Skeini et al., para 137.

[94] ECtHR, Issa et al., para 71 ('Article 1 of the Convention cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory'); McCorquodale and Simons 2007, p. 617; Jägers 2002, pp. 166–167; Sornarajah 2010, pp. 166 *et seq.*; ICJ, Corfu Channel case (United Kingdom v. Albania), 9 April 1949, I.C.J. Reports 1949, p. 4, p. 22 ('[it is] every State's obligation not to allow knowingly its territory to be used contrary to the rights of other States'); Arbitration Tribunal, The Rainbow Warrior (New Zealand v France), 30 April 1990, 82 ILR 449, para 1165.

[95] ICJ, Reparation for Injuries Suffered in the Service of the United Nations, 11 April 1949, I.C.J. Rep. 1949, p. 174, p. 187; Seyersted 2008, p. 141.

[96] This reasoning reinforces de Guttry's conclusion in Chap. 2 of this Volume.

[97] See Chap. 16.

[98] King 2009, pp. 543–544.

entail preventative healthcare measures, such as immunization and chemoprophylaxis, tailored to the risks of the specific mission.[99] Requiring the adoption of similar measures for the fulfilment of international human rights obligations is not unreasonable under public international law,[100] in that most of these measures are 'domestic measures with extraterritorial implications'[101] that do not breach the sovereignty of the host State. In some cases, the international organization might even be under an obligation to provide certain economic, social and cultural rights that its civilian personnel, for reasons beyond their control, cannot realise themselves by the means at their disposal.[102] This could be the case, quoted earlier in this chapter, of the civilian officer of an international organization deployed in a high-risk country or area in which the personnel is required to reside in a compound and strictly respect curfew,[103] and/or in which the local health system is inadequate or inaccessible. When it is impossible for the personnel—due to security considerations or practical impediments—to access the healthcare system or, for instance, sources of food and water outside the compound, it does not seem excessive to argue that fulfilling the related rights would be an obligation of the international organization. Evidence from the UN system shows how medical services and staff accommodation policies for personnel deployed to high-risk areas are not streamlined across different missions or duty stations, with the result that living conditions and healthcare provision are not always of an adequate standard.[104] However, international organizations should consider that, in some circumstances, at least in the mission's timeframe, providing services such as emergency healthcare, medical evacuation, safe accommodation, food and water to the personnel involved might be part of their human rights obligations.

[99] See Buscemi in Chap. 5 on the cholera outbreak in Haiti and UN's reaction to the accident. Creta notes that in the UN system health and psychosocial support services are currently more focused on mitigation, rather than on prevention (Chap. 7, Sect. 7.4.1(c)).

[100] The adequacy of due diligence undertaken by an international organization can only be addressed on a case by case basis. As the ILA Study on Due Diligence under International Law notes, 'due diligence is a positive obligation on States but will tend to be assessed on an ex post facto basis to determine compliance and responsibility' (ILA 2016, p. 7). Moreover, 'the term "reasonable" is, as the due diligence standard itself, difficult to determine in abstracto, and leaves States much discretion in the choice of means' (ibid., p. 9).

[101] Ruggie 2010, para 49.

[102] CESCR 2000, para 37.

[103] Respect of a curfew and other obligations of the employee sent on mission are often included in the contract in the form of a binding code of conduct whose breach by the employee might entail sanctions such as suspension from service or dismissal.

[104] Chap. 7, Sect. 7.4.1(a). Concerning the Organization of American States, Nader and Dutra note that there is no indication in the international organization's policies that the OAS will provide its own medical services when these are not accessible in the host country (Chap. 12, Sect. 12.4.8).

17.4 Conclusions

The present chapter has argued that international organizations have positive human rights obligations towards the civilian personnel they send on mission regardless of the specific type of employment relationship that they establish with the latter. It has been argued that the spatial and personal models of jurisdiction based on effective authority and control, while able to trigger an international organization's jurisdiction, are relevant only in a minority of cases. Effective control, however, has been shown to be only one among different modalities that the *de facto* power relationship between the international organization and its personnel can assume. Building upon the tripartite categorization elaborated by King, this chapter has argued that the employment relationship established between the international organization and the individual confers upon the former a lawful competence, under international law, to influence the latter, bringing the civilian personnel, for the relevant aspects, under the international organization's human rights jurisdiction. This does not impose on the international organization unreasonable positive obligations, in that the extent of such obligations is determined by the extent of its lawful competence and finds its upper limit in what the international organization is allowed to do under public international law.

Once it is established the international organization is bound, for instance, by the human right to life (primary norm), this does not only translate into a negative obligation, but also into a positive obligation to adopt every reasonable and appropriate measure[105] to prevent harm to the life of personnel during the mission. The content of the due diligence required from the international organization will be influenced by the specific factual circumstances of each mission. These measures may include, but not be limited to, a thorough assessment of the personnel's fitness for the role,[106] the provision of pre-deployment training, of adequate insurance, of accurate information, etc. It has been submitted that the exercise of functional protection, while discretionary under public international law, is actually part of an international organization's obligations under international human rights law. In the same way, the provision of some economic, social and cultural rights to its personnel during a mission could fall within the positive obligations of an international organization under some circumstances. These obligations will typically include the provision of emergency healthcare when the person cannot be reasonably expected to receive it from the local health system.

Most of the positive duties here recalled by way of example are preventative measures that the international organization needs to adopt even before the deployment of its personnel in the territory of the host country, a circumstance that diminishes the risk of breaching the host State's sovereignty. Although the reasoning given in Sect. 17.3 borders a *de lege ferenda* approach, it must be underlined

[105] ILA 2016, pp. 3, 8–9.

[106] In the case of external contractors, this will also entail a diligent selection process which factors in more than merely the economic aspect.

that the tripartite definition of jurisdiction elaborated by King is anchored in existing ETO jurisprudence and compatible with the position of the UN human rights treaty bodies. As such, it constitutes a solid basis to ground conceptually the scope of international organizations' human rights jurisdiction in a way that, it is useful to note, is largely in line with the definition of duty of care that derives from the analysis of the case law of international administrative tribunals.[107]

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[107] See Chap. 2.

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Chapter 18
Victims' Right to Reparation and the Residual Application of Diplomatic and/or Functional Protection

Francesca Capone

Contents

Abstract It is traditionally considered that under the existing international legal framework the obligation to provide reparations is incumbent on any actor/subject of international law that is accountable for the damage, material and moral, resulting from the breach of an international obligation. This is a key corollary of the attribution of international responsibility for wrongful acts, and as such it pertains to both States and international organizations. After providing a short

Annex II—the Table of Cases—can be accessed online here: http://extras.springer.com/.

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overview of how the right to reparation developed beyond the traditional inter-State paradigm, this chapter will address the issue of redress for victims, focusing on civilian personnel sent on missions or assignments outside their normal place of activity, as well as on international organizations' breaches of their duty of care. Furthermore, this chapter will discuss the residual application of States' diplomatic protection and international organizations' functional protection, in cases where the injury suffered by the staff member engages the interests of the State of nationality, the international organization, or both.

Keywords right to reparation · ARSIWA · ARIO · UNBPG · diplomatic protection · functional protection

18.1 Introduction

At both the domestic and international levels, the right to reparation is considered as the indispensable complement of the failure to fulfil a legal obligation.[1] This statement applies to States, individuals and international organizations, even though it is worth stressing from the outset that the existing framework to claim and provide reparations has received less analysis and discussion in relation to international organizations in comparison to the former actors. Before focussing on the obligation to provide reparation that international organizations have towards individuals belonging to the narrow category of civilian personnel sent on a mission, some caveats are needed.

Among States the principle that every violation of international obligations gives rise to a duty to make reparation is well established in law and functions reasonably well in practice.[2] It is well known that the key features that traditionally govern the right to reparation at the inter-State level are spelled out in the judgment of the case concerning the *Factory at Chorzów*, issued by the Permanent Court of International Justice (PCIJ) in 1928. According to the PCIJ:

> It is a principle of international law that the breach of an engagement involves a [State's] obligation to make reparation in an adequate form [and] reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.[3]

On that occasion the PCIJ clearly described the common approach to reparations in an inter-State dispute, highlighting that there are two main components, i.e. (i) a breach of international law generates an obligation of reparation;[4] and (ii) reparations must insofar as possible eradicate the consequences of the illegal act. Such

[1] Shelton 2015.

[2] Gillard 2003, p. 530.

[3] Factory at Chorzów, Germany v Poland, Judgment of 13 September 1928 (Merits), PCIJ, Ser. A, No. 17, para 78 (emphasis added).

[4] On the issue of causation, see Plakokefalos 2015, pp. 481–483.

approach has been reiterated several times in various judicial and non-judicial settings and it was enshrined in the International Law Commission (ILC) Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA).[5] The ARSIWA explain that a State responsible for the commission of a wrongful act is under an obligation to cease the conduct and to offer appropriate assurances, normally given verbally, and guarantees of non-repetition, such as preventive measures to be taken to avoid repetition of the breach. The responsible State is also under an obligation to make reparation for the injury caused by the internationally wrongful act. Notably, although Article 33 stipulates that the ARSIWA concern the duties owed by the responsible State towards other States, they are without prejudice to 'any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State', hence meaning that in the context of human rights the individuals are the ultimate beneficiaries and in that respect the holders of an array of rights, including the right to reparation.[6]

The forms of reparations identified in the ARSIWA and endorsed by the jurisprudence of the International Court of Justice (ICJ) are restitution, compensation and satisfaction, either independently or in combination and, where appropriate, accompanied by interest.[7] Restitution, or *restitutio in integrum*, is commonly regarded as the preferred remedy, in the sense that it is the 'best' and the fairest way in which a violation of international law can be redressed.[8] Compensation is a secondary form of reparation and this entails that a State has the obligation of compensation for damage when this has not been made good by restitution, thus covering any financially assessable damage including loss of profits insofar as it is established.[9] Satisfaction, which is the third type of reparation envisaged in the ARSIWA, is relevant whenever restitution and compensation cannot result in full reparation.[10] Satisfaction can be provided in multiple ways, for example a State can formally acknowledge the wrong done, express its regret, formally apologise or choose another appropriate modality.[11] The commentary makes clear that the obligation of full reparation excludes exemplary or punitive damages or other awards that would extend beyond remedying the actual harm suffered as a result of the wrongful act.[12]

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[5] International Law Commission, Responsibility of States for Internationally Wrongful Acts, UN Doc. A/RES/56/83 (2001).

[6] While there is overwhelming support in the international legal community for the right to reparation for individuals, see in particular Capone 2017; Shelton 2015; and Evans 2012, some authors, in particular Professor Tomuschat, offer an opposing opinion. See Tomuschat 2002, p. 166; and Tomuschat 2005, pp. 582–584.

[7] Nissel 2006; Crawford 2002, p. 201.

[8] Buyse 2008, p. 129.

[9] Article 36 ARSIWA.

[10] Tomuschat 2007, pp. 907–911.

[11] Article 37 ARSIWA; Gray 1987, p. 13.

[12] Shelton 2002, p. 845.

The relevant provisions of the Articles on the Responsibility of International Organizations (ARIO) mirror the text of the ARSIWA, reiterating the existing forms of reparation and maintaining the same hierarchy between restitution, compensation and satisfaction. Although perhaps trivial, it is worth stressing that neither set of articles addresses primary rules, nor the content of international obligations, the breach of which gives rise to responsibility. These primary rules are found instead in the international agreements that establish international organizations, in treaties to which States or international organizations are parties, and in general international law.[13] The international legal framework dealing with the breach of an international obligation and the consequences of such breach is relevant to the present analysis in light of the fact that the employment relationship between staff members and international organizations is governed by the internal law of the organization, which, as authoritatively stated by Amerasinghe,[14] is a 'particular type of international law'.[15] The claims arising from the employment relationship by staff members against international organizations are generally settled judicially by international administrative tribunals (IATs),[16] which are international in character and have been established by, or under the constituent instruments of, such organizations.[17]

With regard to international organizations' duty to provide reparations as a result of breaches of international obligations, the commentaries to the ARIO highlight that compensation is the form of reparation most frequently awarded by international organizations,[18] and make reference to the relevant practice, starting from the settlement of claims arising from the United Nations (UN) operation in the Republic

[13] Daugirdas 2015, p. 994. The question of international organizations being subjects of international law and hence bound by certain legal obligations has been addressed by the ICJ: '[i]nternational organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties'. ICJ, Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, 20 December 1980, I.C.J. Rep. 73, paras 89–90.

[14] Amerasinghe 2005, p. 272, where the author explains the *ratio* behind the necessity of such internal law: '[i]f the national law of the member states applied to relations between the organization and its staff, the courts of states would probably be competent to hear disputes, apart from employment relations being subject to the laws of member states, a situation which would have had drawbacks for the organization. It would then find itself subject to the control of members.'

[15] Amerasinghe 2010, p. 375.

[16] Amerasinghe 1996, p. 162, to use the author's words: 'It is important to note that these are not subsidiary organs of the organ of the organization establishing them or of any other organ. They are true judicial organs with independence and the capacity to give binding decisions like any court of justice, binding on the organization over which they exercise jurisdiction and even on the organs creating them.'

[17] Ibid.

[18] Articles on the responsibility of international organizations, with commentaries, Yearbook of the International Law Commission, 2011, vol. II, Part Two (ARIO with commentaries). See Chap. 3 by Spagnolo in this volume.

of Congo.[19] The commentary to Article 31 of the ARIO provides a definition of 'injury', explaining that this term covers any 'damage' or 'harm',[20] i.e. a concept which 'is common to all the international law sub-systems', whether material or moral, caused by an internationally wrongful act. Moral, or non-material damage is generally understood to encompass loss of loved ones, pain and suffering as well as the affront to sensibilities associated with an intrusion on the person, home or private life.[21]

In the ARSIWA and the ARIO the most prominent role in the reparations discourse is played, respectively, by States and international organizations. Nonetheless, it is undeniable that in some fields of international law, e.g. human rights law and environmental law, the rules on reparations are more likely to be invoked in proceedings involving individuals and non-State actors, i.e. outside the traditional inter-State paradigm. This has led to the development of an individual's right to reparation, which is comprehensively outlined in the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (UNBPG), adopted by the UN General Assembly (UNGA).[22] Despite their soft law status, the UNBPG represent a landmark shift towards the recognition of an individual legal standing to make claims for reparations in judicial and non-judicial settings.[23] Furthermore, the UNBPG has contributed to shedding light on the interplay between the concepts of 'remedies'[24] and 'reparation', explaining that the former encompasses equal and effective access to justice, access to relevant information concerning violations and reparation mechanisms, *and* adequate, effective and prompt reparation for harm suffered.[25] The forms of reparation envisaged by the UNBPG are not limited to restitution, compensation and satisfaction, but include also rehabilitation and guarantees of non-repetition, thus broadening the scope of the reparative measures that can be awarded in case of human rights violations.

[19] Simmonds 1968, pp. 231–235.

[20] The terms 'injury', 'harm', 'damage', 'loss' etc… are not defined consistently in international law and there are no agreed or exact equivalencies between in all various official languages of the UN. Crawford et al. 2001, p. 971.

[21] Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, Yearbook of the International Law Commission 2001, vol. II, Part Two, p. 101 (ARSIWA with commentaries).

[22] UNGA, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law UNBPG 2005, A/RES/60/147.

[23] Capone 2017, p. 71.

[24] On the definition of remedies under international law see generally Capone 2012.

[25] UNBPG 2005, p. 6.

Claims for reparations brought forward by international organizations' personnel injured while on mission are, at least in part, informed and guided by the international framework outlined above. In addition to cases of so-called 'direct' State and international organization responsibility, international practice indicates that responsibility can also be attributed based on general insufficiency of government actions in meeting States' or international organizations' obligations, when these require some form of due diligence.[26] The principle of due diligence applied to the obligations of conduct serves as a criterion for assessing State or international organization compliance with a given duty, regardless of the consequences of a particular action or omission.[27] For example, failing to introduce or enforce preventive measures can be considered an infringement of the standard of due diligence, as the judgment thus goes to 'a legally imputable difference between conduct *as it has been* and conduct *as it should have been*'.[28] Therefore States and international organizations are required to 'take all feasible measures' necessary to prevent harmful effects, but are not obliged to guarantee those effects will not arise.[29] There is a significant overlap between the common law concept of a duty to exercise reasonable care and the duty to exercise due diligence contained in international primary norms requiring such standard.[30] In a nutshell, and allowing for a certain degree of simplification, it can be argued that the former is the transposition of the latter at the level of municipal law for States, and internal law for international organizations.[31]

After this short introduction, the present chapter will first deal with the relevant international organizations' implementation of the right to reparation, providing a critical appraisal of whether and to what extent IATs have been able to go beyond the usual recourse to compensation, widely regarded as the most common form of reparation in administrative settings.[32] Secondly, this chapter will discuss the residual application of States' diplomatic protection and international organizations' functional protection, in cases where the injury suffered by the staff member engages the interests of the State of nationality, the international organization, or both. Finally, the concluding remarks will provide an analytical summary of the main findings enshrined in this chapter.

[26] Pisillo Mazzeschi 1992; Kulesza 2016, pp. 264–266.

[27] Kolb 2017, p. 41.

[28] Ibid.

[29] Kulesza 2016, p. 267.

[30] See Chap. 2 by de Guttry in this volume.

[31] Blay et al. 2005.

