



**POLICY PAPER**

## **Can you get sued?**

Legal liability of international humanitarian aid organisations  
towards their staff

**Edward Kemp  
Maarten Merkelbach**

**Security  
Management  
Initiative**



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This paper should not replace or supplement the provision of specific legal advice to individual nonprofit organisations who have staff operating in conflict zones or other dangerous areas, with respect to their liabilities and obligations. This paper should not be relied upon for legal advice by any non-profit organisation or other third party, and the authors shall not be liable to such persons. The paper relies on the memoranda listed in Appendix 2 as an accurate and comprehensive characterisation of the law as it exists in the countries referred to.

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## ABOUT THIS PAPER

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This Policy Paper is produced by the Security Management Initiative (SMI) and is the result of an SMI research project. SMI focuses on topics of central interest to the risk and security management community of international aid agencies. SMI offers policy makers and practitioners an overview of key practices and conceptual issues as well as a summary of the recent evolution of a given topic, points to some of the main debates and suggests perspectives for moving forward. It thus aims to clarify and inform the risk and security management of non-profit organisation, and contribute to the professionalisation of the sector.

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## Executive summary

This paper demonstrates that international aid organisations (IAOs), even though they are non-profit, are subject to the same basic legal ground rules as other any other enterprise – be they commercial, public or associative in nature – and subject to outside scrutiny irrespective of sector specific or internal self-regulatory standards and guidelines.<sup>1</sup>

The paper highlights that IAOs' concern with the well-being, safety and security of their staff is mandatory, not voluntary or optional. IAOs are subject to and are obliged to conform to legal standards, legislation and provisions in relation to their duty of care and legal liability regarding their employees. This complements and reinforces the existing concerns of IAOs, including risk security management, that focus on the well-being, safety and security of their staff. However, these are generally approached as a matter of choice and thus basically voluntary and subject to various interpretations.

From a legal perspective, the current essentially self-regulatory nature of the IAO sector's safety and security management and practices can be rephrased in legal, mandatory terms. Rather than self-regulatory, the legal framework provides an overarching regulatory level that supersedes the IAO sector and its individual organisational actors, and lays down principles and guidelines that are commonly shared by all social, economic and public actors in civil society of which IAOs are a part. This legal framework can be seen as a codification of existing moral, ethical norms shared in society, including IAOs – formalizing and benchmarking the 'right thing to do'. The legal perspective thus informs and clarifies current IAO practice, notably as to the articulation of and links between the various and many good practices that already exist; it thus does not necessarily contradict current practice. Furthermore, the principles and guidelines in this paper also simplify framing and ordering of current risk security management practices and concerns by placing obligations within a limited number of key areas. It also presents the logical reasoning that lies behind the implementation of answering obligations within these key domains, albeit that contextual and national variations will present numerous possible practices and interpretations.

Importantly, legal standards and dispositions as to the duty of care owed to their staff by an enterprise or organisation underline that safety and security are first and foremost a corporate, institutional issue. Implementation of measures in the field by operational staff is but one element of the overall legal responsibility of an organisation. Several components of an organisation are involved – including the governance, executive, human resources, finance, training, and operations components – and their various distinct roles need to be integrated and coordinated. This strengthens IAOs' ability to respond to concerns and implementation of measures related to staff safety and security and improves an individual staff member's protection and rights. It strengthens IOAs' ability to gain safe and secure access and thus contributes to sustainable, responsible programme implementation. Taking steps to conform to basic duty of care reinforces an organisation and its staff; it does not need to be seen as placing an impossible burden that limits an organisation's mission, objectives and action.

Last but not least, on par with other economic, public or associative endeavours, the legal perspective presented in this paper contributes a necessary facet towards the professionalisation of the international non-profit humanitarian, aid and advocacy sectors.

<sup>1</sup> UN agencies are not specifically considered in this paper, mainly in view of the fact that they generally benefit from immunity to prosecution in State courts. However, some of the legal reasoning presented here may well inform and be followed in internal UN arbitration.



## I. Introduction

The 'humanitarian enterprise' is no longer a matter of well-intended philanthropy or charity but must be considered a global multi-billion dollar 'business'. Indeed, the IAO<sup>2</sup> community strives to be a distinct professional enterprise with objective professional standards for the overall humanitarian aid community, organisations and with professional staff.<sup>3</sup> The corollary is that IAOs are subject to the same basic ground rules as other enterprises – be they commercial, public or associative in nature – and thus subject to scrutiny irrespective of declarations of community-wide principles, standards and guidelines. While self-regulatory policies exist, they are de facto adhered to on a voluntary basis and cannot be enforced nor can violations be sanctioned.

Much has been said and written about the many major changes in the geopolitics during the last three decades since the end of the Cold War, and the institutional and operational challenges faced by the humanitarian aid business in this fast changing environment.<sup>4</sup> Various reports<sup>5</sup> underline the changes in the environment that agencies face and the security risks and incidents they encounter, and continue to express concern about the increasing numbers of incidents and the need for community-wide. Such reports reflect an increased attention to how security issues facing aid agencies and UN affect humanitarian access.<sup>6</sup> This has implications for IAO staff<sup>7</sup> and relatives, as well as for donors. Increased media attention highlights the issues. A range of studies note and further encourage access to personal safety training,<sup>8</sup> improved reporting and record keeping of security incidents<sup>9</sup> and a more widespread general use of – or at least reference to – monitoring and analysis of incidents and trends as a tool for risk analysis and management. All these contribute to a better understanding of the threat environment and the development of pertinent preventive and/or protective mitigating measures.

Already as of the late 1990s, attention was being given to sharing good practices and improved security coordination.<sup>10</sup> During the following decade inter-organisation and organisation specific guidelines were established and shared, comprehensive studies were undertaken and publications were issued. At least within major agencies, security positions were created and specialists were hired, policies were drawn up and operating procedures were established both as an inter-operational baseline

<sup>2</sup> For the sake of simplicity, we use the term '*international aid organisation*' to refer to a variety of non-profit organizations, notably those operating on complex environments. We recognise that non-profit organizations working in these environments may be carrying out activities that would more accurately be described as humanitarian, developmental, peace building, protection, advocacy, etc. or any combination of the these. The term '*organization*' is used as any formally constituted entity within the sector including national, state and regional associations. (cf. for example: Standards Australia Limited/Standards New Zealand (2004; 2010), '*Guidelines for managing risk in sport and recreation organizations*', HB 246:2010 (First published as HB 246—2002). Second edition 2004. Jointly revised as HB 246:2010. © Standards Australia Limited / Standards New Zealand.

<sup>3</sup> Others argue for the use of 'humanitarian entities', which in a broad sense (...) include all bodies (whether international, national, or local) that perform acts of humanity in response to the needs of vulnerable individuals or communities, whatever the prevailing situation in the country", Marion Haroff-Tavel, 'Violence and humanitarian action in urban areas: new challenges, new approaches', *International Review of the Red Cross*, Volume 92, nr 878, June 2010.

<sup>4</sup> Antonio Donini, et al. (2008) ; Pierre Gassmann (2005)

<sup>5</sup> HPG report 23 (2006); HPG Briefing paper 24 (2006); HPG 34 (2009); Muggah, Robert, (2003); King, Dennis (2002a; 2002b; 2002c)

<sup>6</sup> Bruderlein, Claude, and Pierre Gassmann (2006)

<sup>7</sup> Roberts, David Lloyd (1999); IFRC (2007)

<sup>8</sup> ECHO (2004a)

<sup>9</sup> Bolletino, Vincenzo (2006)

<sup>10</sup> White, Jim (1999); Van Brabant, Koenraad (1998a; 1998b; 1999; 2000; 2001); Gallien, Pierre (1998)



and for particular contexts.<sup>11</sup> Various studies, handbooks and operational security training manuals were produced by individual organisations<sup>12</sup> as well as by (inter-) governmental bodies.<sup>13</sup> Specific non-profit field security-training initiatives<sup>14</sup> – both at headquarters and field level – were developed, while numerous specialist freelance consultants offer training.

This was also made possible by the fact that some of the major donors had become sensitive to the need to finance security and contributed to the overall professionalisation of IAO security management,<sup>15</sup> and encouraged operational collaboration.<sup>16</sup> These efforts were supplemented and supported by practical tools issued by the UN, ECHO and NGOs. Last but not least, donor governments put the issue on the agenda of, for example, the Good Humanitarian Donorship (GHD) initiative.

In the field, several inter-organisation security coordination and information sharing bodies were set up: Afghanistan NGO Safety Office (ANSO); Liberia NGO Security Office (LiNSO); NGO Coordination Committee in Iraq (NCCI); Initiative ONGs Sécurité (IOS); Gaza NGO Safety Office (GANSO), among others. At headquarters' level, opportunities and networks of exchange for security staff were set up and inter-organisation initiatives were started in several countries as well as internationally. In the US, InterAction started a Security Advisory Group (SAG), the European Interagency Security Forum (EISF) was initiated in 2007, and the Security Management Initiative (Geneva) has been active since 2005. Via the Inter-Agency Standing Committee (IASC), the UNDSS-led 'Saving Lives Together' (SLT) programme was initiated in 2006 to improve on collaboration of security arrangements between the UN and non-UN humanitarian actors.

The trend towards greater professionalisation has not only addressed safety and security management and incident mitigation. Growing awareness of staff needs, for example in terms of health, both physical and mental, and human resource management also took place and are addressed by specialist organisations.<sup>17</sup> Research was undertaken supported by evidence-based reporting, increasingly specific expertise was provided to support staff needs and management, and organisational staff management practices were initiated in the field, aided by an expanding network of specialists. At the same time, staff demand for support services grew, and the main donors increasingly accepted the need for integrated staff support programmes – not least due to the argument that better staff support leads to better programme implementation – informed by standards that were developed specific to the IAO sector. Some IAOs have capitalized on these developments and implemented staff support services. However, overall the sector's commitment to staff support remains generally deficient. In practice many IAOs provide virtually no organisational resources to protect staff from dangerous challenges they may confront in the

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<sup>11</sup> For example: InterAction (2001; 2006a)

<sup>12</sup> Such as the ICRC and IFRC.

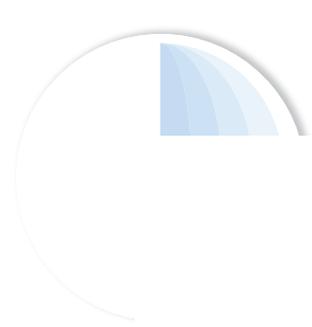
<sup>13</sup> For example: ODI in the UK; the EU's humanitarian branch ECHO.

<sup>14</sup> Such as: RedR, which has affiliates around the world; the Centre for Safety and Development (CSD) in the Netherlands.

<sup>15</sup> ECHO (2004b).

<sup>16</sup> ECHO (2007)

<sup>17</sup> For example in the UK: People in Aid, InterHealth.



field.<sup>18</sup> Moreover, international staff receive priority attention over national staff.<sup>19</sup> The discrepancy between consideration and treatment of international as compared to national/local staff poses fundamental ethical – as well as legal – problems that have only started to be addressed in the past few years. The question of health, safety & security of national staff has thus far remained underdeveloped despite genuine concern within the sector as to staff well-being.

It is worth pointing out that this attention to staff health, safety and security is generally seen in terms of ‘caring for’; the point of departure is a moral and ethical stance. The legal dimension of ‘duty of care’ as a legal term signifying a legal responsibility has thus far not been addressed.

As this paper demonstrates, IAOs are subject to legal standards, legislation and provisions in relation to their duty of care and legal liability regarding employer-employee relations. National and international standards and legal dispositions related to due financial accountability – answering objective and mandatory financial requirements – have long received attention and are subject to outside scrutiny (audits). Similarly, compliance with compulsory national employment law and regulations (such as social security and health insurance obligations) are generally standard practice. However, legal standards and dispositions as to the duty of care/legal responsibility to provide staff with a safe and secure workplace underline that due safety and security are mandatory, an obligation – i.e. not optional – and are first and foremost a corporate issue.<sup>20</sup>

This has far-reaching implications for IAOs and their operations, governance and executive, staff and their dependents, as well as for the sector as a whole. Since safety and security are not only an ethical and moral concern but a legal obligation, due safety and security are not mere personal, subjective matters of choice or conscience but must also answer to objective laws, regulations, standards and norms that can be objectively evaluated and are open to scrutiny – and can be enforced.

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<sup>18</sup> People In Aid (2010)

<sup>19</sup> ‘Aid Worker Security Report 2011 – Spotlight on security for national aid workers: Issues and Perspectives’, Humanitarian Outcomes (August 2011)

<sup>20</sup> Cf. also: ‘Vicarious liability of a charity or its trustees’, UK Charity Commission

## II. Research project

### 1. The basic question

The scene is Iraq 2003. The UN has just suffered the worst attack in its history when a bomb attack kills 22 UN staff and visitors and injures over 150 others at its Baghdad headquarters.<sup>21</sup> The event is generally seen as a watershed.<sup>22</sup> Further attacks on the ICRC and many NGOs and their staff confirm that even the most respected humanitarian actors are not only no longer respected but have become direct targets of belligerents.

The following question is posed by a seasoned humanitarian professional with decades of top management experience in hostile environments: “In this extreme threat environment, on a daily basis I take many decisions on what staff can and cannot do. And despite a wide range of constantly adapted measures to reduce and limit risk, I must assume that a critical, fatal incident will probably happen one day. Apart from serious moral and ethical concerns, is there not also a legal angle to this? If a critical incident happens, what is the legal responsibility? To what extent can my organisation or I be held legally accountable? Could either be taken to court?”

Perhaps the question – and title of this paper – is put crudely and simplistically, but the short and simple answer is basically ‘yes’. Of course the issue is more complicated than that; but it has far-reaching implications.

### 2. Background

Legislation is becoming increasingly demanding regarding the responsibility of employers to ensure a safe work environment. Moreover, litigation has spread to areas that would have been almost unthinkable only a few years ago, as cases brought against military forces by military personnel or their relatives indicate.<sup>23</sup> Litigation is an avenue used by staff (or their families) to seek redress, and the same may well become a reality rather than an exception for non-profit organisations<sup>24</sup> (as well as the United Nations). However, while the need for compliance with legal standards is an established practice in the private sector,<sup>25</sup> a preliminary review showed that among IAOs the notion was rarely on the agenda and that practice falls short.<sup>26</sup>

Given the complex environments in which many IAOs operate, their staff have routinely faced considerable risks to their health, safety and security. However, in recent years the level of risks and the types of threats have changed, in some contexts becoming more extreme. Moreover, recent developments seem to indicate that

<sup>21</sup> “Report of the Independent Panel on the Safety and Security of UN Personnel in Iraq” (October 2003)

<sup>22</sup> The incident and report of the Independent Panel led to a reform of the UN security management; among other, UNSECOORD was dissolved and UNDSS was created.

<sup>23</sup> For example, a case brought in 2009 against the French military by family of French soldiers ambushed and killed in Uzbin valley, Afghanistan, in 2008.

<sup>24</sup> In May 2011, an aid worker who had been kidnapped and held in Darfur in 2010 filed a lawsuit in Manhattan Federal Court against the NGO Samaritan’s Purse and the private company Clayton Consultants.

<sup>25</sup> See for example: Claus, Lisbeth (2009)

<sup>26</sup> A recent exception is: Geneva International Centre for Humanitarian Demining (GICHD), A Guide to Liability and Insurance in Mine Action, (June 2011)



the traditional (Western) IAO principled approach does not any longer “protect” humanitarian workers or guarantee humanitarian access and presence in some operational contexts (e.g. Afghanistan, Somalia, Pakistan, Darfur).<sup>27</sup>

While many of the (large and main) agencies have considerably developed their risk security management, the need for and attention to adequate, comprehensive risk and security management is far from accepted, nor is the capacity to do so evenly shared even if security is on an IAO’s agenda. However, where due and functional operational risk and security management strategies and practices do exist, these often fail to be complemented and framed in terms of institutional policy and management. Only seldom are risk and security management explicitly set with respect to the institutional legal responsibilities and requirements of what is in essence a contractual employee-employer relationship.

### 3. Research objectives

This research project aims to contribute to the improvement of risk and security management policies and practices of international aid agencies, in order both to enhance their operational capacity and to preserve adequate occupational health and safety for their national and expatriate staff, particularly those working in high risk environments. Specifically, the research intends to contribute to:

- Raising awareness that legal accountability must be part of an adequate institutional risk and security management policy and practice;
- Improving institutional IAO risk and security management policies and practices that will both enhance institutional responsibilities and operational capacity, and preserve adequate occupational health and safety for national and expatriate IAO staff working in high risk environments.

The research project was guided by a number of key issues and questions:

- To what extent do IAOs include risk and security aspects in the overall institutional and operational management of their organisation?
- To what extent do IAOs take into account the legal aspects underlying health, safety and security standards and requirements on behalf of their staff?
- To what extent do current risk and security management practices fulfil the duty of care owed by IAOs to their staff?
- To what extent would prevailing legal standards be applicable to the activities of IAOs working in hazardous environments and thus be a ground for IAOs’ legal accountability?
- To what extent does an adequate insurance coverage fulfil the duty of care owed by IAOs?
- Is it possible to determine international common minimum guidelines that can enable compliance with the duty of care/legal liability for the benefit of IAO staff?

<sup>27</sup> Stoddard, Abby, et al (2009); Hammond, Laura (2008)

## 4. Methodology

### General approach

The research project has two components:

1. A current practice review among a selection of IAOs to identify whether the notion of duty of care and/or legal liability informed or is part of current risk and security management policy and practices, and whether gaps can be identified between legal norms and actual practice.
2. A legal review in a certain number of countries to define more clearly what national the legal obligations of IAOs are, and to see whether commonalities, or a generic appreciation and reasoning, can be identified.

To seek coherence, an attempt was made to have the legal reviews cover the same countries where interviewed IAOs are headquartered. Moreover, legal practice was favoured instead of legal theory. Thus, law firms with expertise in litigation were approached rather than academics.

### *Limitations*

The scope of the research, the number of national laws reviewed and IAOs interviewed were necessarily limited and cannot be taken to represent the entire IAO community. Although the interview data is thus not representative of the entire IAO community, it should be noted that the IAOs interviewed were well-known and well-established organisations. The interviews were conducted in 2009 and the picture they present will have evolved since then. However, the snapshot provided by the interviews does indicate where weaknesses and gaps tend to exist. Moreover, it may be assumed that among smaller and less established agencies the same weaknesses and gaps will be accentuated.

