

= Whitepaper =




# Duty of Care of the EU and Its Member States towards Their Personnel Deployed in International Missions

Andrea de Guttry

## Foreword

As CEO of Prevent, I welcome this whitepaper from Professor de Guttry. Prevent is strongly committed to improving working conditions in companies and organisations and to improving the employability of workers. It has expertise in wellbeing and prevention at work, and in employability and reintegration.

Prevent aims for a close cooperation on a European and international level, targeted at creating synergies in knowledge development and knowledge transfer. As such, it has strong ties with the Brussels' based EU institutions and agencies. Prevention is a crucial element of Duty of Care. It emphasizes the Return on Prevention that a proper focus on Duty of Care is likely to generate



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## Abstract

Andrea de Guttry<sup>\*</sup>

### Duty of Care of the EU and Its Member States towards Their Personnel Deployed in International Missions<sup>\*\*</sup>

In this article, the author examines the current interpretation of the "duty of care" and the obligation to protect life in the international legal system. He defines the precise obligations of the EU and its Member States at this regard, points out what has been done so far to implement them, and highlights the potential consequences of violating these obligations.

There are two legal bases for this development: the evolving concept of "duty of care" whose content and scope has become more precise thanks to the significant contribution of international tribunals, and the more general duty incumbent on State and International Organisations to adopt an active policy to protect life. The practical implications of these two rules are discussed in this article and require the European Union Institutions and its Member States to be extremely careful in planning international operations and in dealing with their staff and personnel sent on mission.

As most of the problems associated with the notion of the "duty of care" are similar both for the EU and its Member States, and as they are intrinsically connected and sometimes difficult to address separately, investigation will take into account both situations, highlighting where appropriate potential differences in the legal regime regulating the obligations of the EU and those of the Member States. The continuous (and inevitable?) cross-fertilization between the "duty of care" of States and of International Organizations makes the decision to focus research on both situations almost inevitable.

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## 1. Introduction

Over the last three decades, man-made, natural and technological disasters have been increasing in terms of frequency, severity and material damage caused. The number of those affected by these phenomena - i.e. individuals requiring immediate emergency assistance such as protection, provision of food, water, shelter, sanitation and immediate medical assistance - is worrying. This has inevitably brought a proliferation of new actors ready to deploy multipurpose field missions: among them, the EU has undoubtedly become a major provider of security and post-conflict reconstruction (mainly through CSDP Missions)<sup>1</sup>, an active partner in delivering civil protection operations after natural or man-made disasters (EU Civil Protection Mechanism)<sup>2</sup>, and a major provider of humanitarian aid (through ECHO)<sup>3</sup>. The number of international personnel deployed in these missions has become impressive.

Regardless of a particular mission's mandate, these operations are deployed more and more often in countries which present serious security problems owing to their instability, their political and economic situation or major health-related risks. The issue of protecting the security, safety and health of the persons deployed has become a key concern for the Organisation/State deploying them, and not only for the hosting State, which in any case bears the main responsibility to protect international officers legally deployed on its territory<sup>4</sup>.

The concept of "duty of care" (sometimes also called "duty of protection", "due diligence", "duty to safeguard the lives and the well being of the employees", "framework for accountability") has gained increasing interest among practitioners, International (both universal and regional) Organizations as well as States involved in deploying personnel (civilian, police and military) to international field operations (peace-keeping, peace-building missions, crisis-management operations, humanitarian assistance, election observation, civil protection, technical assistance, etc.). The specific duties associated with this concept (regardless of the expression used in international practice to refer to it) are very often described in a detailed manner in the legislation of several nations, although mainly to address situations occurring within national borders or related to multinational companies deploying their personnel abroad. In UN or EU regulations the concept has been, especially in the past, formulated in generic terms, if at all<sup>5</sup>. More recently, the situation has changed significantly, owing to the continuous effort to substantiate it and also to the contribution of case-law.

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<sup>1</sup> EU's role in providing security outside its borders in post-war and post-disaster settings is rapidly expanding: in 2001, at the meeting of the European Council in Feira, Portugal, the Union decided to develop the civilian aspects of crisis management in four priority areas: policing; strengthening the rule of law; strengthening civilian administration; and civil protection. The specific capabilities in these four fields could be used in the context of EU-led autonomous missions, or in the context of operations conducted by lead organizations, such as the UN or OSCE. The emphasis on the active involvement of the EU in these operations was formally confirmed in the consolidated version of the Treaty on European Union (2010). Article 42(1) of this Treaty states that "The common security and defence policy shall be an integral part of the common foreign and security policy. It shall provide the Union with an operational capacity drawing on civilian and military assets. The Union may use them on missions outside the Union for peace-keeping, conflict prevention and strengthening international security in accordance with the principles of the United Nations Charter. The performance of these tasks shall be undertaken using capabilities provided by the Member States (...)". The

In Europe, the issue at stake poses some additional problems, owing to the differentiated employment *status* of the personnel sent on mission (staff of the General Secretariat of the Council and other EU Officials; national experts seconded to European Institutions; personnel seconded by contributing Member States or third States to a crisis management operation or to an EU Special Representative – EUSR; and international and local staff contracted under the authority of a Head of Mission, Operation and Force Commanders or EUSR)<sup>6</sup>. It seems evident however that both EU Institutions in Brussels and Member States share the same problem of enacting their "duty of care" protecting the personnel sent into or to the field through proper mission planning which includes preparation for any potential threats, sharing of information, protection activities, risk minimising measures and appropriate training.

In this article, the author examines the current interpretation of the "duty of care" and the obligation to protect life in the international legal system. He defines the precise obligations of EU and its Member States at this regard, points out what has been done so far to implement them and highlights the potential consequences of violating these obligations. As most of the problems associated with the notion of the "duty of care" are similar both for EU and its Member States, and as they are intrinsically connected and sometimes difficult to address separately, this investigation will take into account both situations.

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following Article 43(1) clarifies that "The tasks referred to in Article 42(1), in the course of which the Union may use civilian and military means, shall include joint disarmament operations, humanitarian and rescue tasks, military advice and assistance tasks, conflict prevention and peace-keeping tasks, tasks of combat forces in crisis management, including peace-making and post-conflict stabilization (...)". As of spring 2012, the EU has 14 deployed missions in 3 continents: the number of personnel directly involved in these field operations is about 6,000. The purely civilian missions are 10 employing about 1800 personnel seconded by EU Member States and third States, about 500 contracted personnel, a limited number of EU officers temporarily assigned to a mission, plus local staff. Very often the EU-led missions are deployed in countries or regions with major security risks. See more on [www.consilium.europa.eu/](http://www.consilium.europa.eu/)

<sup>2</sup> The *EU Civil Protection Mechanism* is made up of 32 States (27 EU Member States plus Croatia, former Yugoslav Republic of Macedonia, Iceland, Liechtenstein and Norway) which co-operate in the field of civil protection to better protect people, their environment, property and cultural heritage in the event of major natural or man-made disasters occurring both inside and outside Europe. The cooperation can take the form of in-kind assistance, equipment and teams, or involve sending experts to carry out assessments. It relies on government resources and, if assistance is required in third countries, usually works in parallel with humanitarian aid.

<sup>3</sup> The *European Community Humanitarian Office* (ECHO) was created in 1992 as an expression of European solidarity with people all around the world. In 2004 it became the Directorate-General for Humanitarian Aid before integrating Civil Protection in 2010 for better coordination and disaster response inside and outside Europe. In 2010, Kristalina Georgieva was appointed as the first dedicated Commissioner for international cooperation, humanitarian aid and crisis response.

<sup>4</sup> The concept that the hosting State has the primary responsibility to protect the members of the international mission deployed in its territory is clearly stated in the "Convention on the Safety of United Nations and Associated Personnel", 9 December 1994 (General Assembly resolution 49/59). The "2005 Optional Protocol" to this Convention further expands the scope of "operations" and thus makes it applicable to a larger number of staff. Article II(1) of the Optional Protocol expands the scope of the Convention to the following operations: "(a) Delivering humanitarian, political or development assistance in peace-building, or (b) Delivering emergency humanitarian assistance". See M. H. ARSANJANI, *Convention on the Safety of U.N. and Associated Personnel*, United Nations Audiovisual Library of International Law, available at [untreaty.un.org](http://untreaty.un.org).

<sup>5</sup> C. F. AMERASINGHE, *The Law of the International Civil Service: As Applied by International Administrative Tribunals*, I and II, Oxford, 1994.

<sup>6</sup> The issue of proper protection of local staff by the recruiting Organization or State has attracted increasing attention in practice and in the literature. According to a recent study, related mainly to aid workers "[d]espite the fact that local staff make up over 90% of all field workers they tend not to figure highly in agencies' security policies. The study found a significant discrepancy between local staff and internationals in their access to security-related training, briefing and equipment": see K. HAVER, *Duty of care? Local staff and aid worker security*, in *Forced Migration Review*, 2007, p. 10 ff., available at [www.fmreview.org](http://www.fmreview.org).

## 2. The notion of "duty of care" in domestic and international law: a few general remarks

According to a legal dictionary, "duty of care" is "[a] requirement that a person acts toward others and the public with watchfulness, attention, caution, and prudence that a reasonable person in the circumstances would. If a person's actions do not meet this standard of care, then the acts are considered negligent, and any damages resulting may be claimed in a lawsuit for negligence"<sup>7</sup>. The legal concept of "duty of care", which is well known and developed mainly in legal systems belonging to the common law family<sup>8</sup> and only recently found a place in official documents of IOs, presumes therefore that "[i]ndividuals and organizations have legal obligations to act towards others and the public in a prudent and cautious manner to avoid the risk of reasonably foreseeable injury to others. This obligation may apply both to acts and omissions"<sup>9</sup>.