[32] Shelton 2015, p. 175.

18.2 An Overview of the Reparation Awards Issued by International Administrative Tribunals

The obligation to award adequate reparation and the obligation to provide an effective route to obtain it, are essential elements of victims' redress. The (procedural) means by which a right is enforced, or the means by which a violation of a right is prevented or redressed, and the substance of the relief afforded are two sides of the same coin and the latter cannot exist without the former. Accordingly, the next two sections will deal with both aspects in order to provide the reader with a better understanding of the concrete implementation of the general principles presented above.

18.2.1 A Few Preliminary Caveats on the 'Route' to Reparations

Notably, IATs can be regarded as a relatively recent development. Before the establishment of IATs, internal disputes of international organizations relating to employment relations were usually settled, not by judicial means, but by the administrative decision of an executive organ with or without an appeal to the legislative or deliberative organ.[33] Even since the IATs have been set up, it is worth stressing that the initial remedial decision after the dispute arises usually is still taken by an executive organ. It is then left to the employee of the international organization, if he/she is dissatisfied, to take the matter up in a judicial forum where available.[34] Since surveying all the existing executive organs of the various international organizations would be impossible, the overview provided below will focus only on the relevant IATs and their approach to reparations. It is worth clarifying that the jurisdiction of these bodies is generally restricted to actions brought by staff members, or in some instances persons with derivative rights, e.g. the family of the injured staff member, against the organization, provided such cases concern their contracts or terms of employment.[35]

Of course, the exact scope and breadth of the jurisdiction of each tribunal depends on the particular provisions of its statute. Nonetheless, it is possible to infer that there are certain general principles applicable to most settings. In the first place, the cases must arise from the contract of service or terms of employment. Second, they must be brought by staff members or by persons with derivative rights

[33] Amerasinghe 2005, p. 489.

[34] Ibid.

[35] The majority of international organizations base their relations with their staff members on a contractual nexus, in only a handful of cases is the bond between the organization and its staff members statutory and not contractual. Amerasinghe 2005, p. 281. On the different models of internal administrative tribunals, see Chap. 2 by de Guttry in this volume.

specified in the statute. Thirdly, the staff member is always the plaintiff and the organization is the defendant.[36]

Furthermore, it should be stressed that the jurisdiction of the IATs is often seen as complementary to the immunity enjoyed by the respondent international organization. Due to the fact that international organizations usually enjoy immunity in disputes brought by private parties, including their personnel, such bodies are called to provide an alternative judicial or quasi-judicial route to justice, and thus reparations.[37] Ultimately, this is both a legal requirement stemming from treaty obligations incumbent upon international organizations, and the result of human rights obligations involving access to justice.[38] Thus, in lieu of litigation before various national courts,[39] staff members are supposed to bring their complaints before internal grievance mechanisms and ultimately before administrative tribunals set up by the organizations.[40] It is worth highlighting that the scope of jurisdiction of such administrative tribunals largely covers the kind of staff disputes that are *de facto* insulated from national court's scrutiny as a result of the immunity from legal process enjoyed by international organizations.[41]

Moreover, until quite recently, even when the grant of immunity was not explicit,[42] national courts considered staff disputes to fall outside the scope of their jurisdiction. This traditional view has been challenged in a number of cases brought before national courts of various European countries, as they have started to examine the 'human rights impact' of their immunity decisions,[43] in light of the jurisprudence of the European Court of Human Rights (ECtHR).[44] In other words,

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[36] Ibid., p. 497.

[37] As stressed by the International Labour Organization Administrative Tribunal (ILOAT) in the *Rubio case*: '[…] an employee of an international organization is entitled to the safeguard of an impartial ruling by an international tribunal on any dispute with the employer'. ILOAT, Rubio v. Universal Postal Union, Judgment, 10 July 1997, Case No. 1644, para 12.

[38] The concept that human rights are binding upon international organizations has been endorsed by many administrative tribunals in their jurisprudence; see Reinisch 2008, p. 290. On access to justice as a human rights see Francioni 2007.

[39] There are many States whose courts have recognised the immunity from jurisdiction of international organizations in employment-related cases, e.g. Germany, Argentina, Mexico, Chile, the Philippines etc…See Amerasinghe 2005, p. 325.

[40] Reinisch 2008, p. 291.

[41] Reinisch 2008, p. 287.

[42] Gaillard and Pingel-Lenuzza 2008, p. 2.

[43] Reinisch 2008, p. 295. For example in some cases French courts have actually refused to accord immunity to international organizations where claimants would have been deprived of a forum hearing their claims, see Tribunal de grande instance de Paris (ord. Re f.), UNESCO v. Boulois, 20 October 1997, Rev. Arb. 575.

[44] See ECtHR (Grand Chamber), Waite and Kennedy v. Germany, Judgment (Merits), 18 February 1999, Application No. 26083/94. In this case, which involved contractors suing the territorial State (Germany) for dismissing their claim regarding an employment contract with the European Space Agency (ESA), and in subsequent ones, the ECtHR found that: '[i]t would have been incompatible with the object and purpose of the ECHR if the Contracting States were totally absolved from their responsibility under the Convention in a particular field by the attribution of immunity to an

national courts' current approach in most instances consists of verifying the existence of the international organizations' internal justice systems and assessing whether it affords a level of protection that is equivalent to the protections provided in the European Convention of Human Rights.[45]

18.2.2 The Substance of the Relief Afforded by International Organizations

In the aftermath of injuries suffered by the civilian personnel as a result of breaches of international organizations' duty of care, a number of cases have been brought before the relevant administrative tribunals. It has been stressed in many instances that international organizations 'have a duty to adopt appropriate measures to protect the health and ensure the safety of their staff members […] An organization which disregards this duty is therefore liable to pay damages to the staff member concerned.'[46] This statement has often led to the award of compensation for monetary and moral damages suffered by the complainant and attributable to the international organization's failure to fulfil its duty to protect the staff member concerned. In respect to the UN administrative justice system, it is worth stressing that the Statute of the United Nations Dispute Tribunal (UNDT) and the Statute of the United Nations Appeals Tribunal (UNAT) foresee only two kinds of reparations, which can be ordered either alone or in combination, i.e. (i) rescission of the contested administrative decision or specific performance; and (ii) compensation for harm, supported by evidence, which shall normally not exceed the equivalent of two years' net base salary of the applicant.[47] As noted by Reinisch and Knahr, the UNDT and UNAT power to order specific performance is severely limited in practice, because the fixed amount of compensation makes it easier for the Secretary General to choose to grant only monetary relief.[48] Furthermore, it has

international organization', para 57. See Gaillard and Pingel-Lenuzza 2008, p. 5; see also Webb 2016, p. 756.

[45] Ibid.

[46] ILOAT, Mr. F. M. against the Organisation for the Prohibition of Chemical Weapons, 17 February 2005, Judgment No. 2403, para 16 (see Annex II, Case 14); ILOAT, Mr. A. P. against the International Telecommunication Union (ITU), 6 July 2011, Judgment No. 3025, para 2 (see Annex II, Case 11); ILOAT, J. T. B. (No. 4) v. WHO, 6 July 2016, Judgment No.3689, para 5 (see Annex II, Case 21).

[47] Article 10(5)(a) and (b) UNDT Statute, as mirrored by Article 9(1)(a) and (b) UNAT Statute. Both provisions further specify that the UNDT and the UNAT in exceptional cases may order the payment of a higher compensation for harm, supported by evidence, and shall provide the reasons for that decision. Statute of the United Nations Dispute Tribunal (adopted 24 December 2008) by UNGA Res 63/253 GAOR 63rd Session Supp 49, vol. 1, 503; Statute of the United Nations Appeals Tribunal (adopted 24 December 2008) UNGA Res 63/253 GAOR 63rd Session Supp 49, vol. 1, 503.

[48] Reinisch and Knahr 2008, p. 476.

been argued that the two-year limitation may often amount to inadequate compensation and an injustice to the compensated party.[49]

Instead, the International Labour Organization (ILO) Administrative Tribunal (ILOAT), the equivalent appeal tribunal which currently exercises competence over staff disputes involving 58 international institutions (and their staff) in addition to the ILO itself,[50] awards monetary compensation only in cases where rescission or specific performance is not possible or advisable.[51] Notably, the ILOAT does not have the two-year net base salary limit on award for claimants,[52] even though in practice the ILOAT awards very rarely exceed the UNAT limits.[53]

An approach similar to that adopted by the ILOAT is followed by the World Bank Administrative Tribunal (WBAT), whose Statute states that

> If the Tribunal finds that the application is well-founded, it shall order the rescission of the decision contested or the specific performance of the obligation invoked unless the Tribunal finds that the Respondent institution has reasonably determined that such rescission or specific performance would not be practicable or in the institution's interest. In that event, the Tribunal shall, instead, order such institution to pay restitution in the amount that is reasonably necessary to compensate the applicant for the actual damages suffered.[54]

The absence of a maximum ceiling on compensation that may be ordered by the WBAT is noteworthy. Nonetheless, the key point is that the WBAT is empowered to make a determination on the conclusion reached by the respondent institution, thus meaning that the WBAT may in the final analysis take its own view on whether the respondent has reasonably determined that the non-financial remedy would not be practicable or in the institution's interest. Thus there is the possibility that the WBAT could overrule the view expressed by the respondent institution, even though it is very unlikely that it would do so.[55]

At the regional level in the case of the EU, the Staff Regulations describing the rules, principles and working conditions of the European civil service[56] provide that

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[49] Robertson et al. 2006, p. 20, para 53.

[50] For a brief excursus on how ILOAT and UNDT/UNAT were established see Riddell 2010; see also Klabbers 2015, pp. 216–218. See Chap. 7 by Creta in this volume.

[51] Statute of the Administrative Tribunal of the International Labour Organisation (adopted 9 October 1946 as amended 29 June 1949) (International Labour Office Geneva 1954). See Article VIII: 'In cases falling under article II, the Tribunal, if satisfied that the complaint was well founded, shall order the rescinding of the decision impugned or the performance of the obligation relied upon. If such rescinding of a decision or execution of an obligation is not possible or advisable, the Tribunal shall award the complainant compensation for the injury caused to him.'

[52] Administration of Justice: Harmonization of the Statutes of the United Nations Administrative Tribunal and the International Labour Organization Administrative Tribunal, Report of the Joint Inspection Unit, Doc. JIU/REP/2004/3, Geneva 2004, 2006, para 5.

[53] ILOAT, In re Grasshoff v. World Health Organization (WHO), 24 April 1980, Judgment No. 402, para 6 (see Annex II, Case 19).

[54] Article XII, Amended Statute of the World Bank Administrative Tribunal. See Chap. 14 by Viterbo in this volume.

[55] Lewis 2012, p. 344.

[56] See Chap. 8 by Saluzzo in this volume.

an official working for the EU is insured, from the date of his entering the service, against the risk of occupational disease and of accident;[57] furthermore injuries resulting from threats or attacks to his/her person or property by reason of his/her position or duties give rise to the right to receive compensation.[58] Finally, in the event of an official's death, the surviving spouse or dependent children shall receive the deceased's full remuneration until the end of the third month after the month in which the death occurred.[59] Moreover, as addressed in the sadly famous case of *Livio Missir Mamachi di Lusignano v. European Commission*,[60] the EU Civil Service Tribunal held that, in view of the lump-sum nature of the benefits laid down in the Staff Regulations for the heirs and successors of a deceased official, those heirs and successors are entitled to seek additional compensation from the institution—in the present case, the Commission—where the latter can be held responsible for the death of the official and the benefits payable under the staff insurance scheme are insufficient to provide full compensation for the injury suffered.[61] Nonetheless, the EU Service Tribunal found that the Commission was only 40% responsible for the damage caused,[62] and that the claim for compensation for the non-material damage suffered by the victim's heirs was inadmissible.[63] On 7 December 2017 the Appeal Chamber of the General Court overturned the judgment, firstly by recognising the joint and several liability of the Commission,[64] secondly by affirming that the victim's sons had suffered not only material damage, but also moral damage.[65] With regard to the latter issue, the Appeal Chamber confirmed that the concept of moral damage is not spelled out in the Staff Regulations of officials of the EU. However, the claim is not inadmissible since it is possible to rely on general principles of law shared by EU Member States, which in similar circumstances provide the persons entitled with the right to claim compensation for moral damages before a national judge.[66] Consistently with this view, the Appeal Chamber confirmed the Commission's responsibility to pay in full 3 million EUR in compensation for the material damage suffered by Mr. Missir

[57] Articles 73(1) and (2), Regulation No 31 (EEC), 11 (EAEC), laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Economic Community and the European Atomic Energy Community, last amended 12 December 2014 (EU Staff Regulations).

[58] Article 24 EU Staff Regulations.

[59] Article 70 EU Staff Regulations.

[60] EU Civil Service Tribunal, Livio Missir Mamachi di Lusignano v. European Commission, 12 May 2011, Case F-50/09 (see Annex II, Case 7).

[61] Ibid., para 106.

[62] Ibid., paras 192–193.

[63] Ibid., paras 84–86.

[64] General Court of the EU (Appeal Chamber), Livio Missir Mamachi di Lusignano and Others v. Commission, 7 December 2017, Case T-401/11 P RENV-RX, paras 114–119 (see Annex II, Case 10).

[65] Ibid., paras 204–205.

[66] Ibid., para 194. See Chap. 4 by Gasbarri in this volume.

Mamachi's heirs, furthermore the Court imposed on the Commission the payment, to each of the claimant, of 100,000 EUR in compensation for moral damages.

With regard to the North Atlantic Treaty Organization (NATO), the organization's duty to provide redress to the civilian staff injured while participating in a mission is stated in the Civilian Personnel Regulations (CPR).[67] According to Article 14(2) of the CPR

> If, by reason of their present or former office or duties with the Organization, staff members or former staff members or members of their families suffer material damage, the Organization shall, subject to the provisions of Article 14.4, grant compensation insofar as they have not wilfully or through serious negligence themselves provoked the damage and have been unable to obtain proper redress, taking also into account any other payment coming from the Organization or from other sources.

The Secretary General and the major NATO commanders enjoy a discretionary power to decide whether there is a direct link between the injury suffered and the staff members, or former staff members, whether proper redress has been obtained, what form any assistance should take and, in the case of material damage, what compensation, if any, should be granted.[68] The CPR makes explicit reference only to material damage, nonetheless, the cases brought before the NATO Administrative Tribunal (NATO AT) show that the claimants tend to seek also moral damage for the injury suffered, although their request is, in most cases, dismissed for 'lack of justification'.[69]

Concerning the Council of Europe (CoE), Article 60(2) of the Staff Regulations affirms that the Administrative Tribunal shall have unlimited jurisdiction in disputes of a pecuniary nature and '[i]n other disputes, it may annul the act complained of. It may also order the Council to pay to the appellant compensation for damage resulting from the act complained of.'[70] Notably, 'annulment decisions' are subject to a caveat, in fact

> If the Secretary General considers that the execution of an annulment decision is likely to create serious internal difficulties for the Council, he or she shall inform the Tribunal to that effect in a reasoned opinion. If the Tribunal considers the reasons given by the Secretary General to be valid, it shall then fix the sum to be paid to the appellant by way of compensation.[71]

[67] NATO Civilian Personnel Regulations, last amended 25 June 2016.

[68] Ibid., Article 14(4). Disputes concerning the decision can be brought before the NATO Administrative Tribunal.

[69] See for example NATO AT, JF Appellant v. NATO Airborne Early Warning and Control Force (Geilenkirchen Respondent), 2 September 2016, Case No. 2016/1070, para 48.

[70] Staff Regulations of the Council of Europe, amended version in force since 1 January 2017.

[71] Ibid., Article 60(7).

Therefore, compensation appears to be also in this instance the preferred form of reparation, which the CoE Administrative Tribunal awards for both material and moral damage following the recognition of the CoE responsibility.[72]

With regard to the Organization of American States (OAS), the Statute of the Administrative Tribunal establishes that

> If the Tribunal finds that the complaint is well founded, either in whole or in part, it shall so state in its judgment and shall provide that the challenged decision shall be rescinded, that the obligation for which claim is made shall be complied with, or that the right of the complainant *shall be restored in such manner as the Tribunal may deem appropriate*.[73]

The provision provides for a broader reparations mandate in comparison to the other administrative tribunals surveyed in this section, thus conferring upon the OAS Administrative Tribunal the opportunity, at least in principle, to adopt an approach more in line with the current international human rights standards.

18.3 The Residual Application of Diplomatic Protection and Functional Protection

Notably, even after the successful resort to the international organization's internal mechanisms the staff member's claim may still be unsatisfied.[74] For example, what could happen is that the organization ultimately refuses to execute the judgment of the IAT and the reparations, although awarded, are not duly implemented. The question in this case would be whether the national State of the employee could exercise diplomatic protection in respect of his/her grievance vis-à-vis the organization. Another relevant issue arises when both the international organization and the State of nationality want to bring an international claim on behalf of an individual who suffered injury in circumstances involving the responsibility of the host State.[75] In such instances it is important to shed light on the relationship between the State's diplomatic protection and the international organization's functional protection of its agent and determine which mechanism should be used.

Although there are similarities between these two concepts, it is worth stressing that there are also important differences. *In primis*, diplomatic protection is a mechanism to claim reparations for injury suffered by the national of a State, premised on the *fictio iuris* that an injury to a national is an injury to the State itself.