The country legal reviews – and this paper in general – are not to be taken as authoritative legal advice. The legal reviews of the five countries covered can only point to a specific country law and a generic formulation of the common issues and challenges. Legal issues will necessarily need to be defined, detailed and refined for each national law and in the case of litigation, to a specific, particular event. Nevertheless, from an expert legal perspective the reviews of the legal systems do point to commonalities between legal systems and national legislations. As such, the assumption of this study – that there are shared, generic legal notions of responsibility and liability that apply to IAOs – is confirmed, at least for the limited number of legal systems covered here.

### Current Practice Interviews

Current practice interviews were carried out with well-known, established organisations in seven countries: France, Germany, Italy, Sweden, Switzerland, the United Kingdom, and the United States.



### *Interview selection*

IAOs with a diversity of status, expertise and backgrounds were selected and approached for the interviews. Issues considered included:

- Legal status: i.e. for example, international organisation, governmental organisations, private based association, non-profit association, charity-based association
- Expertise: i.e. technical, political, humanitarian, medical, development assistance
- Orientation: i.e. secular, charity-faith based
- Size (staff levels, budget)

### *Organisations*

The interviews took place during the first quarter of 2009. Of the 42 organisations that were approached, all showed significant interest and agreed to be interviewed. Of these, 38 were ultimately interviewed, both secular and faith-based organisations. 30 were operationally active IAOs; 6 provide policy research; one is primarily a donor (three were of another type, e.g. legal, staff union).

### *Interviews*

Interviews took place as much as possible with people working in a various functions such as designated security persons, senior management, human resources, and legal advisers. 67 people were interviewed across seven countries in Europe as well as in the US, sometimes in small groups. Of the 67 interviewed, 55 were staff members of operational IAOs; seven were researchers or academics with specialist IAO interest; and the remainder were active in humanitarian policy, private law, donor government, or other.

The interviews were conducted as semi-structured interviews on the basis of an outline (a series of issues and questions) that was analogous to that set out for the legal reviews. The interview outline was shared, often in advance, with those interviewed. Each interview lasted one to two hours, with some extending to four hours or more. In total more than 150 hours of interviews were carried out. The interviews were conducted on a discretionary basis: neither the names of those interviewed nor their organisational affiliation will thus be disclosed.

### **Country legal reviews**

Five law firms contributed with texts that set out in detail respective national law as applicable to responsibilities and liabilities of IAOs. Via the network of Advocates for International Development (A4ID) in the UK, a call was sent out to private law firms to obtain pro bono advice and reviews on the questions presented by the research. A4ID was instrumental in obtaining commitments from law firms in the UK, France and Italy. Interest from the US law firm was obtained via SMI contacts, while the Swedish law firm was contacted via the Swedish International Development Agency (Sida).



A UK barrister (one of the authors) drafted, also on a pro bono basis, a summary of the five national legal papers that had been provided. This summary paper formed the basis of an expert meeting organized by SMI in collaboration with A4ID and with financial support of the *Cellule de Crises* at the French Ministry of Foreign Affairs and the Swiss Ministry of Foreign Affairs. The meeting was held in Geneva late 2010, and was attended by all legal experts that had contributed with texts as well as senior staff from six IAOs with extensive institutional and operational experience and familiarity with the issue. The detailed discussion was followed up by further drafts of the summary legal reasoning, case illustrations, and with ongoing substantive input from all the legal experts that had attended the meeting.



### III. CURRENT PRACTICE REVIEW: MAIN INTERVIEW OUTCOMES

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The issues covered in this section focus on risk and security management, policy, procedures and implementation, and whether these are explicitly linked to IAOs' duty of care or legal responsibility.<sup>28</sup> While this list is by no means exhaustive, these are all issues that are relevant to duty of care and legal responsibility. As such, they give some indication of the degree of compliance; or point to gaps. Actual compliance will, of course, depend on many more agency, staff and context details and specifics.

The overall conclusions of the current practice review are as follows:

- There is a growing awareness among IAOs of the relevance of legal responsibilities towards their staff.
- Perception and understanding of the range of legal responsibilities remain deficient.
- Current practice falls short of compliance with legal standards as to employer obligations.

#### 1. Line management and reporting

Around:

- 30% of IAOs have an institutionalised system of security management and reporting.
- 30% of IAOs have no such system.
- 30% of IAOs have started to introduce a security management plan.

*Comments*

Only a third of the IAOs interviewed have implemented a working security mechanism that integrates security management into what can be considered a common, shared professional and institutional culture of security.

Developing security policy and guidelines does not on its own suffice to meet duty of care standards. Actual implementation of such a policy/guidelines is required, including concrete security measures, as well as the effective enforcement of any policy/guidelines. This in turn requires an empowering mechanism with clear attribution of authority and responsibility and lines of reporting. (It can be expected that this extends to and includes responsibilities for providing technical safety and security equipment.)

In the event of a court case, the actual existence of a security mechanism and its effectiveness will be under scrutiny; documentation can be key for demonstrating compliance. A court will probably look at a range of topics, such as:

- Line of command and responsibilities
- Risk and security and analysis mechanism and management
- Security information flow process & reporting
- Existence of updated security policy/guidelines
- Continuous (regular) risk and security assessment, review and updating
- Preventive and mitigating measures

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<sup>28</sup> Several of the issues and respective findings are discussed in detail in the legal section of this paper where they are more usefully covered.

- Contingency plan
- Enforcement mechanism
- Information and training
- Technical equipment and its regular verification

## 2. Resources

- 88% of IAOs allocate human resources to security.
- 34% of IAOs provide for security in the budget, either specifically designated or integrated systematically in the global budget.
- 66% of IAOs do not have a specific security budget line or guidelines for integrating security in the budget.

### *Comments*

Key enabling criteria are human resources (88%) and budget (34%) allocation. The creation of a security position seems to be the first step in addressing safety and security. But a position in itself is not enough. As the data indicates, many IAOs now have such a position, but it does not mean that the concern is integrated into the rest of the management structure, planning and budgets. Thus, the 66% of IAOs where security is not part of an integrated approach when deciding on budget roughly corresponds to the 60% (see above) that either do not have or have only started to introduce a security management system.

It is noteworthy that 12 of the 30 IAOs interviewed only created a designated security position and/or structure between 2007 and 2009. This would indicate that awareness of the importance of security issues and management and the decision to act on it is relatively recent. Since awareness, policy decisions and implementation are relatively recent for many IAOs it can be expected that the process still needs to reach maturity and that lacuna will persist over the coming years.

None of the interviewees claimed that lack of specific guidelines for an integrated security mechanism was due to funding. However, the internal lack of specific security related budgeting was seen as limiting the role and effectiveness of a security function and guidelines. Lack of funding would probably not resist judicial scrutiny in relation to duty of care towards staff.

Donors interviewed stated that funding would be forthcoming if it were requested. Some major donors now exercise some scrutiny of programs and projects when it comes to security, and require, even if only in superficial terms, that an IAO includes security management and measures as a complement to programme implementation in funding proposals.

## 3. Safety and occupational health

- 50% of IAOs do not have a proper occupational health and safety protocol.
- 50% of IAOs respect and, as far as possible, enforce HEADQUARTER



occupational health regulations for the benefits of the international staff, and undertake specific measures in favour of national staff.

- 50% provide a pre-deployment medical check-up and preventive health-related information.
- Prevention and response measures for specific health risks have been implemented by 50% of the IAOs, (e.g. HIV, PTSD).

#### *Comments*

Attention to specific health risks is rising, and protocols and support options have evolved in recent years, along with the need for an alert mechanism and options for redress.

Apart from being generally seen as 'good practice', compliance with health and safety standards, regulations and measures are all part of duty of care.

Half of IAOs interviewed have a protocol for situations of psychological distress and illness. It is worrying that 50% of IAOs do not treat safety and occupational health as a specific institutional concern when it comes to staff working overseas.

Safety and occupational health includes preventive measures that are relatively clearly adapted to a specific context. Preventive health measures such as a medical check-up and a medical 'green light' as well as the provision of information and briefing about specific mission-related health/medical risks and possible measures are easily implemented and documented.

## **4. Redress and insurance**

The interviews specifically addressed insurance as one of the main redress mechanisms. The various substantive issues and concerns that fall under the rubric of redress – such as, for example, physical and psychological treatment and rehabilitation, or loss of income compensation – merit fuller, specialist attention which is not given here. However, it is notable that:

- About 85% of IAOs resort to some type of insurance coverage; of these, one IAO assists in providing additional self-insurance.
- 75% of IAOs have a full-fledged insurance coverage for illness, injuries, invalidity and death as well as conflict-related risk coverage.
- 15% of IAOs either do not have a proper insurance coverage or have only a failing mechanism, and stated that national staff coverage depends on the country director or management.
- 20% of IAOs stated that full-fledged coverage exists in theory, but that as a result of a lack of coherent management and clear policy it probably does not cover all staff.

#### *Comments*

International staff are generally covered on the basis of HEADQUARTER insurance coverage regulations. National staff tend to be covered with respect to local legislation.



However, the system is not always coherent. When such shortcomings are known, IAOs declare that compensation will nevertheless be paid.

Insurance coverage is common practice in the private sector. While 75% of IAOs interviewed provided full-fledged coverage, the interviewees offered two observations:

- Full-fledged insurance exists, often thanks to such contracts concluded one or two decades ago.
- Similar insurance coverage would not be affordable nowadays.

The high cost of insurances was a recurrent remark among the IAOs. The interviewees' perception is that if the insurance had to be concluded today, the percentage of IAOs providing coverage would be less. Many IAOs might argue they would not be able and thus would not want to pay for such full coverage; this would result in them contravening existing legal regulations. Undoubtedly insurance coverage – especially for war risks – must be considered good practice.

Insurance compensation is to be seen as a part of a redress system to compensate for damages to a staff member. It also helps IAOs to avoid claims for damages being brought in front of the courts and thus protects IAOs in case of claims. This calls for three observations:

- i. Insurance coverage – and the financial compensation it may provide – is part of but does encompass full duty of care owed to the staff.
- ii. Financial compensation paid by insurance may not suffice to (fully) compensate or satisfy a need for redress, or a claim for damages.
- iii. Further action against an IAO as to legal liability – civil and criminal – cannot be excluded by the mere fact of having insurance or having paid financial compensation.

## 5. Contracts: international and national staff

- 50% of IAOs have structured contractual management that applies to both international and national staff.
- 25% of IAOs have a system which is not unified, not coherently implemented or not functioning properly.
- 25% of IAOs have no existing unified system when it comes to national staff.

### *Comments*

One of the primary sources of health, safety and security responsibilities is found in the contractual relationship between the IAO and a staff member. Beyond and apart from contracts, it is generally understood that national regulations regarding insurance and social benefits are to be respected and complied with. Where a structured contractual management system is in place, the contract includes compulsory insurance coverage, social and welfare benefits. A clause as to jurisdiction in case of dispute tends to be included and generally refers to the law where headquarters is based.



Where no structured or working system exists, the international staff's employment contract nevertheless generally includes compulsory insurance and social benefits. However, two IAOs mentioned that the contractual situation for third country international staff was not settled; i.e. the contract did not provide for social and welfare benefits or extensive/complementing insurance coverage. Further complications arise when the IAO resorts to different types of employment contracting.

For a significant proportion of IAOs, the contracting of national staff was decentralized to the field level. As a result, no uniformity exists and headquarters has no overview of the contractual situation of national staff. National staff contracts and inclusion of social welfare benefits as well as insurance depend upon the IAO's country director/head of mission. Where headquarters guidelines do exist, a country director is expected to implement them. However, it was noted that there is no reporting requirement and that there is no headquarters control system to ensure that contractual guidelines and minimum standards are respected.

A jurisdiction clause does not appear to be systematically included in contracts with national staff, but the trend is to insert such a clause.

## 6. Volunteers

- Only two of the IAOs said they used volunteers at field level:
  - For one of these, the volunteers are included in the international staff structure and system. While a minimal insurance coverage is provided for, social and welfare benefits are not paid.
  - For the second, a faith-based IAO, volunteers go out on their own accord, not via the IAO
- Another two IAOs use volunteers but they are not sent on missions abroad due to security and risk concerns, as well as insurance reasons.

## 7. Consultants

All IAOs interviewed made a distinction between a freelance consultant and a consultant (temporarily) attached and/or integrated into the IAO.

- Freelance consultants have to provide for their own social welfare benefits as well as insurance.
- Consultants attached to the IAO are generally included in the contractual insurance system.

Two IAOs specifically mentioned that in case of serious incidents, their system takes care of compensation of damage.

## 8. Briefing and informed consent

- 50% of IAOs provide a briefing to international staff leaving on third country missions:
  - Two among those also provide a systematic briefing to newly hired national staff.
  - A third is starting to structure a briefing system for senior national staff members.
- 25% of IAOs are in the process of implementing a briefing procedure and practice.
- 25% do not provide any briefing at all.
- Only four of the IAOs interviewed seek an ‘informed consent’ from international staff.

### *Comments*

Only two IAOs interviewed were sensitive to the need to ensure that updated security and risk information is provided in the briefing. Three IAOs, while aware of the issue, stated that updated information for a briefing on the current security and risk situation could not always be guaranteed. This lacuna highlights the importance of information flow between the field and the headquarter, and the importance of a high level of acquaintance of headquarter staff – operational desks as well as human resources – with the field.

Formalising and systematising pre-deployment and field arrival briefings are part of the evolution that is taking place among IAOs. Briefings should include information on tasks to be carried out by the staff member during deployment; the environment in which deployment takes place; threats and risks in this environment; mechanisms, rules and guidelines to mitigate risks; and contingency and redress measures that are in place. Briefing is of utmost importance when it comes to compliance with duty of care, and IAOs would do well to document it. Informed consent, an important subsequent step, cannot be obtained if a full briefing is not provided; it cannot be implicit or assumed.

## 9. Disclaimer/Waiver

- 60% reported that no disclaimer is signed
- 20% stated a disclaimer was to be signed prior to departure.
- 20% of the IAOs are considering introducing a disclaimer in the near future.

### *Comments*

That only 20% require a disclaimer would indicate that the practice is less prevalent than it is generally perceived to be. Still, some IAOs have changed their practice several times over the years, stopping and reintroducing the use of disclaimers.



Two IAOs have specific consent/waivers signed for deployment to hazardous environments and combine this with full, detailed and updated information about the related risks of the mission with a view to formally complying with the duty of care. However, the legal validity of such a disclaimer and its impact on the duty of care owed are not clear even when concluded in the context of ‘informed consent’.

## 10. Additional observations

### *Triggers*

While many interviewees cited the number of attacks on aid workers that have taken place in the last two decades and the evolution of the political context in the aftermath of the 9/11, in the observation and experience of most interviewees, most changes in security management have occurred only since 2007. Few of the interviewees were able to clarify what exactly – e.g. a specific incident affecting the IAO – had triggered this change in revision of staff policy, internal code of conduct, etc. Some interviewees pointed to a growing awareness of recent incident data, and the need to refer to headquarters national legislation relative to health, safety and security.

### *Litigation*

While there are only a few known cases filed against IAOs,<sup>29</sup> there is anecdotal evidence of more threats of a lawsuit. As such, it is hard to tell whether IAOs face increasingly litigious constituencies.

However, litigation and claims for negligence and foreseeable safety and security incidents are regularly brought in the private and public sectors. At times these cases receive broad media attention. Media coverage would seem to add to awareness and assertion of an individual’s right to due safety and security. Relatives of expatriates who have been involved in an incident now seem to question the circumstances surrounding incidents, often claiming that incidents would have been preventable if adequate measures had been taken.

The financial aspect of potential litigation is only one element of concern. Only one interviewee advanced what must be a highly relevant concern for IAOs. IAOs will be particularly concerned with the possible collateral damage that a court case can cause in terms of the reputation and image of the agency. Thus, apart from recognising and accepting responsibility with the individual having suffered on legal or moral grounds, there would also be clear interest for an agency to avoid being brought in front of a court with the attendant media attention. This would be an added explanation for the alleged practice among IAOs to discretely settle out of court or before a case may be brought. However, any financial settlement, in or out of court, is often only part of the solution. A case may never be really ‘settled’ but may need to be managed and attended to by an IAO for many years on. Staff that have been injured and traumatized may never recover or feel that the compensation and/or treatment is adequate to repair the loss they suffered and continue to suffer.

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<sup>29</sup> For example: The Swiss Tribunale federale/Tribunal federal (‘Arjan Arkel case’) (2008); Wagner v. Samaritan’s Purse (2011)

## 11. Summary conclusions of current practice

The premise of the research – developed and confirmed in the legal review – is that:

- Non-profit international humanitarian aid agencies are legally responsible for the safety and well-being of their staff, and can be held liable and are thus exposed to litigation on the basis of (national) law.<sup>30</sup>

Although the issue is receiving growing attention by the IAOs interviewed – 30 of which were operationally active – the current practice interviews pointed to several shortcomings. The following general observations can be drawn from interviews focusing on current practice:

- There is an increasing awareness among IAOs of the relevance of legal responsibility to their staff.
- Understanding on the part of IAOs of the range of legal responsibilities towards their staff remains deficient.
- Serious gaps exist between legal requirements and current practice as to employer obligations.
- IAO generally fall short of compliance with legal standards and general notions of duty of care.

The interviews also showed that:

- Funding is not the root or main cause of these deficiencies. The principle causes identified were an absence of a ‘culture of security’, of understanding/knowledge, and of institutionalised willingness, decisions and mechanisms.
- The key notion of ‘informed consent’ is problematic or inadequately addressed and may point to further flaws in due institutional safety, security and risk management. An explicit statement that the individual staff member will be exposed to risk that may give rise to an incident leading to trauma, injury or death remains largely taboo in IAO staff management.

<sup>30</sup> National law of countries where operations are carried out is not included in this review. This is not to say that it is, or is not, relevant and/or potentially applicable. It may well be.

## IV. LEGAL REVIEW: GLOBAL PRINCIPLES AND COUNTRY REVIEWS

### 1. Introduction

Many International Aid Organisations<sup>31</sup> ('IAOs') regularly work in high risk and dangerous environments (including major natural disasters) from areas of acute conflict to post-conflict environments where they are engaged in emergency response, reconstruction, development, advocacy and peace building activities.

The risks and threats that staff of IAOs face, in terms of health, safety and security are numerous and range from warfare, terrorist attacks, exposure to disease, kidnappings, assaults, travel accidents, theft to natural and industrial disasters.

IAOs owe a legal responsibility, a duty of care, to their staff to ensure a safe work environment, whatever and wherever that may be and to take practical steps to protect them against any reasonably foreseeable risks they face. IAOs, unlike the United Nations and its agencies, are not protected or immune from legal liability because they are or may be non-profit or charitable organisations.

