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The Content of Organizations' Duty of Care within the UN System: Insights from Relevant Internal Legal Sources and Prospective New Developments

In brief

The duty of care of the United Nations can be described as 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.”¹ The duty has been crystallized in policies, regulations and rules, and other internal acts of an organization, and its content has been further delineated through the interpretive efforts of administrative tribunals. However, while there exists a legal obligation of duty of care on the part of the UN, practice and compliance with the obligation can be uneven. This can be attributed to the fact that a coherent normative framework defining the content of duty of care does not exist within the UN system. The High Level Committee of Management’s Duty of Care Task Force have highlighted the need for compliance with, and further operationalization of, existing rules and policies relating to duty of care in a coherent manner throughout the UN system, as well as the need to further articulate on the content of duty of care with regards to neglected risk areas such as occupational safety and health. This brief undertakes to examine the legal nature and the content of duty of care within the UN and will analyze the possible evolution of the obligation in light of recent work by the Duty of Care Task Force.

The content of the duty of care: review of legal sources

International organizations have a legal duty to protect their employees. This obligation, commonly referred to as the ‘duty of care’ (hereafter, ‘DoC’), aims at the protection of an organization’s personnel when they perform their official functions.² Within the UN system, the internal rules and regulations of UN organizations are therefore the most immediate

¹ Chief Executive Board for Coordination (CEB) High Level Committee on Management (HLCM) 37th Session Report, ‘Cross-functional Task Force on Duty of Care Report, April 2019,’ CEB/2019/HLCM/2019 (2019), p. 3

² Claus L., ‘Duty of Care of Employers for Protecting International Assignees, their Dependents and International Business Travellers,’ International SOS (2009); Kemp E. & Martin Merkelsbach, ‘Can you get sued? Legal liability of international humanitarian aid organisations towards their staff,’ Security Management Initiative Policy Paper (2011)

legal source to look at when it comes to considering the organization's DoC towards their personnel.³ While the concept of DoC of international organizations is not new in international law, the UN itself does not conform to the legal standards set out in prevailing international human rights treaties or conventions,⁴ such as the International Covenant on Civil and Political Rights or the ILO Labour Conventions.⁵

Adding onto this is the concept of administrative decisions: where the organization fails in its DoC and its personnel are accordingly injured, staff must bring claims against the organization through the UN's internal justice system, be it the United Nations Dispute Tribunal (UNDT) and Appeals Tribunal (UNAT), or the International Labour Office Administrative Tribunal (ILOAT). These tribunals have jurisdiction over staffs' administrative claims, which necessitates that claims are based on administrative decisions that effects some aspect staffs' terms of appointment.⁶ In other words, where an administrative decision is taken that effects staff contrary to the internal rules and regulations of an organization, the staff member must have recourse to the administrative tribunals.

As such, the basis of organizations' DoC is enshrined in the UN's Staff Regulations and Rules. UN Staff Regulation 1.2(c)⁷ 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 regulation therefore recognizes the responsibility as a basic right of staff. Furthermore, in *Edwards*⁸ the UN Dispute Tribunal held that 'Staff Regulation 1.2(c) codified a duty of protection having the value of a general principle of law,' and the ILOAT considered DoC to be a "long established principle that an international organization owes [...] to an employee."⁹

The contracts that individuals sign with organizations, where the rights and duties of staff are described, is also a source of the DoC. It is a consolidated principle in the jurisprudence of the tribunals that there is a violation of DoC 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."¹⁰

Administrative tribunals have also played an important role in defining the legal contours of DoC. This is precisely because they may resort to the concept of DoC as a general principle of law even in instances where the internal rules or the employment contracts did not provide solid legal ground for DoC. The ILOAT held that "the Tribunal's case law obliges international organizations to take appropriate measures to protect their officials' health and

³ Kemp & Merkelbach, 'Can you get sued? Legal liability of international humanitarian aid organisations towards their staff,' (2011)

⁴ Flaherty & Hunt, 'Rule without Law - Injustice at the United Nations?', The Centre for Accountability for International Organisations (2006); Kemp & Merkelbach, 'Can you get sued? Legal liability of international humanitarian aid organisations towards their staff,' (2011)

⁵ For example, DoC can be found in ILO Convention No. 155, Occupational Safety and Health Convention, 1981; Recommendation No. 164, Occupational Safety and Heath Recommendation

⁶ Ibid.