National legislation and case-law have helped to clarify and make more specific this obligation. As an example, in the UK legal system "[t]he duty of care may be described as the concept which defines the categories of relationships in which the law may impose liability on a defendant in damages if he or she is shown to have acted carelessly. To show a duty of care, the claimant must show that the situation comes within an existing established category of cases where a duty of care has been held to exist. In novel situations, in order to show a duty of care, the claimant must satisfy a threefold test, establishing: that damage to the claimant was foreseeable; that the claimant was in an appropriate relationship of proximity to the defendant; that it is fair, just and reasonable to impose liability on the defendant. These criteria apply to claims against private persons as well as claims against public bodies"<sup>10</sup>.

Similar rules are codified in several other legal systems, including those of Australia, Belgium, France, Germany, The Netherlands and Spain<sup>11</sup>. Much of this national legislation was adopted to implement the "1981 Occupational Safety and Health Convention", the "1981 Occupational Safety and Health Recommendation No. 164", as well as the more recent "ILO 2006 Convention 187, Promotional Framework for Occupational Safety and Health Convention". According to this last Convention, States are specifically requested to "promote continuous improvement of occupational safety and health to prevent occupational injuries, diseases and deaths, by the development, in consultation with the most representative organizations of employers and workers, of a national policy, national system and national programme"<sup>12</sup>.

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<sup>7</sup> See *Free Dictionary by Farlex*, available at [legal-dictionary.thefreedictionary.com](http://legal-dictionary.thefreedictionary.com).

<sup>8</sup> See more in the recent study by L. CLAUS, *Duty of Care of Employers for Protecting International Assignees, their Dependents and International Business Travelers*, International SOS, 2011, available at [www.internationalsos.com](http://www.internationalsos.com).

<sup>9</sup> *Ibidem*, p. 8

<sup>10</sup> European Court of Human Rights, Judgment of 10 May 2001, *T.P. and K.M. v. The United Kingdom*, para 45.

<sup>11</sup> See more L. CLAUS, *op. cit.*, *passim*.

<sup>12</sup> In this connection, it seems worth mentioning as well both Article 7 of the 1966 UN Covenant on Economic, Social and Cultural Rights (stating that "[t]he States Parties to the present

With reference to the well-known distinction between "obligation of results" and "obligation of means", the "duty of care" must be classed amongst the latter, as it merely requires the adoption of a risk-minimizing attitude and a policy aimed at protecting others against reasonably foreseeable risks, and it does not require a guarantee of a specific final result.

On the other hand, the issue of the applicability of the "duty of care" to International Organizations was already addressed in the UN's earliest years: in its "Resolution 258/III" of December 3, 1948, the UN General Assembly raised with great emphasis the urgency of the question of "the arrangements to be made by the United Nation with the view of ensuring to its agents the fullest measures of protection". One year later, in a well-known "Advisory Opinion on reparation for injuries suffered in the service of the United Nations", the International Court of Justice adopted a very clear-cut position on the obligations incumbent on IOs deploying personnel in dangerous areas: "[h]aving regard to its purposes and functions already referred to, the Organization may find it necessary, and has in fact found it necessary, to entrust its agents with important missions to be performed in disturbed parts of the world. Many missions, from their very nature, involve the agents in unusual dangers to which ordinary persons are not exposed (...) Both to ensure the efficient and independent performance of these missions and to afford effective support to its agents, the *Organization must provide them with adequate protection*. This need of protection for the agents of the Organization, as a condition of the performance of its functions, has already been realized, and the Preamble to the Resolution of December 3rd, 1948 (...), shows that this was the unanimous view of the General Assembly"<sup>13</sup>.

The UN decided therefore to address the whole issue in a more detailed manner in the "U.N. Staff Regulations". In the most recent version of these rules, the "2009 Staff Regulations of the United Nations and provisional Staff Rule"<sup>14</sup>, the UN Secretary General is formally required to ensure, having regard to the circumstances, that all necessary safety and security arrangements are made for staff carrying out the responsibilities entrusted to them. The Staff Regulations reinforce the Principle 37 of the "Standards of Conduct in the International Civil Service", updated in 2001 by the International Civil Service<sup>15</sup>, which the General Assembly noted with satisfaction in Resolution 56/244 and the Secretary-General appended to his bulletin ST/SGB/2002/13. According to this Principle "[w]hile an executive head must remain free to assign staff in accordance with the exigencies of the service, it is the responsibility of organizations to make sure that the health, well-being and lives of their staff, without any discrimination whatsoever, will not be subject to undue risk.

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Covenant recognize the right of everyone to the enjoyment of just and favorable conditions of work which ensure, in particular: (...) (b) Safe and healthy working conditions") and Article 31(1) of the Charter of Fundamental Rights of the European Union (which clearly states that "[e]very worker has the right to working conditions which respect his or her health, safety and dignity").

<sup>13</sup> See *Reparation for injuries suffered in the service of the United Nations, Advisory Opinion of 11 April 1979, I.e.J. Reports*, 1949, p. 174 (emphasis added).

<sup>14</sup> UN doc. ST/SGB/2009/7, 21 October 2009, available at [www.un.org](http://www.un.org).

<sup>15</sup> Available at [icsc.un.org/](http://icsc.un.org/).



*The organizations should take measures to protect their safety and that of their family members.* On the other hand, it goes without saying that it is incumbent on international civil servants to comply with all instructions designed to protect their safety"<sup>16</sup>.

Furthermore, in his commentary on the UN Staff Regulation Rules of 2002<sup>17</sup>, the UN Secretary-General clearly indicated that the obligation of the UN to ensure the safety and security of its staff can also be considered a "basic right of the staff"<sup>18</sup>. To fully enjoy this rights, however, the officers sent on mission in risky areas have a duty of loyalty and allegiance, which implies that they respect the instructions given by the employer and act in a cautious and prudent manner, avoiding exposure to unnecessary risks to themselves and the sending organization<sup>19</sup>. The employee also has an obligation to inform immediately and in a complete manner their employer about new and unexpected situations which might create additional risks to their mission. Not doing so could, depending on circumstances, represent a violation of their duty and prevent or make more difficult future legal action against the employer.

The EU commitment to the "duty of care" can be traced in several recent EU Council Joint Actions launching new EU Crisis Management Missions. For example, in the Council Joint Action 2008/124/CFSP of 4 February 2008 on the European Union Rule of Law Mission in Kosovo, EULEX Kosovo<sup>20</sup>, it is clearly stated in Article 7 that "(...) 5. The Civilian Operation Commander shall have over- all *responsibility for ensuring that the EU's duty of care is properly discharged*"<sup>21</sup>.

An almost identical phrase was used in the Council Joint Action 2008/736/ CFSP of 15 September 2008 on the European Union Monitoring Mission in Georgia<sup>22</sup>, while in previous missions no reference was made to this specific aspect<sup>23</sup>. Reference to this "duty of care" incumbent on the EU when dealing with personnel deployed in the field is also regularly mentioned in various Calls for Contributions (CfC) issued by the EU in order to identify the Member States personnel to be deployed to given EU-led missions<sup>24</sup>.

This trend must be considered in conjunction with an important EU Council document adopted on June 7, 2006 and entitled "Policy of the European Union on the security of personnel deployed outside the European Union in an operational capacity under Title V of the Treaty on European Union". This document and the subsequent "Field Security Handbook for the protection of personnel, assets, resources and information"<sup>25</sup>, which was prepared by the General Secretariat of the Council in 2008 to make more specific the EU Council 2006 document, are very indicative of the increasing attention devoted by the EU Institutions to the issues at stake.

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<sup>16</sup> Emphasis added.

<sup>17</sup> UN doc. ST/SGB/2002/13, available at [www.unops.org](http://www.unops.org).

<sup>18</sup> *Ibidem*, p. 15.

<sup>19</sup> See more in the above-mentioned "Standards of Conduct for the International Civil".

<sup>20</sup> OJEU L 42, 16 February 2008.

<sup>21</sup> Emphasis added.

<sup>22</sup> OJEU L 248, 17 September 2008.

<sup>23</sup> Council of the European Union, Brussels, 29 May 2006, doc. 9490/06.

<sup>24</sup> See for example the European Union First (1ST) Extraordinary Call for Contribution 2011, European Union Police Mission in Afghanistan (EUPOL Afghanistan), European Union Annex 1, available at [www.consilium.europa.eu](http://www.consilium.europa.eu), in which it is stated that "[t]o ensure duty of care in a non- benign environment, selected personnel should, in principle, be under the normal age of retirement in EU Member/Contributing States" (emphasis added).

<sup>25</sup> GENERAL SECRETARIAT OF THE EU COUNCIL, *The Field Security Handbook for the protection of personnel, assets, resources and information*, Brussels, 2008.

### 3. A better definition of the scope and content of the "duty of care" through international case-law and selected soft law documents.

In view of the sensitive nature of the issue and the increasing number of field operations deployed in dangerous areas by the UN and regional organizations, several legal disputes have arisen between sending Institutions and their personnel for harm suffered while on mission. Many of these disputes have been submitted to the competent Administrative Tribunals of the UN which have recently been reformed<sup>26</sup> (the UN Dispute Tribunal and the UN Appeal Tribunal) and to the Administrative Tribunal of the ILO which has been responsible for hearing complaints from serving and former officials of the International Labour Office since 1947<sup>27</sup>.

The judgments of these and other international administrative tribunals deserve attention as they offer a unique contribution to better define the precise scope and content of the "duty of care". It has to be anticipated that this duty has very often been perceived by these Tribunals as an important component of a contractual obligation and sometimes as part of an extra-contractual obligation: the latter applies if the employer, although not violating any conventional rules, caused by his negligent or inappropriate behaviour, harm to the employee<sup>28</sup>.

The first element identified by international jurisprudence as characterizing the "duty of care" is *the obligation incumbent on IOs to provide a working environment conducive to the health and safety of its staff members*. This obligation implies a proper and sound mission planning to take into proper account all potential risks.