#### Examples of Threats

- *An employee may suffer with PTSD following a placement to a war zone.*
- *A worker at in a medical centre can contract HIV from a needle-stick injury.*
- *A volunteer building a school may sustain a head injury when a brick falls on her head.*
- *An employee can be kidnapped for a ransom.*
- *An employee may be assaulted by a beneficiary at a distribution site.*
- *An employee can be disabled after contracting an endemic virus.*
- *An employee may be killed by an improvised explosive device.*
- *An employee may suffer injury, material loss or be killed in a natural/industrial disaster*
- *Etc.*

The legal liability that IAOs face for failing to protect their staff from reasonably foreseeable dangers can be both extensive and complex within a multi-jurisdictional environment. They may risk liability for breaching the national laws of the countries in which they are registered, the laws applicable to any contract between the IAO and the staff member, the laws of countries in which their staff reside or have nationality and also the countries to which their staff travel or are expatriated to. The international nature of their work may also give rise to difficult legal issues concerning the extra-territorial scope of laws, conflicts of law including choice of law and jurisdictional issues as to which country will hear a claim.

<sup>31</sup> For the sake of simplicity, we use the term 'international aid organisation' to refer to a variety of non-profit organizations focusing on complex environments. We recognize that non-profit organizations working in these environments may be carrying out activities that would more accurately be described as humanitarian, developmental, peace building, protection, advocacy, etc. or any combination of the these.

## What is liability?

An example discussed further below is the *Ultramarina* case. A travel agency owed a duty of care to its customers to assess the level of safety of the destination of its holiday makers. The travel agency was found to have breached its duty in circumstances where the French foreign affairs ministry had issued a warning discouraging travel to the intended destination of the agency's customers. Accordingly, as the travel agency was found to have breached its duty of care, it was found to be liable (by the French Courts) for the damages suffered by its customers who were kidnapped by an armed group whilst on holiday.

The consequences of legal liability for IAOs can be expensive not only financially, in terms of damages that may be payable to staff following litigation, but also in terms of potential criminal liability, loss of reputation, damage to public relations, adverse effect on staff morale and recruitment and compromising fundraising efforts.

This paper aims to set out a generic and basic understanding of the legal responsibility that IAOs owe to their staff based on a review of the law in five different civil law and common law jurisdictions. The five country reviews will provide an illustration of some of the key legislation and case law on the duty of care. The paper does not purport to cover and summarise every law and there will be specific legal issues applicable to IAOs that will lie outside the scope of this paper. The paper also aims to clarify some of the legal reasoning which aid agencies would do well to consider and in this respect contribute to establishing common minimum health and safety standards and best practice for IAOs.

## 2. Glossary of terms

This paper refers to the following terms, defined as follows:

**Risk:** the uncertainty of a threat event occurring and if it does, the uncertain impact this has on pursuing and achieving objectives.

**Risk management:** coordinated activities to direct and control an organisation with regards to risk.

**Legal responsibility:** being responsible for an act or omission as required by law.

**Tort:** a wrongful act or an infringement of a right (other than under contract) leading to legal liability.

**Liability:** being responsible for loss or damage by act or omission as required by law and the obligation to repair and/or compensate for any loss or damage caused by that act or omission and/or other sanction imposed by a court.

**Strict liability:** responsibility for loss or damage by act or omission without proof of intentional or negligent conduct.

**Fault-based liability:** responsibility for loss or damage by act or omission requiring proof of intentional or negligent conduct.

**Criminal liability:** individual or (in some countries) corporate responsibility for an act or omission under criminal laws.



**Administrative liability for criminal acts:** responsibility attaching to an organisation for criminal acts or omissions punishable by administrative sanctions (Italian concept).

**Jurisdiction:** the geographic area over which a legal authority extends/ the authority to hear and determine causes of action.

**Choice of law:** term of a contract in which the parties specify that any dispute arising under the contract shall be determined in accordance with the law of a particular jurisdiction.

### 3. Legal responsibility and duty of care

The jurisdictions that are reviewed in this paper can be grouped into two types of legal system: the civil law (France, Italy and Sweden) and the common law (England & Wales and the USA). The distinction between these two systems is not merely linguistic or terminological but also in the level of responsibility that each type of legal system may impose on an employer.

A key terminological difference in the present context is that the civil law systems tend to refer to “*legal responsibility*” rather than the “*duty of care*”, which is an Anglo-Saxon concept used mainly in the common law world. Moreover, most of the civil law jurisdictions surveyed in this paper tend to impose on employers a level of legal responsibility called strict liability, where a person is legally responsible for the damage and loss caused by his or her acts or omissions without proof of intentional or negligent conduct. This responsibility is generally only owed to employees and not to volunteers, service providers or consultants.

However, it can be difficult to make valid generalisations that cut across the different legal systems reviewed in this paper. For example, whilst England and Wales is a common law jurisdiction, it also has certain specific strict liability health and safety laws, that come from European law and can be invoked by employees against their employer. In Sweden (a civil law jurisdiction), liability according to the Swedish Work Environment Act and the Penal Code generally requires at least negligence and therefore the liability is not strict.

The duty of care is a legal obligation imposed on an individual or organisation requiring that they adhere to a standard of reasonable care while performing acts (or omissions) that present a reasonably foreseeable risk of harm to others. Negligence is often defined as a failure to adhere to, in other words a breach of a standard of reasonable care causing loss or damage. The standard of reasonable care is typically assessed by reference to the actions of a person exercising reasonable care and skill in the same or similar circumstances. The standard of reasonable care will vary from country to country. In other words, the duty of care is a fault-based concept where imposition of liability on a party requires a finding of negligence.

The significance between fault-based liability and strict liability is that in practice the latter imposes a much higher standard for employers and makes it harder for the employer to avoid liability to pay compensation for the damage caused.

## 4. Legal responsibility – some global principles

Whilst the multinational work and make up of staff in IAOs can and does give rise to complex legal problems that will inevitably expose stark differences between legal systems, it can be all too easy to lose sight of common approaches to the principles surrounding the legal responsibility of employers across Europe and the US and the standards expected of them.

### Sources of responsibility

Employers can be subjected to a legal responsibility from a wide variety of sources including:

- express individual contractual terms, terms in any applicable collective bargaining agreement, and terms implied through common expectation
- statutory sources such as national health and safety laws or codes
- judge-made or “*common law*” principles of negligence and recklessness
- social security programs
- international norms such as European Directives or International Labour Organisation Conventions

### Scope of responsibility

The scope of responsibility will vary depending on the relationship between the IAO and the legal status of its staff. Generally speaking, employees are owed the highest level of responsibility as they have a reduced capacity to act voluntarily and employers are in a better position to understand and control risks. Many countries have specific health and safety laws for employees.

IAOs do owe those who are not employees, such as independent contractors, consultants and volunteers, legal responsibilities but those responsibilities often fall outside the scope of specific legislation protecting employees and is reduced by the extent to which the non-employee controls their work environment, execution of tasks and has access to information about prospective risks.

A key question when considering the potential scope of legal responsibility of the IAO is therefore whether the injured party is an “*employee*”. It is as a general rule the factual circumstances, and not the parties’ “*labelling*” of the legal relationship that determines if an employment relationship exists between the parties. Factors that are commonly considered to be decisive if someone has “*employee*” status or not:

- a personal obligation to act under the direction and supervision of the employer, or autonomous way of performing/organising the activity
- fixed regular salary or project based pay
- a personal obligation to complete the work or if an individual can substitute to perform their obligation

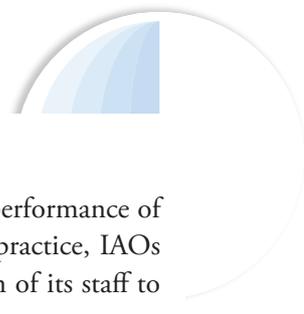
- 
- ownership of work equipment
  - the degree of risk adopted by the individual
  - the degree of integration of the individual into the business
  - the ability to work for other organisations
  - control over the work schedule
  - applicability of the employer's rules or handbook
  - fixed term or open contract
  - receipt of other benefits from employer

Take the unpaid 'volunteer' who is engaged by the IAO to work overseas. The IAO gives the volunteer free return travel, free food and housing, insurance coverage and the volunteer is under the IAO's management and supervision. Applying the above factors, a Court in the European countries surveyed is likely to consider that the travel, food and housing amount to wages and as the volunteer is under the IAO's control they are likely to be considered to be an employee such that they may benefit from specific health and safety laws protecting employees. From the US perspective, applying the same factors, a US Court is likely to find that the IAO owes a similar duty of care to the volunteer that it would owe to an employee.

#### **Liability of IAOs for family/dependents of staff**

Across all of the countries surveyed, the IAO may owe legal responsibilities to family and dependents of staff such that an injured family member may be able to bring a claim for compensation for personal injury against the IAO. The level of responsibility is likely to depend on the degree of control that the IAO has over the act or omission that caused injury or loss to the family member. Generally speaking, a higher level of responsibility will be owed to those family members who are stationed with staff and who are injured on the premises of the IAO or under its control or supervision. The IAO may still owe visiting family and dependents legal responsibilities but these will be reduced or even extinguished to the extent that the injury or loss was caused by acts or omissions outside the control and supervision of the IAO.

Family and dependents of injured or deceased staff of IAOs may also be able to bring claims for compensation against the IAO, if the IAO is found to have acted or omitted to act in breach of specific health and safety laws or negligently causing injury or death to a staff member. However, many of the European jurisdictions impose a limit on the damages that family or dependents can recover from the employer. For example, in Sweden relatives are, according to Swedish Law of Tort, entitled to loss of maintenance allowances or other financial support although if a relative had a close relationship with the deceased (e.g. a spouse), they can recover compensation for personal injury. In the US, such claims can be brought under wrongful death laws where typically the awards of damages are much higher than in Europe and, depending on the jurisdiction wherein the suit is filed, can sometimes include much larger awards of punitive damage in cases of malicious or wilful misconduct.



## **Liability of IAOs for staff behaviours**

IAOs can also be liable for the faults of their employees during the performance of their duties. This is known as vicarious liability. As a point of best practice, IAOs are advised to provide adequate training, instruction and supervision of its staff to minimise the risk of injury.

Courts and tribunals hearing a claim for compensation against an employer can take into account the blameworthy conduct of the employee or staff member and its causal effect on the accident in issue. This can lead to a reduction in damages awarded for the contributory negligence of the employee.

### **Assumption of risk**

Can IAOs be relieved of their duty of care if they have informed and warned staff of the risks and staff willingly accept those risks and choose to take part in the dangerous activity? Generally speaking, it must be shown that the acceptance of the risk has been entirely voluntary. The member of staff has to be fully informed of the context, risk and mitigating measures taken by the employer and must have accepted such knowingly and freely. In summary, there needs to be informed consent. Often this requires that in addition to simply signing a document explaining their assumption of the risk, they must also certify that they received training or a verbal explanation of what it means to assume the risk of travelling and working in these dangerous environments. This may be documented by way of a signed informed consent form following training or induction in relation to the dangerous activity. However, whether voluntary assumption of the risk by the staff member can be a defence to a claim of negligence varies from country to country.

A staff member's voluntary assumption of the risk may be difficult to prove in an employer—employee relationship where an employee is often considered not to be in a position to choose freely between acceptance and rejection of a risk because he is acting under the compulsion of his duty to his employer. It may be easier to establish in an independent contractor or volunteer relationship.

### **Waivers and restrictions of liability**

IAOs may also consider using signed contractual waivers of liability by staff. However, the scope for using such a waiver as a successful defence to a negligence claim or suit varies enormously among countries. In Europe, many countries will not recognise contractual restrictions of liability for negligence causing personal injury or death as having any legal effect. In the US, waivers and assumptions of risk may reduce an organisation's liability unless the accused organisation was grossly negligent, intentionally created harm or the agreement is between an employer and employee. However, an employee may still bring a claim or lawsuit for compensation arising from an accident even if they have signed a waiver form.

### **Significance of social security law**

In many of the European countries surveyed, social security law may apply to workers of IAOs. The main principle is that the income-based social insurance applies to individuals who work on national territory and that residence-based



insurance applies to individuals domiciled within national territory. However, this main principle is nuanced by specific provisions. There are two situations for IAOs to be specifically aware of. Firstly, if an employee is on secondment (a short-term placement) from the IAO to a foreign country, they may remain subject to their national social security laws even if they are working temporarily abroad. Secondly: expatriate employees. This situation would apply to employees of an IAO who, for whatever reason, do not remain under their national security regime or employees who are engaged directly by the IAO abroad. In many host states there will be no (or insufficient) social security regime in which case it is advisable for the expatriate staff to be covered by occupational or private insurance.

### **Penal liability and extra-territoriality**

In all the countries surveyed, liability of an IAO may result from the application of national criminal laws. Criminal liability can result in fines or imprisonment. The principle is that national penal law applies to workers who work on national territory. However, in some of the countries surveyed there are limited exceptions or nuances to this rule where there is some connection between the crime committed abroad and the national state. For example, in the UK an IAO may be prosecuted for health and safety offences if it fails to comply with health and safety legislation when conducting a preliminary risk assessment in the UK before sending employees overseas or when employing local workers overseas. This may also apply to board decisions that occur in the UK which then result in injury or death in another country.

In Sweden, there is limited extra-territorial effect of the Swedish Penal Code. Swedish courts will assume jurisdiction and apply Swedish law to any crimes committed outside Sweden provided that: (i) the crime was committed by a Swedish citizen or resident; (ii) the crime was committed by a foreign national who subsequently becomes a citizen or resident of Sweden or citizen of Denmark, Norway, Finland or Iceland who is presently in Sweden; (iii) the crime was committed by a foreign national who is presently in Sweden and the stipulated punishment for the crime under Swedish law is no less than six month's imprisonment. However, there are notable restrictions to these provisions which do not apply if: (i) the perpetrator is free from criminal responsibility in the state in which the act or omission takes place, or; (ii) if the act or omission takes place in a territory which does not belong to any state and for which no harsher punishment than a monetary fine is prescribed for by Swedish law. There may be further limitations provided by international bi- or multilateral agreements between Sweden and specific states.

Italian criminal law has limited extra-territorial effect. Italian law applies in some cases of crimes committed abroad by Italian citizens or to the detriment of the Italian State or of an Italian citizen, or by offenders that are in Italy, depending on the seriousness of the crime and other circumstances proscribed by the Italian Criminal Code. Criminal liability only attaches to individuals (e.g. supervisors and employees) and not organisations. However, a form of vicarious "*administrative liability*" for criminal acts, which involves criminal prosecution but entails administrative sanctions only, may apply to the respective organisations having their head office in Italy, unless prosecuted in the country where the crime was committed pursuant to such country's applicable laws.



## **Time limitation**

All of the countries surveyed in this paper have time limits in which civil claims for compensation must be brought. If the claim is brought outside of the applicable time limit, the Court will not hear the claim. The applicable time limit or limitation period will vary depending on the type of claim being brought and the country in which it is being brought.

In France, the time limits are five years for the civil liability and the breach of the duty of care as far as employment law is concerned and two years for the breach of the duty of care as far as social security law is concerned.

In Italy, civil claims based on contractual liability must be filed within ten years, and civil claims based on tort liability must be filed within five years.

In Sweden, the general time limit for civil claims is ten years from the creation of the claim.

In the England and Wales, there is a three year time limit for filing civil claims for personal injury.

Finally, in many US jurisdictions, wrongful death claims or personal injuries claims must be filed within one or two years of the incident. For example: in Virginia, a wrongful death suit must be initiated within two years of the death. By contrast, in Louisiana, to be viable, the same suit would have to be filed within one year of the incident.

## **Employer's liability insurance**

In some of the countries surveyed there are legal obligations on employers to purchase "*employer's liability insurance*" in respect of liability to employees, even those who work abroad. It would be advisable for an IAO to take out such insurance for employees sent overseas to protect the IAO against any losses arising from claims brought in Europe or the US. IAOs would do well to tailor the type of insurance cover to reflect the risk of its activities and operational area.

## **5. Which laws apply?**

As we have already seen with social security and criminal law, in limited circumstances national laws can apply outside of the territory of the national state. This concept is known as the extra-territorial effect of laws. It is also worth noting that in some of the countries surveyed specific duties in national health and safety laws can have extra-territorial effect. For example, in Italy the duty on the employer to perform health and safety risk assessments can apply to workplaces outside of Italy (see for example, the "*Malaria case*" below). In Sweden, if a Swedish IAO conducts operations abroad with Swedish citizens or when posting employees from Sweden to another country to fulfil a job assignment, the employer may have an obligation to instruct the employee in relation to workplace hazards in accordance with the Swedish Work Environment Act. However, there is no precedent case law regarding this principle in the Swedish Courts.



Many of the countries in which IAOs operate will have much lower health and safety standards than those in Europe or the US. Some countries lack specific duty of care legislation or enforcement mechanisms. As such it is more likely that staff will try to seek redress for harm in Europe or the US where many IAOs are registered or based rather than in the country where the accident occurred.

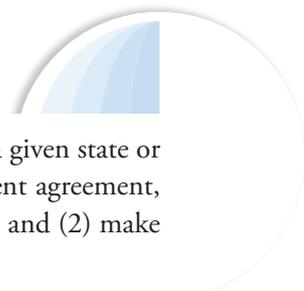
Conflicts of law and jurisdiction issues about the country that will hear any claim may arise due to the location of the accident, the nationality or country of residence of the member of staff.

This is especially the case in suits filed in the US. In each jurisdiction in the US, courts consider similar issues to these to determine which “*choice of law*” will apply. Some put a greater weight on some considerations than others. For instance, Virginia applies a “*lex loci delicti*” test, which means that the court will apply the “*law of the place of the wrong*” to govern the dispute. In other words, once the location of the injury has been established, the “*lex loci delicti*” test suggests that tort suits will follow the relevant laws for that state or country, which include liability, standard of care and causation. By contrast, Ohio applies a test called the most significant relationships test. Under this analysis, while the court gives some weight to the law of the place where the incident occurred, it also requires the court to consider other factors, including: the place where the conduct causing the injury occurred; the domicile, residence, nationality, place of incorporation, and place of business of the parties; and the place where the relationship between the parties, if any, is located. The “*choice of law*” principles that will be applied to a given dispute will be those of the state in which the lawsuit is filed.

From the US perspective, there is at least an argument that the parties to an employment contract – employer and employee – can select the law that will apply to all claims “*related to or arising out of*” the employment relationship. This can be accomplished by including a term within the employment contract that states the parties agree that the law of a given state or country will be applied if any litigation that arises between them. In so doing, the parties can avoid the uncertainty that comes with a court applying choice-of-law principles to determine the substantive law that will govern a dispute.