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[72] CoE Administrative Tribunal, Nelly Rougie-Eichler v. Secretary General, 17 March 2015, Appeal No. 529/2012.

[73] Article IX of the Statute of the OAS Administrative Tribunal, 16 July 1971, Resolution CP/RES. 48 (I-O/71) (emphasis added).

[74] Amerasinghe 2005, p. 487.

[75] See Chap. 4 by Gasbarri in this volume.

On the other hand, functional protection is a method for promoting the efficient functioning of an international organization by ensuring respect for its agents.[76] Moreover, while the former is based on the nationality of the victim in accordance with the nationality of claims rule, the latter is based upon the victim's status as agent of the organization. Therefore, in the case of functional protection it does not matter whether or not the State to which the claim is addressed regards the international organization's agent as its own national, because the question of nationality is not pertinent to the admissibility of the claim.[77] Due to its scope and purpose, it is possible to affirm that functional protection is more closely related to States' right to claim for injuries suffered by their officials abroad than to diplomatic protection of private persons.[78]

This statement has important consequences since the duty of protection owed to officials of a foreign State has been traditionally recognised as higher than that owed to aliens as such.[79] With regard to the latter, States have a duty to protect aliens in light of a general principle of international law. Under this principle, the host State must make available 'suitable measures to prevent and to punish wrongful acts against the person or the property of an alien committed on its territory'.[80] The standard of suitability needs to be commensurate to what is usually made available for all individuals in a given State. A State that does not fulfil its obligation to protect any alien on its territory has an international obligation to pay compensation for damage to the State of nationality of the alien. Such compensation may be the subject of international procedures by the State of which the injured individual is a citizen, namely, diplomatic protection.[81]

In relation to the former scenario, it should be noted that the general duty to protect also covers the case of the alien who is an organ or official of his own State and who is abroad on an official mission. Nonetheless, if for private persons the host State may limit itself to normal police oversight, for aliens who are organs of another State it must adopt measures which are 'all the more intense the higher their rank and the more dangerous their mission'.[82] Furthermore, even though already assured by the general principle of the protection of all aliens, the protection of an alien who is an organ or an official of a State is also contemplated and made obligatory by an *ad hoc* principle of international law. This norm is autonomous and it departs from the general principle to the extent to which it is designed to protect an interest that, primarily, belongs to the State as the organ or official is performing a State function. It follows that by safeguarding the person of the official

[76] Fifth report on diplomatic protection, by Mr. John Dugard, Special Rapporteur, 4 March 2004, A/CN.4/538, p. 49.

[77] Grant and Barker 2009, p. 230.

[78] Crawford 2014, p. 567.

[79] Conforti 2005, p. 113.

[80] Conforti and Focarelli 2016, p. 132.

[81] Hardy 1961, p. 517.

[82] Conforti and Focarelli 2016, p. 141.

or of the organ, the function of the State is safeguarded too.[83] The specificity and the importance of such norm become more evident in the case, still quite infrequent, of aliens who are citizens of one State and organs of another. The host State's obligation to protect in such a case exists, in international practice, both with respect to the national State and in respect to the State of which the alien is an organ.[84]

The principle that the State that accepts on its territory a foreign organ or official on a mission has an obligation, towards the State that the official represents, to protect him/her can be applied by analogy to the UN, as well as to the other international organizations. According to Conforti, the rationale of the principle, which as explained above consists in protecting not the individual, but the State function, 'easily covers the hypothesis of the function exercised for an IO'.[85] In cases where a foreign organ or official is injured on a mission, diplomatic protection can still be exercised by the national State in order to obtain compensation for damage for the victim or for his/her heirs. Notably, in such instance the State may also complain that the autonomous rule set in place for the protection of the State function has been breached. This means that the State can claim compensation for the damage that it has suffered through the loss or the injury of its organ or official. When the organ or official is a national of the State, this second claim may usually appear to be covered by diplomatic protection; whereas it will be fully autonomous in the case of an alien who is the organ or official of a State different from the State of which he or she is a national.[86] Finally, it is worth noting that one of the differences traditionally observed between claims by a State on behalf of its nationals, and those on behalf of its officials, is that whereas in the first, either as a procedural or as a substantive requirement, available local remedies must be exhausted, in the second no such rule applies; to use Hardy's words this entails that 'the plaintiff State can go straight to the Foreign Ministry of the offending State'.[87]

18.3.1 Diplomatic Protection of International Organizations' Staff Members by National States

Diplomatic protection, which can be also described as the procedure by which a State acts extraterritorially in order to assert its legal interest,[88] under international

[83] Ibid., p. 143.

[84] Ibid., p. 144.

[85] Conforti 2005, p. 115.

[86] Conforti and Focarelli 2016, p. 142.

[87] Hardy 1961, p. 525.

[88] A more comprehensive definition is enshrined in Article 1 of the ILC Articles on Diplomatic Protection, which reads: 'For the purposes of the present draft articles, diplomatic protection consists of the invocation by a State, through diplomatic action or other means of peaceful

law does not currently constitute a right of the injured individual, but is rather a discretionary remedy of the State concerned.[89] It follows that, in principle, a State has the power, not the duty, to intervene on behalf of its nationals.

Remarkably, in his work as Special Rapporteur, Dugard made a case for providing *de lege ferenda* that there was a duty to exercise diplomatic protection, subject to some exceptions, on request by the injured person if the injury resulted from a grave breach of a peremptory norm and the injured person was unable to bring a claim for the injury before a competent international court or tribunal.[90] The ILC ultimately failed to endorse this approach, concluding instead that international law neither imposes a duty of diplomatic protection on the State nor gives the injured person an enforceable right to the exercise of diplomatic protection by the State of nationality.[91] Along with nationality,[92] the other fundamental requirement for admissibility of a diplomatic protection claim is that the injured person has exhausted all effective local remedies available in the host State.[93] The idea behind the rule of exhaustion of local remedies is that 'the State where the violation occurred should have an opportunity to redress it by its own means, within the framework of its own domestic legal system'.[94]

With regard to claims brought by a State against an international organization and the duty to exhaust local remedies, two situations should be distinguished, on the one hand the generic situation where the international organization is the respondent in a case involving the protection of an individual who is a State's national, on the other hand the instance when the claim arises from the employment relationship between an individual and an international organization. In relation to the former, since international organizations possess international legal personality the view has been expressed that diplomatic protection vis-à-vis an international organization is also subject to the prior exhaustion of internal or local remedies.[95] The explanation provided is that, once the international personality of an international organization is recognised by a State, diplomatic action by that State in respect of a national allegedly wronged by the organization can only take place after

settlement, of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility.' Draft Articles on Diplomatic Protection, Official Records of the General Assembly, Sixty-first Session, Supplement No. 10 (A/61/10) (Draft Articles on Diplomatic Protection).

[89] McGregor 2007, pp. 908–911; Vermeer-Künzli 2007, p. 580.

[90] Dugard, First Report, Yearbook of the International Law Commission, 2000, vol. II, Part One, pp. 220–226.

[91] Crawford 2014, p. 571; Dugard 2005, p. 80.

[92] PCIJ, The Mavrommatis Palestine Concessions, Greece v. Britain, Preliminary Objections, 30 August 1924, PCIJ Ser. A No. 2, p. 4.

[93] Crawford 2014, p. 580; see Article 44 ARSIWA.

[94] ICJ, Interhandel Case, Switzerland v. U.S., Preliminary Objections, 21 March 1959, I.C.J. Rep. 6, p. 27.

[95] Amerasinghe 2010, p. 371.

the individual has exhausted the means of redress provided to him by the international organization.[96] Other authors, instead, have noted that, notwithstanding their international personality,[97] international organizations are not States,[98] and they normally lack the capacity to exercise jurisdiction over an individual, whether he or she be a national of a State or not, when an injury is inflicted by it on that individual.[99] Since there is no general principle that the rule of local remedies is automatically applicable to the situation, the duty to exhaust remedies, at least according to the Institute de Droit International,[100] is made dependent on the acceptance of the jurisdiction of the adjudicating body by the national State of the injured individual or on a binding decision of the international organization, to which the State must be a party.[101]

Concerning the latter scenario, i.e. claims arising from the employment relationship and brought by a staff members against the international organization, internal remedies are provided by administrative tribunals or courts established by, or under the constituent instruments of, such organizations. Disputes between individuals and organizations include cases where staff members of an international organization are injured while on a mission as a result of a breach of the organization's duty of care. Inasmuch as international organizations' written internal rules make specific provision for the exhaustion of internal remedies and spell out the remedies to be sought,[102] the applicants must seek redress, first, through the internal channels of dispute settlement of the organization and, then, through the international administrative tribunals having competence in the matter.[103]

Once the issue of admissibility is solved, in cases where no mode of settlement is agreed upon between the employee and the international organization, or in cases where local courts have no jurisdiction, there is no reason why an individual should not resort to a request for diplomatic protection by his national State. The State would not be precluded from exercising such protection, of course in appropriate circumstances.[104]

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[96] Ritter 1962, pp. 454–455.

[97] Gautier 2000, pp. 334–337.

[98] ICJ, Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 11 April 1949, I.C.J. Rep. 174, p. 179 (*Reparations case*).

[99] Amerasinghe 2010, p. 374; Crawford 2012, p. 714; Cançado Trindade 1979.

[100] Institut de Droit International, Session of Zagreb, 1971, Article 8: 54 AIDI (1971-II), pp. 469–70.

[101] Amerasinghe 2010, p. 374.

[102] Ibid., p. 376.

[103] Ibid.

[104] Amerasinghe 2005, p. 505.

18.3.2 The Functional Protection of International Organizations

The issue of functional protection by an international organization was first expounded in the *Reparations case*. A well-known passage of the case states that

> In order that the agent may perform his duties satisfactorily, *he must feel that this protection is assured to him by the Organisation, and that he may count on it*. To ensure the independence of the agent, and, consequently, the independent action of the Organisation itself, it is essential that in performing his duties *he need not have to rely on any other protection than that of the Organisation* (save of course for the more direct and immediate protection due from the State in whose territory he may be). In particular, *he should not have to rely on the protection of his own State*. If he had to rely on that State, his independence might well be compromised, contrary to the principle applied by Article 100 of the Charter.[105]

In the *Reparations case* what the ICJ acknowledged was first and foremost that, as a result of the according of international personality to international organizations like the UN, such international organizations have the right to bring claims on behalf of their staff members for injuries suffered in the performance of their official functions.[106] Furthermore, in the *Reparations case* the ICJ defined the term 'agent' as 'any person who, *whether a paid official or not*, *and whether permanently employed or not,* has been charged by an organ of the organization with carrying out, or helping to carry out, one of its functions, in short, any person through whom it acts'.[107] This definition is broader than the definition of 'officials' on whom privileges and immunities are conferred under the Convention on the Privileges and Immunities of the United Nations, since the Convention does not extend to those who are 'recruited locally and are assigned to hourly rates'.[108] Functional protection, as a general rule, can be triggered only if the agent is carrying out activities in the official services of the organization, i.e. 'in the performance of his duties', thus meaning that private acts of the agent will not be covered.[109] Even though the

[105] *Reparations case*, p. 183 (emphasis added).

[106] As already stressed above, the resort to functional protection remains a faculty of the international organization and not an obligation. A significant example is provided by the *Alrayes case*, discussed in Chap. 14 by Viterbo in this volume. When the US G4 visa of Mr. Alrayes, a Saudi Arabian national who worked as International Finance Corporation (IFC) Senior Officer on a Term contract, was cancelled for alleged terrorist activities the IFC provided assistance, also offering Mr. Alrayes new terms of appointment, but refused to take legal action against the US. WBAT, US. *Alrayes v. IFC*, Preliminary Objection, 13 November 2015, Decision No. 520; WBAT, US. Alrayes v. IFC, Merits, 8 April 2016, Decision No. 529 (see Annex II, Case 43).

[107] *Reparations case*, p. 64 (emphasis added).

[108] Convention on the Privileges and Immunities of the United Nations, opened for signature 13 February 1946, UNTS 33, vol. 90, p. 327, entered into force 17 September 1946.

[109] *Reparations case*, p. 183. See WBAT, Abadian v. International Bank for Reconstruction and Development (IBRD), 19 May 1995, Decision No. 141; in which the IBRD contended that the applicant was not performing official functions and that therefore the Bank was not in the position to pursue claims involving personal assets with a member country.

distinction between official duties and private acts seems rather clear on paper, in practice it is quite difficult to ascertain to what extent an agent of a given organization has acted in the course of the performance of his mission and this assessment needs to be carefully made on a case by case basis.[110] Clearly, in any instances where the injury suffered by the agent is not service-incurred, it would be difficult for an international organization to bring a claim against the host State and demonstrate that it failed to ensure the efficient and independent performance of the agent's duties.[111]

Traditionally the degree of protection that the organization may seek for its own benefit from a host State, by reason of the international obligations of the latter, will be considerably 'wider and usually less specific' than the duty of care that the organization will owe to the particular employee.[112] As mentioned above, in principle there is widespread agreement on the idea that international organizations' officials are entitled to the same degree of protection shown by the host State to officials or organs of another State.[113] This issue was amongst those that arose in the *Tellini case*. The case involved the assassination on Greek territory of the Chairman and several members of an international commission entrusted with the task of delimiting the Greek-Albanian border. The Committee of Jurists responsible for hearing the case, stated that '[t]he *recognized public character of a foreigner* and the circumstances in which he is present in the territory entail upon the State a corresponding duty of "special vigilance" on his behalf.'[114] The exact content of such duty was, however, not discussed, but, as clarified above, it is possible to affirm that this was one owed under general international law and would correspond to that owed by States to other States in respect of the latter's officials.[115] This entails that the receiving or host State has not only the 'duty of abstention' towards official of the foreign State (and thus towards the international organization's agents), but also of prevention of any acts violating the inviolability of such officials

[110] ICJ, Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, 29 April 1999, I.C.J. Rep. 62, p. 85, para 52.

[111] For example Regulation 2.07 of the Organization for Security and Co-operation in Europe (OSCE) Staff Regulations and Staff Rules, according to which: 'OSCE officials shall be entitled to the (functional) protection of the OSCE in the performance of their duties within the limits specified in the Staff Rules.' See Chap. 10 by Russo in this volume. See also Article 40(1) of the Council of Europe Staff Regulations, which states that: '[s]taff members may seek the assistance of the Secretary General to protect their material or non-material interests and those of their family where these interests have been harmed without fault or negligence on their part by actions directed against them by reason of their being a staff member of the Council.' See Chap. 11 by Magi in this volume. See also Article 14(1) of the NATO CPRs. See Chap. 9 by Vierucci and Korotkikh in this volume.

[112] Hardy 1961, p. 523.

[113] Eagleton 1925, p. 304. See Chap. 4 by Gasbarri in this volume.

[114] League of Nations Official Journal 1924, No 4, 524; quoted in Przetacznik 1983, p. 202 (emphasis added).

[115] Amerasinghe 2005, p. 392.

by private individuals.[116] In cases involving States that are not members of the international organization whose agent has been injured, it may be problematic to establish what kinds of obligations were owed. In the *Reparations case* the ICJ solely recognised the capacity of the UN to make a claim against non-member States, and not the basis upon which such claim could be actually brought.[117] Unlike a member State, non-member States do not owe specific duties to the organization under the law, meaning that in principle the foundation for claims will be lacking.[118] However, a basis for claims may exist in particular cases. For example a non-member State might have received an agent of an international organization into its territory in circumstances implying agreement on its part to be bound, in the treatment of the agent, by the same obligations as are incumbent on member States.[119]

Concerning instead the relationship between diplomatic protection and functional protection, although the ICJ stated in the *Reparations case* that an agent should not have to rely on the protection of his or her State of nationality,[120] the doctrine of functional protection does not prevent that State from exercising its right to offer diplomatic protection. Moreover, there is no rule of international law that assigns priority to the claim of either the State or the organization. The ICJ approach on this matter has been quite elusive, as the Court commented that it saw 'no reason why the parties concerned should not find solutions inspired by goodwill and common sense'.[121] Despite the fact that the two forms of protection are not mutually exclusive, in practice, the concurrent implementation of diplomatic and functional protection in relation to the same incident can cause difficulties. These difficulties are sometimes pre-empted by treaty provisions regulating how claims should be managed, also in light of the fact that, as stressed by the ICJ in the *Reparations case*, 'although the bases of the two claims are different, that does not mean that the defendant State can be compelled to pay the reparation due in respect of the damage twice over.'[122]

18.4 Concluding Remarks

The ICJ, as early as 1954, held that it would '[…] hardly be consistent with the expressed aim of the Charter to promote freedom and justice for individuals […] that [the United Nations] should afford no judicial or arbitral remedy to its own staff

[116] Przetacznik 1983, p. 39.
[117] *Reparations case*, p. 187.
[118] Conforti 2005, p. 116.
[119] Amerasinghe 2005, p. 393; Crawford 2014, p. 596.
[120] On this point see Chap. 16, Sect. 16.6 by Poli in this volume.
[121] *Reparations case*, p. 186.
[122] Ibid.

for the settlement of any disputes which may arise between it and them.'[123] As stressed above, the establishment of IATs fulfilled both a factual necessity and the need to satisfy a fundamental human right, i.e. individuals' right to access a court and to claim reparations.