In a seminal judgment addressing the death of a UN staff member while on mission for the UN, the UNAT, after having confirmed that the principle whereby the UN Administration is bound to provide a healthy and safe working environment, moved even further, stating that "even were such obligation not expressly spelled out in the Regulations and Rules, general principles of law would impose such an obligation, as would normally be expected of every employer. The United Nations, as an exemplary employer, should be held to higher standards and the Respondent is therefore expected to treat staff members with the respect they deserve, including the respect for their well being"<sup>29</sup>. Moreover, in Judgment No. 1194 (2004), the former UN Administrative Tribunal, addressing an issue of job harassment, recognized that the Organization had a duty to "maintain a healthy working environment" which must be interpreted in an extensive manner to include protection of staff members' physical and psychological integrity.

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<sup>26</sup> See more in A. REINISCH, C. KNAHR, *From the United Nations Administrative Tribunals to the United Nations Appeals Tribunals - Reform of the Administration of Justice System within the United Nations*, in *Max Planck Yearbook of the United Nations Law*, 2008, p. 447 ff.

<sup>27</sup> The Tribunal is also mandated to examine cases against other International Organizations that have recognized its jurisdiction: currently it is available to approximately 46,000 serving or former international civil servants of some sixty organizations.

<sup>28</sup> See EU Court of First Instance, Judgment of 8 July 2008, Case T-48/05, *Franchet and Byk v. Commission*, para 95 to 97; and Judgment of 10 December 2008, Case T-57/99, *Nardone v. Commission*, para 162.

<sup>29</sup> UNDT/GVA/2010/039 (UNAT 1645), Judgment No. UNDT/2011/022/Corr.126, January 2011, *Edwards v. Secretary General of the U.N.*, available at [www.un.org](http://www.un.org).

Although in these two cases, owing to the specific nature of the problem under investigation, seems to limit this obligation to the physical premises of the organization (mainly office space), several other judgments have extended the obligations related to the "duty of care" beyond office space to include the "outside environment" in which the employee is expected to carry out most of his duties. In this connection, an authoritative statement is to be found in the decision of the Administrative Tribunal of the International Labour Organization *In re Grasshoff* (Nos. 1 and 2), Judgment No. 402 (1980). The Tribunal in this case examined how to balance the need to perform a given task and the need not to expose the personnel working in dangerous spots to abnormal risks. The Tribunal stated that "[i]t 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 (...). If there is doubt about the safety of a place of work, it is the duty of the employer to make the necessary inquiries and to arrive at a reasonable and careful judgment, and the employee is entitled to rely upon his judgment (...). This principle is to be applied with due regard to the nature of the employment. In some employments there are unavoidable risks. A doctor may have to risk infection and a soldier or a policeman to risk bombs. The question in each case is whether the risk is abnormal having regard to the nature of the employment"<sup>30</sup>.

The Tribunal then developed its reasoning to address the problematic issue of how to decide whether a risk is "abnormal" in a given circumstance: although stating that it is not an exclusive criterion, the Tribunal suggests that a reasonable test might be to consider whether an insurance company could properly demand an additional premium for cover against the risk of injury<sup>31</sup>.

The EU Civil Service Tribunal developed further ideas on this subject in the *Missir Mamachi di Lusignano* case of May 11, 2011. This was an appalling incident which occurred in Morocco and raised great concern in the press and European public opinion<sup>32</sup>. The Tribunal, after a thorough examination of the events and of all relevant and available documents, stated that "[a]s regards safe working conditions for its staff, it cannot be disputed that the Commission, like any public or private employer, has a duty to act. The staff can rely on a right to working conditions that respect their health, safety and dignity, as recalled in Article 31(1) of the Charter of Fundamental Rights of the European Union (...).

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<sup>30</sup> Available at [www.ilo.org](http://www.ilo.org).

<sup>31</sup> *Ibidem*.

<sup>32</sup> Alessandro Missir Mamachi di Lusignano, a senior EU officer, was posted to the Commission's delegation in Rabat as political and diplomatic counsellor. During the night from 17 to 18 September 2006, a burglar entered his house by squeezing between the bars of a ground-floor window. Suddenly awakened by the presence of the burglar, Alessandro Missir Mamachi di Lusignano surprised the intruder, who was searching the room. The criminal then stabbed the official several times till he died from his wounds. The wife of Mr Missir Mamachi di Lusignano was stabbed in the back and died very quickly from her injuries. The murderer spared the children. He left the premises at about four in the morning taking with him various objects. By letter of 10 September 2008, the father of the murdered officer, after long negotiations with the EU bodies, decided to submit a complaint to the EU Civil Service Tribunal in which he maintained that the Commission bore liability for wrongful acts on account of its failure to meet its obligation to protect its staff. He also claimed that the Commission bore liability even without fault owing to the harm caused by an omission.

Moreover, it is clear both from general texts on the subject and from the case-law that *the Commission's duty, as employer, to ensure the safety of its staff must be discharged with particular rigour and that the administration's discretion in this area is reduced, although not eliminated*<sup>33</sup>.

However, the EU Civil Service Tribunal introduced a few limitations to reduce the scope of this obligation incumbent on EU Institutions: "[a]lthough this duty to ensure the safety of its staff is wide, it cannot go as far as to place an absolute duty on the institution to achieve the desired result. In particular, budgetary, administrative or technical constraints to which the administration is subject, and which sometimes make it difficult or impossible to implement urgent and necessary measures swiftly despite the efforts of the competent authorities, cannot be ignored. Moreover, the duty to ensure safety becomes delicate where the official concerned, unlike a worker in a fixed position in a set location, is required, as was the applicant's son, to work in a third country and to assume a function comparable to a diplomatic function, exposed to a variety of risks that are less easy to identify and manage"<sup>34</sup>.

Even the Court of Justice of the European Union had cause to acknowledge that an Institution had incurred liability by failing to fulfill its duty to ensure the safety of its staff. For example, the Court ordered an Institution to make amends for the consequences of an accident that occurred at a holiday camp for the children of its officials because it had failed to arrange adequate insurance or to inform the persons concerned of this fact<sup>35</sup> or to compensate an official injured while travelling on official business in a poorly maintained official vehicle driven by another official of the Institution<sup>36</sup>.

An important contribution to better clarify the scope of this "duty of care" is offered by a judgment of the Asian Development Bank Administrative Tribunal in the 1995 *Barnes v. the ADB* case<sup>37</sup>. The case is extremely interesting for our purposes: Mr. Barnes, ADB Assistant General Counsel, was killed on 7 January 1992 in the car park of the Bank as he was leaving the Bank to drive home at the end of his working day. His assailant was a security guard employed by a private security firm which the Bank had contracted for the provision of security services at the Bank's headquarters. The Tribunal stated first of all that "(...) as a matter of the general principles of the law of employment, the Bank owes to all members of its staff a contractual duty to exercise reasonable care to ensure their safety whilst on the Bank's premises. This is the same as saying that the Bank must not be negligent in constructing, equipping or maintaining its premises, or in making provision for the personal protection of its staff members on those premises against reasonably foreseeable risks"<sup>38</sup>; and that "(...) an organization is not absolutely liable for injury suffered by a staff member in its service.

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<sup>33</sup> See European Union Civil Service Tribunal, Judgment of 12 May 2011, Case F-50/09, *Livio Missir Mamachi di Lusignano v. European Commission*, para 126 (emphasis added).

<sup>34</sup> *Ivi*, para 130.

<sup>35</sup> Judgment of 7 October 1982, Case 131/81, *Berti v. Commission*, para 23 and 24.

<sup>36</sup> Judgment of 8 October 1986, Joined Cases 169/83 and 136/84, *Leussink v. Commission*, para 15 to 17.

<sup>37</sup> Asian Development Bank, Administrative Tribunal Decision No. 5, *Barnes v. ADB*, 31 May 1995, available at [www.adb.org](http://www.adb.org).

<sup>38</sup> *Ivi*, para 21.

But it necessarily follows from this that an organization is likewise not absolutely liable for injury suffered by a staff member on its premises. Rather, in both situations the obligation of the organization is only to take reasonable care"<sup>39</sup>.

The Tribunal then emphasized the specific tasks the organization must fulfill in order to fully implement its obligation to exercise reasonable care to ensure the safety of its personnel. According to the Tribunal, the Bank "(...) can act only through those whom it employs, whether as servants, agents or independent contractors. In selecting such persons to perform the functions with which it is charged, the Bank must of course use reasonable care to choose those who are fully capable of performing the functions for which they are employed or retained. It must, moreover, ensure that all who perform these functions themselves exercise reasonable care in doing so".

The "duty of care", however, cannot be considered absolved only if the Bank uses reasonable care in the selection of its servants, agents or contractors. On this point, the Tribunal indicated clearly that, though the Bank is free to hire a contractor to provide a service within the Bank that it might otherwise itself perform directly through its own employees, the Bank must maintain sufficiently close supervision over the contractor to ensure that the latter uses reasonable care. In the firm opinion of the Tribunal, the employment of a contractor does not reduce the level of care to which the staff member is entitled under the contract of employment.

This decision of the Tribunal is a good example of the current trend in the international community to increase the responsibility of International Organizations. This trend inevitably implies an additional burden on the IOs, as they are required to address the issue of safety and security of their personnel in a much more comprehensive manner<sup>40</sup>. On the basis of the existing case-law, one may conclude that Institutions deploying personnel in field operation face a specific duty to plan missions and deploy personnel with due consideration for safety and security; to do whatever is possible to prevent and minimize any threat which could be reasonably expected; to have a sound security plan and strategy which has to be updated on a regular basis, according to the way the situation on the ground develops; and to have efficient, well organized emergency procedures to be activated whenever necessary.

A second component of the "duty of care" has been identified in *the obligation of the recruiting Institutions to provide adequate information* to their dependents about the potential dangers they might face in the mission they have been assigned to.