Certainly, it is well-settled that terms like these govern common employment disputes, such as whether either party breached the agreement or whether the employee is rightly owed overtime pay. Whether such contract terms apply to an employee’s tort claims – such as a lawsuit alleging that the employer is liable for the employee’s injuries that occurred because of lack of a secure working environment – is often litigated, however. In such instances, the plaintiff employees argue that injuries that resulted from the employer’s alleged negligence fall outside of the agreed choice of law term and suggest that the term applies strictly to disputes over the interpretation of the contract. In response, defendant employers argue that the choice of law term was written broadly specifically because the parties contemplated that it would govern *all* disputes between them. In instances where such disputes arise, the proper determination is often quite fact specific and depends on both how the injury occurred and the language of the agreement.

For employers who intend for such choice of law terms to govern tort suits brought against them by employees, it is in the employer’s best interests to: (1) include specific



language in the employment agreement to the effect that the law of a given state or country governs all claims related to or arising out of the employment agreement, including all claims relating to injuries that the employee may suffer; and (2) make sure that the employee fully understands the effect of this language.

### Case Study 1 – contractual claims

A French IAO contracts with a Swedish citizen to provide aid work in the DRC. The Swedish contractor sustains injury in the DRC and he wants to claim compensation for his injury from the Agency. Does French, Swedish or local law apply?

The Rome Regulations provide guidance on choice of law issues within the European Union (including Italy, France, Sweden and the UK). Rome I governs choice of law issues stemming from employment contracts and contracts with independent consultants. In Case Study 1, the Swedish contractor and the French organisation might select French law to resolve any disputes. Under Rome I, parties are free to choose the law that governs the substance of their contract. However, such choice cannot have the effect of depriving the employee of the protection afforded to him by the mandatory rules of the country whose rules would have been applied in the absence of a choice of law selection. This is an important caveat. Whilst it is best practice for IAOs to stipulate the applicable law in their contracts of employment in order to achieve certainty, they should be aware of the possibility that certain local mandatory rules may override the law stipulated in the contract.

In the absence of an express selection on the choice of law, the following guidelines apply:

- contracts with independent consultants are governed by the law of the country where the consultant habitually resides. However, where it is clear from all the circumstances of the case that the contract is manifestly more closely connected with another country, the law of that other country shall apply.
- employment contracts are governed by the law of the country where the employee habitually performs the contract. In the event that it cannot be established where the employee habitually performs the contract, the applicable law will be the law where the employer has its centre of business. Where it appears from the circumstances as a whole that the contract is more closely connected with a country other than that indicated above, the law of that other country shall apply.

### Case Study 2 – non contractual claims

The French wife of an employee of an Italian IAO sustains injury in the DRC and she wants to claim compensation for her injury from the organisation? Does Italian, French or local law apply?

Rome II addresses the law applicable to non-contractual claims such as negligence claims for breach of the duty of care. Under Rome II, within the EU, the general rule is that the law of the country where the damage occurred applies. There are two main exemptions:

- if the claimant and the defendant have their habitual residence in the same country at the time the damage occurs, the applicable law will be the law of that country; and

- where all the circumstances of the case show that the tort is “manifestly” more connected with another country, the laws of that country shall be applied to the issue of tort liability.

Consider Case Study 2. The Aid Agency does not engage the wife of its employee through a contract but may still owe her a duty of care depending on the circumstances. Under Rome II, the local laws of the DRC may apply. Although, there may be arguments otherwise if either of the main exemptions apply.

Parties may decide to select the law that will govern any non-contractual claims however there are limitations. It must be done either by:

- an agreement entered into after the event giving rise to the damage, or;
- where all the parties are pursuing a “*commercial activity*”, also by an agreement “*freely negotiated*” before the event giving rise to the damage.

The Rome II Regulation does not define either “*commercial activity*” or “*freely negotiated*”.

These limitations have a substantial impact if the choice of law for non-contractual liability results from an employment contract. Indeed, employees are presumed to have only limited capacity to negotiate with their employer, so an agreement between the employer and the employee about a choice of law regarding a non-contractual liability made in advance of a potential claim is unlikely to be found to be “*freely negotiated*” and thus invalid. Moreover, it appears unlikely that parties to an employment contract or a contract with a volunteer would be deemed by the courts to be pursuing a “*commercial activity*”.

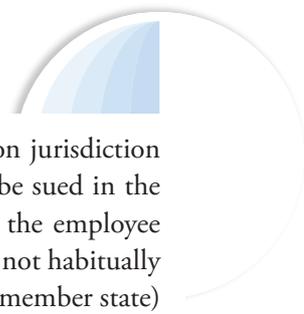
The practical effect of these provisions is that a choice of law regarding a non-contractual obligation, made prior to an event that gives rise to a claim, would be ineffective with employees or volunteers. They may be effective with independent contractors if it can be shown that the agreement was freely negotiated and contemplates a “*commercial activity*”.

### Case Study 3 - jurisdiction

An English Aid Agency contracts with a Congolese national domiciled in the Congo to provide consultancy services in the Congo. The consultant sustains personal injury and wants to claim compensation against the Agency. Which country (England or Congo) would hear the claim for damages?

The EU’s Judgments Regulation may apply where a claim is brought in a member state court by: (a) a party domiciled in that member state against a person domiciled in another member state, or vice versa; or (b) a party domiciled in a member state against a party not domiciled in a member state, and vice versa. In other words, the Judgments Regulation gives member state courts jurisdiction to hear claims involving member state organisations by non-member state claimants.

There are specific provisions in the Judgments Regulation relating to contracts of employment and other contract/tort.



In respect of employment contracts, if there is no valid agreement on jurisdiction (see further below), an employer domiciled in a member state may be sued in the courts of that member state or in another member state: (i) where the employee habitually carries out his work; or (ii) if the employee does not or did not habitually carry out his work in any one country, in the country (being another member state) where the business which engaged the employee is or was situated. Conversely, an employer may only bring proceedings against an employee in the courts of a member state where the employee is domiciled.

In respect of other contracts (e.g. consultancy or sub-contractor agreements), a person domiciled in a member state may, in another member state, be sued in the courts of the place of performance of the obligation in question (e.g. the place where the services were or should have been provided). In matters relating to tort, a defendant domiciled in one member state may be sued in the courts of another member state where the accident occurred or may occur. Therefore, where the contract is performed in a non-member state outside of the EU or an accident occurs outside the EU, the default position (absent any valid jurisdiction agreement) is that a person domiciled in a member state may be sued in that member state.

Take Case Study 3. The default position under the Judgment Regulations is that the English courts could hear the claim for damages brought by the Congolese consultant against the English IAO.

However, the parties to a contract may wish to agree that disputes arising in connection with the contract will be subject to the jurisdiction of a particular country. In relation to most types of contract where one party is domiciled in a member state, under the Judgments Regulation, agreements on jurisdiction are effective and confer exclusive jurisdiction in the courts so specified.

In respect of contracts of employment, an agreement on jurisdiction will only be valid if: (i) it is entered into after the dispute has arisen, or; (ii) allows the employee to bring a claim in a court other than that of the member state that would have jurisdiction if the rules described above for employment contracts applied. Therefore, an exclusive jurisdiction clause in a contract of employment that is negotiated prior to, for example, an accident giving rise to a claim is likely to be ineffective.

In respect of a contract which is deemed by a court to be a contract for services (e.g. a consultancy contract), an exclusive jurisdiction clause may be valid. However, the question of whether a contract will be categorised as an employment contract or contract for services is not always straightforward as indicated earlier on in this paper.

Take Case Study 3 again. The English IAO may have a valid exclusive jurisdiction clause in favour of the Congolese Courts. However, the Congolese consultant must be genuinely self-employed and not an employee of the IAO. If the consultant was in fact an employee of the IAO, he would be subject to jurisdictional rules set out for employees under the Judgment Regulations.

In the US, courts require subject matter jurisdiction and either territorial jurisdiction or personal jurisdiction to hear a claim. Subject matter jurisdiction refers to a court's ability to hear a particular issue, for example bankruptcy issues are generally heard



in federal bankruptcy courts. Personal jurisdiction is generally established through “*minimum contacts*,” meaning for the court to have jurisdiction over a specific party, that party must have, at least some, minimal relationship with the jurisdiction in question. In the US, this can be established through a forum selection clause where parties agree to a particular forum.

The US Alien Tort Claim Act (USATCA) is another avenue to federal jurisdiction and basis for a claim within the US legal system. The USATCA allows the US Federal Courts to hear claims even if there is little to no nexus with the United States, if it is based on a violation of international law or a treaty of the United States. In summary, there are several avenues for a claim against an IAO to be made in the US legal system.

## IV. COUNTRY REVIEWS

The following is a review of some key legislation and case law on the duty of care relevant to IAOs in the following countries: France, Italy, Sweden, England and Wales and the US. Although personal injury claims are being made against IAOs,<sup>32</sup> it appears that many are settled out of Court and do not go as far as a Court decision because across the countries surveyed, reported Court decisions of such claims against IAOs are rare. The case studies referred to in this section, in the main, involve personal injury claims in the private sector. However, it is unlikely that the basic reasoning that the Courts would apply to IAOs would be substantially different.

### 1. France

In France, employers (whether French or foreign) have a general duty under French employment law to ensure that their employees are working in a safe environment. The IAO will have an obligation to assess and manage any foreseeable risk and the case law interprets this obligation very strictly and it requires a determined result rather than merely the reduction of health and safety risks. This means that in case a court recognises that the risk is foreseeable or should have been foreseeable, it will not be sufficient for the employer to argue that he did his best to mitigate the risk, he will be under an obligation of result and is liable if he did not succeed in preventing the risk for occurring.

Pursuant to the French Employment Code, Article L4121-1 provides “*the employer takes the measures which are necessary to ensure safety and to protect the workers’ mental and physical health*”. To this aim, the employer must set up various types of actions as follows:

- actions for the prevention of professional risks
- actions for training and information, and
- an adapted organisation and resources

The employer must also adapt these measures to take into account any changes in the circumstances and to seek to improve the existing situation.

The aforementioned measures must be implemented by the employer on the basis of nine general principles, which are provided by Art. L4121-2 of the French Employment Code as follows:-

- the avoidance of risk: the best way to protect employees is to ensure that they evolve in a safe environment
- the assessment of the risks which cannot be avoided: it is not possible to avoid all the risks to which employees may be exposed in the performance of their duties and it is thus essential the employer assesses these risks
- the need to fight the risks at their outset: the risks must be reduced through actions conducted directly on the risks, rather than on their effects

<sup>32</sup> See for example: Wagner v. Samaritan’s Purse, a lawsuit filed in May 2011 in the United States District Court for the Southern District of New York by an employee of an IAA claiming compensation for personal injury allegedly suffered as a result a kidnapping in Darfur, Sudan (litigation ongoing).

- the adaptation of work to employees, which concerns in particular the conception of the posts and choice of work equipment, production and work methods
- the need to take into account the evolution of techniques: the employer must take care to choose the safest equipment and materials
- the replacement of what is dangerous by what is safe or less dangerous
- the planning of prevention, by including the technical means, the work organisation, the working conditions, the social relationships and the influence of the environment; the employer must define the measures and actions which will be used to avoid or reduce risks
- the implementation of measures of collective protection: such measures must be given priority over measures of individual protection as they are more efficient to ensure the employees' safety than measures of individual protection
- the need to give appropriate instructions to workers: the employer must give to the workers instructions which are adapted to the risks to which they are exposed in the performance of their duties.

Furthermore, when the employer asks an employee to perform a task, he must take into account his ability to perform it with caution to ensure health and safety, based on the nature of the employer's activities.

The employer must communicate the results of its evaluation of the risks in a written document which will be communicated to the courts in the event of an accident.

Finally, it should be noted that in addition to this general duty of care, a high number of additional technical obligations exist in French employment law to cover specific risks or areas for example in relation to work premises, the risk of explosion, chemical risks etc.

In addition to employment law, French social security law may also impose a liability on IAOs to its employees. If the IAO commits an act of inexcusable misconduct, it must compensate the social security authorities for all the benefits paid to the employee or his successor in title. These provisions will apply to employees and also to volunteers. However, they will not normally apply to expatriates.

In principle, in the case of a work related accident or disease, the employer is not liable for the payment of damages to the employee or to his family, except if it or one of the persons to whom it has given a delegation of power has committed an act of inexcusable misconduct. The definition of work-related accident/work-related ill health is drawn and interpreted very broadly. Art. L.411-1 of the French Social Security Code provides that an accident is deemed to be a work-related accident, whatever its cause, if it occurred at work or as a result of work to any person employed or working, in any quality or in any place, whatsoever, for one or several employers. In the event that a work-related accident or ill health occurs, the victim receives automatic compensation for the loss suffered from social security organisms, in the form of a lump sum compensation payment.

What is inexcusable misconduct? The French Courts have, since 2002, held that an employer commits inexcusable misconduct if it was, or should have been, aware of the danger of the situation but did not take the necessary measures in order to prevent the danger.

## French Case Notes 1

*The Karachi litigation : Court of appeal of Rennes, 24 October 2007*

FACTS: An employee of the company Technopro was sent to Karachi, in Pakistan, in the context of a provision of service. The employee was assigned to the "Direction des Constructions Navales" ("DCN"), company which has built some of the French Navy boats. DCN provided each employee with safety information and was responsible for the safety of the employee. On 8 May 2002, the employee was taken by bus to his place of work and was killed in a bomb attack with 13 colleagues. The widow brought a claim against Technopro before the Social Security Tribunal of Brest. She claimed that there was a breach of the duty of care by the employer. The Tribunal at first instance recognised that the employer had committed "*inexcusable misconduct*" by violating his duty of care as even if a third party was responsible for safety, the employer was still under a duty of care. However, the widow lodged an appeal regarding the amount of damages to be paid by the employer.

ARGUMENTS: The widow argued that there was "*inexcusable misconduct*" by the employer who did not exercise his duty of care despite the real and known risk of terrorist attack. Indeed, although the safety instructions were given by DCN, it was up to the employer to implement the duty of care. The employer sought to argue that when his employee was killed, he worked for DCN. DCN was in charge of the safety of the expatriate employees. Therefore, the employer denied that it had committed "*inexcusable misconduct*".

DECISION: The Court of Appeal held that even if the employer entrusted his employees' safety to a third party, he still has a duty of care towards them and has to check that the safety measures taken were complied with. It appears from the first instance decision that DCN had given to each employee in Pakistan an information guide, with the safety recommendations from the consulate in an appendix, which recommended changing the routes and hours of the travel between the hotel and the place of work. On 4 February 2002, a note was distributed by DCN indicating that a small explosive charge had been found under a car of the French Embassy and that it was necessary to implement surveillance of the cars. But after this attack and despite DCN's instructions, although there was a real risk of attack for the employees, they were still taken to their place of work using the same route on a bus with the sign "PN" (Pakistanis Navy). The employer had never checked that DCN's safety instructions were complied with. Consequently, the employer had committed an "*inexcusable misconduct*" and was the only responsible party of that misconduct.

COMMENT: The Karachi case illustrates the very strict duty of care of the employer towards their employees under French law. The employer has an obligation to protect the employees from any danger likely to occur in relation to their work and must achieve such protection, i.e. the avoidance of any risks likely to threaten the employees' safety. If not, the employer can be liable. In the Karachi case, breach of the duty of care was determined because the employer had not checked that the safety measures to protect the employees were actually implemented. The breach of the duty of care was considered by the Court as "*inexcusable misconduct*".

Even if the safety of the employees is undertaken by third parties, it does not remove the employer's responsibility.

The Karachi case gave rise to various claims by the injured victims or their widows or children. Such cases are quite rare in France but have been increasing over the years.

In addition to duties under employment and social security laws, a duty of care may be owed under general French civil law for instance in contracts or the general law of negligence:

- Art. 1147 of the French Civil Code: the liability of an individual or IAO can be based on the breach of a contractual obligation. Case law is not yet fixed on

this point, but it is possible that a Judge could decide that an IAO commits a breach of contract by not guaranteeing a safe workplace.

- Art. 1382/1384 of the French Civil Code: an individual or an organisation is liable if it caused loss by its own act of default, the act of its agent, or the act of an object (such as equipment, machinery) of which it has control. The Courts assess the default by reference to the behaviour which a person using all reasonable and usual care, skill and forethought (“*bon père de famille*”) should have had.

## French Case Notes 2

*The Jolo/ Ultramarina case : Court of appeal of Paris, 23 January 2009*

FACTS: Three people were going on holiday and booked their trip through the travel agency La Goélette, “Ultramarina” company, to stay in Pulau Sipadan Island, in the Sulu archipelago, to do some recreational diving. On 23 April 2000, while they were at their hotel, they were attacked by an armed group who took them to Jolo Island, in the Philippines. They were kept there as hostages for nearly four months, and were subjected to difficult and degrading living conditions. Once freed, the hostages brought a claim against a number of parties including the travel agency. The French “Tribunal de Grande Instance” (first instance court) decided that the travel agent was responsible and had to pay damages. However, an appeal was lodged.

ARGUMENTS: In summary, the travel agency and the Association for the Defence of Tour Operator argued that the kidnapping was an unforeseeable and uncontrollable act which was a force majeure releasing the travel agency of any contractual responsibility to the three hostages. It was argued specifically that the kidnapping was uncontrollable because of the number of attackers, their weapons, the violence of their act, and the absence of security force on this island. It was unforeseeable because it was the first successful kidnapping in Malaysia and the attack was undertaken by an armed group from another country in Malaysia’s territory.

The three hostages argued that the travel agency had failed to perform its obligation of information, advice and safety, because it did not prevent them from buying the trip, and they sold it despite the instability of the situation in Sulu due to regular raids by pirates and terrorists, which were well known locally and also that the French foreign affairs had produced advice not to go to the Sulu archipelago. Further, the kidnapping was not a “*force majeure*”. The kidnapping was foreseeable, because the Sulu archipelago was infested with pirates and many violent incidents had occurred in the North East of Sabah state and in Sipadan Island. No safety measures had been taken to protect the tourists, who were easy prey for the pirates. The French foreign affairs had discouraged travel in the Sulu archipelago on 14 April 2000.

DECISION: The Court of appeal confirmed that the travel agency was responsible and had to pay damages. According to article 23 of the law dated 13 July 1992, a travel agency is responsible towards the person who bought the holiday if the contract is not performed properly, except if the agency can establish that the contract has not been performed properly due to a *force majeure* (e.g. an unexpected or uncontrollable event).