Clearly, IATs do not form part of an interconnected judiciary system or of a structured judicial order. Furthermore, they have been established as the need arose and sometimes even in an irrational manner, like in the case of the ILOAT and the UNDT/UNAT that serve the same international organization and associated organizations.[124] The IATs' composition, their statutes and rules of procedure, as well as their regulations are definitely not homogenous.[125] Nonetheless, there are a number of common features, including, as discussed in this contribution, a very cautious approach to reparations, which is in line with international law's traditional understanding of reparations, but not with the more dynamic and victim-centred approach that is prospering under the international human rights law framework.

The question arises as to whether alternative mechanisms could be implemented at least in those instances where the injury suffered by the staff member engages the interests of the State of nationality, the international organization for which he or she works, or both. In principle, as previously discussed in this chapter, the possibility for States and international organizations to bring an international claim on behalf of their national/agent exists and is well established under international law, but it cannot be framed as an obligation and whether or not to resort to such mechanisms remains a choice of the interested State or the international organization.[126] As a result, the nexus of nationality or functionality alone are not sufficient to trigger the concrete exercise of such mechanisms, in whatever forms. The case of *Livio Missir Mamachi di Lusignano v. European Commission* is quite revealing in this sense. In fact, the European Commission, in the aftermath of the brutal murder of its official and his wife, swiftly affirmed that 'no negligence or fault could be attributed to the Moroccan authorities and that the conditions for opening diplomatic negotiations with Morocco with a view to obtaining compensation were not fulfilled'.[127]

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[123] ICJ, *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*, Advisory Opinion, 13 July 1954, I.C.J. Rep. 47, p. 57.

[124] There have been (so far fruitless) proposals for merging UNAT and ILOAT, in order to provide a strong and authoritative appeal tribunal for the resolution of all disputes involving staff employed by the UN or associated International Organisations. Robertson et al. 2006, p. 21.

[125] de Vuyst 1981, p. 82.

[126] This does not exclude the fact that international organizations still have the duty to take steps to alleviate the predicament in which the staff member finds himself/herself following a wrongful act or omission by the host State; as emerged from the *Hassouna case*, which concerned a UN staff member placed on *persona non grata* (PNG) status by the government of Sudan. UNDT, Hassouna v. Secretary General of the United Nations, 10 July 2014, Judgment No. UNDT/2014/094, para 51 (see Annex II, Case 40).

[127] EU Civil Service Tribunal, Livio Missir Mamachi di Lusignano, para 30.

In conclusion, due to the jurisdictional immunity of international organizations from national courts and the discretionary nature of States' and international organizations' recourse to, respectively, diplomatic and functional protection, IATs remain the best and most reliable fora for securing access to justice and reparations in the aftermath of injuries suffered by the international organizations' personnel on mission and to implement the duty of care of international organizations towards their civilian personnel.

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Chapter 19
Concluding Remarks

Edoardo Greppi

In the preface to this book, Micaela Frulli highlighted the importance of a research project on the duty of care of international organizations. Indeed, it appears to be a rather underestimated issue, which nonetheless has a dramatic impact on the administration of international organizations, as the first chapter of this book proved. This does not want to suggest, however, that a research project on the duty of care has only practical significance. The very structure of the volume suggests, to the contrary, that a theoretical inquiry was needed before dwelling into more practical problems. In this regard, the duty of care of international organizations represents one of those silent areas of international law where more than elsewhere the doctrinal debate needs to be ignited.

Against this background, the book has shown that the three levels of analysis proposed—general international law, the law and practice of selected international organizations, and human rights law—reflect a tension between the need to establish general rules applicable to the discharging of the duty of care by international organizations and the acceptance of fragmented regimes that with some difficulties talk one to each other.

After having read the first part of the book, it seems that, indeed, a tension actually exists when it comes to defining the sources of the duty of care. Andrea de Guttry affirmed, in his chapter, that the duty of care at the same time is grounded in a peculiar general principle of law, in human rights law, particularly the right to life, or in a legal obligation that arises in the context of the rules of each international organization. This

Annex II—the Table of Cases—can be accessed online here: http://extras.springer.com/.

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approach catches the multifaceted nature of such an obligation. It is in fact reasonable to opine that the duty of care has different natures at the same time, and that at the present stage of the research agenda it is not possible to exclude one of them. Moreover, de Guttry's proposals firmly ground the duty of care in international law, meaning that neither the international organizations involved, nor their Member States can easily refuse to comply with it without violating an international obligation.

Consequently, in light of these findings, the following chapter, authored by Andrea Spagnolo, tackled the issue of conduct and responsibility attribution according to international law. This chapter showed how the rules on the responsibility of States and international organizations might provide useful criteria grounded in international law to allocate the duty of care in multilayered scenarios such as the field mission established by an international organization.

In line with the need to clarify the respective responsibilities of the relevant actors involved, Lorenzo Gasbarri analyzed in his chapter the relationship between the international organization and the host State when a mission is deployed, affirming that the so-called 'primary responsibility' of the latter is actually to be grounded in its human rights obligations. A crucial role is also played by States as members of international organizations, in that, as shown by Martina Buscemi in her chapter, they must abide by their own human rights obligations when transferring power to such organizations. Buscemi argued that States must use their leverage to ensure that violations do not result from the programmes, policies and rules of the organizations to which they are members, and act in a manner that fosters respect of the duty of care by those organizations towards their civilian personnel.

The existence of a duty of care and of the respective obligations of international organizations and States largely depends on the institutional link between the personnel and the organization involved, or on the control that the latter exercises on the former. To this end, it is clear that the contractual relationships of the individuals with the organizations involved play an important role; as Valeria Brino demonstrates in the third chapter of the first part, there is an extreme variety of forms of employment that does not help a uniform implementation of the duty of care.

The findings of the first part of the book are to be paired with the analysis of the implementation of the duty of care by the international organizations (UN, EU, NATO, OSCE, AU, OAS, CoE, WB) considered in Part II. A common feature of this survey is represented by an extreme variety in terms of sources, contents and recipients of the duty of care. As Annalisa Creta put it when assessing the implementation of the duty of care by the UN, 'the concept and legal contours of the duty of care of the United Nations as an employer are contained in a plethora of hard and soft law instruments, policies, regulations and rules, administrative instructions and other internal acts of the Organisation.'

Even the case of the EU is paradigmatic, as highlighted by Stefano Saluzzo in his chapter. The instruments adopted within the EU for the implementation of the duty of care are far from creating a comprehensive and coherent legal framework and their enactment is based on a complex interrelation between the role and functions of EU institutions and those of Member States.

This conclusion applies to all the other international organizations showing promises and perils of a normative framework that appears to be entirely grounded

on the internal rules of each organization. Promises and perils that are self-evident reading the various chapters. Indeed, some international organizations have a consolidated internal legal framework regulating the duty of care, such as the UN, the WB, the EU and CoE, while others, such as NATO, the OSCE, the AU and OAS, are still striving for developing their own norms. Consequently, the former organizations, more than the latter ones, have a more reliable practice as far as the discharging of the duty of care is concerned. In particular, the research showed that the absence of a comprehensive and detailed legal framework negatively affects the definition of the categories of individuals to which the duty of care is owed. This is evident in the chapters on NATO, the WB and the AU, respectively authored by Luisa Vierucci, Annamaria Viterbo and Linda Darkwa. Even in the context of the CoE, which has developed a coherent legal framework, the differences in treatment among the various categories of personnel appears to be a weak point, as highlighted by Laura Magi. All the more, the absence, or the weakness, in the internal rules of each organization, of a legal framework governing the duty of care impacts on the content of this obligation; consequently, the policies and practices of the international organizations analyzed represent a fragmented scenario.

The same conclusion applies to the functional protection that international organizations grant to their personnel. As Deborah Russo argued in her chapter on the OSCE, the exercise of protection is a corollary of the legal personality of each organization. This is an important issue for the OSCE, which appears to show a positive attitude towards the exercise of functional protection notwithstanding its disputed international status. Yet, all other international organizations show different degrees of engagement in this regard, proving that the fragmented scenario presented before impacts also on the issue of the functional protection.

Besides these elements, the central part of the book has also revealed areas of duty of care where intervention is even more necessary. One example is offered by risk assessment procedures, which differ not only among different international organizations, but sometimes also among organs of the same organization. Clarifying risk assessment procedures and making them more effective will serve at least two purposes: on the one hand, it will enhance the organization's capability to adopt preventive and protective measures suitable for the specific situation: on the other hand, it will increase awareness of personnel sent on mission, from the first stages of training to the final deployment abroad. David Gold provided some practical tips, in his contribution, on how risk assessment procedures and other relevant policies might be designed and implemented by international organizations. Undoubtedly, the adoption of a clear legal and policy framework in regard of certain elements of the duty of care may also play a role in improving accountability of the organization both at the internal and at the external level.

However, many of the mentioned issues arise as a result of different and diverging regimes dealing, directly or indirectly, with the implementation of the duty of care. In this regard, one might wonder whether such a fragmented scenario can find a convergence in the light of international human rights law. In fact, as Ludovica Poli stated in the opening chapter of Part III of the book, it is undeniable that international organizations must abide by international human rights standards, though mediated by the principle of specialty. Being the duty of care a corollary of

human rights positive obligations to protect life, health and safety of individuals, it can be concluded that international organizations are bound to respect the duty of care (and, thus, to take appropriate steps to safeguard life of their staff members, as well as their health and safety) even if it is not detailed in their internal rules.

A similar characterization of the duty of care entails also a positive dimension that applies transnationally, wherever the personnel is deployed on mission, as Chiara Macchi convincingly demonstrated. The findings of the first two chapters of Part III are important as far as they allow to conclude that international human rights law can be a harmonizing factor in the definition and the implementation of the duty of care by international organizations. Defining the duty of care obligations of international organizations in light of human rights law, as stated in the above-mentioned chapter by Buscemi, also entails recognizing the right of their civilian personnel to have access to justice for employment disputes. In this connection, one might ask what would be the 'dispute resolution mechanism' that must be set up to comply with human rights standard. According to Francesca Capone, in the last chapter of this part, the administrative tribunals of each international organization represent the most suitable and reliable avenue for obtaining redress, because the jurisdiction of national courts is barred by immunity and functional protection depends largely on the will of the organization concerned.

The findings of the three parts of the book allow a final reflection, which is at the same time critical and constructive. As already mentioned, there seems to be a tension deriving from the interplay between general and special regime(s) governing the duty of care. This tension is well reflected in the structure of this volume. However, a detailed analysis of the findings of the first two Parts of the book demonstrates quite the contrary. In fact, the same structure of international law—not only the sources, but even the rules on responsibility—clearly accommodates the different approaches adopted by the various international organizations and reported in the book. It appears that there is no 'structural requirement' for discharging the duty of care in a uniform way. In fact, international human rights law is potentially able to harmonize the content and the implementation of the duty of care, through the obligations binding upon international organizations, the host States and the States of nationality. In this regard, it appears that the actual practice of international organization could improve through a reference to human rights standards.

This should not be a surprise: the duty of care is basically a primary obligation entailing the responsibility of several actors. This book showed how the responsibility of one of those actors—the international organizations that send their personnel to missions and assignments—is designed and implemented.

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Appendix: Guidelines

Annex I: Guiding Principles on the Implementation by International Organizations of Their Duty of Care Obligations Towards Their Civilian Personnel

Andrea de Guttry

Introduction to the Guiding Principles

The aim of these Guiding Principles is to offer to all those interested a general overview and clarification of the content and articulation of the duty of care obligations. In the meantime, the Guiding Principles will facilitate the senior management of the interested international organizations in taking the necessary decisions aimed at aligning the practice and the internal rules of their Organization to the existing international obligations stemming from the duty of care.

The Guiding Principles have been distilled through a comprehensive analysis of the content of the duty of care as it emerges in the different contributions in this book from authoritative policy instruments and the internal regulations of international organizations, as well as from the jurisprudence of the administrative tribunals of international organizations.

10 Principles have been identified. For each of them a short commentary is provided together with some samples of policies and best practices that international organizations have already put in place in order to fulfil their duties. A list of case law completes the description of each Principle, referring to some relevant examples of cases in which the administrative tribunals of international organizations have contributed to defining the exact legal obligations deriving from the duty of care.

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Guiding Principles on the Implementation by International Organizations of Their Duty of Care Obligations Towards Their Civilian Personnel

Principle 1—Safe Working Environment

International organizations have a duty to provide a working environment conducive to the health and safety of their personnel.

Commentary

The international organization's specific obligation to provide a safe working environment for its employees has been consistently upheld by various international administrative tribunals. The term 'workplace' has to be intended in a wide sense, including the headquarters, any country of deployment/activity of the personnel, as well as wherever the Organization has ongoing official business. The employer has a duty to act with reasonable care to prevent and mitigate any harm to the health and safety of its personnel. The specific measures to be adopted will vary depending on a number of factors, including the severity and likelihood of the risks identified (see Principle 2), the context, the nature of the employment, specific vulnerabilities of the personnel, etc. In order to discharge this duty, the international organization must allocate financial and human resources to ensuring health and safety in the workplace as a matter of priority, taking concrete and targeted steps towards the fulfilment of this obligation. In any case the measures should not be discriminatory and personnel should not be deprived of protection due to the nature of their employment contract with the Organization (e.g. temporary staff, consultants, etc.).

Selected examples from the policies and practices of international organizations

African Union

- The AU is required by its own regulations to provide for the physical security of personnel by ensuring that they are provided with suitable logistics and facilities. The deploying authority is obliged to ensure that civilians have the requisite logistical support that guarantees their safety and security in a field office. It is the responsibility of the deploying authority to ensure that the logistical support required by the civilian component is addressed in the integrated concept of operations (or equivalent) and that adequate resources are in place to meet the needs of the civilian component along with the requirements of the police and military components (Standard Operating Procedure Establishment and Changes to the Role and Staffing Structure of the Civilian Component of a Field Operation).

European Union

- Directive 89/391 requires Member States and EU institutions to adopt the necessary legal and operational measures in order to eliminate risk factors for occupational diseases and accidents, and at the same time it encourages the development of improvements in the safety and health of workers (Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the health and safety of workers at work).

World Bank

- The 1983 Principles of Staff Employment establish that the WB organizations have a duty to establish and maintain programmes to promote the health and wellbeing of staff members and to provide financial protection and assistance for staff members and their families, including but not limited to annual, maternity and sick leave, coverage for medical and hospitalisation expenses, accidents and loss of life (WB, 1983 Principles of Staff Employment).

Selected examples of relevant case-law

- Administrative Tribunal of the African Development Bank, Clotilde Anne Isabelle Bai, Applicant African Development Bank, Respondent, 29 June 2010, Judgment No. 72 (see Annex YZ, Case 1)
- UNDT, Edwards v. Secretary General of the United Nations, 26 January 2011, Judgment No. 2011/022 (see Annex YZ, Case No. 39)
- UNDT, Mc Kay v. Secretary General of the United Nations, 9 February 2012, Judgment No. 2012/018 (see Annex YZ, Case 42)

Principle 2—Active Protection of Staff

International organizations shall actively protect their officers facing general and specific challenges and/or threats.

It is the duty of the international organization, as an employer, to make the necessary inquiries to arrive at a reasonable and careful assessment of the risks connected to employment, having regard to the nature, context and specific requirements of the work to be performed.

When using independent contractors, international organizations must use reasonable care in selecting them and maintain sufficiently close supervision over them to make sure that they use reasonable care.

Commentary

International organizations have a positive duty to actively protect their officers facing general and specific challenges and threats. This includes addressing specific challenges linked, for instance, to gender or sexual orientation, as well as addressing cases of physical and non-physical violence in the work place. Fulfilling this duty requires having in place a professional system for analysing available data on the security situation in a given area, a sound security risk assessment and risk

management system, continuously updated security and emergency plans, and a proper decision-making procedure that guarantees decision-makers are duly informed about the situation in the field and have the professional capacity to take informed decisions in due time.

While the employer shall not require the employee to work in a place that s/he knows or ought to know to be unsafe, some tasks and assignments carry inherent risks. It is a clear duty of the international organization, as an employer, to assess whether the risk is abnormal having regard to the nature of the employment and what the context- and employment-specific measures should be adopted in order to mitigate and eliminate the identifiable risks. Risk assessments should be carried out at the pre-posting/pre-deployment phase, as well as on a regular basis at different stages of the employment, in order to account for changing circumstances and newly emerging risks.

Whenever the employing Organization outsources specific activities, and especially those that might affect the safety, security and well-being of the employees, it must exercise reasonable care in the selection of the contractor and then maintain sufficiently close supervision over the latter to ensure that the all the contractual clauses are respected and fully implemented.

Selected examples from the policies and practices of international organizations

European Union

- The identified necessary security measures for the planning of a mission or of a deployment are generally included in the Concept of Operation (CONOPS), whose implementation is further detailed by the Head of Mission in the Operation Plan (OPLAN). Appropriate protection measures will be thus put in place 'to ensure an operationally acceptable level of security'. The EEAS also acknowledges its own duty to put in place in all its premises all appropriate physical security measures which shall be commensurate to the assessed risk (EEAS Security Decision, 2013).
- Risk assessment forms an integral part of the planning of a crisis management operation, of a Union's special representative deployment abroad and of the so-called 'pre-posting programme'. It is conducted using risk ratings defined by the General Secretariat, and can sometimes involve the deployment of an exploratory mission (Field Security Handbook for the Protection of Personnel, Assets, Resources and Information, 2008).