In his Commentary to the UN Staff Regulation Rules of 2002<sup>41</sup>, the UN Secretary-General took a clear position on this point, stating that "(...) since staff are subject to assignment, *measures should be taken to ensure that staff are properly advised, before departure*, of conditions prevailing at the duty station to which they are assigned"<sup>42</sup>.

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<sup>39</sup> *Ivi*, para 23.

<sup>40</sup> O. BEHN, M. KINGSTON, *Whose risk is it anyway? Linking operational risk thresholds and organisational risk management*, in *Humanitarian Exchange Magazine*, June 2010, available at [www.odihpn.org](http://www.odihpn.org).

<sup>41</sup> UN doc. ST/SGRB/12002/113, available at [www.unops.org](http://www.unops.org).

<sup>42</sup> *Ivi*, p. 16 (emphasis added).

In the 2008 Report of the Independent Panel on Safety and Security of UN Personnel and Premises Worldwide<sup>43</sup>, it is clearly restated that "(...) personnel should understand, prior to their deployment, what risks they will face at a post, what the U.N. will do both to mitigate this risk in keeping with the goal of the U.N. security management system, and what compensation will be provided to the individual or his beneficiaries in the event of serious injury or death in the line of duty. It is the duty of managers to ensure this information is clearly provided, and regularly updated. Staff members and associated personnel must then decide on the basis of this information whether to accept deployment".

Similar conclusions were reached by the EU Civil Staff Tribunal in the *Missir Mamachi di Lusignano* case, cited above, in which the Tribunal stated very clearly that "the Commission's duty to ensure safety in such a situation implies (...), secondly that it should inform the staff involved of the risks that have been identified and check that the staff have received appropriate instructions on the risks to their safety"<sup>44</sup>.

This obligation of the International Organizations to inform their staff about potential dangers and risks which might affect their lives corresponds to an almost identical obligation incumbent on European States and others. According to recent judgments of the ECHR<sup>45</sup>, "[t]he obligation on the part of the State to safeguard the lives of those within its jurisdiction has been interpreted so as to include both substantive and procedural aspects, notably a positive obligation to take regulatory measures and to adequately inform the public about any life-threatening emergency (...)".

A third component of the "duty of care", although closely associated with the previous one, was identified by the ILO Administrative Tribunal in *the obligation of IOs to treat their staff with due consideration, to preserve their dignity and to avoid causing them unnecessary injury*<sup>46</sup>.

In its recent Judgment No. 3024 of July 6, 2011, the ILO Administrative Tribunal declared that "the principle of good faith and the concomitant duty of care demand that international organisations treat their staff with due consideration in order to avoid causing them undue injury; an employer must consequently inform officials in advance of any action that may imperil their rights or harm their rightful interests (...)"<sup>47</sup>.

A fourth component is related to *the obligation to have sound administrative procedures, to act in good faith and to have properly functioning internal investigation mechanisms* to address request and complaints by the employee within a reasonable time.

This aspect has been repeatedly emphasized by international case-law. In the opinion of the ILO Administrative Tribunal, by failing to conduct an inquiry to determine the validity of serious accusations, the Organization breaches "both its duty of care towards one of its staff members and its duty of good governance, thereby depriving the complainant of her right to be given an opportunity to prove her allegations"<sup>48</sup>.

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<sup>43</sup> See "Towards a Culture of Security and Accountability", 9 June 2008, available at [www.un.org](http://www.un.org).

<sup>44</sup> Para 132.

<sup>45</sup> European Court of Human Rights, *Budayeva and Other v. Russia*, Judgment of 20 March 2008. See in similar terms as well *Oeetyldiz v. Turkey*, Judgment of 30 November 2004.

<sup>46</sup> See, for example, 109th Session, Judgment No. 2936, of 8 July 2010 available at [www.ilo.org](http://www.ilo.org).

<sup>47</sup> 111th Session, Judgment No. 3024, of 6 July 2011.

<sup>48</sup> 110th Session, Judgment No. 2973, of 2 February 2011.

It must be noted that, in various disputes between employers and employees, the latter have very often expressed their concern for the ineffective functioning of the administration or the delays in the examination of requests submitted to the employer. The ILO Administrative Tribunal clarified this issue in a judgment of 2004<sup>49</sup>, in which it affirmed that "[i]n view of its duty of care towards its staff, an organisation must spare them the material and psychological drawbacks of endless procedures (...)".

A fifth component has been perceived by international jurisprudence in *the duty of organizing and providing effective medical services to be offered to the staff should an emergency occur*.

The issue of guaranteeing effective and professional health provision, management and monitoring for its staff as an instrument to fulfill their "duty of care" has traditionally been a major challenge for all the International Organizations, especially for the United Nations<sup>50</sup>.

In its Judgment No. 872, the ILO Administrative Tribunal confirmed that a staff member has "reason to expect that the organization for which [the staff member] volunteered to serve in a dangerous location had a duty to make extreme medical emergency decisions in a manner so as to provide [the staff member] the greatest opportunity to recover fully from any injury to [the staff member's] physical or mental health that resulted from that service"<sup>51</sup>.

In a recent decision, the UN Dispute Tribunal was even more clear on this point, stating that "[t]he duty of care encompasses that of securing prompt and adequate treatment for those serving in hazardous duty stations in the event of medical emergencies"<sup>52</sup>.

A sixth aspect of the "duty of care" is related to so-called "*diplomatic protection*", which is a well-known instrument available for a State (and an International Organization, at least under certain circumstances), to take diplomatic and other actions against another State on behalf of its national/officer whose rights and interests have been violated by the other State (in our case most probably the State hosting the mission).

Although, according to international practice and rules, diplomatic protection is merely a discretionary right of a State/International Organization, it is the opinion of the present author that whenever the violation of the rights of the citizens/officers concerns a person working in an international mission on behalf of the sending Institution, this Institution should seriously consider using the tools available in the framework of diplomatic protection. Only in doing so would the sending State/IO fulfill the "duty of care" it owes towards its citizen/ officer, provided, obviously, that the person is suffering a violation of his/her rights and that there are no valid and credible arguments presented by the State/ IO not to do so<sup>53</sup>.

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<sup>49</sup> Judgment No. 2345, consideration 1 c.

<sup>50</sup> See more on this in the "Review of the Medical Service in the United Nations System", doc. JIU/REP/2011/1, available at [www.unjustice.org](http://www.unjustice.org).

<sup>51</sup> Former UN Administrative Tribunal Judgments No. 872, Hjelmqvist (1998).

<sup>52</sup> See *Mc Kay*, UNDT, 2012/018, para 43.

<sup>53</sup> See more in P. SZCZEKALLA, *Die Pflicht der Gemeinschaft und der Mitgliedstaaten zum diplomatischen und konsularischen Schutz*, in *Europarecht*, 1999, p. 325 ff.; G. PORZIO, *Consular Assistance and Protection: An EU Perspective*, in *The Hague Journal of Diplomacy*, 2008, p. 93 ff.; M. LINDSTROM, *Consular Cooperation in Crisis Situations*, in S. OLSSON (ed.), *Crisis Management in the European Union*, Berlin-Heidelberg, 2009, p. 109 ff.; S. BATTINI, *The impact of EU Law and Globalization on Consular Assistance and Diplomatic Protection*, in E. CHITI, B. G. MATTARELLA (eds.), *Global Administrative Law and EU Administrative Law. Relationships, Legal Issues and Comparison*, Berlin-Heidelberg, 2011, p. 173-186.

This conclusion is based on the fact that IOs as well as States, on the basis of the "duty of care" towards their personnel sent on mission, must do whatever is reasonably possible to protect them: unless there are exceptional circumstances, the denial of the diplomatic protection could amount to a clear violation of this duty. These conclusions are in line with an important judgment of the ILO Administrative Tribunal in which, making reference to "a general principle concerning the rights of the international civil service" already laid down by the ICJ<sup>54</sup>, the Tribunal concluded with the statement that "*it is the duty of ILO to protect and assist its officials in the performance of their functions or in connection therewith*"<sup>55</sup>.

A seventh component of the "duty of care" has been identified by international jurisprudence in *the need to provide adequate training to personnel for the task they have to perform*. In a significant judgment, the ILO Administrative Tribunal formally stated that "an international organisation owes to its staff a duty of fair treatment, protection of the employees' due reputation and *the provision of adequate training for the tasks which they are required to carry out*"<sup>56</sup>.

A similar concept was developed by the EU Civil Service Tribunal in the *Missir Mamachi di Lusignano* case. During the proceedings, the issue of the importance of attending a specific training session on security was examined, and the Tribunal clearly indicated that "the official's absence from pre-posting training sessions on security undoubtedly constitutes negligence on his part"<sup>57</sup>. According to the Tribunal, training is therefore an important component of the "duty of care".

In conclusion, it is the firm opinion of the present author that both International Organizations and States bear a "duty of care", despite dissenting opinions (which are more based on formal aspects than on substance)<sup>58</sup>. Such a conclusion is based on the relevant documents and practice of the UN (although the expression "duty of care" is used only recently in official documents) and of other International Organizations, and is further supported by the significant case-law commented on in this paragraph. Considering the relevant documents and practices examined so far, this "duty of care" presents many facets and imposes several distinct obligations on IOs and States.

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<sup>54</sup> International Court of Justice, *Reparation for Injuries Suffered*, above cited.

<sup>55</sup> ILO Administrative Tribunal, 12th Session, Judgment No. 70, of 11 September 1964, para 3 (emphasis added).

<sup>56</sup> 98th Session, Judgment No. 2417, of 5 November 2004, para 25 (emphasis added).

<sup>57</sup> Para 186. The Tribunal reached the conclusion that in the case under consideration the statement has to be attenuated considering that it was unclear from the invitations to attend these sessions if that participation was "an essential official obligation before posting to a delegation", and that it was possible to post the applicant's son to Morocco without him having undergone that training.