In relation to “*force majeure*”, the first instance court had heard evidence from a range of sources (e.g. the founder of the worldwide confederation of underwater activity and a Swedish academic) that a lot of acts of piracy occurred in the waters around Sulu and on each side of the border between the Philippines and Malaysia. Some of the events at the end of 1999 and the beginning of 2000 reflected the aggravation of security conditions in the area, namely because of political tension in the Philippines. The armed group Abu Sayyaf were considered as very active and responsible for various kidnappings at the end of 1999 and the beginning of 2000. These events led the E.U and France to discourage their citizens to travel to the Sulu archipelago.

Even if the event was uncontrollable given the security force in presence on the day of the attack, it was not unforeseeable, because of the aggravation of recent tension in this area and the warning given by the French foreign affairs concerning the Sulu archipelago.

The travel agency could not be exempted from their responsibility. Neither the contractual document warning the client on the conditions of the stay, far from any modern life, with difficult access, nor the discharge of the company's responsibility in case of injury or death signed by the client when they arrived to the hotel, had an impact on the responsibility.

COMMENT: This case does not relate to an employer/employee relationship but illustrates the increased volume of litigation relating to the duty of care whether based on an employment obligation or a civil obligation. This decision is quite in line with the French Supreme Court's position in this type of case.

The special legal responsibility regime of the travel agencies is very strict. The travel agency is automatically responsible when the contract with their client is not performed properly. Namely, the travel agency has a very strict duty of care towards their client and is responsible for any breach of it.

It should be noted that a kidnapping was previously considered as a "force majeure", because it was considered as an unforeseeable event. But in the Jolo case, the kidnapping was considered to be foreseeable. The determining element was the warning notice that the French foreign affairs had published one week before the departure.

Finally, criminal liability can exist if there is a breach of specific health and safety laws or where there has been carelessness leading to death or personal injury even if non-intentional:

- Art. L.4741-1 of the French Employment Code: when an individual or a corporate body commits a breach of health and safety regulations provided by law, they can be held liable.
- Arts. 121-2/121-3 of the French Criminal Code: carelessness or breach of a legal duty of care committed by an individual or a corporate body, which leads to death or personal injury, can constitute a non-intentional criminal offence.
- Arts.221-6/221-7 of the French Criminal Code: if carelessness or breach of duty of care committed by an individual or a corporate body led to death, the offence is negligent homicide.
- Arts. 222-19 to 222-210 of the French Criminal Code: if carelessness or breach of the duty of care committed by an individual or a corporate body led to injury, the offence is negligent injury.
- Arts. 223-1/223-2 of the French Criminal Code: the deliberate breach of a particular legal duty of care or prudence even in the absence of injury is punishable as an offence of "*risk of endangering others*" when an action or omission creates an immediate risk of death or injury which could cause mutilation or permanent disability. So, the potential of a loss is sufficient to create a liability even in the absence of actual injury.

In Italy as in France the legal responsibility of employers is governed by specific laws, in addition to contractual agreements that may be made between the parties:

- Legislative Decree No. 81 of 9 April 2008 (Consolidated Safety at Work Act): Employees are required to have a safe workplace, all required safe work equipment, a safe working system, method and process including effective supervision and adequate training. The employer is required to prepare the Risk Evaluation Document, a document analysing all the health and safety risks in the workplace and indicating which measures should be implemented to protect the workforce, which requires continuous analysis and updates regarding health and safety risks. Independent contractors and volunteers may be afforded some specific protections only, or many of the same protections under these provisions as employees depending on the circumstances, where they are operating on the organisation's premises or the organisation controls their activity.
- Art. 2087 of the Italian Civil Code (which governs the contractual liability of the employer towards its employees): the employer is required to adopt all measures necessary to ensure the physical integrity and psychological welfare of employees, taking into account the particular nature of the work, the experience and the technical knowledge of each employee. This obligation extends outside of Italy where it can be shown that the organisation has the potential to minimise external risks. The employer will be liable for damages under Art. 2087 if it is shown that there is a causal nexus between the working activity and the injury and that the employer was negligent.
- Art. 2043 of the Italian Civil Code: any person who commits a fraudulent, malicious, or negligent act that injures or damages another is required to pay damages.
- Art. 2049 of the Italian Civil Code: Employers are liable for the damages caused to third parties by one of their employees during performance of his or her assigned duties. So, family members of a staff member of an IAO could bring a claim in tort under articles 2043 and 2049 of the Italian Civil Code against the organisation for any damages that they have suffered as a result of the injury or death of the staff member.

### Italian Case Notes

*The 'Malaria' case: Civil Supreme Court No. 5002 of 29 May 1990*

FACTS: The employee (an Italian citizen) had worked for the employer (an Italian construction company) performing his duties in Cameroon, where he carried out his job as an assistant during a dam construction. This work activity was carried out outdoors in a humid area, the typical habitat for mosquitos. The employee contracted malaria and because of this he resigned from his employment and returned to Italy where he decided to bring a claim against the employer for damages for breach of contract.



ARGUMENT: The employee raised a claim for contractual liability of the employer under Article 2087 of the Italian Civil Code, that provides the employer's duty to provide safe working conditions to ensure the protection of the physical integrity and psychological welfare of its employees, taking into account the particular nature of the work, the experience, and the technical knowledge.

The employee argued that:

- (i) the employer had the burden to give evidence that, according to Article 2087 of the Italian Civil Code, it had evaluated and implemented all the measures necessary to ensure to protect the integrity of the employee;
- (ii) the employer had not implemented any measures to avoid exposure to malaria infection, not even providing an adequate dose of quinine to efficiently prevent it.

The employer argued that the employee had the burden to prove that:

- (i) the employer had breached Article 2087 of the Italian Civil Code (e.g.: the employee had the burden to prove what specific measures the employer was obliged to implement and did not); and
- (ii) there was a causal nexus between the work activities carried out by the employee as an assistant during a dam construction and the malaria infection, as malaria is widely spread throughout the territory he was working in, and thus it was not necessarily a direct consequence of the working activity.

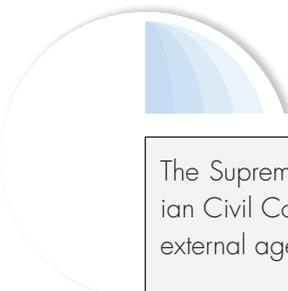
DECISION: The Supreme Court held that, according to Article 2087 of the Italian Civil Code, the employer had to take into account not only the equipment, the machinery, and the services that the employer should provide, but also the work environment, in relation to which the measures to be taken must concern not only the risks relating to the work site but also those deriving from the action of external agents that are connected with the area (in that case, a malaria zone) where the workplace was located, even if abroad.

The Supreme Court also held that it is the employer that should have proved that it had adopted all possible measures to avoid the employee from contracting malaria. Specifically, the employer should have proven (and did not) that, while assigning the employee to carry out his work outside in a humid area – a typical habitat for mosquitos - for a very high number of hours per day, the employer itself has adopted all the measures to avoid the malaria infection, including providing a supply of quinine to avoid the sickness developing. Moreover, in order to adopt all measures necessary to ensure the protection of the physical integrity and moral welfare of the employee, the employer should have known the initial state of the malaria and the precarious health conditions of the employee, as the contractual liability under the Article 2087 governs all the hypotheses of the employer's duty to provide safe working conditions, including the duty to know the typical risks of the workplace and the health condition of the employee.

The Supreme Court further recalled that – for malaria infection – the employee did not even have to prove that there was a causal nexus between the work activities carried out and the infection. This because the Constitutional Court had already settled this point, by recognising in its decision No 226 of 1987 that malaria is a professional illness, thus there is no need for the employee to prove the relating causal nexus.

Finally, the Court also recalled the Constitutional Court decision No 369 of 1985, that extended the Italian mandatory insurance for professional injuries and illnesses to Italian employees employed by an Italian employer and working abroad.

COMMENT: The decision faced the contractual liability of the employer towards its employees under Article 2087 of the Italian Civil Code (which leads to payment of damages) in a case where the workplace was outside of Italian territory.



The Supreme Court held that the employer's duty of care to its employees under the Article 2087 of the Italian Civil Code has to be interpreted as also referring to the work environment risks deriving from the action of external agents (such as malaria), and regardless that the facts occurred abroad.

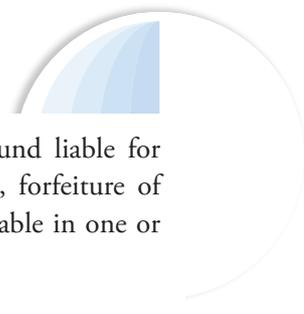
It may be inferred from this case that, in practice, the employer is required to assess the risks even if the employees work abroad, because: (i) under Article 2087 of the Italian Civil Code the employer is required to implement possible measures to safeguard health and safety, and: (ii) the logical premise to identify the appropriate measures is to assess the risks. Thus, although not specifically declaring an extraterritoriality of the health and safety assessment as governed by the Consolidated Safety at Work Act, this case requires that some assessment of risks on the workplace to be made anyway including workplaces outside Italy.

Under Italian criminal law, the Italian Constitution provides that criminal liability only attaches to individuals and not organisations. However, Law No. 231 of 8 June 2001 creates a form of vicarious "*administrative liability*" for injury and death, which involves criminal prosecution but entails administrative sanctions only.

Under Law No. 231, in certain circumstances, administrative liability may apply to legal persons and other entities for crimes committed by officers and employees within the scope of their employment. For example, an IAO with a head office in Italy, if not prosecuted under the local laws of the country where the offence is committed, could be prosecuted in Italy under Law No. 231.

Law No. 231 only applies to specific crimes including manslaughter and battery/assault resulting in significant injuries to persons in the presence of violations of health and safety at work legislation. A number of exemptions from liability are available, i.e.:

- (i) if the IAO proves that the person acted in their own interest or in the interest of third parties other than the IAO when the crime was committed; or
- (ii) in case the crime was committed by representatives of the entity, directors, managers, if the IAO proves that:
  - a. its board of directors adopted and effectively implemented internal controls to prevent the occurrence of crimes of the same or similar nature to the crime at issue, and
  - a. the crime occurred as a result of fraudulent non-compliance with the organisation and management plans, and a management body of the entity, with autonomous decision-making and control powers, was entrusted with the task of supervising the implementation and update of, and
  - a. compliance with the organisational management plans, and the supervision and update was in fact carried out and was not inadequate;or,
- (iii) in case the crime was committed by an employee under management control, if the Public Prosecutor does not prove that the IAO failed to manage, supervise and monitor their activities (i.e. where organisational and management plans were not adopted or were not effectively implemented).



A range of administrative sanctions can apply to an employer found liable for violating Law No. 231: expensive monetary fines, disqualification, forfeiture of profits or publication of the ruling declaring that the employer is liable in one or more national newspapers.

Finally, breaches of the Consolidated Safety at Work Act are in themselves punishable, with imprisonment for up to 8 months or with other criminal fines, or administrative fines depending on the type of breach. Only natural persons (e.g. a supervisor) are subject to imprisonment and criminal fines while the administrative fines may be applied to legal persons such as an IAO. In cases of repeated violations of the legislation by the same employer, the maximum applicable administrative sanction is an order to suspend the employer's business activities.

### 3. Sweden

In Sweden, the Swedish Work Environment Act (WEA) defines the outer framework of work environment regulations. In addition, the Swedish Work Environment Authority issues ordinances with specific provisions and general recommendations specifying the requirements of the work environment. For example, provisions that concern dangerous substances or machinery.

The main purpose of the WEA is to prevent accidents and ill-health at work but also to create a good working environment regarding job diversity, job satisfaction, social participation and personal development. The WEA applies to all work where an employee performs work for an employer. However, safety responsibility may also occur for persons who sojourn on workplaces (e.g. persons undergoing training or education).

Under the WEA, the work environment must be satisfactory taking into account the nature of the work as well as the technological and social developments in society. The most extensive responsibility devolves on the employer, who is obliged to take *all* measures required to prevent the exposure of employees to the risk of ill-health or accidents at work. According to the legal commentaries a nuanced assessment must be made when imposing requirements on the work environment. Efforts to improve the work environment is only required if they are not considered unreasonable compared to the result that may be achieved. The WEA is mandatory and requires employers to have a systematic work environment management that focuses on the reduction of risk. The regulations on systematic work environment management encompasses all natural day to day activities in the workplace including all important physical, psychological and social conditions, for example:

- providing satisfactory atmospheric, acoustic and lighting conditions;
- taking adequate safety precautions to prevent injuries that may be caused by falls, collapses, fire, explosions and other hazards;
- machinery, tools and other technical equipment must be designed, positioned and used in such a way as to afford adequate safeguards against illness and accidents;

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- substances liable to cause illness or accidents may only be used in conditions affording adequate security;
  - personal protective equipment must be used when adequate protections against illness or accidents cannot be achieved by other means. However, personal protective equipment may not be provided *instead* of taking measures necessary to provide a safe work environment. All equipment and clothes needed to carry out work safely is deemed to be personal protective equipment.

The scope of this obligation depends on the nature of the work. The employer is obliged to continually investigate, carry out and follow up the company's activities in such a way that ill-health and accidents at work are prevented and a satisfactory working environment is achieved. Once a risk is identified, the employer is required to take appropriate measures to reduce or eliminate the risk. In addition, the employer must, *inter alia*, investigate work-related injuries and incorporate a suitably organized scheme of job modification and rehabilitation activity in its operations. The systematic work environment management must be documented in writing. The employer, in co-operation with its employees, is obliged to prepare action plans covering various contingencies.

WEA requires that mandatory safety officers are appointed by (as applicable) either the local employee organization or directly by the employees for organizations with over five employees and safety committees for organisations with over fifty employees. The safety officer(s)/safety committee shall *inter alia* monitor the developments with respect to protection against illness and accidents and the development of a safe work environment.

The employer also has the obligation to ensure that the employees clearly understand any potential hazards existing in the workplace and are continuously updated. This is known as the employer's obligation to inform. The employer must ensure that the employee receives the necessary training and that he or she is aware of what measures must be taken for the avoidance of hazards at work. The employee must be made aware of the hazards entailed by the work and the manner such work is performed in order to minimise such hazards as much as possible. In addition, the employee must be made aware of the protection available and how to use or operate any equipment.

The Swedish Tort Liability Act ('TLA') also provides that an employer is liable for acts or omissions which have caused personal injury, loss or damage to property. The TLA will apply unless otherwise provided by law or under a contract, so if a contract of employment contains rules regarding tort liability such rules have preference over the TLA. An employer, under the TLA, is also vicariously liable for damage caused by its employees during the course of their employment. The basis of the Swedish Tort Liability Act, like the duty of care concept, is the *culpa* rule i.e. liability for negligence. The Swedish Courts tend to apply standards (to measure the potentially negligent behaviour) from existing laws or regulations that are applicable to the conduct in issue. Previous court cases and customs can also be taken into account. Alternatively, a Court will balance the likelihood of the damage, seriousness of the damage if the damage occurs, the cost of avoiding the risk and the recognition of the risk of damage.



The Government, or by authority of the Government, the Work Environment Authority may prescribe payment of a special sanction charge for infringement of a provision issued by authority under certain sections of the WEA. The Government or the authority decided by the Government is for example allowed to, in questions of technical provisions or substances which can cause illness or accident, notify regulation as regards conditions of manufacture, use and labelling or other product information. A sanction charge shall be paid notwithstanding that the infringement was not intentional or negligent. The amount of the charge is between SEK 1,000 and SEK 100,000 payable to the State by the natural person or legal entity which conducted the business in which the infringement took place.

Liability of employers (the legal entity) can also be found under the provisions of the Swedish Penal Code under Chapter 36, Section 7 of the Swedish Penal Code. An entrepreneur can, for a crime committed in the exercise of business activities, be ordered to pay a corporate fine if the sentence for the criminal act is more severe than a fine and (unless the crime was directed against the entrepreneur): (i) the entrepreneur has not done what could reasonably be required of him in order to prevent the crime, or; (ii) the crime has been committed by a person in a leading position based on trust to act or make decisions on behalf of the entrepreneur, or a person who otherwise has had a particular responsibility for supervision or control of the business. It is important to note that the definition of “*entrepreneur*” is wide enough to include non-profit associations such as IAOs.

Like Italian law, criminal liability under Swedish law must always be imposed on a natural person and cannot be imposed on a legal person such as an IAO (however, IAO’s may be ordered to pay *corporate fines*, please see the paragraph above). The Swedish Courts will decide where the criminal liability lies i.e. the natural person who is responsible having regard to whether the obligations of the natural person are matched by adequate powers and economic resources and whether that person possessed adequate competence for them. It must further be established that the person acted wilfully or negligently.

The WEA contains a number of provisions that may impose criminal liability on an individual:

- An individual who intentionally or negligently fails to comply with an injunction or prohibition issued by the Work Environment Authority pursuant to certain provisions under the WEA may be fined or sentenced to imprisonment for not more than one year. However, if the injunction or prohibition is issued in conjunction with a default fine, the liability for payment of the default fine will normally rest with the legal entity.
- Fines may also be imposed on an individual who intentionally or negligently under certain conditions: (i) employs a minor; (ii) contravenes certain penal sanctioned provisions under the WEA (e.g. provisions dealing with substances capable of causing illness or accidents, technical equipment, work processes and work methods) or the Work Environment Ordinance; (iii) furnishes incorrect particulars in matters of importance when a supervisory authority has requested information, documents or samples or has requested investigations; or (iv) without valid cause removes a safety device or renders such a device inoperative.

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- Individual liability for the environmental offence may also occur if an employer fails to comply with a provision issued by the Work Environment Authority and this failure causes an accident or death (please see below).
  - In addition, the Swedish Penal Code can impose criminal liability on an individual:-
  - An *environmental offence* is committed when an individual intentionally or carelessly fails to perform his or her duties under the WEA in order to prevent sickness or accidents and thereby: (i) through carelessness causes the death of another, or (ii) through carelessness causes another to suffer bodily injury or illness which is not of a petty nature, or (iii) through gross carelessness exposes another to mortal danger or danger of severe bodily injury or serious illness.
  - As mentioned above, the responsibility for the environmental offence is borne by individuals, primarily the board of directors. The responsibility can however to a certain extent be forwarded by delegation. The sentence for an environmental offence ranges from fines to imprisonment (maximum six years for causing another's death, gross crime), depending on the circumstances of the case.

#### 4. England and Wales

In England and Wales, potential liability of an IAO for personal injury or death of its staff arises under specific health and safety regulations, under contract or under Judge made law ("*the common law*"). It is worth noting that the UK is in fact two jurisdictions namely England & Wales and Scotland. There may be differences between the laws under each legal system.

In England and Wales, an individual may have recourse against an IAO by virtue of breach of a statutory duty, where specific legislation gives rise to a civil cause of action against the IAO. There is an extensive list of health and safety regulations, which if breached, may entitle an employee or a third party to claim against an IAO on the basis of breach of statutory duty.