United Nations

- Minimum Operating Security Standards (MOSS) is the primary mechanism for managing and mitigating security risks to UN personnel. In some circumstances, context-specific Residential Security Measures (RSMs) can also be approved at a given duty station to enhance residential security depending on the residential security risk environment. When proper risk controls are not viable/effective, one potential option is the temporary removal of persons or assets from a

situation of unacceptable residual risk by using alternate work modalities, relocation or evacuation, or a combination thereof.
- The Security Risk Management entails a structured process that assesses the likelihood and impact of harmful events and combines them in a risk matrix. While some protective measures apply everywhere and at any time irrespective of the context, others are commensurate to the potential level of risks identified. A special risk management framework applies to 'high' and 'very high' security risks (UN Security Management System).
- The 2012 policy on the use of armed private security companies, adopted by the Inter-Agency Security Management Working Group, identifies in the responsible senior security official, supported by the Security Management Team, the person in charge of supervising the work of the contractor. The day-to-day management of the contract is the function of the UNSMS organization that has engaged the company (UNDSS Security Policy Manual, 2017, Chapter IV—I. Armed Private Security Companies).

Council of Europe

- The Safety and Security Department carries out country-specific security risk assessments and planning before deciding where to establish an office and throughout the execution of the office's functions. They are directly conducted by CoE security officers and include threat and vulnerability assessments for the country/area in which the office is located, as well as the proposal and implementation of risk-mitigating measures, i.e. reinforcement of physical security at CoE offices (Security Management System).

Selected examples of relevant case-law

- ADB Administrative Tribunal, Cynthia M. Bares et al. v. ADB, 31 May 1995, Decision No. 5 (see Annex XY, Case 2)
- ILOAT, In re Grasshoff (Nos. 1 and 2), 24 April 1980, Judgment No. 402, para 1 (see Annex YZ, Case 19)
- UNAT, Durand v. the Secretary-General of the United Nations, 19 August 2005, Judgment No. 1204 (see Annex YZ, Case 36)
- UNAT, Mwangi Against the Secretary-General of the United Nations, 30 September 2003, Judgment No. 1125 (see Annex YZ, Case 38)

Principle 3—Protection of Private Property

International organizations shall act with care and consideration with regard to their personnel's private property.

Commentary

The duty of care implies that international organizations have a broad duty to act with care and consideration not only with regard to the members of their staff, but also towards their property. This obligation entails assisting the personnel when their property, by reason of their present or former office with the Organization, suffers threats or attacks. It also requires the Organization to take all necessary

precautions when it decides to relocate the personal effects of its personnel from one place to another. The obligation is particularly stringent when it is not physically possible for the personnel to carry out the relocation because they are deployed far from their duty station, especially if the duration of the deployment lies solely within the discretion of the Administration.

Selected examples from the policies and practices of international organizations

European Union

- The Staff Regulations state the EU's duty to assist its officials in proceedings against any person perpetrating threats or attacks to person or property to which the official or a member of his/her family is subjected by reason of his/her position or duties (Regulation No 31 (EEC), 11 (EAEC), 1962).

NATO

- NATO's regulations posit that the Alliance has to provide assistance in cases where staff members or former staff members or their families, by reason of their present or former office or duties with the Alliance, suffer 'any insult, threat, defamation or attack on their […] property', 'in particular in taking action against the author of any such act' (NATO Civilian Personnel Regulations, 2005, Article 14.1).

OSCE

- OSCE Regulation 2.06 provides for compensation in case of loss and damage occurring to the officials' personal effects caused by the performance of their official duties. When the loss or damage occurs in an emergency caused by war, civil commotion or natural calamity, the maximum compensation is higher (OSCE Staff Regulations and Staff Rules, Regulation 2.06).

Selected examples of relevant case-law

- UNAT—Case 1545 v. the Secretary-General of the United Nations, 30 September 2009, Judgment No. 1472 (see Annex YZ, Case 34)
- ILOAT, F. M. v. the Organisation for the Prohibition of Chemical Weapons (OPCW), 2 February 2005, Judgment No. 2403 (see Annex YZ, Case 14)

Principle 4—Fair Labour Contracts

International organizations shall offer labour contracts which are fair and which take into due consideration the particular nature of the risks associated with the specific working context and with the personnel's specific tasks.

Commentary

The jurisprudence of the administrative tribunals has contributed to defining the international organizations' duty to offer 'fair contracts'. The notion of fairness has been interpreted, in cases of disputes with staff deployed overseas, to include: social services; the guarantee that, in the case of transfer from one post to the other, this

will be carried out with due respect for the dignity of the personnel concerned, particularly by providing them with work of the same level as that performed in their previous post and matching their qualifications; the payment of the agreed salary (which has to be fair considering the specific working conditions) on a regular basis; appropriate consideration for the period spent abroad on official mission; and the founding of decisions to reduce staff following a reconfiguration of the mission on grounds which are not manifestly unfair or erroneous.

Selected examples from the policies and practices of international organizations

European Union

- Contractual regimes have to provide for certain social services and benefits and for annual leave of various durations; they also include emoluments and family allowances when living conditions are particularly hard due to insecurity, climate, medical assistance or isolation of the area where the mission takes place ((Regulation No 31 (EEC), 11 (EAEC), 1962, Annex 10).

NATO

- If the period of the deployment is to be longer than 30 consecutive days, a staff member can only be deployed after he or she has expressed consent (Civilian Personnel Regulations, Annex XIV). The Regulations put temporal limitations on the deployment of staff members to a remote location not specifically mentioned in their contracts (Ibid).

United Nations

- 'Danger pay' is a special allowance established for internationally and locally recruited staff who are required to work in locations where very dangerous conditions prevail, comprising the following: duty stations where UN staff are clearly, persistently and directly targeted or where premises are clearly, persistently and directly targeted, thus presenting an imminent and constant threat to staff and activities; duty stations where UN staff or premises are at high risk of becoming collateral damage in a war or active armed conflict; and non-protected environments where medical staff are specifically at risk to their life when deployed to deal with public health emergencies as declared by the WHO.

Selected examples of relevant case-law

- ECJ, Mario Berti v. Commission of the European Communities, 7 October 1982, Case 131/81 (see Annex YZ, Case 9)
- ILOAT, J. L. Against the International Labour Organization (ILO), 8 July 2009, Judgment No. 2856 (see Annex YZ, Case 20)
- ILOAT, Jorge Giusti Bertolotti against the International Labour Organisation (ILO), 10 December 1987, Judgment No. 870
- ILOAT, R. A.-O. against the United Nations Educational, Scientific and Cultural Organization (UNESCO), 16 July 2003, Judgment No. 229 (see Annex YZ, Case 25)

- ILOAT, Stanley Robert Wakley v. WHO, 6 October 1061, Judgment No. 53
- IMFAT, 'A' v. International Monetary Fund, 12 August 1999, Judgment No. 1999-1 (see Annex YZ, Case 28)
- UNAT, Case 1358 v. the Secretary-General of the United Nations, 31 January 2006, Judgment No. 1275 (see Annex YZ, Case 33)

Principle 5—Informed Consent

International organizations shall make adequate information available to personnel about the potential dangers they might face and about the specific situation in the country of destination.

Commentary

Informed consent is a key principle of the duty of care and must always be fulfilled to assist the person in his/her decision whether or not to accept to be deployed. Consequently, international organizations have a duty to provide adequate information to their personnel about the potential dangers they might face in the mission they have been assigned to and update them continuously, should the external situation so require. The information to be provided to staff includes not only the political and security situation in the country but also proper information about specific challenges related to issues such as gender, sexual orientation, and access to medical care in the case of specific medical needs of the staff (such as HIV/AIDS). Proper information has to be provided, furthermore, about the need for vaccinations and immunizations, cultural issues, specific environmental problems etc.

Selected examples from the policies and practices of international organizations

Council of Europe

- The CoE has a contract with an international company to provide travel advisory services for all countries. It provides relevant security and cultural advice (gender issues included), health and hygiene information and advice, information about environmental threats and recommended medical facilities and embassies.

OSCE

- The principle of informed consent is applied throughout an OSCE mission. Officials will receive a 'security briefing' prior to the deployment on assessed risks, on the measures used by OSCE to face them and a field security briefing on arrival. They have the right to withdraw from a particular activity if they assess that the assignment is endangering their life or the lives of other officials. Security plans and contingency plans are delivered to all OSCE officials, in order to keep them aware of the specific risks of the mission and of the precautionary measures to be adopted (OSCE Operational Guidelines for Working

in a Potentially Hazardous Environment; UK Stabilisation Unit, Deployee Guide to Working in a Mission of the Organisation for Security and Co-operation in Europe, 2014).

United Nations

- In 2016, the UNSMS promulgated the policy 'Gender considerations in Security Management' for promoting the understanding by all UN security personnel of gender-specific risks for different groups of individuals, as well as the need for gender-sensitivity and gender-responsiveness in all aspects of the security management process.
- The UNSG underlined that the UN should take measures to ensure that personnel are properly advised, before departure, of conditions prevailing at the duty station to which they are assigned (Activities of the Office of the United Nations Ombudsman and Mediation Services, Report of the Secretary-General A/71, 2016).

World Bank

- Country Office Managers are responsible for familiarising resident and mission staff with the local security situation, security procedures and communications (Administrative Manual Statement 6.40 'Global Security', 2007). In country offices, Security Focal Points (SFPs) assist the personnel by managing their safety and security on the ground and by providing security information, advice and training.

Selected examples of relevant case-law

- ILOAT L. J.-S. v. the European Patent Organisation (EPO), 4 July 2013, Judgment No. 3213 (See Annex YZ, Case 22)

Principle 6—Non-discrimination and Respect of Personal Dignity

International organizations shall treat the workforce in good faith, with due consideration, with no discrimination, to preserve their dignity and to avoid causing them unnecessary injury.

Commentary

The relations between an international organization and its personnel must be governed by good faith, respect, transparency and consideration for the personnel's dignity. The prohibition on discriminatory treatment includes both direct and indirect discrimination, and entails both substantial and procedural aspects.

This principle must be observed in all aspects of the work relationship, including in case of transfer of a staff member from one post to another or changes to his/her job title. This duty also implies that the employer must inform the personnel in advance of any action that may imperil their rights or harm their rightful interests.

Selected examples from the policies and practices of international organizations

African Union

- The African Union has a stated duty to protect fundamental human rights, dignity, worth and equal rights of all its staff members. Its regulations specify that no staff member shall be discriminated against in pursuit of his or her career with the Union. They stipulate the Union's responsibility to provide assistance, protection and security for its staff members where appropriate against threats, abuse, harassment, violence, assault, insults or defamation to which they may be subjected by reason of, or in connection with, the performance of their duties (Staff Regulations and Rules, Regulation 3.2(a)).

NATO

- NATO's policies prohibit discrimination on the grounds of gender, race or ethnic origin, religion or belief, age or sexual orientation (NATO Civilian Personnel Regulations, 2005, Article 12; NATO Policy on Protection against Discrimination and Harassment at Work, 2003).

World Bank

- The general obligations of the IBRD, IDA and IFC in their relations with staff members include the duty to act with fairness and impartiality, the duty to follow due process, the duty of non-discrimination and the duty to respect the essential rights of staff members that have been and may be identified by the WB Administrative Tribunal (Principles of Staff Employment, 1983).

Selected examples of relevant case-law

- AsDBAT, Carl Gene Lindsey v. Asian Development Bank, 18 December 1992, Decision No. 1, para 12 (see Annex YZ, Case 3)
- ILOAT, C. E. S. v. the World Health Organization (WHO), 9 July 2014, Judgment No. 2642 (see Annex YZ, Case 13)
- ILOAT, G. V. against the International Fund for Agricultural Development (IFAD), 11 February 2015, Judgment No. 3409, para 10 (see Annex YZ, Case 16)
- ILOAT, H. P. W. against the International Telecommunication Union (ITU), 9 July 2014, Judgment No. 3353, para 26 (see Annex YZ, Case 17)
- ILOAT, In re Giordimaina v. the Food and Agriculture Organization of the United Nations (FAO), 30 January 2002, Judgment No. 2116 (see Annex YZ, Case 18)
- ILOAT, L. T. against the International Labour Organization (ILO), 6 July 2011, Judgment No. 3024
- IMFAT, 'G', Applicant and 'H', Intervenor v. International Monetary Fund, Respondent, 18 December 2002, Judgment No. 2002-3
- IMFAT, 'GG' (No. 2) v. International Monetary Fund, 29 December 2015, Judgment No. 2015-3 (see Annex YZ, Case 29)

Principle 7—Remedy

International organizations shall have in place sound internal administrative procedures, act in good faith and have proper functioning internal investigation mechanisms to address requests and complaints by their personnel within a reasonable time.

Commentary

International organizations must have in place an efficient and independent internal system to allow their staff to submit grievances and complaints and to see the latter answered in a proper and timely manner. Part of this obligation entails ensuring that proceedings move forward with reasonable speed. The contours of the obligation to properly and promptly investigate any grievances submitted by staff can vary depending on the gravity of the specific case submitted. Cases of serious misconduct, such as those involving harassment, and especially those involving physical or sexual violence, need to be prioritised, be dealt with quickly and with specific attention to the rights and the dignity of the person in question.

Selected examples from the policies and practices of international organizations

African Union

- The AU has an Office of Ethics exercising oversight over compliance with the relevant instruments of the Organization and providing advice to personnel who may allege infringement of their rights. The regulations provide for an Administrative Tribunal that is established by the Executive Council and has jurisdiction to hear cases of alleged violations of employees' terms of appointment and/or violations of the Staff Regulations and Rules (Staff Regulations and Rules, Rule 62.2).

Council of Europe

- The CoE Administrative Tribunal examines appeals by staff members against the decisions of the Secretary General concerning complaints against any administrative act adversely affecting them. During the proceedings before it, the Tribunal may arrange for any kind of inquiry it deems necessary (Rules of Procedure of the Administrative Tribunal of the Council of Europe, Rule 32).

NATO

- Personnel wishing to challenge a decision can start a four-step internal procedure. Other possible avenues include mediation and the submission of a complaint to the Head of NATO (Civilian Personnel Regulations, Annex IV). After exhausting the other available avenues, personnel can resort to the NATO Administrative Tribunal (ibid.).

Organization of American States

- The OAS has in place a system of administrative review of complaints by staff members. These include the right to a hearing in case of administrative actions

taken against the staff member; a right to reconsideration by the Secretary-General of any administrative decision taken, as well as resort to the OAS Office of the Ombudsperson (General Standards to Govern the Operations of the General Secretariat of the Organization of American States, OAS document OEA/Ser.D/I.1.2 Rev. 18).

United Nations

- The UN has in place a two-tier formal system of administration of justice composed of the UN Dispute Tribunal and the UN Appeals Tribunal (Staff Regulations and Rules, Regulation 11.1). Rule 11.1 further establishes avenues of informal resolution of disputes through the Office of the Ombudsman.

Selected examples of relevant case-law

- ILOAT, G. C. v. the International Atomic Energy Agency (IAEA), 8 February 2012, Judgment No. 3104 (see Annex YZ, Case 15)
- ILOAT, Mr A. K. against the United Nations Educational, Scientific and Cultural Organization (UNESCO), 14 July 2004, Judgment No. 2345
- ILOAT, Mr B. F. against the World Intellectual Property Organization (WIPO), 10 May 2007, Judgment No. 2636
- ILOAT, R. D.A. G. against the Pan American Health Organization, 4 February 2014, Judgment No. 3295 (see Annex YZ, Case 26)
- IMFAT, 'GG' (No. 2) v. International Monetary Fund, 29 December 2015, Judgment No. 2015-3 (see Annex YZ, Case 29)

Principle 8—Medical Services and Insurance Policy

The international organization has a duty to provide effective medical services to personnel, especially in case of an emergency and afterwards, through an efficient insurance policy, and adopt the necessary measures to guarantee the well-being of the staff.

Commentary

This duty must be fulfilled during the entire contractual assignment abroad and especially during an emergency situation and in its aftermath, and must guarantee that those who have suffered an incident receive the necessary medical and psychological attention for the necessary time after the traumatic event.

The sending Organization is required to offer proper health insurance that must cover the case of death and all possible incidents, including those related to malicious acts and terrorist acts. The insurance policy of any deploying institution should be continuously subject to updates and revision to make sure that it properly reflects the evolution of the situation in the country of deployment and/or new and emerging threats.

The international organization has to adopt all possible measures to prevent excessive stress and to promote the well-being of its staff, such as measures to facilitate the maintenance of proper connections with their families and their dependents (e.g. putting at their disposal free or reasonably cheap internet

connections and phone calls or providing for work breaks which should be long enough to allow family reunions) as well as facilitated access to psychological support during the mission and afterwards.

Selected examples from the policies and practices of international organizations

African Union

- Full medical benefits are provided for regular, continuing regular and fixed term staff. These include medical evacuation to an appropriate medical facility outside the duty station where necessary (Staff Regulations and Rules, Regulation 9). The AU has a positive obligation to provide a working environment that promotes the emotional and psychological well-being of employees (Ibid., Regulation 3(f)). In recognition of the potential challenges in the field, there are provisions for counselling to employees who may become traumatised (Standard Operating Procedure on Wellness of Civilian and other staff in a Field Operation, para 10).