<sup>58</sup> See for example E. P. FLAHERTY, *U.N. Agency Duty of Care & Legal Liability*, available at [www.unjustice.org](http://www.unjustice.org). According to this author, "a review of the U.N.'s constituent documents and even the case-law of the two main U.N. administrative Tribunals fails to find a clear and single, definitive statement of the duty of care of U.N. Agencies": notwithstanding this, the author concludes stating that "it is certain that such a standard exists, albeit in a more muted and apparently ad hoc state, at least for U.N. staff members".



#### 4. The "duty of care" as a corollary of the obligation of States (and of IOs) to protect the life of those within their jurisdiction or control.

The obligation to protect persons and prevent risks in performing the duties they have been assigned can be related not only to the concept of "duty of care", but also to established and more traditional international rules. Among the latter are rules requiring States (and International Organizations, where applicable) not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within their jurisdiction/ control. The applicable rules are Article 6 of the 1966 International Covenant on Civil and Political Rights and, in the European context, Article 2 of the 1950 European Convention on Human Rights and Fundamental Freedoms. International case-law, especially the judgments of the European Court of Human Rights, has contributed a great deal to clarifying the scope of application of this essential rule, at least as far as the obligations of the States are concerned.

In the well-known case *Osman v. The United Kingdom*<sup>59</sup>, the European Court reiterated its previous interpretation according to which "Article 2 of the Convention may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk. In the opinion of the Court, where there is an allegation that the authorities have violated their positive obligation to protect the right to life in the context of their above-mentioned duty to prevent and suppress offences against the person, it must be established that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual". In the Court's opinion, bearing in mind the nature of the right protected by Article 2, "it is sufficient for an applicant to show that the authorities did not do all that could be reasonably expected of them to avoid a real and immediate risk to life of which they have or ought to have knowledge".

Both in *Budayeva*<sup>60</sup> and *Öneriyildiz*<sup>61</sup> cases, claims of this nature were rejected by national courts, which argued that the causes of death could not have been foreseen or prevented, as they were natural and the state could not be held responsible. However, in both cases, the European Court of Human Rights found that States which had actions brought against them in the Court were responsible for violation of their duty to protect life, having failed to take appropriate preventive measures. The Court affirmed that the right to life "does not solely concern deaths resulting from the use of force by agent of the State but also (...) lays down a positive obligation on States to take appropriate steps to safeguard the lives of those within their jurisdiction"<sup>62</sup>.

According to the Court, a causal link exists between national authorities' actions or omissions and the deaths of the victims. In the Court's words, deaths occurred "because the authorities neglected their duty to take preventive measures when a natural hazard had been clearly identifiable and effective means to mitigate the risk were available to them".

<sup>59</sup> Judgment of 28 October 1998, 87/1997/871/1083.

<sup>60</sup> See the *Budayeva* case, cited above.

<sup>61</sup> *Öneriyildiz v. Turkey*, Judgment, of 30 November 2004.

<sup>62</sup> *Budayeva v. Russia*, cited above, para 128-129. See B. NICOLETTI, *The Prevention of Natural and Man-made Disasters. What Duties for States?*, in A. DE GUTTRY, M. GESTRI, G. VENTURINI (eds.), *International Disaster Response Law*, The Hague, 2012.

The conclusions of the European Court are extremely interesting and contribute to a better definition of the content and the scope of the obligation of States to protect the life of the persons under their jurisdiction. The applicability of this conclusion to situations involving International Organizations is less clear and has not yet been examined in a detailed manner by relevant International Tribunals<sup>63</sup>.

It is worth recalling that this obligation applies not only within the territory of a given State party to a given human rights treaty but, under certain circumstances, to State organs acting outside national borders as well. The issue at stake is very sensitive, as it concerns the problem of the so-called extraterritorial application of human rights conventions. In recent times, these problems have been addressed both by the International Court of Justice in its Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*<sup>64</sup>, and by the European Court of Human Rights.

The ICJ considered specifically the question whether the 1966 International Covenant on Civil and Political Rights was capable of being applied outside the State's national territory. The Court observed that, while the jurisdiction of States is primarily territorial, it may sometimes be exercised outside the national territory. Considering the object and purpose of the International Covenant on Civil and Political Rights, the Court expressed the opinion that "it would seem natural that, even when such is the case, States parties to the Covenant should be bound to comply with its provisions".<sup>65</sup> In conclusion, the ICJ considered that "the International Covenant on Civil and Political Rights may be applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory".

Similar conclusions were reached as well by the European Court of Human Rights. That Court made reference to Article 1 of the 1950 Rome Convention, according to which "[t]he High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of [the] Convention", and stated, at the outset, that "jurisdiction" under Article 1 is a threshold criterion and that the exercise of jurisdiction is a necessary condition for a Contracting State to be able to be held responsible for acts or omissions imputable to it which give rise to an allegation of the infringement of rights and freedoms set forth in the Convention"<sup>66</sup>.

The Court, in its judgment, recognised a number of exceptional circumstances capable of giving rise to the exercise of jurisdiction by a Contracting State outside its own territorial boundaries. In each case, the question whether exceptional circumstances exist must be determined with reference to the particular facts<sup>67</sup>. According to the Court, one of these circumstances is when, through the consent, invitation or acquiescence of the Government of that territory, a State exercises all or some of the public powers normally to be exercised

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<sup>63</sup> The ILO Administrative Tribunal in case 2662 of 11 July 2007, stated, for example, that the 1950 European Convention is not applicable to International Organizations (para 12): however, the Tribunal did not explain the legal basis of this statement.

<sup>64</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, *I. C. J. Reports*, 2004, p. 136.

<sup>65</sup> *Ibidem*, para 109. According to the ICJ there is a constant practice of the Human Rights Committee consistent with this. "Thus, the Committee has found the Covenant applicable where the State exercises its jurisdiction on foreign territory. It has ruled on the legality of acts by Uruguay in cases of arrests carried out by Uruguayan agents in Brazil or Argentina (case No. 52179, *Lopez Burgos v. Uruguay*; case No. 56179, *Lilian Celiherti de Cusariego v. Uruguay*). It decided to the same effect in the case of the confiscation of a passport by a Uruguayan consulate in Germany (case No. 106181, *Montero v. Uruguay*)" (para 110).

<sup>66</sup> *Ilaşcu and Others v. Moldova and Russia*, Judgment (Grand Chamber) of 8 July 2004, para 311.

<sup>67</sup> *Al-Skeini and Others v. the United Kingdom*, Judgment of 7 July 2011, para 132.

by that Government<sup>68</sup>. Thus where, in accordance with custom, treaty or other agreement, authorities of the Contracting State carry out executive or judicial functions in or within the territory of another State, the Contracting State may be responsible for breaches of the Convention thereby incurred, provided that the acts in question are attributable to it rather than to the territorial State<sup>69</sup>.

Finally the Court stated that "it is clear that, whenever the State through its agents exercises control and authority over an individual, and thus jurisdiction, the State is under an obligation under Article 1 to secure to that individual the rights and freedoms under Section 1 of the Convention that are relevant to the situation of that individual. In this sense, therefore, the Convention rights can be 'divided and tailored'"<sup>70</sup>.

This conclusion is very important to our concerns, considering that the cases under scrutiny are those involving personnel sent abroad to perform their jobs in international field operations. Considering that the judgment which has been quoted refers mainly to the behavior of States, it remains dubious whether these conclusions are also entirely applicable to International Organizations, at least as far as they are not party to the relevant Conventions. In the specific case of the EU, however, it has to be emphasized that, with the adoption of the Nice Charter of Fundamental Rights of the EU, the European Union formally recognized its obligation to respect the rights, freedoms and principles laid down in the same Charter (including the right to life, the right to the integrity of the person and the right to working conditions which respect his or her health, safety and dignity). Therefore, the obligation to protect life, which was formerly attributed only to the States, must now be considered applicable to the EU as well<sup>71</sup>.

This allows us to draw the conclusions that, under general international law, both States and IOs are bound to respect the rights to life, integrity and healthy working conditions of the employees they send on mission.

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<sup>68</sup> See more on this E. ROXSTROM, M. GIBNEY, T. EINARSEN, *The NATO Bombing Case (Bankovic et Al. v. Belgium et Al.) and the Limits of Western Human Rights Protection*, in *Boston University International Law Journal*, 2005, p. 55.

<sup>69</sup> See *Drozdz and Janousek v. France and Spain*, Judgement of 26 June 1992; *Gentilhomme and Others v. France*, Judgment of 14 May 2002; and *X and Y v. Switzerland*, Commission's admissibility decision of 14 July 1977, p. 57.

<sup>70</sup> See *Al-Skeini and Others* case, cited above, para 75.

<sup>71</sup> In the *Missir Mamachi di Lusignano* case, cited above, para 126, the EU Civil Service Tribunal clearly stated the EU staff can rely "on a rights to working conditions that respect their health, safety and dignity as recalled in Article 31(1) of the Charter of Fundamental Rights of the European Union".

## 5. Who bears the consequences of the violation of the "duty of care", and what are they

A well known and widely accepted principle that applies to IOs is that "[e] very internationally wrongful act of an international organization entails the international responsibility of that organization"<sup>72</sup>. An almost identical principle applies to States. According to the International Law Commission (ILC), an internationally wrongful act of an International Organization consists of an action or omission which is attributable to that organization under international law and constitutes a breach of an international obligation of that organization<sup>73</sup>.

The ILC spelled out the consequences of such a wrongful act. They can be summarized under these headings: the continued duty of performance (Article 29); the obligation (a) to cease that act, if it is continuing, and (b) to offer appropriate assurances and guarantees of non-repetition, if circumstances so require (Article 30); and finally the obligation to make full reparation<sup>74</sup> for the injury<sup>75</sup> caused by the internationally wrongful act (Article 31). The important findings of the ILC are based on fairly consistent judgments of relevant international tribunals.

