

The Duty of Care of International Organizations Towards Their Civilian Personnel

Andrea de Guttry · Micaela Frulli
Edoardo Greppi · Chiara Macchi
Editors

The Duty of Care of International Organizations Towards Their Civilian Personnel

Legal Obligations and Implementation
Challenges

Foreword by Jean-Pierre Lacroix



ASSER PRESS



Springer

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Additional material to this book can be downloaded from <http://extras.springer.com>.

ISBN 978-94-6265-257-6 ISBN 978-94-6265-258-3 (eBook)
<https://doi.org/10.1007/978-94-6265-258-3>

Library of Congress Control Number: 2018945091

Published by T.M.C. ASSER PRESS, The Hague, The Netherlands www.asserpress.nl
Produced and distributed for T.M.C. ASSER PRESS by Springer-Verlag Berlin Heidelberg

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Printed on acid-free paper

This T.M.C. ASSER PRESS imprint is published by the registered company Springer-Verlag GmbH, DE part of Springer Nature
The registered company address is: Heidelberger Platz 3, 14197 Berlin, Germany

Foreword

The global security environment remains unprecedentedly 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

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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