In order for a claimant to bring a successful claim for breach of a statutory duty, the following must be established:

- the statute cited must apply to the claimant (i.e. it applies to the category of employee or worker which the particular claimant falls into)
- the statute must have been designed to prevent the type of injury incurred by the claimant
- the statute must have been breached
- the injury must have been caused by the breach of the statute

In 1992, England and Wales enacted the 'six pack' regulations in order that the jurisdiction could comply with various European legislation and in practice these are the most commonly invoked statutory duties against employers. These are:

- Management of Health and Safety at Work Regulations 1999 ['MHSWR']
- Provision and Use of Work Equipment Regulations 1998 ['PUWER']
- Manual Handling Operations Regulations 1992 ['MHOR']
- Workplace (Health, Safety and Welfare) Regulations 1992 ['WHSWR']
- Personal Protective Equipment at Work Regulations 1992 ['PPE']
- Health and Safety (Display Screen Equipment) Regulations 1992 ['HSR']

It is worth noting that exceptionally some of these statutory duties are strict, insofar as no finding of fault is required to impose liability on the employer, for example: (i) the duty to maintain work equipment in an efficient state, in efficient working order and in good repair under Reg. 5(1) of PUWER, and; (ii) the duty to maintain the workplace, equipment, devices and systems in an efficient state, in efficient working order and in good repair under Reg. 5(1) of WHSWR. The Courts have defined "*efficient*" from the view point of health, safety and welfare.

Other statutory duties are qualified by terms such as "*reasonably practicable*". In other words, an employer can escape liability if it can be established that it did all that was reasonably practicable to avoid the risk. Courts can decide, when considering whether steps taken were "*reasonably practicable*", to apply a test which is similar to considering "*reasonable care*" in a claim for negligence. The duties of employers to avoid the need for his employees to undertake any manual handling operations at work which involve a risk of their being injured (Reg. 4 MHOR) and the duty to keep floors and traffic routes in work places free from obstructions or slipping/tripping hazards (Reg. 12(3) of WHSWR) are examples of duties that are subject to a reasonably practicable defence.

There are in addition to the 'six pack regulations' many additional statutory duties on employers that cover specific activities or injuries, for example working at height or working in confined spaces or control of asbestos.

In addition to specific statutory duties on employers, employment contracts may make express reference to a duty on behalf of the employer to take reasonable care for the employee's health and safety. If there are no express terms, Courts may be willing to imply such terms into the contract.

Further, IAOs may be held liable for negligence at common law if it can be shown that:

- a duty of care is owed to the claimant
- breach of the duty of care
- the organisation's negligent conduct (including the conduct of its employees or agents under its control) caused actionable damage to the claimant
- the damage suffered is not too remote

An employer owes an established duty to take reasonable care for the health and safety of his employees and certain others, such as not to expose them to a foreseeable risk of injury. The employer must take such steps that are reasonably practicable



to protect the employee from reasonably foreseeable risks. If the danger cannot be eliminated, reasonable care must be taken to reduce it. The employer has a duty to tell prospective employees about health and safety risks, if he accepts the job, to enable them to properly evaluate the benefit of the job against the health and safety risk. The work or work activity should not proceed if the danger remains too great after all mitigating measures have been put in place.

## English Case Notes

*Hopps v. Mott Macdonald & Another: High Court, 24<sup>th</sup> July 2009*

FACTS: The Claimant (Mr. Hopps) was a consultant electrical engineer who volunteered to go to Iraq under contract with Mott Macdonald ('D1'). D1 had agreed to provide six volunteers, including the Claimant, to work on the coalition forces' Emergency Infrastructure Plan ('EIP') to repair essential services and improve the life of ordinary Iraqis. D1's staff were co-located with the British Army which protected them against various identified threats including physical attack, kidnapping, mortar attack, small arms fire and grenade or rocket propelled grenade attack.

In October 2003, while travelling through Basrah in a standard production Land Rover Discovery, escorted by another Land Rover containing soldiers, the Claimant was injured when the vehicle was struck by the exploding material from an improvised explosive device ('IED') incorporating an artillery shell.

ARGUMENTS: The Claimant claimed damages against D1 and the British Ministry of Defence ('D2') in negligence on the basis that there had been a failure to take reasonable care for his safety. The Claimant contended that D1 should have carried out a risk assessment to assess the suitability of the proposed transport arrangements and the provision of security. In light of the prevailing security situation at the time, the Defendants should have provided an armoured vehicle or the Claimant should have remained at the base; if he had been in an armoured vehicle he would have suffered either no injury or significantly less injury as a result of the explosion.

DECISION: The Claimant's claim was dismissed:

1. Assessment of risk. The Court accepted that assessment of risk involves considering: (i) the nature of the risk; (ii) the likelihood of it eventuating; (iii) the likelihood of harm being sustained (and the extent of that harm) if it does. In deciding what steps had to be taken in order to deal with these risks, it is relevant to take into consideration: (i) the nature and purpose of the work that the Claimant was employed to perform; (ii) the priority of the risks i.e. which were the principle and which the secondary risks; (iii) the effectiveness of various protective measures that could be taken and; (iv) the consequences of taking them. The Court undertook a detailed analysis of risk on the facts.
2. Breach of duty. It was not unreasonable for the Claimant to have been carried around Basrah in an unarmoured vehicle. Before the incident, the point had not been reached at which the exercise of reasonable care required the procurement of a factory produced armoured vehicle. The information available to the Army about IEDs, amongst other weaponry, was not such as to have made it unreasonable to allow civilian personnel outside the airport in Land Rovers driven by armed soldiers and accompanied by an escort. The number of attacks appeared to be increasing; but the nature of the attacks and devices involved and of their consequences was not such that, acting reasonably, the defendants should have ordered armoured vehicles for civilian contractors.
3. Delegation by D1 to D2. Although D1 did not carry out a risk assessment in respect of its employees, it did keep the security situation under review. In any event, D1 had delegated responsibility to the Army for security, therefore the reasonableness or otherwise of D1 and D2's duty of care had to be

down to D1 or not. It was clear from the evidence the Court heard that the Army's advice at the relevant time would have been that the level of risk was not such as to require the use of armoured vehicles. D1 would probably have accepted that advice. The Army's view showed that there was an assessment of risk applicable to the Claimant and his colleagues. The absence of a recognisable risk assessment was only of potential significance if, had one been made, it would or should have led D1/D2 to provide an armoured car or confine them to base.

4. Compensation Act. The Court also considered, for the first time, the impact of S.1 of the Compensation Act 2006 which allows a court considering a claim in negligence or breach of statutory duty to have regard to the deterrent effect of potential liability in determining whether the defendant should have taken particular steps to meet a standard of care. The Court was able to apply the Compensation Act even though the accident occurred before the Act came into force because the Claimant's claim was a claim which the Court was "considering". On the facts, in determining whether particular steps should have been taken, such as confinement to the airport until armoured vehicles were available for transport, the Court was entitled to have regard to whether such steps would prevent a desirable activity being undertaken, namely the work of reconstructing the infrastructure of Iraq which was itself a measure to reduce risk.
5. Causation. The onus is on the Claimant to prove that he would have suffered either no injury at all or a lesser injury if he had been transported in an armoured vehicle. Liability does not follow simply because the absence of an armoured vehicle increased the risk of injury. On the evidence the Court heard, given that shell fragments were likely to penetrate even an armoured vehicle, and that the explosion is chaotic in that fragments behaved unpredictably and may involve ricochet and spalling, it was impossible to conclude that if the Claimant had been in an armoured vehicle he probably would not have suffered the same injury, or that his injuries would have been less serious.

COMMENT: This case demonstrates that the English Courts will go into an in-depth analysis of risk. The mere fact that there was a foreseeable risk of injury from a fragmentation of an IED if it exploded by a soft skinned land rover which offered no protection from such an explosion, did not establish breach of duty.

Another interesting point is the application of the s. 1 of the Compensation Act 2006, which may be relied upon by IAOs in the English Courts, to argue that the Court should consider whether a requirement on a defendant to take particular steps to meet a standard of care may prevent a desirable activity from being undertaken at all, to a particular extent or in a particular way or discourage persons from undertaking functions in connection with a desirable activity.

This case makes clear that this legal provision is not restricted to desirable activities such as providing public amenities or playing sports but extends to desirable activities such as post war reconstruction of a shattered infrastructure in a territory occupied by armed forces, particularly when failure to expedite that work would carry with it increased risks to the safety of coalition forces and civilian contractors in Iraq as a whole.

**Under its duty of care, the employer must provide:**

- A safe place of work and equipment,
- Safe systems of work (i.e. a proper system and effective supervision), and,
- Reasonably competent employees.

The employer's duty of care to his employees is personal and cannot be delegated to a manager or safety advisor. The employer remains vicariously liable for any negligence



in performing the duty on the part of the person or entity appointed to perform it. The employer need not do everything in its power to prevent injury, but must take such reasonable steps to prevent exposure of the employee to unnecessary risk.

In addition, IAOs can face liability under English criminal law although most of the health and safety legislation only applies to work carried out within the UK:

- The Health and Safety at Work Act 1974 (only applies to work within the UK): there is an obligation on an organisation to ensure, so far as is reasonably practicable that (i) employees and (ii) persons who are not employed but who may be affected by its undertaking are not exposed to health and safety risks. A breach of the HSWA or its subordinate regulations is a criminal offence and will be prosecuted in the criminal courts. An organisation need not have caused bodily injury or illness; (and like the French law example) there need only be a risk of harm from its activities for a successful prosecution.
- Management of Health and Safety at Work Regulations 1999 (only applies to work within the UK although an IAO may be prosecuted for health and safety offences if it fails to comply with the law when conducting a preliminary risk assessment in the UK before sending employees overseas): (i) employers must make a “*suitable and sufficient risk assessment*” of the work-related health and safety of their employees, and non-employees affected by their activities, identifying any necessary measures; (ii) employers must not employ persons under 18 unless the risk assessment has specifically been reviewed for persons under 18; (iii) make and give effect to appropriate arrangements for effective planning, organisation, control, monitoring and review of preventative and protective measures; (iv) appoint one or more competent persons to implement measures required under health and safety law; (v) establish procedures to be followed in the event of serious and imminent danger to persons at work; (vi) provide employees with understandable and relevant information and training on risk; (vi) produce a written health and safety policy if five or more employees.
- Corporate Manslaughter and Homicide Act 2007 (not applicable if harm resulting in death was suffered outside the UK): an organisation is guilty under the Act if the way in which its activities are organised or managed by senior management causes a death, and this amounts to a “*gross*” breach of the duty of care. Courts may fine the organisation and/or make a remedial order.

## 5. USA

In the US, the duty of care comes from a wide variety of sources including both express and implied contractual terms, judge made negligence law and specific health and safety regulations.

The exact definition of negligence varies from state to state but like the UK essentially boils down to three components:

- a legal duty of care to conform to a certain standard
- breach of that duty

- damages as a result of this failure

The duty requires organisations to provide employees with a reasonably safe working environment and a full warning of any dangers in the work environment which they (the employee) may not be able to discover. This extends to all dangers that are foreseeable from a reasonable person's perspective. The actions of the organisation to meet the duty of care, and to identify and mitigate risks will be measured by the circumstances known at the time.

There are certain circumstances where the duty of an IAO will be enhanced or heightened. These factors include the following:

- if the organisation is in a better position to protect the injured party than the injured party himself or herself, or
- the risk of the harm is particularly foreseeable or predictable.

Generally, US law requires employers to warn of, or sometimes protect, its employees from known dangers. Generally, under US law, employers owe to their employees a duty to provide as safe a work environment as possible under the circumstances of the nature of the workplace. As previously explained, employers can sometimes shift this burden by including clearly articulated assumption of risk waivers within employment agreements.

## USA Case Notes 1

*Hilliard v. Schroeder Indus., Inc.*, 1990 WL 2910 (App. 2 Dist. Ohio 1990)

**FACTS:** The plaintiff, Steven Hillard, was an employee of the defendant manufacturing company, Schroeder Industries. Hillard alleged that Schroeder removed a safety guarding device from a machine he was assigned to operate. At the time of his injury, Hillard's left hand, arm and shoulders were pulled into the press causing injury to his left middle finger, hand and wrist and a near amputation of his left arm. Hillard sued Schroeder for the damages that resulted from his injury.

**ARGUMENTS:** Hillard alleged that Schroeder, by removing the safety device he alleged should have remained on the machine, subjected him to a condition where harm was substantially certain to occur. For this reason, Hillard claimed that Schroeder was responsible for his injuries. In response, Schroeder argued that Hillard had been instructed to place the safety guard in its operational position and stated that, at the front of the machine, where Hillard stood to help feed the material into it, was a sign which read, "warning, keep hands out of the way while machine in use." Schroeder claimed that because of these warnings, and because Hillard continued to operate the machine despite them, Hillard effectively assumed responsibility for the risk of any harm that may have resulted from his operation of the machine.

**DECISION:** The Court held that employers owe to their employees a duty to provide as safe a work environment as is possible under the circumstances of the nature of the workplace. Further, the Court found that the voluntariness with which a worker assigned to a dangerous job assumes the risk of injury is illusory. Accordingly, the Court concluded that, as a matter of law, Hillard did not assume the risk of injury simply by operating the machine, and that it was a question for the jury to determine whether Schroeder had violated its duty to provide Hillard a safe work environment.

COMMENT: This case illustrates the IAOs cannot simply rely on the fact that their employees and/or volunteers agreed to a posting in a dangerous environment to absolve the IAO of liability for injuries that result from being in that environment. As the Court noted in Hillard, while there is no general legal prohibition against express agreements to assume risks, the fact that an employee has agreed to work in a dangerous environment does not, by itself, mean that he or she has assumed the risks that flow from that choice.

Accordingly, IAOs must endeavour to provide as safe a working environment as is possible to their employees wherever they are sent. This general rule does not mean that IAOs are the absolute insurers of their employees' safety; remember, this duty applies only to the extent as it is possible "under the circumstances". It does mean, however, that if an injury occurs and the injured employee sues the IAO for damages in the United States, the IAO must be prepared to establish that the safety measures it took to protect the employee were reasonable given the environment to which the employee was sent.

Employers owe many duties of protection because they are usually in a better position to protect against harm and extend help if necessary. Independent contractors are in a different position than employees, and are thus owed a different standard of care from the employer. This distinction should not suggest that simply classifying an employee as an "independent contractor" will better protect an employer. To the contrary, while US courts will consider the "title" of the servant in such a relationship, whether he or she is a true employee or an independent contractor is a fact-specific consideration made by a court.

## USA Case Notes 2

*Workman v. United Methodist Committee on Relief of the General Board of Global Ministries for the District of Columbia* ('UMCOR'), 320 F. 3d 259, 264 (2003)

FACTS: In 1997, Deena Umbarger became a relief worker for the United Methodist Committee on Relief (UMCOR). She was initially assigned to Kenya, followed by a brief stint in the Republic of Georgia. The next year, she returned to Kenya, where UMCOR retained her for several short-term consulting projects as an independent contractor. On 20 March 1999, Umbarger travelled to Somalia. During her visit, she was shot and killed by a gunman 40 km outside of Kiangu. After the incident, Umbarger's mother, MaryAnn Workman, filed a wrongful death lawsuit against UMCOR in Washington, D.C.

ARGUMENTS: Workman argued that UMCOR had "failed to discharge its duty and obligation to protect [Umbarger] as she assisted UMCOR in carrying out its activities in Kenya and Somalia." While UMCOR established that it had not required Umbarger to travel to Somalia, Workman argued that even in cases where decision-making is left to the aid worker, "the institution for whom she works also is expected to provide reasonable safety and security support," including "proper security assessment of the area in question [and] appropriate risk reduction strategies..." Workman also noted that Umbarger had informed UMCOR that her visit to Somalia could be particularly dangerous. In response, UMCOR argued that it was not responsible for Umbarger's death and had no duty to protect her from the intentional criminal act of a third party.

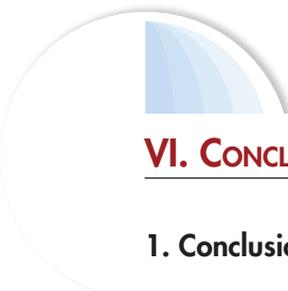
DECISION: Relying on the general rule in the District of Columbia that a defendant may be liable for harm caused by the criminal act of another only if the crime was particularly foreseeable, the Court found that UMCOR was not liable for Umbarger's death for several reasons. First, the Court noted that UMCOR did not send Umbarger to Somalia and, in fact, she decided how best to carry out her mission, including whether to



travel there or not. Second, the court noted that UMCOR was in no better position to provide for Umbarger's safety than Umbarger herself because she was the one on the ground in the region. For these reasons, the Court concluded that Umbarger's attack was no more foreseeable to UMCOR than it was to her.

COMMENT: UMCOR's holding is instructive, but its impact should not be overstated. Had the facts of the case been different, the outcome may have been as well. For instance, had the specific safety concerns been known by UMCOR and not Umbarger, it is more likely that UMCOR would have been held liable. Furthermore, had UMCOR directed Umbarger to travel to an area that UMCOR knew to be dangerous, that also could have influenced the liability calculation. Accordingly, this case should not be read to suggest that an IAO would never be liable in the United States for an attack on an employee that occurs in a particularly dangerous region. If IAOs are sending their volunteers or employees to such locations, and the associated risks are known to the IAOs but not their employees, it is in the IAOs best interests to take steps to educate and train their employees about the dangers they face by accepting their assignments.

In the US, the duty of care is generally determined by the reasonable and prudent standard, looking to what reasonable and prudent organisations would do under similar circumstances. Courts often look to community standards of care to determine this duty. For example courts might look to a medical community to determine what was reasonable for a doctor to do in a particular situation. In the context of a US Aid Agency, courts would likely look to general security standards used in the international emergency relief, aid and development community to determine what precautions were reasonable in those circumstances. Accordingly, in cases like these, where a duty does exist, IAOs would defend themselves by arguing that their actions did not "*breach*" the duty to their employee. In other words, an IAO would argue that their conduct conformed to that which any reasonable IAO would have done under identical circumstances. In US courts, the determination of whether an IAO conformed to such standards, and was therefore not negligent, is often left up to the jury to decide, because it is a fact-specific inquiry.



## VI. CONCLUSIONS, RECOMMENDATIONS AND PERSPECTIVES

### 1. Conclusions

The issues presented in this paper have far-reaching implications for IAOs and their operations, governance and executive, staff and their dependents.