A few important pronouncements of International Tribunals make as well specific reference to the consequences of the violation of the "duty of care" principle. In the case already mentioned *In re Grasshoff*<sup>76</sup>, the ILO Administrative Tribunal stated that "[i]t is sufficient to say that, if [the staff member] accepts the order [to work in an unsafe place] (...) and the employer has failed to exercise due skill and care in arriving at his judgment, the [staff member] is, subject to any contrary provision in the contract, entitled to be indemnified in full against the consequences of the misjudgment"<sup>77</sup>.

In a more recent sentence, the same Tribunal went even further and quantified the compensation to be paid to the victims: "[t]he Organization's serious breaches of the principle of good faith and of the duty of care owed to a member of its staff, as well as the injury to the complainant's dignity and the breach of the principle of equal treatment, have also caused the complainant substantial moral injury. In view of the circumstances of the case, the Tribunal is of the opinion that the compensation due to the complainant for this injury may be fairly assessed at 25,000 euros"<sup>78</sup>.

On the basis of these references, the consequences of the violation of this duty are quite clear, but an additional issue which deserves attention is the identification of the bearer of this responsibility: is it the IO (the EU, in our case) or the State whose citizens suffered the negative consequences of the violation of this principle? The issue is extremely sensitive, as the way it is dealt with has an immediate and inevitable impact on another delicate issue, such as the attribution of conduct and responsibility for internationally wrongful acts in the context of international operations.

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<sup>72</sup> Article 3 of the Draft articles on the responsibility of international organizations, adopted by the International Law Commission (ILC) at its Sixty-Third Session, in 2011, and submitted to the General Assembly as a part of the ILC Report covering the work of that session (A/66/10, para 87), available at [untreaty.un.org](http://untreaty.un.org).

<sup>73</sup> *Ibidem*, Article 4.

<sup>74</sup> According to Article 34 of the ILC Report, full reparation for injury caused by an internationally wrongful act shall take the form of "restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of this Chapter".

<sup>75</sup> Article 31, para 2, further clarifies the notion of injury which includes "any damage, whether material or moral, caused by the internationally wrongful act of an international organization".

<sup>76</sup> Cited above.

<sup>77</sup> Emphasis added.

<sup>78</sup> 108th Session, Judgment No. 2907, of 3 February, 2010, para 27.

According to the present author, the solution, which sometimes might appear controversial, is based on the assumption that, in the absence of specific arrangements, it is the body which recruited and/or sent the given person on a mission which bears the responsibility to protect him/her, provided that it exercises "full control" over him/her<sup>79</sup>. In almost all EU Joint Actions establishing various field operations there are specific rules for dealing with claims presented by seconded personnel: "2. The State or Community institution having seconded a staff member shall be responsible for dealing with any complaints linked to the secondment, from or concerning the staff member"<sup>80</sup>.

Although it might sound surprising, owing to the fact that the personnel usually carries out its duty under the authority of the EU mission leadership, the wording of these rules is clear enough and does not require any additional comment. The only issue which remains open is the one related to contracted personnel (i.e. free-lance personnel recruited by EU Institutions/Missions or by Member States to serve for a specific time in a given mission). In such a case, the rule should be the same. This means that the "duty of care" will be borne by the body which recruits contracted personnel, be it the EU Institutions/Mission or a Member State.

It must be however pointed out that IOs enjoy wide immunity from actions in national tribunals. An injured party recruited by an International Organization can only assert his rights in an *ad hoc* internal tribunal of the relevant IO (such as the UN Dispute Tribunal, the UN Appeal Tribunal, the Administrative Tribunal of ILO, the EU Civil Service Tribunal etc.). It is worth remembering, however, that the International Court of Justice, in its Advisory Opinion on "Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights" clearly stated that "[t]he question of immunity from legal process is distinct from the issue of compensation for any damages incurred as a result of acts performed by the United Nations or by its agents acting in their official capacity. The United Nations may be required to bear responsibility for the damage arising from such acts"<sup>81</sup>.

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<sup>79</sup> The UN Secretary General, in his Report on Financing of UN PKOs (A/51/389) stated that in the absence of formal arrangements "responsibility would be determined in each and every case according to the *degree of effective control*" (emphasis added). The European Court of Human Rights, in the *Behrami* case of 2007, makes reference to the similar but not equivalent notion of "ultimate authority and control". The test of the "effective control" has been used, instead, by the Dutch Court of Appeal in The Hague (*Nuhanovic v. The Netherlands and Mustafic-Mujic et al. v. The Netherlands*, available at [zoeken.rechtspraak.nl](http://zoeken.rechtspraak.nl)).

<sup>80</sup> Article 13, para 2, of the Council Joint Action 2007/405/CFSP of 12 June 2007 on the European Union police mission undertaken in the context of reform of the security sector (SSR) and its interface with the justice system in the Democratic Republic of the Congo, *OJEU* L 151, 13 June 2007. Almost identical rules are included in Council Joint Action of 11 March 2002 on the European Union Police Mission, *OJEU* L 70, 13 March 2002 (Article 11, para 2); Council Joint Action 2005/190/CFSP of 7 March 2005 on the European Union Integrated Rule of Law Mission for Iraq, *EJJUST LEX*, *OJEU* L 62, 9 March 2005 (Article 8.2); Council Joint Action 2005/797/CFSP of 14 November 2005 on the European Union Police Mission for the Palestinian Territories, *OJEU* L 300, 17 November 2005 (Article 9.2); Council Joint Action 2005/889/CFSP of 12 December 2005 on establishing a European Union Border Assistance Mission for the Rafah Crossing Point, *OJEU* L 347, 14 December 2005 (art. 8.2); Council Joint Action 2008/124/CFSP of 4 February 2008 on the European Union Rule of Law Mission in Kosovo, *OJEU* L 42, 16 February 2008 (Article 8.2); and Council Joint Action 2007/369/CFSP of 30 May 2007 on establishment of the European Union Police Mission in Afghanistan, *OJEU* L 139, 31 May 2007 (Article 8.2).

<sup>81</sup> *I.C.J. Reports*, 1999, para 66.

## 6. What have the EU Institutions done so far to fulfill their "duty of care" towards the personnel deployed in the field and what still needs to be done?

It now seems important to examine what the EU Institutions have done so far to fulfill their obligations relating to the "duty of care" towards personnel sent on international missions.

A preliminary observation seems important in this connection. In the EU system, and especially after the Lisbon Treaty, the "duty of care" impacts on two different settings which are not always regulated by the same rules: the new European External Action Service (introduced by Article 23, para 3, TEU) and the CSDP Missions (regulated in Articles 42 and 43 TEU).

This distinction must be kept in mind, as the rules regulating the different categories of personnel interested are not always the same. As an example, the EU Council document cited above, adopted on 7 June 2006 and entitled "Policy of the European Union on the security of personnel deployed outside the European Union" is applicable only to "both crisis management operations, which encompass any operation, mission or action, including preparatory missions, conducted under Title V of the TEU involving the deployment of personnel outside the European Union, and the deployment of European Union Special Representatives (EUSRs) and personnel under their authority outside the European Union". On the other hand, the "Basic Security Rules for EEAS" published/promulgated on 15 June 2011 are relevant only for EEAS personnel. Notwithstanding this, the present author, considering that the "duty of care" principle is mentioned more and more often in official EU documents referring to both categories<sup>82</sup>, is firmly convinced that the distinction between the two categories seems more and more artificial nowadays as far as the "duty of care" is concerned.

Considering the sensitive nature of the issue, it has to be mentioned that the ideas developed in this paragraph may not be entirely accurate and are certainly partially influenced by the fact that several EU documents are classified and therefore not available for consultation. Notwithstanding this, a certain number of inferences may be drawn from the mere fact that at least it has been possible, mainly thanks to the judgments of EU Tribunals, to obtain information about the existence of a certain number of documents regulating various aspects which are relevant in this connection.

As for *the obligation to provide a safe (as far as possible) working environment* which implies a sound mission planning to take into consideration all potential risks, it is important to note the Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work<sup>83</sup>.

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<sup>82</sup> The references to the "duty of care" principle in CSDP missions have been quoted repeatedly in the previous paragraphs. As for the EEAS, we might just remind that in its Report to the European Parliament, the Council and the Commission, 22nd December 2011, the High Representative has made clear that "security is a priority for the EEAS, including *in particular the duty of care for staff*" (emphasis added). "Duty of care" is used, as well, in the already cited 2008 "EU Field Security Handbook for the protection of personnel, assets, resources and information".

<sup>83</sup> *OJEU* L 183, 29 June 1989. The Directive was later amended through Regulation (EC) No. 1882/2003 (*OJEU* L 284, 31 October 2003), Directive No. 2007/30/EC (*OJEU* L 165, 27 June 2007) and Regulation (EC) No. 1137/2008 (*OJEU* L 311, 21 November 2008).

The measures provided in the Directive require Member States to adopt the necessary legal and operational measures in order to eliminate the risk factors for occupational diseases and accidents on one hand, and to encourage improvements in the safety and health of workers at work on the other. To that end, it contains general principles concerning the prevention of occupational risks, the protection of safety and health, the elimination of risk and accident factors, the informing, consultation, and training of workers and their representatives, as well as general guidelines for their implementation. These measures apply to all sectors of activity, both public and private, with the exception of certain specific activities in the public (e.g. army, police, etc.) and civil protection services.

Notwithstanding this restriction, the Directive's importance lies in specifying general guidelines and principles to be respected by the employer in whatever situation. This is emphasized in the same Directive where it is clearly stated that, if the Directive should be inapplicable owing to the specific nature of the activities performed by the employees (army, police, civil protection), "the safety and health of workers must be ensured as far as possible in the light of the objectives of this Directive"<sup>84</sup>. The rules contained in this Directive are of great importance, as they provide a general framework for all the employers/employees relations including those between the EU Institutions and their employees wherever this working relations takes place (i.e. both in Brussels and in other countries): this is confirmed by relevant judgments and by the practice of the EU Institutions<sup>85</sup>.