⁷ UN, Staff Regulations and Rules of the United Nations, ST/SGB/2017/1 (2016).

⁸ UNDT, *Edwards v. the Secretary-General of the United Nations*, Judgment No. 22 of 2011, para 60; Furthermore, in *Mwangi* (UNAT, Mwangi v. the Secretary-General of the United Nations, Judgement No. 1125 of 2003), the former UN 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."

⁹ ILOAT, *P.-M. (No. 2), v. WHO*, Judgment No. 3688 of 2016, par. 27.

¹⁰ UNAT, *Durand v. The Secretary-General of the United Nations*, Judgment No. 1204 of 2005, para. 17; In *In Re Grasshoff* (ILOAT, *In re Grasshoff v. WHO (Nos. 1 and 2)*, Judgment No. 402 of 1980, par. 1) the ILOAT affirmed that DoC is "a fundamental principle of every contract of employment," thus affirming that DoC also finds its origin in organization's contractual relations with their employees.

safety [...]. The measures requested must be reasonable and based on objective evidence of their necessity.”¹¹

Whilst it is clear from the foregoing that the UN has a legal obligation to ensure the health and safety of staff members, practice and compliance with such an obligation can be uneven. This can be attributed to the fact that an univocal and coherent normative framework that defines DoC did not exist in the UN system, making it difficult to determine the precise content of the obligation. Current sources enshrining DoC are relatively limited in scope. For example, while Staff Regulation 1.2(c) outlines the necessity of ‘safety and security arrangements,’ this legal definition does not articulate elements of physical or psychosocial health, nor does it address problems such as harassment, misconduct, or other workplace issues that concern broad patterns of behavior rather than fixed administrative decisions.¹² While there are existing security and safety policies and frameworks in place that are complementary to Staff Regulation 1.2,¹³ such as the UN Security Management System, safety and health risks have been identified that are not fully addressed through current safety and security policies.¹⁴

Without articulation on the organization’s DoC, identifying its content relies primarily on the interpretive efforts of Tribunals. However, there is a brevity in jurisprudence on DoC as it relates to the obligation to take measures to protect staffs’ health and safety or to provide staff with a healthy working environment. Prior to 2019, of the cases of the ILOAT and UNDT/ UNAT that referenced organizations’ DoC, most dealt DoC as it relates to ‘good faith and the concomitant duty of care,’ such as ensuring that internal procedures such as administrative appeals be conducted with in accordance with the obligations of due process,¹⁵ or that allegations of harassment are escalated in accordance with procedures in force.¹⁶ Few cases dealt with an organization’s duty to take measures to protect staff’s health and safety. Fewer still ended in the complainants’ success,¹⁷ the most exemplary being in 2018 with ILOAT judgement no. 4003, wherein it was held that the ICC had a DoC to properly prepare the diplomatic mission to ensure the safety and security of staff members on mission,¹⁸ and one in 2016 with ILOAT judgement no. 3689, wherein it was held that the WHO breached its DoC towards the complainant who had contracted a vector-borne disease by failing to provide him with protective equipment.¹⁹

The UNAT is least in favor of the concept of DoC as it relates to occupational health and safety; indeed, the Tribunal dismissed most applications of the related cases.²⁰ The two in recent years that were successful dealt with organizations’ failure to protect its staff from exposure to any form of prohibited conduct.²¹ From this, it is apparent that the UNDT and UNAT apply an extremely narrow scope of the duty of care, which does not fully represent

¹¹ ILOAT, *T.B. (No. 4) v. WHO*, Judgement no. 3689 of 2016, under 16; also see: ILOAT Judgements no. 2403, 2706, 3025, and 3994.

¹² Kemp & Merkelbach, ‘Can you get sued? Legal liability of international humanitarian aid organisations towards their staff,’ (2011)

¹³ CEB HLCM 29th Session Report, ‘United Nations Common System Occupational Safety and Health (OSH) Framework,’ CEB/2015/HLCM/7, p. 2; CEB HLCM 33rd Session, ‘Conclusions of the High-level Committee on Management at its thirty-third session,’ CEB/2017/3, p. 7, 10, 24.