European Union

- The EU has a duty to provide emergency medical assistance (Regulation No 31 (EEC), 11 (EAEC), 1962, Article 73; Rules of Insurance against the Risk of Accidents and of Occupational Disease). EU institutions usually pay an insurance policy which includes worldwide coverage and physician-directed access to local medical units and hospitals, 24-hour assistance, clinical resources, and medical evacuation.

Organization of American States

- The OAS will pay or reimburse reasonable hospital and medical expenses that are not covered by the health insurance plan (OAS Staff Rules, rule 108.23). Local offices may have established partnerships or references with health care providers; and the contact point in the host government may be activated to deal with emergencies.

World Bank

- The WB's policies include provisions on inoculations and medications to staff when they engage in operational travel or when they relocate due to change of duty station, protocols on medical clearance for staff travelling to a country dealing with a public health emergency, as well as on medical evacuation and other general health and safety standards at the workplace (Staff Rule 6.07 'Health Program and Services').

Selected examples of relevant case-law

- ILOAT, J. T. B. v. the World Health Organization (WHO), 6 July 2016, Judgment No. 3689 (see Annex YZ, Case 21)
- UNAT, Hjelmqvist v. the Secretary General of the United Nations, 31 July 1998, Judgment No. 872 (see Annex YZ, Case 37)

- UN Dispute Tribunal, Mc Kay v. Secretary General of the United Nations, 9 February 2012, Judgment No. 2012/018 (see Annex YZ, Case 42)

Principle 9—Functional Protection

The international organization should exercise its functional protection towards its personnel in full respect of international law.

Commentary

International organizations must do whatever is reasonably possible to protect, directly or in coordination with the State of nationality, their staff suffering violations of their rights perpetrated by the State of the territory where they are performing their official activities. Although functional/diplomatic protection is a discretionary right of international organizations according to international practice and rules, whenever the violation of rights concerns a staff member, the sending institution should use the tools available in the frame of diplomatic protection (such as request for clarification, request to stop the assumed illegal act etc.). Exercising functional/diplomatic protection might be necessary for the sending Organization, acting directly or in close coordination with the State of nationality of the staff member to properly discharge its duty of care, provided that the person is suffering a violation of his/her rights and that there are no valid and credible arguments presented by the international organization not to exercise such protection.

Selected examples from the policies and practices of international organizations

African Union

- Guaranteeing functional/diplomatic protection to deployed personnel is a collective responsibility between the AUC and member States. As sovereign entities, member States retain the primary responsibility for guaranteeing the protection and security of all those within their territory. In exercising functional protection, the AU's primary responsibility, therefore, rests with facilitating the accordance of the necessary protections to its deployed personnel. This does not absolve the AU from fault in the event of breach, as '[t]he Union's institutions shall, where applicable, assume responsibility for any damage resulting from the violation of protected rights of staff members' (Staff Regulations and Rules, Article 3.2(iv)).

Council of Europe

- Staff members may seek the assistance of the Secretary General to protect their material or non-material interests and those of their family where these interests have been harmed without fault or negligence on their part by actions directed against them by reason of their being a staff member of the Council (CoE Staff Regulations, 1981, Article 40). However, the Secretary General may consider that legal action may harm the interests of the Council and ask the staff concerned not to take such action. In such a case, the Council will repair the material damage suffered by the persons concerned, 'provided that they assign their rights to the Council' (Ibid.).

European Union

- The EU legal order does not expressly envisage the possibility for the EU to exercise functional protection with regard to its agents. Nevertheless, functional protection can be exercised in relation to any person working for the Organization, irrespective of the country in which they are carrying out their tasks and regardless of the administrative status deriving from the mode of recruitment (international or local, permanent or temporary). The EU has to assist its staff in proceedings against authors of threats, damages, and attacks to their dignity and their integrity (Regulation No 31 (EEC), 11 (EAEC), 1962, Article 24.1).

OSCE

- The OSCE has included the right to functional protection in its regulations, which establish that 'OSCE officials shall be entitled to the protection of the OSCE in the performance of their duties within the limits specified in the Staff Rules' (OSCE Staff Regulations and Staff Rules, Regulation 2.07).

Selected examples of relevant case-law

- CoE Administrative Tribunal, Renate Zikmund (I and II) v. Secretary General, 30 October 2009, Appeals Nos. 414/2008 and 459/2009 (see Annex YZ, Case 5)
- ILOAT, In re Jurado, 11 September 1964, Judgment No. 70
- UN Dispute Tribunal, Hassouna v. Secretary General of the United Nations, 10 July 2014, Judgement No. UNDT/2014/094 (see Annex YZ, Case 40)
- WBAT, Alrayes v. IFC, 13 November 2015, Decisions No. 520 (Preliminary Objection) and WBAT, Alrayes v. IFC, 8 April 2016, Decisions No. 529 (Merits) (see Annex YZ, Case 43)

Principle 10—Training of Staff

International organizations shall provide their personnel with adequate training and the necessary equipment to carry out safely the tasks to be performed.

Commentary

International organizations have a duty to provide their personnel with adequate training and the necessary equipment to carry out safely the task to be performed. This is a risk-minimising tool, especially in case of personnel's deployment to the field and to high-risk areas. Adequate training should focus, among others, on safety and security aspects, cultural awareness, and specific threats, as well as on the relevant law to be applied and respected in the area of deployment and, on the legal status (including immunities and privileges, where applicable) of the staff.

Selected examples from the policies and practices of international organizations

European Union

- Every level of risk (low, medium or high) related to the deployment entails a specific training of EU staff, in accordance with the degree of threats likely to occur (EEAS Security Decision, 2013). Several training programmes have been established at the EU level to provide a comprehensive and coherent training of field personnel, particularly in the context of the EU Civil Protection Mechanism, Election Observation Missions, and CSDP missions.

NATO

- The 2007 Allied Joint Doctrine for Force Protection provides a wide range of measures and means to minimise the vulnerability of personnel, facilities, equipment, operations, and activities from threats and hazards. In addition to the pre-deployment training, the Doctrine requires as a minimum standard to brief all personnel on the threats, hazards, procedures and alarms, which are typical to the location where the personnel is deployed and encourages the deploying forces to undergo a cultural awareness training. It further provides for in-theatre training and additional or refresher training in case of changing operational environments. These measures apply also to contractors and, to some extent, to locally recruited personnel.

OSCE

- The pre-mission training is conducted by Participating States. The second phase is conducted in Vienna and managed by the Training Unit of the OSCE. In the third training phase, personnel follow the 6 month training programme within each OSCE mission (OSCE Secretary General, Decisions 12/2000 and 20/2002). For some high-risk areas and missions, OSCE security officers must brief the mission members on the necessary level of protection and equipment, and require them to undergo hostile environment awareness training (HEAT) as a condition of employment (OSCE Operational Guidelines for Working in a Potentially Hazardous Environment).

United Nations

- An essential component of the 2016 policy 'Gender considerations in Security Management' in the UNSMS is the Women's Security Awareness Training (WSAT). The training is designed to focus specifically on issues with direct and unique impact on the safety and security of female personnel.

Selected examples of relevant case-law

- ILOAT, A. S. F. v. the European Patent Organization (EPO), 5 November 2004, Judgment No. 2417.

Appendix: Jurisprudence of Administrative Tribunals

Annex II: Jurisprudence of Administrative Tribunals—Summary of Selected Cases

African Development Bank	
Administrative Tribunal of the African Development Bank	
Case 1	**Clotilde Anne Isabelle Bai v. African Development Bank, 29 June 2010, Judgment No. 72**
Link	https://www.afdb.org/fileadmin/uploads/afdb/Documents/Administrative-Tribunal/72%20Application%202007-06%20-%20Judgment%20of%2029%20June%202010.pdf
Brief description	The applicant was working for the Bank in Burkina Faso when she was assaulted by another person working for the Bank as a result of work-related tensions. The applicant suffered injury, material loss and moral damage. Mrs. Bai contended that the Bank had not acted with due care in carrying out a serious, comprehensive and objective investigation, and that the Bank had instead acted with bias.
Decision	The Tribunal asserted that the Bank's proceedings had been characterised by contradictions and excessive delays, and ordered compensation for moral damage in the sum of 10,000 US Dollars. **Quote**: '*[T]he Tribunal finds that [the proceedings conducted by the Bank] were characterized by a wait-and-see attitude, hesitation, if not contradictions, which caused excessive delays in resolving the dispute ... Timely and decisive action is what is expected of the Bank in cases of this nature because violence in the workplace is never acceptable*' (para 21).
Asian Development Bank	
ADB Administrative Tribunal	
Case 2	**Cynthia M. Bares et al. v. ADB, 31 May 1995, Decision No. 5**
Link	https://www.adb.org/sites/default/files/adb-tribunal/adbt0005.pdf
Brief description	The case was brought by Mrs. Bares on behalf of her late husband, the Bank's Assistant General Counsel, Mr. Robert E. Bares, murdered on the premises of the Bank in Manila by a person employed as a security guard there.
Decision	The Tribunal asserted that the Bank must exercise reasonable care in the selection of contractors and then maintain sufficiently close supervision over them to ensure that they use reasonable care. However, it concluded that it could not be established that the death of Mr. Bares was caused by any failure on the part of the Bank to take due care. **Quote**: '*The Bank's duty is […] to exercise reasonable care in every aspect of its activity that impinges or may impinge upon the safety, health and security of its staff.* […] *though the Bank is free to hire a contractor to provide a service within the Bank that it might otherwise itself perform directly through its own employees, the Bank must exercise reasonable care in the selection of the contractor and then maintain a sufficiently close supervision over the latter to ensure that the latter itself uses reasonable care. The employment of a contractor does not reduce the level of care to which the staff member is entitled under the contract of employment*' (paras 25-26).
Case 3	**Carl Gene Lindsey v. Asian Development Bank, 18 December 1992, Decision No. 1**
Link	https://www.adb.org/sites/default/files/adb-tribunal/adbt0001.pdf
Brief description	The applicant filed an application against the Bank claiming remedies for the alleged failure by the Bank to convert his fixed-term appointment into an indefinite contract of employment.
Decision	The Tribunal found that the Bank had failed to carry out the review of the applicant's performance in a valid manner, therefore it should be treated as having in effect denied the applicant the possibility of obtaining the extension or conversion which he might otherwise have received. The Tribunal ordered 185,000 US Dollars in compensation. **Quote**: '*[T]he Tribunal finds that the decision of the Bank not to extend the Applicant's period of employment was invalidated by failure to apply due process. The fault lay in the insufficiency of the system of establishing reports on senior personnel. What was lacking was a procedure that would ensure that senior staff whose performance within the Bank might still be called into question would enjoy proper protection*' (para 38).

Council of Europe	
CoE Administrative Tribunal	
Case 4	**Jannick Devaux v. Secretary General, 30 January 2015, Appeal No. 546/2014**
Link	https://rm.coe.int/16807700d5
Brief description	The dispute derived from a disagreement between the parties as to the interpretation of the provisions which offer temporary staff members who have become permanent the opportunity to have periods of temporary service in the organization credited to them for pension purposes.
Decision	The Tribunal concluded that the complaint was unfounded. **Quote**: '*[T]he criterion of 'legality' requires that all rules should be sufficiently precise to allow staff members – if necessary with the benefit of informed advice – to foresee, to a reasonable extent in the circumstances of the case, the consequences of a given act. This is particularly important in the case of the rules determining all the principles governing the salary and benefits paid by the Organisation to each member of its staff in return for their services*' (para 34).
Case 5	**Renate Zikmund (I and II) v. Secretary General, 30 October 2009, Appeals Nos. 414/2008 and 459/2009**
Link	https://rm.coe.int/1680770033
Brief description	This dispute arose as a result of the Secretary General's decision to second the appellant to another department and the latter's complaint of psychological harassment in circumstances pre-dating that secondment.
Decision	The Tribunal found that the measures taken by the organization failed to ensure that due protection was quickly provided and awarded the appellant a compensation of over 30,000 Euros. **Quote**: '*It is clear that the policy for implementing protection for staff of the Council of Europe required the Organisation to react quickly and take decisions about the protection to be given to the appellant. In the event, the measures taken by the Organisation failed to ensure that such protection was quickly provided and the appellant must be awarded the compensation she is claiming*' (para 56).
European Union	
EU Civil Service Tribunal	
Case 6	**Laleh Aayhan et al. v. Parliament, 30 April 2009, Case F-65/07**
Link	http://curia.europa.eu/juris/document/document.jsf?text=&docid=78303&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=191458
Brief description	The applicants, former session auxiliaries of the European Parliament, sought inter alia, annulment of the decision of the competent body rejecting their complaint requesting that the successive fixed-term contracts concluded by each of them with the Parliament should be regarded as a single part-time contract for an indefinite period, that they should be reinstated on that basis within the Parliament and that they should receive compensation 'representing' the entitlement to paid leave which they acquired in respect of all the periods worked.
Decision	The Tribunal rejected the claim in that the applicant had not convincingly proved the unlawfulness of the conduct alleged against the Parliament. **Quote**: '*Article 1e(2) of the Staff Regulations provides that officials are to be 'accorded working conditions complying with appropriate health and safety standards at least equivalent to the minimum requirements applicable under measures adopted in these areas pursuant to the Treaties'. That provision applies by analogy to members of the temporary staff and members of the contract staff under the first paragraph of Article 10 and Article 80(4) of the Conditions of Employment*' (para 116).
Case 7	**Livio Missir Mamachi di Lusignano v. European Commission, 12 May 2011, Case F-50/09**
Link	http://curia.europa.eu/juris/document/document.jsf?text=&docid=78780&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=167197

Brief description	Mr. Missir Mamachi and his wife were stabbed to death during a burglary attempt in Morocco, where Mr. Missir Mamachi lived with his family during a posting with the EU Commission's delegation in Rabat. The father of Mr. Missir Mamachi maintained that the Commission was negligent in its compliance with the general security obligation incumbent upon it as an employer, failing to fulfil its obligation to provide safe accommodation for the deceased official and his family.
Decision	The Tribunal found that the Commission had duly complied with its duty to provide assistance and protection, and it rejected the claim. **Quote**: '*It is evident that, in certain circumstances, particularly in an emergency, the occupation of temporary accommodation that does not have the same security features as permanent accommodation may be contemplated as a temporary measure. However, even in such a situation the administration cannot dispense with minimum measures to counter the main risks to the safety of the occupants of temporary accommodation or to limit the probability of their occurring, in conditions that are acceptable from the budgetary and administrative points of view. This is all the more true where special circumstances have been brought to the attention of the Commission*' (paras 173-174).
Case 8	**Fotios Nanopoulos v. Commission, 11 May 2010, Case F-30/08**
Link	http://curia.europa.eu/juris/document/document.jsf?text=&docid=81182&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=193554
Brief description	Mr. Nanopoulos claimed that the Commission of the European Communities should, on account of faults which it committed in the management of his situation and his career, be ordered to pay him compensation for the non-material damage which he considered himself to have suffered.
Decision	The Tribunal found in favour of the applicant on a number of claims and awarded compensation amounting to 90,000 Euros. **Quote**: '*[W]hen faced with serious and unfounded accusations concerning the professional integrity of an official in carrying out his duties, [the administration] must refute those accusations and do everything possible to restore the good name of the official concerned […] The requests for assistance made by an official on account of a defamatory statement or an attack on his integrity and professional reputation, made through the press, necessitate, in principle, a particularly rapid response on the part of the administration, in order to produce a practical effect […]*' (paras 139-140).
	European Court of Justice
Case 9	**Mario Berti v. Commission of the European Communities, 7 October 1982, Case 131/81**
Link	http://curia.europa.eu/juris/showPdf.jsf?text=&docid=91436&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=196780
Brief description	The applicant's son, aged seven, had an accident while he was at a holiday camp in Durbuy organized for the children of officials and other employees of the Commission. While he was playing under the supervision of two assistants, the child fell from a swing and was hit on the head by the moving swing. The accident caused serious injury. The applicant claimed, inter alia, that the defendant was bound to compensate for the material, non-material and aesthetic injuries sustained by his son.
Decision	The Tribunal noted that the Commission arranged insurance which provided only partial cover, not extending to all the ordinary consequences of an accident, and, moreover, omitted to inform the parents of that fact in advance, so that they could not decide whether to accept the risk. It ordered the Commission to compensate the applicant for all material and aesthetic injury sustained by his son and invited the parties to agree on the amount of the financial compensation. **Quote**: '*[A]mong the rights and duties arising from the employment relationship between the Commission and its officials and other employees is the duty of the employer to provide for its employees various services of a social nature, some of which are distinguished by the fact that they are intended for the benefit of not only the official or employee but also the members of his family*' (para 15).