Having clarified this aspect, it is now necessary to ascertain whether these rules apply only to the physical premises of the EU mission in the hosting country or, in more general terms, to the working environment in which the officer is required to perform his/her duties while assigned to a mission. The answer to this question seems to be that the basic principles inspiring the Directive also apply, as far as possible and reasonable, to the external environment in which the officer is required to perform his duties. In this connection, the "Staff Regulations of Officials of the European Communities"<sup>86</sup> must be mentioned. According to Article 1(2) of these Regulations, "[o]fficials in active employment shall be accorded working conditions complying with appropriate health and safety standards at least equivalent to the minimum requirements applicable under measures adopted in these areas pursuant to the Treaties".

Furthermore, on 26 April 2006 the Commission adopted a Decision establishing a uniform policy for health and safety at work for all Commission staff<sup>87</sup>, with the purpose of protecting Commission staff in all its services, i.e. not only in the Commission's headquarters, but throughout all its sites, both within and outside the Union. Although,

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<sup>84</sup> Article 2, para 2, of the Directive.

<sup>85</sup> This seems also to be the understanding of the jurisprudence of the EU Civil Service Tribunal. In the recent *Missir Mamachi di Lusignano* case, the Tribunal affirmed that it is clear from several EU directives, and in particular from Directive 89/391, "that the employer is required to ensure the safety and health of its staff in every aspect related to the work" (emphasis added). Moreover, according to the Tribunal, in its role as custodian of the Treaties "the Commission is obliged to interpret strictly the duties thus placed on employers" (see the judgment of 14 June 2007, Case C-127/05, *Commission v. United Kingdom*). Furthermore, the Commission's adoption of the decision of 26 April 2006 confirms that the institution drew the necessary conclusions from Article 1e (2) of the Staff Regulations, basing itself on the rules applicable in the Member States under Directive 89/391.

<sup>86</sup> Available at [http://ec.europa.eu/civil\\_service/docs/toc100\\_en.pdf](http://ec.europa.eu/civil_service/docs/toc100_en.pdf).

<sup>87</sup> The document was submitted to the College of Commissioners for approval at its meeting on 26 April 2006.

formally speaking, the decision applies "in all Commission workplaces"<sup>88</sup> and therefore seems limited to the buildings in which the workplace is located and surrounding areas, the present author has already expressed the opinion that, considering the specific nature and characteristics of the work to be performed by an officer assigned to a EU mission, the general principles contained in this decision must be applied, as far as reasonably possible, to protect the employee wherever he/she carries out his/her duties<sup>89</sup>.

The precise meaning of this duty was summarized recently by the EU Civil Service Tribunal in the *Missir Mamachi di Lusignano* case, where the Tribunal expressed its firm opinion that "(...) in the light of the main rules laid down in Directive 89/391 (...) the Commission's duty to ensure safety in such a situation implies, first, that the institution must assess the risks to which its staff is exposed and take integrated preventive measures at all levels of the service, secondly that it should inform the staff involved of the risks that have been identified and check that the staff have received appropriate instructions on the risks to their safety, and finally that it should take appropriate protection measures and establish the organization and means it considers necessary"<sup>90</sup>.

Considering the specific security problems of the buildings in third countries in which accommodation is provided for the staff of the Commission's delegations, the EU Commission decided, in 2006, to adopt additional detailed security rules very much focused on technical aspects related to the active and passive protection of the buildings<sup>91</sup>. According to an answer given by the then Commissioner Ferrero-Waldner to a parliamentary question presented to the Commission by Paul Marie Couteaux on the murder of Mr. Missir Mamachi di Lusignano and his wife, these measures are quite sophisticated and include "[d]es mesures standard de sécurité/protection physiques et électroniques (boutons anti-paniques reliés à U.N. dispositif d'intervention rapide en cas d'alarme, points d'accès, points d'ancrage des barreaux, éclairages extérieurs afin d'éviter toute zone d'ombre dans les parcelles) sont préconisées et d'application pour les logements des expatriés affecté dans les délégations extérieures. A ces mesures standard, des mesures complémentaires de sécurité/protection peuvent être préconisées en fonction des risques de sécurité/ponctuels (gardiennage, protection rapprochée expatriée ou locale, véhicules blindée, réseaux de radiocommunications, zone de sécurité à l'intérieur des logements)"<sup>92</sup>.

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<sup>88</sup> Article 2(a) defines the Commission workplaces as the places "intended to house workstations on the premises of the Commission and any other place within the area of these premises to which the Staff has access in the course of their work".

<sup>89</sup> This is, however, not the opinion of the Commission, which in the *Missir Mamachi di Lusignano* case clearly stated that "[t]he Commission considered that Directive 89/391 related only to the place of work of employees and that it could therefore not be relevant to the present case, which related to the security of the official's private accommodation" (para 41).

<sup>90</sup> Para 132.

<sup>91</sup> See "Document on Standards and Criteria", 2006 edition (N&C, 2006 edition/DS3/A.W): this document is strictly confidential. The existence of this document was confirmed by the EU Civil Service Tribunal in the *Missir Mamachi di Lusignano* case. According to the applicant, who was given the authorization by the Tribunal to consult the document at the Registry of the Tribunal, this document clearly "showed that the Commission had a duty to ensure security, including that of the temporary accommodation of staff posted to Morocco, and that the measures which the Commission was required to take included, in particular, permanent professional protection by a specialized company" (para 48).

<sup>92</sup> The Commissioner Ferrero-Waldner's answer, P-3367/2007 is available at [www.europarl.europa.eu](http://www.europarl.europa.eu)



The issue of security and safety of the environment in which the mission members are required to carry out their duties is usually given high consideration in the planning of the mission, as can be inferred from the various EU official documents, but especially from the EU Council document adopted on 7 June 2006, and the subsequent "Field Security Handbook for the protection of personnel, assets, resources and information"<sup>93</sup>.

This document largely codifies and builds on existing practice. Its key importance is due to the fact that it gives extremely clear and detailed indications on how to ensure a comprehensive and integrated approach between all levels involved in the planning phase of a new mission while taking all reasonably practicable measures to do so at an acceptable level of risk commensurate with the situation at hand, the objectives of the European Union and the best interests of the personnel. It defines the core measures, roles, responsibilities and core tasks with regard to the security and safety of personnel in such deployments with the aim of ensuring a comprehensive and integrated approach by all levels involved in the conduct of crisis management operations, while taking all reasonably practicable measures to do so at an acceptable level of risk commensurate with the situation at hand, the objectives of the European Union and the best interests of the personnel involved.

To this end, the document clarifies the respective roles and tasks when preparing and conducting operations and deployments in the field. Paragraphs 40 and 41 of the Document seem to be particularly relevant to our discussion: "40. The Head of Mission will take all reasonably practicable measures, in conformity with his or her mandate and the security situation in the area of operation, for the security of personnel under his or her authority. 41. In this regard, the Head of Mission will: (...) include security as part of the mission induction training, in accordance with guidelines on a core curriculum provided by the General Secretariat of the Council, to be received by all members deployed in the crisis management operation before or upon arriving in the mission area of operations (...)"<sup>94</sup>. The general framework provided by this document is instrumental for the implementation of the duty of care through a proper planning of the mission<sup>95</sup>.

Finally, one has to highlight the importance of the recent decisions of the High Representative to adopt, on 15 June 2011, the "Basic Security Rules for EEAS" and to create within the EEAS a Security Directorate, which cooperates very closely with the relevant services in the Council Secretariat and the Commission, as well as an EEAS Security Committee<sup>96</sup>.

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<sup>93</sup> Cited above.

<sup>94</sup> Council of the EU, doc. 9490/06, 29 May 2006, available at [www.eulex-kosovo.eu](http://www.eulex-kosovo.eu).

<sup>95</sup> Para 18 of this decision requests the Mission to put in place adequate protection measures which should include: (a) decisions on the visibility of the mission as well as its distinctiveness, as appropriate, from other actors in the same theatre of operation; (b) the conclusion, whenever possible, of arrangements granting a protected status to deployed personnel, including privileges and immunities (e.g. in a status of forces or a status of mission agreement) and the provision of acceptable security measures by the host State; (c) the application of a mission-specific security plan. For civilian operations and EUSR teams, this plan will be issued respectively by the Head of Mission or the EUSR based on generic field security operating standards produced by the General Secretariat of the Council. For military operations, the plan will be issued by the Force Commander; (d) the establishment of a system for the management of movement of personnel to, as well as within, the crisis area; (e) the establishment of appropriate medical care measures, including medical evacuation, for personnel deployed in the field; (f) adequate training of personnel in field security; (g) the development of resources such as security guidelines and handbooks; (h) ensuring that appropriate insurance coverage is provided for personnel deployed in the field; and, (i) ensuring the protection of EU classified information in accordance with Council Decision 2001/264/EC.

<sup>96</sup> See more on this in the Report by the High Representative to the European Parliament, the Council and the Commission, 22 December 2011, available at [eeas.europa.eu](http://eeas.europa.eu).

Considering the initiatives undertaken by the EU, one may conclude that the EU has most probably adopted an appropriate policy for the protection of official premises and the residences of officers and is carrying out serious efforts to identify and to minimize potential risks that personnel might face working in the field. It will be crucial to check whether all these policies are being fully implemented in the various missions. Should an unfortunate event occur, this is something which will most probably be evaluated on a case-by-case analysis, only *ex post*, and by a third party (such as the EU Civil Service Tribunal).