¹⁴ CEB HLCM 33rd Session, ‘Conclusions of the High-level Committee on Management at its thirty-third session,’ CEB/2017/3, p. 7, 10, 24.

¹⁵ See, for example, ILOAT judgements no. 3586, 3674, 3727, 3840, 3845, 3861, 3929, 3943, 3995, 4028, 4026, 4072, 4090, 4100, 4102, 4246.

¹⁶ See ILOAT judgements no. 3365, 4013, 4064.

¹⁷ Three other successful cases dealt with the obligation to provide staff members with a safe and secure working environment free from harassment. See: ILOAT judgements no. 2524, 2706, 3995.

¹⁸ ILOAT, *A v. ICC*, Judgement no. 3689 of 2016, under 16

¹⁹ ILOAT, *T.B. (No. 4) v. WHO*, Judgement no. 3689 of 2016, under 5

²⁰ See, for example, Judgments no. UNDT/2011/174; UNDT/2017/091; UNAT/2017/945; UNDT/2017/082; UNDT/2020/076; UNDT/2020/167; UNDT/2011/089; UNAT/2013/287; UNDT/2020/111; UNDT/2020/097; UNDT/2020/138; UNDT/2020/142; UNAT/2014/403; UNDT/2014/130

²¹ UNAT, *Delaunay (Appellant) v. Registrar of the International Court of Justice (Respondent)*, Judgment No. 939 of 2019; UNDT, *Jackson v. Secretary-General of the United Nations*, Judgement no. 120 of 2019.

the interest of staff. Indeed, the dismissal of a vast majority of cases shows that there is a risk that tribunals can take a narrow interpretation on the content of DoC, especially in what the Tribunal considers to be “necessary” or “reasonable” measures that an organization must take to protect their personnel.

The lack of clarity on the content of DoC means that the concept is subject to wide-ranging and often narrow interpretations. Without a UN system-wide framework, the policies for ensuring DoC are dispersed across organizations and even departments and functions, which has led to a lack of a systematic articulation of organizational responsibilities for DoC vis-à-vis staff.

Work of the HLCM Duty of Care Task Force in providing a UN system-wide duty of care framework

From the foregoing, it is imperative that the UN develops a normative framework that outlines the content of DoC. The most advanced and latest developments towards clarifying the tenets of DoC for the UN as an employer can be found in the discussions of the UN Chief Executives Board for Coordination's (CEB) High-Level Committee on Management (HLCM). Indeed, the need for a UN system-wide duty of care definition or legal framework underlies the mandate of the HLCM's Duty of Care Task Force (hereafter, 'the Task Force'), who, since 2016, has been in the process of developing and operationalizing an approach to DoC that is comprehensive and integrated in a consistent manner across the UN system by defining standards, clarifying roles and responsibilities, and establishing accountability mechanisms.²²

The Task Force continued the work of the HLCM's Working Group on Duty of Care (hereafter, 'the Working Group'), which was tasked with analyzing different high-risk environments with the aim of identifying DoC issues impacting UN personnel, with the purpose of discussing and recommending how to strategically address and coordinate the issues identified.²³ Fifty-four issues affecting the DoC were identified, which were categorized under four thematic structures: medical arrangements, security and safety arrangements, psychosocial arrangements, and administrative arrangements. The Working Group identified these issues as priorities for subsequent engagement and made recommendations for functional areas of DoC that organizations should implement.²⁴ Upon the end of the Working Group's mandate, the Task Force accordingly implemented key action points for organizations to implement into their existing policy frameworks, which included the creation of a UN System-wide Mental Health Strategy, the development of the Duty Station Health Risk Assessment (DS-HRA) methodology, and the endorsement of UN Living and Working Standards.²⁵

Furthermore, in identifying the issues affecting the duty of care of the organization, the Task Force recognized that the risk universe associated with an organization's duty of care consisted primarily of Occupational Safety and Health (OSH), as well as security risks.²⁶ Psychological strain, poor living conditions, harassment and misconduct, and lack of access to medical care are not always looked at systematically and are often addressed after-the-fact, such as through recourse to administrative tribunals or through mechanisms like boards of inquiries.²⁷ The Task Force therefore noted the need for a more proactive assessment and management of OSH and security risks. In light of this, the scope of the Task Force was broadened to include the elaboration of a DoC-specific risk management framework.²⁸

Security risks are already well-managed throughout the UN system through the UN Security Management System (UNSMS), which was developed by the UN Inter Agency Security

²² CEB HLCM 31st Session Report, 'Final Report HLCM Working Group on "Reconciling Duty of Care for UN personnel while operating in high risk environments,' CEB/2016/HLCM/11

²³ Ibid.