General Court of the EU	
Case 10	**Livio Missir Mamachi di Lusignano and Others v. Commission, 7 December 2017, Case T-401/11 P RENV-RX, paras 114-119 (General Court, Appeal Chamber)**
Link	http://curia.europa.eu/juris/document/document.jsf?text=&docid=197529&pageIndex=0&doclang=FR&mode=req&dir=&occ=first&part=1&cid=1390292
Brief description	The case is the appeal filed by the heirs of Alessandro Missir Mamachi di Lusignano (see above, Case 7) against the decision of the Civil Service Tribunal to limit the reimbursement by the Commission to 40% of the material damage suffered, quantified at 3 million Euros.
Decision	The General Court declared the Commission liable for 3 million Euros and also awarded 450,000 Euros for non-material damage to the victim's relatives. **Quote**: '*Il convient de préciser, à titre liminaire, que, à l'instar des préjudices matériels, la Commission a manqué à l'obligation de protection de son personnel et doit être considérée comme étant coauteur des dommages moraux subis'* (para 171).
International Labour Organization	
ILO Administrative Tribunal	
Case 11	**A. P. v. the International Telecommunication Union (ITU), 6 July 2011, Judgment No. 3025**
Link	http://www.ilo.org/dyn/triblex/triblexmain.fullText?p_lang=en&p_judgment_no=3025&p_language_code=EN
Brief description	The complainant contended that having to move his office caused a deterioration in his working conditions and had a 'negative impact' on his 'moral and physical integrity'. He stated that no checks had been carried out to ensure that the building in which he was required to work complied with Swiss safety, health and environmental standards.
Decision	The complaint was dismissed for lack of a cause of action. **Quote**: '*The Tribunal recalls that an international organisation has a duty to provide a safe and adequate environment for its staff, and they in turn have the right to insist on appropriate measures to protect their health and safety*' (para 2).
Case 12	**B. J. R. v. the United Nations Industrial Development Organization (UNIDO), 3 February 2003, Judgment No. 2197**
Link	http://www.ilo.org/dyn/triblex/triblexmain.fullText?p_lang=en&p_judgment_no=2197&p_language_code=EN
Brief description	The applicant claimed that UNIDO mishandled her application for disability benefit, dealt with it in an arbitrary manner, denied her due process and did not treat her fairly.
Decision	Most of the claims were dismissed, however, the Tribunal found that the delay of over twenty months between the filing of the internal appeal and the start of the hearings was unjustifiable. UNIDO was ordered to pay to the complainant the sum of 3,000 Euros in damages and 1,000 Euros in costs. **Quote**: '*Since compliance with internal appeal procedures is a condition precedent to access to the Tribunal, an organisation has a positive obligation to see to it that such procedures move forward with reasonable speed*' (para 33).
Case 13	**C. E. S. v. the World Health Organization (WHO), 9 July 2014, Judgment No. 2642**
Link	http://www.ilo.org/dyn/triblex/triblexmain.fullText?p_lang=en&p_judgment_no=2642&p_language_code=EN
Brief description	The complainant alleged discriminating treatment in relation to the extension of her contract and sexual harassment by her supervisor.
Decision	The Tribunal confirmed that her supervisor's behaviour had amounted to sexual harassment and found that the WHO had failed to constitute a grievance panel that could investigate her complaint promptly, thoroughly and objectively. She was awarded moral damages (30,000 Swiss Francs plus costs). **Quote**: '*[An international organisation's] duty to a person who makes a claim of harassment requires that the claim be investigated both promptly and thoroughly, that the facts be determined objectively and in their overall context […], that the law be applied correctly, that due process be observed and that the person claiming, in good faith, to have been harassed not be stigmatised or victimised on that account […]*' (para 8).

Case 14	**F. M. v. the Organisation for the Prohibition of Chemical Weapons (OPCW), 2 February 2005, Judgment No. 2403**
Link	http://www.ilo.org/dyn/triblex/triblexmain.fullText?p_lang=en&p_judgment_no=2403&p_language_code=EN
Brief description	The complainant, a former employee of the OPCW, at the time of his separation from service was notified that the payment he would receive from the organization's Provident Fund, in which participation was compulsory, would be inferior to the capital he had invested in it over the years.
Decision	The OPCW was found in breach of its obligation to establish an effective system to monitor the performance of the Provident Fund and ordered to pay the complainant the sum of 2,500 Euros together with interest, plus the costs of the proceedings. **Quote**: '*It is not in doubt that an international organisation is under an obligation to take proper measures to protect its staff members from physical injury occurring in the course of their employment. The same is true with respect to loss of or damage to their personal property. As a matter of principle, the same must be true of financial loss suffered in the course of their employment*' (para 16).
Case 15	**G. C. v. the International Atomic Energy Agency (IAEA), 8 February 2012, Judgment No. 3104**
Link	http://www.ilo.org/dyn/triblex/triblexmain.fullText?p_lang=en&p_judgment_no=3104&p_language_code=EN
Brief description	The complainant alleged that the decision by the organization not to extend her contract was in fact motivated by her health problems and not by programmatic priorities.
Decision	The Tribunal did not decide whether or not the complainant was a victim of harassment, but whether her claims of harassment were properly dealt with, 'in breach of the Agency's duty of care' (para 6). It found that the Agency had failed to initiate a process to address the applicant's allegations and that the applicants had not been treated with due care. It ordered the IAEA to pay material damages, as well as moral damages in the sum of 15,000 Euros. **Quote**: '*[T]he Tribunal notes that the fact that the complainant was not given enough work upon her return from sick leave, which led her to feel marginalised and humiliated, offended her dignity and constitutes an element of the breach of duty of care*' (para 6).
Case 16	**G. V. v. the International Fund for Agricultural Development (IFAD), 11 February 2015, Judgment No. 3409**
Link	http://www.ilo.org/dyn/triblex/triblexmain.fullText?p_lang=en&p_judgment_no=3409&p_language_code=EN
Brief description	The complainants asserted that the abolition of their respective positions was not a necessary consequence of the restructuring of their office, but merely a pretext to remove them from IFAD.
Decision	The Tribunal awarded the complainants material damages and 6,000 Euros each for moral damages stemming from IFAD's unlawful decisions and violation of its duty of care. **Quote**: '*The Tribunal is of the opinion that IFAD violated its duty of care and did not respect the dignity of the complainants*' (para 10).
Case 17	**H. P. W. v. the International Telecommunication Union (ITU), 9 July 2014, Judgment No. 3353**
Link	http://www.ilo.org/dyn/triblex/triblexmain.fullText?p_lang=en&p_judgment_no=3353&p_language_code=EN
Brief description	The two complainants argued that the restructuring in the Divisions of the International Telecommunication Union (ITU) they headed, which led to abolition of their posts, and the manner and haste in which their appointments were terminated caused them injury.
Decision	The Tribunal awarded moral damages for the serious affront to their dignity and the failure to give reasonable notice. The ITU was ordered to pay each complainant 60,000 Euros in damages for moral injury and 3,000 Euros in costs. **Quote**: '*An organisation must care for the dignity of its staff members and not cause them unnecessary personal distress and disappointment where this could be avoided. In particular, good faith requires an organisation to inform a staff member in advance of any action that it might take which may impair a staff member's rights or rightful interest*' (para 26).

Case 18	**In re Giordimaina v. the Food and Agriculture Organization of the United Nations (FAO), 30 January 2002, Judgment No. 2116**
Link	http://www.ilo.org/dyn/triblex/triblexmain.fullText%3Fp_lang=fr&p_judgment_no=2116&p_language_code=EN
Brief description	The complainant accused FAO of 'strategically' interrupting the contractual relationship with her in the course of a selection procedure in order to bar her access to stable employment. She added that FAO failed to give reasons for the non-renewal of her appointment.
Decision	The Tribunal dismissed some of the claims, but found that the appeal had not been sufficiently expeditious, far exceeding the amount of time usually needed to deal with such a case. It found that FAO's omissions caused the complainant significant material and moral injury and awarded 15,000 Euros compensation. **Quote**: '*A staff member who files an appeal is entitled to expect a decision to be taken within a reasonable time. Since an internal appeal is a necessary prelude to judicial review, the Organization too must respect the need for expeditious proceedings*' (para 11).
Case 19	**In re Grasshoff (Nos. 1 and 2), 24 April 1980, Judgment No. 402**
Link	http://www.ilo.org/dyn/triblex/triblexmain.fullText?p_lang=en&p_judgment_no=402&p_language_code=EN
Brief description	A physician, a former WHO staff member, was injured by a bomb while on a mission to East Pakistan (now Bangladesh), which caused him a partial permanent disability. He argued that the WHO was grossly negligent in knowingly exposing him to the serious dangers of the civil war caused by the secession of East Pakistan. While he had received compensation for medical treatment and loss of salary, he disputed the WHO decision to grant him no compensation for the loss of earning capacity.
Decision	The Tribunal found in favour of the applicant and ordered the WHO to pay a compensation of over 16,000 Dollars, as well as the costs of proceedings. **Quote:** '*if [the staff member] accepts the order [to work in an unsafe place] … and the employer has failed to exercise due skill and care in arriving at his judgment, the [staff member] is, subject to any contrary provision in the contract, entitled to be indemnified in full against the consequences of the misjudgment*' (para 1).
Case 20	**J. L. v. the International Labour Organization (ILO), 8 July 2009, Judgment No. 2856**
Link	http://www.ilo.org/dyn/triblex/triblexmain.fullText?p_lang=en&p_judgment_no=2856&p_language_code=EN
Brief description	The complainant submitted that the decision to transfer him to a lower-grade position contravened the Tribunal's case law in that he was not provided with work of the same level as that which he performed in his previous position and matching his experience.
Decision	The Tribunal dismissed the case concluding that, in the circumstances, the ILO had done its utmost to respect the complainant's dignity and good name and not to cause him any harm.
Case 21	**J. T. B. v. the World Health Organization (WHO), 6 July 2016, Judgment No. 3689**
Link	http://www.ilo.org/dyn/triblex/triblexmain.fullText?p_lang=en&p_judgment_no=3689&p_language_code=EN
Brief description	The complainant contended that he contracted onchocerciasis, a parasitic disease which may eventually lead to blindness, during the performance of his duties as a collector of insects that are vectors of the disease, in Côte d'Ivoire under WHO's Onchocerciasis Control Programme.
Decision	The Tribunal found that the complainant had not been issued with adequate protective clothing which would have prevented direct contact with the insects. He had been obliged to wait until they settled on him before catching them, a situation which had created a high risk of infection. The WHO was found in serious breach of its duty to protect the complainant and ordered to pay compensation in the amount of 30,000 US Dollars. **Quote**: '*Regarding the issue of whether WHO breached its duty to protect the complainant, the Tribunal recalls that international organizations have a duty to adopt appropriate measures to protect the health and ensure the safety of their staff members (see Judgments 3025, under 2, and 2403, under 16). An organization which disregards this duty is therefore liable to pay damages to the staff member concerned*' (para 5).

Case 22	**L. J.-S. v. the European Patent Organisation (EPO), 4 July 2013, Judgment No. 3213**
Link	http://www.ilo.org/dyn/triblex/triblexmain.fullText?p_lang=en&p_judgment_no=3213&p_language_code=EN
Brief description	The complainant, the widow of a former employee of the European Patent Office, was denied a survivor's pension after the death of her husband, because she had not been married to the deceased for at least 5 years, as required by the Pension Scheme Regulations. She claimed her rights had been violated because her 12-year cohabitation with the former employee should be considered equivalent to marriage for pension purposes.
Decision	The complaint was dismissed because it was unfounded in its entirety. **Quote**: '*International organizations have a duty of care towards their employees and must provide clear rules and regulations as well as clarifications of such when requested, but they cannot be solely responsible for every situation stemming from confusion regarding said rules. Employees are also charged with the duty to inform themselves, and to request clarification when necessary so that the system can work efficiently to the best advantage of both the Organization and the staff members either as a group or individually'* (para 7). '*The Organisation correctly applied the relevant provisions of the Service Regulations and Pension Scheme Regulations and discharged its duty of care towards the complainant*' (para 7).
Case 23	**O. F. v. the International Labour Organization (ILO), 8 February 2012, Judgment No. 3071**
Link	http://www.ilo.org/dyn/triblex/triblexmain.fullText?p_lang=en&p_judgment_no=3071&p_language_code=EN
Brief description	The complainant argued that the decision not to renew her contract was taken for a purpose other than that stated and alleged a misuse of power on the part of the organization.
Decision	The tribunal recognised that the decision had been taken for an improper purpose and that harassment had taken place in the workplace and awarded moral damages, as well as payment of full salary, allowances and other benefits. **Quote**: '*It is well established that an international organisation has a duty to its staff members to investigate claims of harassment. That duty extends to both the staff member alleging harassment and the person against whom a complaint is made […]the duty is a duty to investigate claims of harassment 'promptly and thoroughly"* (para 36).
Case 24	**P.-M. (No. 2), v. WHO, 6 July 2016, Judgment No. 3688**
Link	http://www.ilo.org/dyn/triblex/triblexmain.fullText?p_lang=en&p_judgment_no=3688&p_language_code=EN
Brief description	The complainant challenged the decision to abolish her post and to separate her from service. She also made reference to acts of prejudice, bias and retaliation against her that allegedly contributed to her dismissal.
Decision	The Tribunal awarded her 90,000 Euros in material damages for the loss of the opportunity to have her contract renewed, the loss of career opportunity as a result of the unlawful abolition of her post, and for the WHO's failure to make reasonable efforts to reassign her. She was also awarded 70,000 Euros in moral damages for the affront to her dignity, the breaches of due process and of WHO's duty of care to her, and for the unreasonable delay in the internal appeal proceedings. **Quote**: '*[WHO] failed to care for the complainant's dignity or to guard her against unnecessary personal distress and disappointment where it could have been avoided*' (para 21).
Case 25	**R.A.-O. v. the United Nations Educational, Scientific and Cultural Organization (UNESCO), 16 July 2003, Judgment No. 2229**
Link	http://www.ilo.org/dyn/triblex/triblexmain.fullText?p_lang=en&p_judgment_no=2229&p_language_code=EN
Brief description	The complainant argued that his transfer was in fact a sanction motivated by the desire to oust him from his post. He asserted that he had suffered an unjust and arbitrary sanction amounting to abuse of authority and seriously harming his reputation, career and health.

Decision	The Tribunal found that the complainant's right to be heard had been breached by the organization's refusal to grant him access to the disciplinary report on which the Director-General had based his decision. It ordered the withdrawal of the impugned decision and awarded 10,000 Euros in damages.
Case 26	**R.D.A.G. v. the Pan American Health Organization, 4 February 2014, Judgment No. 3295**
Link	http://www.ilo.org/dyn/triblex/triblexmain.fullText?p_lang=en&p_judgment_no=3295&p_language_code=EN
Brief description	Complaint concerning a disciplinary measure leading to summary dismissal for serious misconduct.
Decision	The complaint was dismissed by the Tribunal on the grounds that the applicant had not demonstrated the existence of an error warranting the cancellation of the sanction. **Quote**: '*It is true that an organisation should investigate allegations of misconduct in a timely manner both in the interests of the person being investigated and the organisation. These interests include, among other things, safeguarding the reputations of both parties and ensuring that evidence is not lost*' (para 7).
Case 27	**S.H. v. the United Nations Educational, Scientific and Cultural Organization (UNESCO), 8 July 2009, Judgment No. 2851**
Link	http://www.ilo.org/dyn/triblex/triblexmain.fullText?p_lang=en&p_judgment_no=2851&p_language_code=EN
Brief description	The complainant challenged a decision re-classifying her post following a UNESCO reform entailing the adoption of new classification standards for posts in the Paris General Service and related categories.
Decision	The Tribunal found that the internal appeal procedure was unreasonably long and awarded moral damages in the amount of 1,000 Euros. **Quote**: '*The internal appeal procedure was much too long and consequently the complainant was deprived of her right to a speedy resolution of her grievances*' (para 10).
International Monetary Fund	
IMF Administrative Tribunal	
Case 28	**'A' v. International Monetary Fund, 12 August 1999, Judgment No. 1999-1**
Link	https://www.imf.org/external/imfat/pdf/j1999_1.pdf
Brief description	The applicant, a former employee, challenged the termination of their contract by the Fund. He argued, *inter alia*, that the Fund's termination of its employment relationship with him was contrary to the Employment Guidelines on staff appointments, under which he should have been categorised as a regular staff member. He held that he should not have been categorised as an independent contractor when he was doing the work of an employee. He further argued that on a number of occasions the Fund created and then disappointed his expectations of continued employment, on which he relied to his detriment.
Decision	The Tribunal concluded that it lacked jurisdiction *ratione personae* and *ratione materiae* over the complaint because the applicant was not hired as a 'member of staff'. It also expressed concern about the exclusion of the applicant from the possibility of a judicial recourse based on his employment status. **Quote:** '*The jurisdiction of the Administrative Tribunal is conferred exclusively by the Statute itself. This Tribunal is not free to extend its jurisdiction on equitable grounds, however compelling they may be. At the same time, the Tribunal feels bound to express its disquiet and concern at a practice that may leave employees of the Fund without judicial recourse. Such a result is not consonant with norms accepted and generally applied by international governmental organizations. It is for the policy-making organs of the Fund to consider and adopt means of providing contractual employees of the Fund with appropriate avenues of judicial or arbitral resolution of disputes of the kind at issue in this case*' (para 97).
Case 29	**'GG' (No. 2) v. International Monetary Fund, 29 December 2015, Judgment No. 2015-3**
Link	https://www.imf.org/external/imfat/pdf/j2015_3.pdf