A first conclusion of this paper is that there is a legal grounding for ethical and moral imperatives related to staff safety and security. Not only are these of ethical and moral concern: IAOs have a legal obligation to provide a duty of care that covers safety and security. Thus, safety and security are not mere personal, subjective matters of choice or conscience. Safety and security policies and measures must answer to objective laws, regulations, standards and norms; compliance can be subject to scrutiny on the basis of relatively objective criteria.

More specifically, this paper demonstrates that:

1. IAOs are subject to the same legal obligations and responsibilities as other organisations (e.g. commercial/corporate, manufacturing and services, public and associative sectors), in particular with respect to an employer-employee (contractual) relationship.
2. Obligations and responsibilities are not restricted to the terms of an employment contract. Beyond contractual responsibility, IAOs are subject to any other responsibilities and duties stipulated in national law and its principles towards persons with whom they have relations. This could include employee dependents, consultants, volunteers, subcontractors, and other third parties with whom they are in a relationship.
3. Employees and others can press charges and present claims (for damages) against an IAO in court.
4. In some circumstances, individuals in positions of responsibility and decision-making in an IAO can be held personally accountable and taken to court, including members of the executive and governance.
5. Courts will decide whether they can hear a claim and, if so, will decide on relevant applicable national law and statutes as well as principles and jurisprudence.
6. The specifics of national law and sources of law will vary from one country to another. Nevertheless, there are common principles generally included across national jurisdictions that affect both the employer and the employee.

The employer (namely the IAO):

- is under a duty to assess the risk to health and safety in connection with both the workplace duties of its staff and the operational environment, and is required to identify threats and risks.
- is under an obligation to implement mitigating measures to eliminate, avoid or reduce foreseeable risks to its staff at work.
- is to have measures in place to react to and manage any emergency circumstance or event affecting the employee.

- is to have adequate redress measures in place, which may include (health, disability, injury/death, loss of income) insurance (when possible), payment of damages, post-incident treatment, etc. to compensate an employee having suffered damages.
- has an obligation to inform an employee of the work environment and tasks the employee is expected to carry out, the threats and risks, and the reasonable practicable measures taken to reduce foreseeable risks.
- is to obtain an employee's informed consent that acknowledges that with the information received he/she accepts the tasks and related risks (although this will not, in some the countries surveyed, avoid the IAO's liability).
- is to regularly review its assessment of risk and mitigating measures and adapt as appropriate to the circumstances
- The IAO employee:
  - is expected to abide by the mitigating measures taken by the employer.
  - is to express his/her informed consent, acknowledging that with the information received he/she accepts the tasks and related risks (although this will not, in some the countries surveyed, avoid the IAO's liability).

A second conclusion is that responsibility for a safe work environment lies first and foremost with the organisation's governance, potentially shared by its top executive. Implementation of measures in the field by operational staff is but one element of the overall legal responsibility of an organisation. Safety and security obligations are only partially answered by the currently favoured good practice, "*bottom-up*" approach. This approach presents a broad and varying collection of operational measures, rules and guidance which may, to one degree or another, have been formulated into policy with varying levels of responsibility. Good practices are needed and have shown to be very useful. However, in the first instance, observing legal obligations requires a corporate policy position that includes recognition and acceptance of responsibility and accountability of the IAO as per law, i.e. a "*top-down*" position policy issued by the top level of an organisation and applicable throughout the organisation. The current practice review has shown that this is rarely the case; legal considerations only very rarely inform or are included in policy.

A third conclusion is that, in conjunction with governance, executive and those responsible for operations, analyses and implementation of safety and security measures in the field, there is a key role for those responsible for human resources/personnel departments in an IAO. Contract terms and conditions, providing and documenting briefings, formalising informed consent, health and insurance arrangements, managing training requirements, post-incident and redress management, including inter-personal follow-up, are part and parcel of the duty of care and organisational liabilities. Many or most of these issues would typically be ensured by human resources/personnel departments and would furthermore require involvement on the part of funding and finance. It is necessary to co-ordinate the range of issues and centralise the relevant documentation. In most organisations the human resources/personnel departments are best placed to do so, and could act as focal points in coordination and collaboration with other departments and units.



A fourth conclusion is that legal responsibility is closely linked to security risk management. The key elements of an organisation's security risk management reflect key issues of legal responsibilities. However, while current operational good practices cover numerous issues that are drawn together and conceptualised in a relatively complex manner, the legal perspective allows one to reduce the complexity of the model to a limited number of key areas. These elements of duty of care permit the many operational good practices to be reordered into a simpler schema, which clarifies the essential links between the different, but related, elements and practices, allows clear identification of priority areas and gaps, and points to responsibilities and obligations throughout the organisation.

The view of risk as a relation between environment and task is explicit in the legal argument. This relation is analogous to the definition of risk in terms of 'the effect of uncertainty on the achievement of objectives'.<sup>33</sup> From this perspective, linking the uncertainty of events to the objective to be achieved, the management of safety and security is not an inhibitor but an enabler of action and access. By analogy, taking steps to conform to basic duty of care does not need to be seen as placing an impossible burden that limits an organisation's mission, objectives and actions. It may well reinforce an organisation, its staff management, and the realisation of its objectives.

## 2. Recommendations

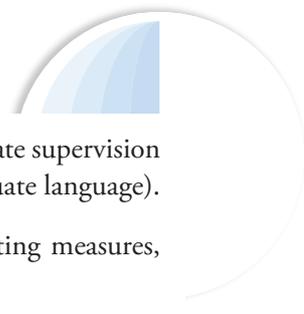
The nature and scope of the IAO's legal responsibility towards the health and safety of its staff across multiple jurisdictions can seem bewildering. Whilst it will not be possible to prevent claims for compensation from injured staff members, it is possible to take measures to reduce the risk of injury to them and document those measures such that the IAO can demonstrate that they have acted responsibly and so limit their potential for liability such that a claim for compensation, if made, can be properly defended in a court.

The following common approach is recommended:

1. Obtain legal advice as to national law and regulations on health and safety in the workplace.
2. Designate an organisational focal point for all matters related to compliance with legal and regulatory dispositions with regard to health and safety in the workplace.
3. Analyse the operational environment, and define threats and risks.
4. Investigate and assess threats and possible risks created by the work environment in relation to the activities of the IAO and the tasks to be performed.
5. Analyse the risk. Such analysis should be routine and ongoing. If risk is only analysed at the beginning of a deployment or a program, particularly in a new environment, and is not reassessed on an ongoing basis, a court of law may consider that this increases the likelihood of liability further down the line.
6. Define and implement mitigating measures to reduce or eliminate the risk (including e.g. training of staff; warning staff of any dangers; providing safety equipment and measures; providing for protective and avoidance measures;

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<sup>33</sup> Cf. ISO 31000:2009



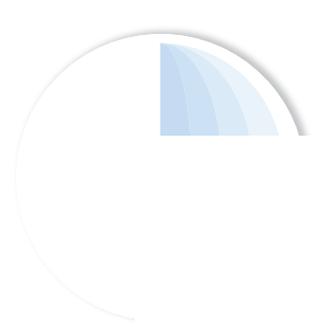
defining and enforcing rules and procedures; providing appropriate supervision and instruction regarding the specific risks in the required/adequate language).

7. Follow-ups: regularly review the assessment of risk and mitigating measures, and adopt these as appropriate to the circumstances.
8. Consider implementing additional protections against liability, such as appropriate choice of law and jurisdiction selection clauses, and assumption of risk waivers.
9. Have an action plan in place for the management of emergency circumstances or events affecting employees (e.g. related to health, safety, security or degradation of the external environment). Regularly testing and practicing such a plan, and adapting as necessary, increases the performance of a plan when implementation is needed. An emergency management plan may include or rely on an external provider.
10. Have adequate redress measures in place. This includes provisions for payment of damages (health, disability, injury/death, loss of income, post-incident treatment, etc.) to compensate an employee having suffered damages. IAOs should consider insurance and if so which type of insurance cover (e.g. when top-up cover for war zones or kidnapping is appropriate relative to the risk).

IAOs registered in Europe or the US are advised to comply with health and safety laws of the national state (preferably specified in a choice of law clause in a contract of employment) in addition to those of the host state, and to ensure that their employees are covered by liability insurance.

IAOs would be well advised to keep all relevant documentation and in particularly document the following:

1. Assessment of the legal nature of the relationship with the staff in view of the possible applicable laws, choice of law and jurisdiction issues that may arise (e.g. via expert legal advice).
2. Written contracts with staff/consultants/sub-contractors etc.
3. Signed consent of the staff member confirming they have read the written contract, received due information as to the environment in which they are to be deployed and the tasks they are to execute, the risks in this environment and the mitigating measures that the organisation has put in place, health and safety policy and any training received.
4. Requirement that staff members are expected to re-certify their understanding of these documents on a periodic basis, and documentation to demonstrate that they have done so.
5. Risk assessments, including action plans listing identified and assessed risks and any mitigating measures.
6. Valid and express delegation of powers (detailing authority, responsibility, accountability), provided in writing and communicated to all relevant actors.



7. An incident report system and process, including forms, that records any accidents and incidents that do not cause injury or death but could have done so, and any further corrective and preventative action that has been taken.
8. Regular reviews of all policies and procedures in force to ensure they are up-to-date and adapted if necessary.
9. Proof that any employee sent to work overseas is covered by the IAO's employer's liability insurance. Employer's liability insurance or its equivalent should be taken out to cover any members of staff sent or recruited to work overseas who may not be covered by the IAO's existing policy (e.g. consultants or volunteers).

### 3. Perspectives

There is growing attention to the need for professionalisation of the aid sector. The trend is illustrated by the formulation and implementation of training programmes that address core competencies as part of a formal academic degree that prepares individuals for a professional humanitarian aid career. While it is too early to speak of certification, academic training would most likely eventually be part of considerations regarding professional qualifications, on par with many other fields and professions.

Incorporating legal norms and reasoning into the sector's policies and risk and security management constitutes an additional avenue in the trend towards professionalisation. While national variations do undoubtedly exist and need to be complied with, a number of basic, generic elements of the legal arguments and standards are shared and are relatively clear as to the principles, considerations and the issues that comprise the duty of care and legal liability of aid agencies towards their staff.

However, the sector's compliance in terms of policy and implementation measures is far from clear. This is not to deny that much good practice exists: indeed, sector-wide guidelines and standards have been developed. Great strides have been made this past decade to improve risk and security management. However, the actual implementation of these good practices and their conformity with legal norms lacks objective scrutiny. The sector as a whole is characterised by a lack of transparency and accountability to both staff and the sector as a whole. Lessons-to-be-learned from negligence and mistakes are generally not shared and are hard to come by in an objective manner and therefore cannot be formalized for sector-wide learning and adaptation.

While self-regulation – motivated and framed by moral and ethical considerations; the 'right thing to do' – is a valuable and necessary step, it shows its limits in that it is non-binding and unenforceable. A critical, concerned observer may well wish for something with 'more teeth' in view of the size of the multi-billion dollar sector and the stakes involved.

Formal, state regulation of non-profit organisations and charities is relatively undemanding and generally focuses merely on statutory registration and financial accountability. In view of growing state concern – both as a donor and as a reflection of public interests – a state may eventually consider further regulating the sector and place more stringent demands.



However, a state may hesitate in further regulating a sector that represents and responds to generally recognised humanitarian and human rights norms. Regulation could be perceived as unduly restrictive and limiting, or even depriving, many of the opportunity to translate concern into action. On the IAO side, sector-specific state regulation would likely be resisted because it would be perceived as limiting their relative freedom of association and action.

Many professional communities and associations have found a middle ground via regulatory bodies that combine a degree of self-regulation with compliance with national legal demands. Various professions (e.g. legal, medical, to name just the some of the most obvious) have regulatory bodies that place mandatory demands on training, certification and standards. Similarly, sports federations regulate and enforce rules, standards and certification. These sectors can and do provide modes of alternative dispute resolution to the courts and apply sanctions or other redress measures in case of non-compliance. While seeking admittance to such bodies is voluntary, meeting the demands and standards of these professional bodies is mandatory and enforceable, even if only by the threat of exclusion and withdrawal of permission to exercise. Generally, a state will only intervene as a last resort, e.g. if legal norms fail to be applied or are contravened.

Sector-wide professional regulation is a middle ground which has more “teeth” than voluntary self-regulation. Professionalisation of risk and security management on the basis of mandatory legal responsibilities should be part of the sector’s goals. The law exists, and cannot be ignored. A step forward from self-regulation would be moving towards a professional body, both on the national and the international level, that can set and enforce mandatory standards and regulations – this is a relatively long-term process. Apart from requiring the sector’s desire, interest and adherence to such a ‘*middle option*’, this can only take place with the agreement – and most likely the sponsorship – of states.

The overarching aim of the process to achieve this should be to develop an international sector standard based on common generic norms and standards of legal liability (duty of care), and eventually the establishment of external independent mechanisms for effective governance and oversight. The first step should be to set up international standards, a code of conduct, in relation to the duty of care and legal liability of aid agencies. This would provide the sector with greater legal certainty as to which standards apply to a dispute, possibly bridging differences in standards between nation states and hopefully overcoming difficult disputes as to conflict of law and jurisdiction.

The advantage of a code of conduct resides in the fact that:

- it clarifies global standards for the sector; and
- it sets an agenda for the establishment of effective governance and oversight mechanisms to facilitate better accountability to these standards.

The remedy an oversight body could provide should be based on a collective agreement on best practice between all aid agencies and workers setting out what is or is not expected. Disputes should be subject to binding arbitration.<sup>34</sup> This would

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<sup>34</sup> In, for example, Switzerland.



preclude going to court until arbitration has been tried. This is how, for example, sport would deal with it.<sup>35</sup>

Adherence of IAOs should articulate an organisation's commitments to complement existing public regulation and to fill gaps when compliance with regulation fails. Analogous to other professional bodies, functions of an oversight body could include:

- analysis of sector-related legal issues and advice;
- legal advice on the sector's and individual member's statutes and regulations;
- discussion and studies of national laws affecting the sector;
- provision of legal advice regarding disputes;
- the hearing and mediation of complaints and disputes.

IAOs would have to sign up to such an international agreement. Staff of IAOs would probably need to be given the option of selecting national law/courts to resolve any disputes or for all disputes to be regulated by the body charged with overseeing the code of conduct. Such an oversight body would most likely need to draft its own internal rules and regulations, and its powers and authority would need to be defined. In order to do this, IAOs would have to sign up to an international agreement. Staff of IAOs would probably need to be given the option of selecting national law/courts to resolve any disputes or for all disputes to be regulated by the oversight body.<sup>36</sup>

Working towards this goal will provide an opportunity for a shared effort – between the IAO sector and the state – to move common interests further on more solid ground. The structuring and functioning of security risk management and responsibilities in an organisation would be set on a more objective basis. It would contribute to levelling the playing field between an organisation and a donor as to funding requirements and minimum standards to qualify for funding. It would allow for better coordination and lessons-learned in the sector. It would permit more objective analysis – and scrutiny – of overall organisational preparedness as to policies, plans, performance and incident management. On par with other professional sectors, it would introduce a measure of mandatory regulation to the sector's activities. This would add a key element towards professionalisation of the sector.

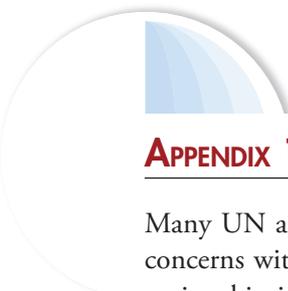
Whilst the IAO community has in the last decade started to wake up to its duty of care and legal liability towards staff members, it is hoped that in the next decade further strides forward can be made to harmonising the duty of care standards that IAOs are under and providing credible and effective regulation and dispute resolution.

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<sup>35</sup> Adhesion to such a body could also be used to obtain liability insurance on good terms.

<sup>36</sup> In, for example, Switzerland.





## APPENDIX 1 – SUMMARY NOTES AND COMMENTS ON UN RESPONSIBILITY TOWARDS ITS STAFF

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Many UN agencies operate in the same hostile environments as non-governmental organisations. The same concerns with staff safety and security thus arise. However, the UN status – and its general immunity from national jurisdictions – has led to a different approach and treatment of these concerns.

While the issue is broad and complex, and therefore merits a far fuller and complete treatment, which is available, a few summary comments are provided below.

### UN immunity

The United Nations and its various agencies are generally immune from national laws. This immunity comes from either the General Convention on the Privileges and Immunities of the United Nations or other national laws or headquarters agreements negotiated with host countries. International immunity is classically divided into three categories; sovereign immunity held by States, diplomatic immunity afforded to individuals as representatives of States, and organisational immunities granted to international organisations. The essence of immunities afforded to representatives of foreign territories has always been to secure the unhindered fulfilment of diplomatic functions, such as immunity from criminal and civil litigation and a guarantee of safe passage.

The theory behind the functional immunity enjoyed by international organisations is to protect them from the maneuverings of nation States and to ensure that international organisations function independently in furtherance of specific, collaborative goals. Functional immunity evolved from sovereign immunity enjoyed by nation States. Sovereign immunity is often traced to the Treaty of the Peace of Westphalia, signed on 30 January 1648, a treaty which initiated modern diplomacy and international relations, giving rise to a number of sovereign nation States as fully independent States. Today, it is an established concept in law that international organisations may possess international legal personality.<sup>37</sup>

The UN's 'functional immunity' is an immunity from legal process in respect of words spoken or written and acts performed by officials of the UN in their official capacity, protecting these officials from law suits in the host nation State where they work. Its purpose in international organisations is to enable staff to discharge their responsibilities independently. Throughout international organisation headquarters in Geneva, New York, Paris, Vienna, The Hague and around the world, international civil servants are not subject to local civil or criminal jurisdiction, as described in most host State Headquarters Agreements, unless their immunity is waived by the chief executive of the international organisation.

### Claims and UN tribunals

The civil liability of the UN as an employer may arise when its staff commit civil wrongs. The right and duty to waive the immunity and permit local jurisdiction to accrue rests solely with the chief executive.

UN staff have to bring claims for compensation in the UN's internal justice system before either the United Nations Appeals Tribunal (UNAT) (which has jurisdiction for the UN secretariat and most of its affiliated organs, which system includes a first instance UN Dispute Tribunal (UNDT), a single justice judicial body staffed by independent, full-time national court judges, which conducts evidentiary hearings, and issues binding final judgments appealable by either the UN or the staff member, or the International Labour Office Administrative Tribunal (ILOAT) which has jurisdiction for the majority of other UN agencies.