²⁴ Ibid.

²⁵ CEB HLCM 34th Session Report, 'Duty of Care Task Force Interim Report,' CEB/2017/HLCM/16; CEB HLCM 38th Session Report, 'Cross-functional Task Force on Duty of Care Final Report, October 2019,' CEB/2019/HLCM/27

²⁶ CEB HLCM 35th Session Report, 'Cross-functional Task Force on Duty of Care for personnel in high risk environment Report, April 2018,' CEB/2018/HLCM/5

²⁷ CEB HLCM 34th Session Report, 'Duty of Care Task Force Interim Report,' CEB/2017/HLCM/16

²⁸ CEB HLCM 34th Session Report, 'Duty of Care Task Force Interim Report,' CEB/2017/HLCM/16

Management Network (IASMN).²⁹ As the SMS is already operational, the Task Force concentrated on the risks associated with OSH that do not fall within the purview of the UNSMS for the development of a DoC risk management approach which will incorporate OSH considerations into its prevention and mitigation measures.

OSH is already a defined discipline for which an OSH Framework has already been endorsed by the HLCM in 2015.³⁰ The Framework, which was promulgated as a means to define the minimum requirements for UN system agencies' existing OSH programs and policies, contemplated a phased implementation of a system for assessing, monitoring and managing risks to health and safety in UN workplaces, and described principles for the adoption of an UNSMS-equivalent OSH risk management system. This laid the groundwork for the Task Force's progression towards the inclusion of the OSH Framework as an essential part of the future DoC risk management framework. According to this integrated risk management system, UN organizations, with the assistance of OSH committees, should ensure that risks associated with DoC are integrated into their internal risk management and accountability frameworks.³¹

The Task Force provided guidance to assist UN organizations in tethering OSH into their overarching DoC risk management frameworks, following the core elements on implementation of an OSH management system as outlined in the OSH Framework. Accordingly, organizations must: issue a formal OSH policy statement which will underscore the organizations' commitment to providing a safe and healthy workplace for its personnel; create an OSH oversight body/ committee; regularly populate a risk register which includes a risk category pertaining to OSH; and incorporate OSH-related risks into the accountability and escalation frameworks for Heads of Offices/ representatives.³²

The Task Force also determined "Core Principles for a healthier, safer and more respectful UN workplace" to provide a working guide for UN organizations to articulate their approach for DoC when reviewing any new or existing policy. The Principles are: risk awareness and transparency; safe and healthy working and living environment; inclusion and respect for dignity; caring for consequences of risk; and accountability at all levels. Each Principle is accompanied by a set of objectives for organizations to implement, which in turn would necessarily be operationalized by the action points endorsed by the HLCM, such as the DS-HRA, the OSH-integrated DoC risk management framework, UN Living and Working Standards, and the Mental Health and Wellbeing Strategy.³³

In concluding its work, the Task Force felt that an interagency forum was needed for further mainstreaming of OSH and the tools developed by the Task Force. It proposed the establishment of an interagency OSH body to coordinate, set directions, and develop tools and common standards. The WHO agreed to lead this forum and committed to bring issues to HLCM's attention.³⁴

²⁹ UN, Inter-organizational security measures: Framework for accountability for the United Nations field security management system, Report of the Secretary-General A/57/365 (2002)

³⁰ CEB HLCM 29th Session Report, 'United Nations Common System Occupational Safety and Health (OSH) Framework,' CEB/2015/HLCM/7

³¹ CEB HLCM 36th Session Report, 'Cross-functional Task Force on Duty of Care for personnel in high risk environment Report, October 2018,' CEB/2018/HLCM/17; CEB HLCM 37th Session Report, 'Cross-functional Task Force on Duty of Care Report, April 2019,' CEB/2019/HLCM/19