Brief description	The applicant contended that the director of her former department engaged in a pattern of retaliation (for reporting misconduct of another staff member), harassment (including sexual harassment), and gender discrimination towards her, which constituted a hostile work environment and impeded her career advancement. She alleged, among other things, that the Bank failed to address the pattern of unfair treatment.
Decision	The Tribunal agreed with the applicant and awarded a 60,000 US Dollars compensation. **Quote**: '*When a hostile work environment arises directly from the conduct of a senior official of the Fund, the Tribunal considers that the Fund's responsibility will ordinarily arise as a matter of course*' (para 272).
NATO	
NATO Administrative Tribunal	
Case 30	Appellant v. NATO Joint Force Training Centre Respondent, 27 April 2016, Case No. 2015/1066 MDP
Link	https://www.nato.int/nato_static_fl2014/assets/pdf/pdf_2017_06/20170602_2016-AT-judgments.pdf
Brief description	The Appellant was informed that his accommodation in the duty station in Poland was considered as a temporary domicile and that he was required to move to another place of residence otherwise his installation and expatriation allowances would not be granted. He challenged the decision.
Decision	The Tribunal rejected the Applicant's submissions for cancellation. **Quote**: '*This duty implies, in particular, that when the administration takes a decision concerning the situation of a staff member, the competent service should take into consideration all the factors which may affect its decision, and when doing so it should take into account not only the interests of the service but also those of the staff member concerned*' (para 58).
Organization of American States	
OAS Administrative Tribunal	
Case 31	**Anna Chisman et al. and George P. Montalván et al. v. Secretary General, 30 April 1982, Judgment No. 64**
Link	https://www.sites.oas.org/tribadm/EN/pages/downloads.aspx?file=Lists%2FDocuments%5FTribAdm%2FAttachments%2F3092%2Fresources%5F0%5F64%2Edoc&DT=A
Brief description	The applicants filed a complaint before the Administrative Tribunal claiming that the Secretary General had violated certain contractual rights by not paying their salaries at parity with the United Nations since 1979.
Decision	The Tribunal found that the Secretary General's obligation in the present case would be met by paying the difference that existed between the Complainants' classification and salary level in December 1978, taken as the base, and the salary that each of them received beginning in the month of January 1979.
United Nations	
UN Administrative Tribunal	
Case 32	**Applicant v. the Secretary-General of the United Nations, 23 November 2005, Judgment No. 1273**
Link	http://untreaty.un.org/UNAT/UNAT_Judgements/Judgements_E/UNAT_01273_E.pdf
Brief description	During a mission, the applicant experienced two cardiac syncopes while in transit from the Democratic People's Republic of Korea and Beijing. When back in the office, she found out she had lost her job as her supervisor's secretary and an opportunity for promotion.
Decision	The Tribunal found that the applicant's supervisor in Beijing grossly neglected his duties and responsibilities regarding the well-being and safety of the staff member entrusted to his care during the field mission. Although he had the authority to order her medical evacuation, he chose not to do so, leaving her in a hospital where she was hampered by language barriers and where medical treatment was unreliable. The Tribunal awarded compensation for loss of two years in seniority, for post-traumatic stress disorder and for permanent loss of function. **Quote**: '*The Tribunal is of the view that the supervisor grossly neglected his duties and responsibilities regarding the well-being and safety of the staff members entrusted to his care during a field mission.*' (para III).

Case 33	**Case 1358 v. the Secretary-General of the United Nations, 31 January 2006, Judgment No. 1275**
Link	http://untreaty.un.org/UNAT/UNAT_Judgements/Judgements_E/UNAT_01275_E.pdf
Brief description	The Tribunal agreed with the applicant that the decision by UNDP not to renew his contract was indeed based solely on the external pressure put on it by the UAE Government and therefore was improper. The UNDP, moreover, failed to take any subsequent steps to rectify the situation and to find the applicant another position with the organization after his contract was improperly not renewed.
Decision	UNDP was ordered to pay compensation.
Case 34	**Case 1545 v. the Secretary-General of the United Nations, 30 September 2009, Judgment No. 1472**
Link	http://untreaty.un.org/UNAT/UNAT_Judgements/Judgements_E/UNAT_01472_E.pdf
Brief description	The complainant sought redress for damage and loss of property during the relocation of his belongings.
Decision	The Tribunal found that the administration had failed to act with care and consideration with regard to the applicant and his property, causing the loss of belongings of great cultural and historical value during their relocation. UNDP was ordered to pay compensation for the material losses and the moral damage caused by the violation of the applicant's right to be treated with respect and to be compensated within a reasonable period of time. **Quote**: '*[T]he Administration has a broad duty to act with care and consideration with regard to the members of its staff and their property*. […] *This obligation also requires the Administration to take all the necessary precautions when it decides to relocate the personal effects of one of its staff members from one place to another, especially when it is not physically possible for the staff member to carry out the relocation himself because he is kept away from his duty station*' (para XXIII).
Case 35	**Daw Than Tin v. the Secretary-General of the United Nations, 26 February 1991, Judgment No. 505**
Link	http://untreaty.un.org/UNAT/UNAT_Judgements/Judgements_E/UNAT_00505_E.pdf
Brief description	The applicant's husband died while on duty in Bangkok. She claimed that, despite the expiry of time limitations, her claim for death benefits should be accepted because she was not notified in a timely fashion of her rights as a beneficiary of her husband and could not reasonably be expected to have been aware, either of these rights or of the time limitations governing determination of their award. She further claimed that her husband's death was service-incurred.
Decision	While it could not determine whether her husband's death was attributable to the performance of his job, the Tribunal noted the administration's negligent failure to inform her of her rights, and awarded compensation (15,000 US Dollars in addition to the 12,000 US Dollars already paid). **Quote**: '*[T]he Applicant was in no way to blame for the passage of some 11 years before she filed her claim under Appendix D. This resulted from the Administration's failure to draw her attention to her rights under Appendix D and to the time within which a claim under that Appendix has to be made. […] The Tribunal regards this as negligence on the part of the Administration*' (para IV).
Case 36	**Durand v. the Secretary-General of the United Nations, 19 August 2005, Judgment No. 1204**
Link	http://untreaty.un.org/UNAT/UNAT_Judgements/Judgements_E/UNAT_01204_E.pdf
Brief description	The family of a deceased UN staff member serving in Iraq, Nancy Durand, argued that the negligence of the organization caused or contributed to her untimely death.
Decision	The Tribunal found that the organization had unduly withheld information concerning the circumstances surrounding Durand's death. It also noted the organization's lack of care for the decedent. The Tribunal ordered compensation. **Quote**: '*All of this - the lack of adequate medical care, the lack of concern and care for the decedent - was a failure by the Organization to provide her with the reasonable attention and care she was entitled to receive as a staff member of the United Nations and which constituted an egregious violation of the terms of her employment and contract*' (para XXII).

Case 37	**Hjelmqvist v. the Secretary-General of the United Nations, 31 July 1998, Judgment No. 872**
Link	http://untreaty.un.org/UNAT/UNAT_Judgements/Judgements_E/UNAT_00872_E.pdf
Brief description	The applicant worked for the UN Guard Contingent in Iraq (UNGCI) when he was involved in a shooting accident. He argued that the organization's failure to provide appropriate devices for physical protection, as well as to institute and utilise an appropriate procedure for medical evacuation in a known high-danger area was an act of gross negligence and the proximate cause of his irreparable physical and psychological injuries.
Decision	The Tribunal ordered that the applicant be compensated for the injuries he suffered as a result of the organization's gross negligence in the handling of an extreme medical emergency. **Quotes**: '*[T]he Applicant had reason to expect that the organization for which he volunteered to serve in a dangerous location had a duty to make extreme medical emergency decisions in a manner so as to provide him the greatest opportunity to recover fully from any injury to his physical or mental health that resulted from that service*' (para III). '*The Tribunal fails to understand the rationale for preventing staff from access to their own medical files. It recommends that this policy be reconsidered and reversed*' (para XVI). '[…] *the Respondent's gross negligence in the handling of an extreme medical emergency arising in a situation known to be very dangerous to the Applicant, which resulted in severe physical and psychological impairment for the Applicant*' (para XVIII).
Case 38	**Mwangi v. the Secretary-General of the United Nations, 30 September 2003, Judgment No. 1125**
Link	http://untreaty.un.org/UNAT/UNAT_Judgements/Judgements_E/UNAT_01125_E.pdf
Brief description	The applicant, who worked in Kenya with UNICEF, was assigned to a delicate investigation that caused him and his family to become the objects of threats and attacks. As a result, when his request for relocation to another office was ignored, he requested early retirement as well as to be compensated for performing work at a higher level than the one he occupied, consideration for loss of earnings and allowance for the risks incurred. He argued that the level of compensation received from the organization was inadequate.
Decision	The Tribunal found in favour of the applicant and ordered 50,000 US Dollars compensation in addition to payment of an adequate Special Post Allowance. It stressed that the request for early retirement, which frustrated the Applicant's career and had a negative impact on his pension benefits, had been made necessary by the fact that the organization had negligently ignored the applicant's request for relocation. **Quote**: '*The United Nations, as an exemplary employer, should be held to higher standards and the Respondent is therefore expected to treat staff members with the respect they deserve, including the respect for their well being. The Tribunal further wishes to point out that, particularly in cases where investigations are carried out, such as in the present case, the success of these investigations often depends on cooperation from the local staff. The Organization would find it very difficult to obtain such cooperation if it fails to accord protection to those providing it*' (para IV).
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Case 39	**Edwards v. the Secretary-General of the United Nations, 26 January 2011, Judgment No. 22**
Link	http://www.un.org/en/oaj/files/undt/judgments/undt-2011-022e.pdf
Brief description	The Applicant contested the decision of the Secretary General refusing to compensate her for damage sustained as the result of harassment she claims to have suffered and for breach of duty by the Administration in failing to provide a safe and healthy working environment.
Decision	The Tribunal agreed that the administration had failed in its duty to create working conditions conducive to the health of the applicant, incurring liability. The applicant was awarded compensation for material and moral damages. **Quote**: '*[T]he Organization had a duty to guarantee a working environment conducive to the physical and psychological integrity of its staff members*' (para 63).

Case 40	**Hassouna v. the Secretary-General of the United Nations, 10 July 2014, Judgment No. 094**
Link	http://www.un.org/en/oaj/files/undt/judgments/undt-2014-094.pdf
Brief description	The applicant filed an application before the UNDT in Nairobi, contesting the decision of the Secretary General to not redeploy him from the Operation in Darfur (UNAMID) following the Government of Sudan's decision declaring him as *persona non grata*.
Decision	The Tribunal held that the applicant should not have suffered the consequences of a host country's decision for which he was not to blame, and that the organization should have taken steps to minimise the impact of such decision on his career. In finding that the applicant's redeployment should have been on the same terms and conditions as his original contract, it ordered compensation. **Quote**: '[…] *in the case of a staff member who has been declared* persona non grata *and the host country is not forthcoming with information as to the basis for his/her expulsion or the reasons, if any, do not justify a PNG decision, […] a change in the terms and conditions of the staff member's contract or non-renewal is not an option open to the Secretary-General. […] under such circumstances it is the duty of the Organization to take steps to alleviate the predicament in which the staff member finds himself/herself following his/her expulsion from the host country*' (para 51).
Case 41	**James v. the Secretary-General of the United Nations, 30 September 2009, Judgment No. 25**
Link	http://www.un.org/en/oaj/files/undt/judgments/undt-2009-025.pdf
Brief description	The applicant, a G-6 employee of the UN, appealed against a decision that he should not be appointed to a P-3 position for which he had been selected after an interview. The decision not to appoint the applicant to the P-3 post was, in turn, influenced by the administration's decision to add some limitations to his existing contract.
Decision	After finding that the organization had negligently handled the claimant's application for a P-3 position, causing him avoidable stress, the Tribunal ordered the removal of the limitations imposed on the applicant's contract and to pay compensation. **Quote**: '*It was unfair to allow the applicant to go through the entire selection process when he was not eligible for consideration, regardless of his previous experience in the Organization. It gave rise to unattainable expectations on his behalf […]the applicant was subjected to unnecessary and avoidable stress and anxiety by the manner in which his application for a P-3 position was handled*' (paras 37, 40).
Case 42	**McKay v. Secretary General of the United Nations, 9 February 2012, Judgment No. 2012/018**
Link	http://www.un.org/en/oaj/files/undt/judgments/undt-2012-018.pdf
Brief description	Mrs. McKay requested compensation alleging that her late husband's death from a heart attack while on duty in Lebanon was attributable to the organization's failure to afford him due protection, and in particular to UNIFIL Security's failure to provide medical assistance on a timely basis.
Decision	The Tribunal was not able to conclude that the alleged breach of the duty of care, contributing to Mr. McKay's death, had occurred or that the measures in place in response to health emergencies were insufficient. It also found that, regardless of any deficiency in the organization's duty of care towards its staff members, Mr. McKay had died before his wife called for help. **Quote**: '*The duty of care encompasses that of securing prompt and adequate treatment for those serving in hazardous duty stations in the event of medical emergencies […]*' (para 43).
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Case 43	**Saad Abdulrazak Alrayes v. IFC, 13 November 2015, Decisions No. 520 (Preliminary Objection), and 8 April 2016, Decision No. 529 (Merits)**
Link	https://webapps.worldbank.org/sites/wbat/Judgments%20and%20Orders1/Decision%20No.%20520%20-%20Alrayes.pdf

Brief description	The US G4 visa of Mr. Alrayes, a Saudi Arabian national who worked as IFC Senior Officer on a Term contract, was cancelled for alleged terrorist activities while he was on a routine mission to the Gulf States. It took over four years for Mr. Alrayes to obtain a visitor's visa for the US. During all this time, he was forced to live abroad, away from his family and children. The applicant contended that the IFC had breached its duty of care in that, among other things, it had refused to take legal action against the US.
Decision	The WBAT dismissed most of the claims, awarding limited compensation. **Quote**: '*[T]he Applicant encountered unjustifiable delays on the part of the IFC with respect to payment of his relocation and pension entitlements (…). The Tribunal further observes that the IFC's failure to provide the Applicant with information in writing, in a timely manner, complicated his efforts to obtain continuing health coverage for his children. This is inconsistent with the fair treatment that the WBG owes its staff under Staff Principles 2.1 and 9.1*' (para 100).
Case 44	**Louis de Merode et al. v. the World Bank, 5 June 1981, Decision No. 1**
Link	https://webapps.worldbank.org/sites/wbat/Judgments%20and%20Orders1/de%20Merode,%20Lamson%20Scribner,%20Jr.,%20Reese,%20Reisman%20Toof,%20Ruberl,%20Shapiro%20v.%20The%20World%20Bank.pdf
Brief description	The case concerned whether a 1979 decision by the Bank concerning tax reimbursement and salary adjustment amounted to non-observance of the contracts of employment or terms of appointment of the Applicants.
Decision	The Tribunal rejected the claims in that the contested decisions were fully in accordance with the obligations of the Bank. **Quote**: '*The principle of non-retroactivity is not the only limitation upon the power to amend the non-fundamental elements of the conditions of employment. The Bank would abuse its discretion if it were to adopt such changes for reasons alien to the proper functioning of the organization (…) Changes must be based on a proper consideration of relevant facts. They must be reasonably related to the objective which they are intended to achieve. They must be made in good faith and must not be prompted by improper motives. They must not discriminate in an unjustifiable manner between individuals or groups within the staff. Amendments must be made in a reasonable manner seeking to avoid excessive and unnecessary harm to the staff*' (para 47).
Case 45	**Susana Mendaro v. IBRD, 4 September 1985, Decision No. 26**
Link	https://webapps.worldbank.org/sites/wbat/Judgments%20and%20Orders1/Mendaro%20v.%20IBRD.PDF
Brief description	The main issue raised by the applicant was whether there had been a non-observance of the conditions of her employment because of alleged discrimination on the basis of sex and sexual harassment, imputable to the respondent.
Decision	The claim was declared inadmissible. **Quote**: '*It is clear that the Tribunal's jurisdiction includes adjudication of claims of sexual discrimination or harassment*' (para 20).
Case 46	**Michael J. Sharpston v. IBRD, 23 July 2001, Decision No. 251**
Link	https://webapps.worldbank.org/sites/wbat/Judgments%20and%20Orders1/Sharpston%20v.%20IBRD.PDF
Brief description	The applicant requested compensation and the rescission of a decision denying his request for a review of the conduct of a psychiatrist employed by the Bank. He claimed the Bank had breached its duty of care as concerns the mental health of its staff.
Decision	The case was declared inadmissible. **Quote**: '*Referring to the need for an international organization to adhere to international standards, the Applicant has thus invoked a number of texts and precedents arising under the American Convention on Human Rights, the International Covenant on Civil and Political Rights, and the European Convention on Human Rights. To the extent that these texts recognize the entitlement to be protected from inhuman or degrading treatment, they are entirely uncontroversial*' (para 56).
Case 47	**Tamara Lansky (No. 1 and No. 2) v. IFC and IBRD, 9 December 2009, Decision No. 425**
Link	https://webapps.worldbank.org/sites/wbat/Judgments%20and%20Orders1/Lansky%20(No.%201%20and%20No.%202)%20v.%20IFC%20and%20IBRD.pdf

Brief description	The applicant, an IFC Senior Investment Officer, travelled on a road in DRC without knowing that it was controlled by paramilitary forces. She was the victim of an attack but managed to escape, being later diagnosed with severe Post Traumatic Stress Disorder. In 2009, upon termination of her employment, the applicant and the WB entered a MoU, whereby Ms. Lansky agreed to settle and release any and all claims or causes of action alleging negligence or breach of contract arising out of the security incident in the DRC.
Decision	The Tribunal dismissed the claim for relief, but, in light of the exceptional circumstances of the case recommended the WB to develop - in cooperation with the Staff Association - appropriate procedures to process payment or reimbursement claims under the Workers' Compensation and Disability Programmes.