The foregoing two Tribunals generally have jurisdiction over a staff member's administrative claims. In the case of the UNAT, its jurisdiction is limited to review of judgments from its first instance UNDT. The ILOAT sits

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<sup>37</sup> International Organisations Watch: <http://www.iowatch.org/archive/ruleoflaw/mostseriousloopholes.shtml>



as both a first instance and final appellate authority, although its jurisdiction generally attaches only after such claims have been treated by the employer organisation internally, usually by submission to an advisory board made up of members appointed by management and staff representatives. In most international organisations outside the UNAT system, such internal boards are merely advisory, and it is generally the executive officer of the organisation that takes a final administrative decision that can then be appealed.

### International Labour Organization (ILO)

The International Labour Organisation Administrative Tribunal, or ILOAT, is the successor of the League of Nations Administrative Tribunal. It was created as a judicial system for international civil servants. The ILOAT is older than the UN itself, being a descendant of the League of Nations Administrative Tribunal. It is the court for labour disputes, including workplace harassment, promotions difficulties, unfair dismissal and discrimination, for many international organization employees.

The International Labour Organization (ILO) has produced several International Conventions and Recommendations which set international standards. Most countries have adopted these norms. The Conventions create binding obligations once they have been ratified by countries who are ILO members. The recommendations provide guidance on policy, legislation and practice. IAOs would be advised to check that the host country in which they are operating has adopted the relevant Conventions. It may be noted however that breaches of a Convention do not result in any legal sanctions.

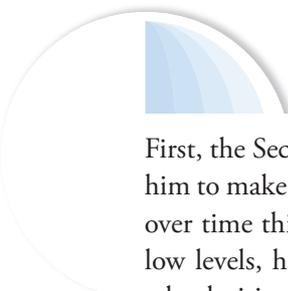
<p><b>Convention No. 155, Occupational Safety and Health Convention, 1981</b></p>	<p>The employer is obliged to ensure that the workplace, machinery, equipment and processes under their control are safe and do not constitute any danger to health and that chemical physical and biological substances and agents are without risk to health when the appropriate measures of protection are taken.</p> <p>The employer must provide, where necessary, adequate protective clothing and equipment.</p> <p>The employer is also under an obligation to undertake and implement measures to deal with emergencies and accidents.</p> <p>The employer is not able to limit responsibility regarding the work environment through the use of warning signs or waiver clauses in agreements.</p>
<p><b>Recommendation No. 164, Occupational Safety and Health Recommendation, 1981</b></p>	<p>The Convention (above) applies to all branches of economic activity and to all categories of workers.</p>

### Pre-2009: the most serious loopholes<sup>38, 39</sup>

The internal systems of justice of the UN and other international organisations have been regularly criticised for their limited jurisdiction, and for not meeting the minimum standards of many human rights norms and conventions; only time will tell if the most recent reforms to the UN internal justice system will adequately redress such criticisms. Although, the complexity and slow pace of the UN internal justice system do not deter appellants, its administration has serious loopholes.

<sup>38</sup> International Organisations Watch: <http://www.iowatch.org/archive/ruleoflaw/mostseriousloopholes.shtml>

<sup>39</sup> Justice Geoffrey Robertson Q.C. et al., 'Report of the Commission of Experts on Reforming Internal Justice at the United Nations', published by the United Nations Staff Union, New York, 12th June, 2006



First, the Secretary-General's discretionary authority, as chief administrative officer of the Organization, allows him to make exceptions to UN staff rules, a right which dominates the UN's internal justice system. In practice, over time this powerful personal right has long been seriously diluted, as dozens of UN staff, many at rather low levels, have been delegated this authority de facto. It allows them to threaten, write position papers, or take decisions in the name of the Secretary-General concerning other UN staff, up to and including threats of «summary dismissal» without any warning.

A second handicap is the concept of «administrative decisions.» An appeal must be based on a formal, written decision by the Administration, concerning and affecting some aspect of a staff member's terms of appointment, and applying personally to him. While this very narrow focus may be adequate for routine administrative matters (say the level of an education grant), it is totally inappropriate for the new, widely-recognized workplace issues cases of mobbing/harassment, misconduct, mismanagement, abuse of authority, and accountability, which concern broader patterns of behavior over periods of time. Potentially abusive actions are rarely put in writing.

Third, the internal justice process introduces «the Administration». There are not two clear-cut parties to a dispute: one the one hand there is the «Appellant», on the other the entire bureaucracy of the UN. Since «the Administration» still includes the internal justice functionaries who completely staff the Registries of the UNDT and UNAT, «the Administration» is in fact assessing the actions of «the Administration».

Fourth, the system previously provided no real «due process», although the Staff Rules cite due process requirements in very general terms and with the usual admonishments that they must be observed. However, the rules do not elaborate the essential, internationally recognized principles and rights of due process: proceedings bound by rules of evidence, such as:

- mandatory «discovery» and sharing of pertinent material by both sides;
- a public hearing;
- “discovery” rights for both parties for all relevant information and documentation;
- the required appearance and examination of witnesses;
- a code of legal conduct which binds the lawyers involved;
- strict time limits on all stages of the proceedings and sanctions for delays;
- professional legal counsel for appellants and the award of attorney fees for successful cases;
- expanded access to filings and pleadings and the right to confront accusers in all misconduct investigations; and
- open conduct and reporting of all proceedings unless all parties agree otherwise.

Although the recently promulgated UNAT/UNDT statutes do in fact make provision for the foregoing, once again, it is too soon to tell whether such standards will be upheld on a systematic basis. A review of some of the initial judgments of the UNDT and UNAT indicate a willingness of the UNDT judges to adhere to such fundamental standards, but the initial reported UNAT judgments seem less embracing.

Fifth, the system provides no sanctions for managerial misfeasance, even though a UNAT/UNDT ruling may include expression of concern about managerial impunity.

Last but not least, interestingly or ironically, fundamental human rights standards, which the UN promulgated and promotes, are not directly recognized by ILOAT nor thus applied. The UN itself does not conform to the

legal standards set out in the prevailing international human rights treaties. This is peculiar for an organization that serves as the repository of human rights law and as the ultimate guardian and arbiter of international human rights.<sup>40</sup>

In short, no law other than that defined by the international organisations themselves is generally applied. The law applied by ILOAT in its decisions is largely limited to the internal regulations of a given organisation and applicable employment contract provisions; occasionally reference is made to principles of ‘international law’. Furthermore, internal regulations of organisations are relatively limited in that 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.<sup>41</sup>

Nevertheless, it is interesting to note that the main issues and reasoning included in the notion of duty of care/legal responsibility presented in the main body of this paper are also found, as the ILOAT Case Notes below illustrates.

### ILOAT Case Notes

*In re GRASSHOFF (Nos. 1 and 2), Judgment No. 402, The Administrative Tribunal, Forty-third Ordinary Session, 24 April 1980.*

**FACTS:** The complainant (Mr Grasshoff) served as a physician on the WHO staff from 1959 to 1971 in several posts in south-east Asian countries. While he was on a mission to East Pakistan (now Bangladesh) a bomb explosion in Dacca on 11 August 1971 caused injury to his head and spine and as a result he had to spend a long time in hospital and stop work for over a year. On 1 February 1973 he was transferred to headquarters in Geneva. He remained there until 30 June 1977, when he reached the age of 60 and retired from WHO.

Since he joined the WHO at the age of 40 he is entitled to only two-thirds of the amount of a full retirement pension with which to maintain himself, his wife and his daughter. Since his condition prevents him from doing more than six hours' work a day, his applications for several posts as medical consultant in the Federal Republic of Germany have been unsuccessful, and he is quite unfit for medical practice. He has had to make do with employment which brings him less than 40% of the average yearly net earnings of a doctor accredited to a sickness fund in his country.

For his injury he was awarded a lump-sum compensation for permanent partial disability estimated at 10 per cent. The Director-General granted him an additional payment of compensation for a deterioration in his condition which increased the degree of his disability to 30 per cent.

**ARGUMENTS:** The complainant contends that the WHO was quite aware of the dangers of living in Dacca when it ordered him to resume duty there in July 1971. The complainant maintained that the WHO was at fault in forcing him to go back to Dacca. Because of hostilities the Government of Pakistan was unable to ensure the safety of experts. It was only after a visit lasting a few hours that the permanent representative of the UNDP concluded that the general state of affairs was normal. The WHO was under a duty to satisfy itself that there were no risks for its expert, particularly since it had itself actually drawn his attention to the danger, which, from press and other reports, was in any case a matter of public knowledge. The WHO was also negligent in failing to take out special accident insurance for experts exposed to unusual risks. Moreover, the complainant was engaged in the campaign against malaria and it was quite obvious that he could not work properly in

<sup>40</sup> Flaherty, Edward Patrick and Sarah Hunt, 'Rule without Law - Injustice at the United Nations?', The Centre for Accountability for International Organisations (2006; modified 2007)

<sup>41</sup> Ibid.



1971, so that he was sent into danger for nothing. The complainant argued that the WHO therefore bears full liability for the consequences of his injuries, including loss of earning capacity. The rules on service-incurred accidents that were applied to his case cover only accidents that may occur in ordinary circumstances. But the circumstances of his own case were quite extraordinary and the WHO was grossly negligent in wittingly exposing him to the serious dangers of the civil war caused by the secession of East Pakistan.

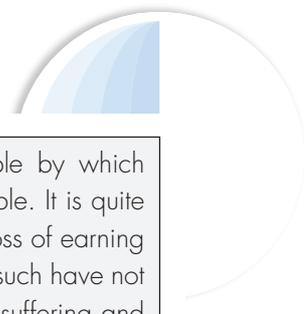
The WHO argued it is under no duty to compensate a staff member on retirement for loss of earning capacity. The organization contended that there was nothing irresponsible about ordering the complainant to resume duty in Dacca in July 1971. On 21 June 1971 it had been informed by the permanent representative of the United Nations Development Programme (UNDP) that the Secretary-General of the United Nations had agreed to the Government's request that all United Nations experts should resume duty in East Pakistan. The rule is that experts remain at the duty station for as long as is appropriate in view of the security measures taken by the host government and the arrangements made by the United Nations Secretary-General to facilitate their work. The WHO argued that to establish its quasi-tortious liability, the complainant must prove that by some act or omission it showed wilful or negligent disregard of the consequences.

DECISION: 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. A Staff Regulation which provides that all staff members are subject to assignment by the Director-General to any of the activities or offices of the Organization, is to be read subject to this principle. 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. It is unnecessary in this case to consider whether and in what circumstances an employee may refuse to accept an order to work in an unsafe place. It is sufficient to say that, if he accepts the order, as prima facie he is bound to do, and the employer has failed to exercise due skill and care in arriving at his judgment, the employee is entitled to be indemnified against the consequences of the misjudgment. In the opinion of the Tribunal, reference to hazards within the contract, i.e. those which are inherent in the nature of the employment, cannot be interpreted as empowering the Director-General to require the staff member to accept risks outside the contract.

The WHO representative had made a brief visit to Dacca during which he found conditions to be normal. Senior officials of the Government of East Pakistan, who were not perhaps entirely unbiased, also expressed the view that the situation in Dacca was normal. On 21 June the Secretary-General of the United Nations agreed to the return of experts to East Pakistan but without dependants. On 1 July a bomb explosion injured an FAO driver and there was a report that a power station in Dacca had been blown up. About a fortnight after his return, the complainant was injured by a bomb dropped on the hotel in Dacca which he was visiting in the course of his duties.

The order requiring the complainant to return to work was given by the Regional Director. If he decided that the risk was no higher than normal, he must, in the light of the above facts, have applied the wrong test. The risk of injury by hostile action was no greater for the complainant's dependants than it was for himself. The fact that their return was not authorised is sufficient by itself to show that the risk was abnormal. The Tribunal considers that the order which required the complainant to return to Dacca was one that carried with it an abnormal risk in respect of which he was entitled to be indemnified. He was employed in the branch concerned with malaria eradication and did not therefore by the nature of his employment accept the risk of hostilities in an area of civil war.

The Tribunal does not accept this contention that even in cases where the Organization is at fault, the compensation is limited to the sums provided under this scheme. Staff Rules do not purport to provide a complete indemnity. The section on social security which deals with benefits provided for the staff member should not be interpreted as a clause limiting the Organization's liability in the event of breach of contract. 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.



The compensation rules provide for compensation for disability. There is no general principle by which compensation is restricted to the period of the employee's contract with the employer who is liable. It is quite usual for persons of pensionable age to seek further employment and there is no reason why a loss of earning capacity should not apply to that. The complainant has produced detailed calculations which as such have not been criticised. He should be awarded the sum claimed as well as compensation for pain and suffering and loss of enjoyment of life.

COMMENT: The case presents several principles and arguments that are analogous to national jurisdictions as to legal responsibility. It details that duty of care of the employer as to the safety of a place of work is to make the necessary inquiries (analysis) and to arrive at a reasonable and careful judgment (risk assessment), and an obligation to provide for appropriate redress measures and compensation (insurances). The Tribunal assesses whether the employer has acquitted itself of its duty of care in a 'reasonable' manner.

The case also presents the argument that an employee is under a duty to the employer to follow its orders but should be able to rely on the employer's judgment as to the safety of the workplace. An employee's informed consent is not fully free.

The case further points out that the 'reasonableness' of a given risk is to be set relative to the objective for which the risk is taken.

## Post-2009: Reform

The UN partially reformed its internal justice system in 2009, and created the UN Dispute Tribunal ("UNDT"), made up of current or former national court judges selected by the General Assembly. The UNDT replaced the prior Joint Appeals Boards and Joint Disciplinary Committees of the UN which also were populated by UN staff members, and which only issued advisory reports to the Secretary General.

Although a marked improvement over the prior system, the UNDT system suffers from a number of deficiencies that have only become apparent as the new system has been implemented.

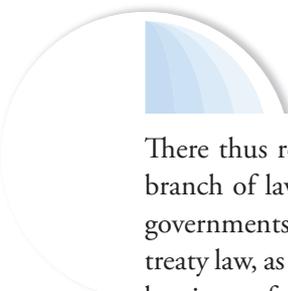
In general, a claimant's rights against an UN are derived from the Staff Regulations and Staff Rules and from the general principles of law applicable to such organisations, as national laws are not applicable. Whilst it is clear that the UN has a legal obligation to exercise reasonable care to ensure the safety of staff members there is currently no single definitive statement of the duty of care of UN agencies. Further, it is worth noting that injured parties who are not current or former UN staff (e.g. certain independent contractors engaged by the UN, as well as interns and temporary staff) have no claim for compensation for injury caused by the organisation (whether before the UN's internal justice system or before national courts) because of the UN's immunity from suit.

Generally, the UN's immunity is upheld by national courts. For example, in 2007, a plaintiff sued WFP after being injured in a bomb attack in Iraq.<sup>42</sup> The US District court, Southern District of New York, upheld the organisation's immunity under the General Convention on the Privileges and Immunities of the United Nations. However, UN immunity is not cut and dry. On appeal, in 2011 a Dutch court in The Hague ruled that the State was in part liable for actions of the Dutch UN contingent (DutchBat) and was ordered to pay damages to families of two Bosnian Muslims killed in Srebrenica in 1995.<sup>43</sup>

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<sup>42</sup> Bisson v. United Nations, 06 Civ. 6352

<sup>43</sup> Nuhanovic v. State of the Netherlands, and Mustafic v. State of the Netherland – Gerechtshof 's-Gravenhage (IJN: BRO132), Sector Civiel recht, Zaaknummer: 200.020.173/01, Zaak-/rolnummer rechtbank: 265618/ HA ZA 06-1672, arrest van 5 juli 2011.



There thus remains a lack of clarity surrounding the application of public law rules to the UN, that is, the branch of law that deals with the nation State or government and its relationships with individuals or other governments. Today's nation States are subject to a set of obligations derived from human rights law, including treaty law, as incorporated into national laws. International organizations, not being beholden to State rules, are, by virtue of their functional immunity, not obliged to observe these rules in the pursuit of their organizational mandates. At the national level, problematic public law issues arise concerning social security and taxation law, health and safety legislation, and the damages caused to third parties when international organizations enter into contracts or otherwise cause them personal injury.<sup>44</sup>

A recent decision issued by the European Court of Human Rights in June 2011<sup>45</sup> may put paid to that, however, and has the potential to substantially impair the assertion by international organisations of immunity to counter lawsuits for damages from staff and injured third parties. A French national working as the chief accountant at the Kuwaiti embassy in Paris was fired after 20 years of service. He tried to go to the Prud'homme (the French labour court), but the French appeals court rejected his claim on the basis of the sovereign immunity of Kuwait. However, he appealed to Strasbourg, and the ECHR found that as he was not exercising a sovereign function in his employment, immunity should not have been applied to his claim, and awarded him substantial damages for the violation of his Article 6 (due process) rights. Logically, as the immunity of international organizations is derived from and subordinate to sovereign immunity, one can anticipate claims being brought in national courts of signatory states to the European Convention of Human Rights against international organizations attempting to set aside their immunity under the Article 6 Convention rights.

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<sup>44</sup> Reinisch, Professor A., *International Organisations before National Courts* (Cambridge University Press 2000)

<sup>45</sup> Sabeh El Leil/ABEH v. France (Application no. 34869/05) Judgement Strasbourg 29 June 2011-<http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=887349&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>

## APPENDIX 2 – PROJECT LEGAL REVIEWS

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The texts listed below were drafted in the framework of and for this SMI research project.<sup>46</sup> These texts are on file, copyrighted by the authors and are not publicly available.

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<sup>46</sup> The research project started out using the term 'International Aid Agencies'; hence the use of IAA here instead of IAO used in the text.



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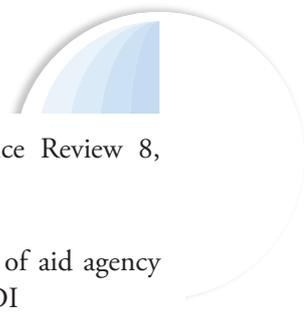
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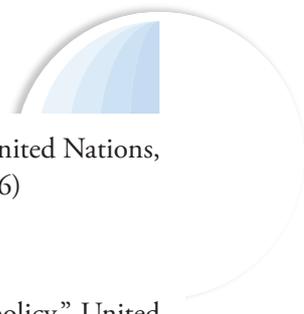
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## ABOUT THE SECURITY MANAGEMENT INITIATIVE

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The Security Management Initiative (SMI) was created to address the challenges in security and risk management faced by non-profit and international organisations in hazardous environments. SMI provides original research, policy development, training and advisory services. Through these products and services, SMI aims to enhance the capacity of non-profit and international agencies to improve risk and security management in hostile environments, reduce the human and program costs for agencies and their staff operating under extreme workplace hazards, and promote a robust risk and security management culture among mid- to senior level professionals of aid agencies. SMI is part of the Geneva Centre for Security Policy (GCSP).



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