³² CEB HLCM 37th Session Report, 'Cross-functional Task Force on Duty of Care Report, April 2019,' CEB/2019/HLCM/19

³³ CEB HLCM 37th Session Report, 'Cross-functional Task Force on Duty of Care Report, April 2019,' CEB/2019/HLCM/19, Annex 1

³⁴ CEB HLCM 38th Session Report, 'Cross-functional Task Force on Duty of Care Final Report, October 2019,' CEB/2019/HLCM/27

In effect, the Task Force's work was intended to provide a set of DoC minimum standards to which all UN entities and organizations should subscribe. Drawing on this work, organizations across the UN system should develop a DoC framework and accordingly promulgate a policy statement on how the organization will manage and minimize the risks to the physical and psychological health, safety, and security of its personnel and outline the minimum standards in the different areas of DoC such as security management, staff welfare and entitlements, health support, and harassment-free working environments.

Evolution of the duty of care obligation

It is clear from the Task Force's focus on OSH as a core part of organization's DoC matrix that organizations would have to make a commitment to allocate the necessary resources to pursue OSH properly as part of their overarching DoC obligation. On behalf of the Task Force, the CEB launched a survey in 2019 to show the progress of implementing the components of the OSH Framework by its 31-member organizations.³⁵ As of August 2019, data shows that few organizations have an OSH policy implemented which is compliant with the requirements of the OSH Framework and the majority of organizations have not started promulgating standards and ensuring compliance and have not provided resources for OSH implementation.

However, towards the end of the Task Force's mandate in October 2019, there have been a growing trend of ILOAT judgments that are reflective of upholding organization's DoC to take appropriate measures to protect their staffs' health and safety. Three such cases have been brought before the ILOAT between 2019 and 2020, which represents a significant up-tick in cases. Perhaps unsurprisingly, all have been successful: in judgement no. 4171, the Tribunal held that UNESCO had a DoC to provide the complainant with a safe and adequate work environment free from harassment.³⁶ Two more cases, judgements no. 4222 and 4239 dealt specifically with OSH as an integral component of organization's DoC. Judgement no. 4222 concerned a service-incurred injury, and the Tribunal held that international organizations 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. In the instant case, it was held that UNESCO should have ensured that construction work was properly carried out so as to have prevented the injury.³⁷ Judgement no. 4239 held that the WHO had an ongoing responsibility to do all it could to mitigate the effects of an accident suffered by a staff member while on mission as part of a more general DoC to protect the health and ensure the safety of its staff.³⁸

These judgments show that the Tribunal is more conscious of OSH and security risks when asserting that an organization owes DoC to staff, and when appeals regarding security or occupational health and safety are filed, the Tribunal will now make a greater effort to ensure that the rules, procedures, and appropriate measures of organizations are in line with the definition and minimum standards of DoC as foreseen by the Task Force. Furthermore, there is growing recognition of OSH being one of the critical aspects to the future of work; the International Labour Conference this year took a decision to, as part of the ILO's centenary declaration, elevate OSH to what is called a fundamental principle on rights at work.³⁹

³⁵ Ibid.

³⁶ ILOAT, *F. (Nos. 5, 6 and 7) v. UNESCO*, Judgement no. 4171 of 2019, under 11

³⁷ ILOAT, *K. d. J. (Nos. 2 and 3) v. UNESCO*, Judgement no. 4171 of 2020, under 17

³⁸ ILOAT, *L v. WHO*, Judgement no. 4239 of 2020, under 21, 25, and 26.

³⁹ CEB HLCM 38th Session Report, 'Cross-functional Task Force on Duty of Care Final Report, October 2019,' CEB/2019/HLCM/27; International Labour Conference, 'ILO Centenary Declaration for the Future of Work, adopted by the Conference at its 108th session,' 2019; ILO Governing

Together with recent developments at the ILOAT, it appears several elements are coming together at a critical time and, moving forward, it is imperative that the UN system continues to expand its DoC framework to be cognizant of its own responsibilities and the needs of staff.

Body 340th Session, 'Follow-up to the resolution on the ILO Centenary Declaration for the Future of Work: Proposals for including safe and healthy working conditions in the ILO's framework of fundamental principles and rights at work,' 2020.