*The obligation to inform about specific problematic issues in the working environment:* at this regard, it has to be observed that in most of the Calls for Contribution as well as in the Job Description forms,<sup>97</sup> the EU does not provide in a regular and consistent manner specific information about the potential sources of risks for safety and security of the personnel to be recruited. Sometimes, this information is extremely generic and very often provided only at a later stage to the short-listed candidates or during the mission induction training after the arrival of selected personnel at their duty station. This is undoubtedly an area where improvements are possible and desirable in order to provide clearer and more detailed information about the specific threats and risks of each mission and allow the personnel to be better equipped to prevent and deal with them.

As for the obligation of the EU to treat its staff with due consideration, to preserve their dignity and to avoid causing them unnecessary injury and to have sound administrative procedures, to act in good faith and to have proper functioning internal investigation mechanism, one may assert that the EU has repeatedly acted in a manner consistent with this obligation.

This can be confirmed by the behaviour of the European Institutions after the terrible crimes suffered by the family of Mr. Missir Mamachi di Lusignano. The European Commission quickly took measures aimed at reducing their sufferings, such as: immediately sending security experts to the place in which the event happened in order to better ascertain the facts; bringing independent action for damages in the Moroccan courts; making immediately the payment due under the first paragraph of Article 70 of the Staff Regulations; paying to the children and heirs of the deceased official a significant amount of money; granting to the four children entitlement to the orphans' pension, granting the deceased official a posthumous promotion to grade A11, first step, with retroactive effect; granting each of the children an *ex gratia* monthly benefit on social grounds equal to a dependent child allowance, payable until they reached the age of 19 years; organizing on September 18, 2007, the anniversary of the double murder of Mr and Mrs Missir Mamachi di Lusignano, a ceremony in Brussels to commemorate the deceased; dedicating a meeting room to the memory of the deceased official and unveiling a plaque bearing his name.

In the case of personnel deployed outside the EU in an operational capacity under Title V of the TEU, one must refer to the detailed rules contained in the cited EU Council decision of June 7, 2006, which creates a mechanism for reporting serious security incidents to the General Secretariat of the Council and includes procedures for effective preparation of political decision-making in emergency situations and a policy for procedures for personnel recovery. Looking to all these activities, it is possible to reach the conclusion that the EU Institutions did their best to preserve the dignity of their officers and to implement sound administrative procedures guaranteeing that their specific needs are properly and promptly met.

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<sup>97</sup> See for example the 2012 job description form for EULEX Kosovo Mission available at [www.consilium.europa.eu](http://www.consilium.europa.eu).

As to the duty of organizing and providing effective medical services to be offered to the staff should an emergency occur, it should be noted that the Staff Regulations<sup>98</sup> and the Rules on Insurance against the Risk of Accident and of Occupational Disease constitute the broader legal framework within which the EU Institutions address these issues. Furthermore the EU Institutions usually pay for an insurance policy with a major international cross-border health insurance company. This policy usually includes worldwide coverage and physician-directed access to local doctors and hospitals 24/7; 24-hour assistance via a global network of health care professionals; 24-hour assistance in getting admission to hospital; clinical resources around the world and medical evacuation where necessary. Once more, the service provided to the personnel seem, to a large extent, perfectly in keeping with the "duty of care" of the EU Institutions.

The issues of the so-called "*consular protection*" by the EU and its Member States, and *Diplomatic protection*, are instrumental in protecting the EU officers and citizens deployed abroad against possible violations of their rights committed by hosting States. They have been widely debated and have, at least partially, found a specific place in the EU Treaties. Article 23 of the TFEU, which rephrases an identical rule originally introduced in the Maastricht Treaty, now regulates the consular protection that the Member States and the EU can offer EU citizens involved in disasters in third countries<sup>99</sup>.

A specific Decision 95/553/EC of the Representatives of the Governments of the Member States meeting within the Council was adopted on 19 December 1995 to deal with protection for citizens of the European Union by diplomatic and consular representations<sup>100</sup>. This Decision, which may be replaced by a draft Directive recently proposed by the Commission<sup>101</sup>, states that the diplomatic and consular representations of EU Member States must provide consular assistance in given situations, offering help in the instance of a grave accident, serious illness or even death, intervening in favour of detainees, aiding victims of violent crimes and repatriating distressed EU citizens<sup>102</sup>.

Alongside consular protection regulated in the TFEU, traditional diplomatic protection continues to remain an instrument available for States and the EU Institutions to redress situations of assumed violations of the rights of their citizens/officers sent abroad to work in international field operations. Both tools (consular and diplomatic protection), have been widely used to protect ordinary European Union citizens in situation of distress or in emergency situations<sup>103</sup> within and outside Europe.

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<sup>98</sup> See Article 73.

<sup>99</sup> Article 23 states that "[e]very citizen of the Union shall, in the territory of a third country in which the Member State of which he is a national is not represented, be entitled to protection by the diplomatic or consular authorities of any Member State, on the same conditions as the nationals of that State. Member States shall adopt the necessary provisions and start the international negotiations required to secure this protection. The Council, acting in accordance with a special legislative procedure and after consulting the European Parliament, may adopt directives establishing the coordination and cooperation measures necessary to facilitate such protection".

<sup>100</sup> OJEU L 314, 28 December 1995, p. 73 ff.

<sup>101</sup> Commission proposal, 14 December 2011, for a Council Directive on consular protection for citizens of the Union abroad, COM(2011)881 final.

<sup>102</sup> Article 6(2), COM(2011)881 final, cited above. See more A. VERMEER-KONZL, *Where the Law Becomes Irrelevant: Consular Assistance and the European Union*, in *International and Comparative Law Quarterly*, 2011, p. 965 ff.

<sup>103</sup> More precise figure about the effective use of this opportunity are offered in *Consular and Diplomatic Protection – Legal Framework in the EU member States*, Report of the Citizens Consular Assistance Regulation in Europe (CARE) project, 2010, available at [www.ittig.cnr.it](http://www.ittig.cnr.it)

The same rules could also be used to safeguard officers of an EU mission in that country as a complementary protection of their rights, immunities and privileges which they might enjoy on the basis of the Status of Mission Agreement (or Status of Force Agreement). In fact, when deploying a CSDP Mission, the EU Institutions usually stipulate an *ad hoc* Status of Force (SOFA) or a Status of Mission (SOMA) Agreement with the local State in order to ensure the efficient performance of the EU mission. These bilateral agreements contain rules which have some relevance to our discussion, as they regulate not only the immunities and privileges of the mission and its personnel but also the sensitive issue of the responsibility to protect the mission's personnel. As a typical example one can mention the 2004 "Agreement between the European Union and Georgia on the status and activities of the European Union Rule of Law Mission in Georgia" (EUJUST THEMIS)<sup>104</sup>, whose Article 8 states that "[t]he Host Party, through its own capabilities, shall assume full responsibility for the security of EUJUST THEMIS personnel. (...) To that end, the Host Party shall take all necessary measures for the protection, safety and security of EUJUST THEMIS and EUJUST THEMIS personnel".

These agreements, although they merely restate the legal obligation of the local State to protect those living in its territory, are relevant to our purposes, as they can be perceived as instrumental in implementing the "duty of care" of the EU Institutions. They demonstrate the strong commitment of the EU to offer not only additional security protection for their personnel sent on mission but also protection against possible legal abuses by the hosting State against the EU personnel<sup>105</sup>. It is clear that, where such bilateral agreements exist between the EU and the host State, the international officer deployed to work in that specific mission might (depending on the situation *in situ*) benefit from increased protection and more opportunities to take legal action in response to possible violations of his/her rights. This does not, however, eliminate the responsibility of sending State/Organizations, as they remain bound to fulfill their "duty of care" as described in the previous paragraphs.

As to *the obligation to provide proper training to the staff deployed*, one has to remind the June 2006 EU Council document "Policy of the European Union on the security of personnel deployed outside the European Union in an operational capacity under Title V of the Treaty on European Union"<sup>106</sup>. The document emphasises, amongst other things, the key importance of standardized core training to be offered to all members deployed in crisis management operations: this training is clearly perceived by the EU Institutions as instrumental in discharging its "duty of care"<sup>107</sup>. This focus on the importance of training personnel requested to work for field operations, especially in high or critical risk missions, also emerges in various Council Joint Actions establishing EU civilian missions. In Council Joint Action 2005/797/CFSP of 14 November 2005 on the European Union Police Mission for the Palestinian Territories<sup>108</sup>, a new rule dealing with training was added for the first time. According to Article 13.4, "EUPOL COPPS staff members *shall undergo mandatory security training* organised by the Security Office of the General Secretariat of the Council and medical checks prior to any deployment or travel to the mission area"<sup>109</sup>. Similar phrasing has been used in subsequent cases, such as the Joint Actions on the establishment of the

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<sup>104</sup> OJEU L 389, 30 December 2004, p. 42. In 2010, the Council of the European Union adopted revised "Guidelines on consular protection of EU citizens in third countries" with the aim to overcome problems related to sharing information, handling relations with the media, decision-making and coordination of the response.

<sup>105</sup> See more on this A. SARI, *Status of Forces and Status of Mission Agreements under the ESDP: The EU's Evolving Practice*, in *European Journal of International Law*, 2011, p. 67 ff.

<sup>106</sup> Cited above.

<sup>107</sup> *Ivi*, para 18(f).

<sup>108</sup> OJEU L 300, 17 November 2005.

<sup>109</sup> Emphasis added.

European Union Border Assistance Mission for the Rafah Crossing Point<sup>110</sup>; on establishing the European Union Police Mission in Afghanistan<sup>111</sup>; on the European Union police mission undertaken as part of the reform of the security sector (SSR) and its interface with the justice system in the Democratic Republic of the Congo<sup>112</sup>; and on appointing the European Union Special Representative in Kosovo<sup>113</sup>.

Although the wording in the various Joint Actions differs to a limited extent, one can observe a trend to highlight the increasing importance of training, especially in safety and security, as a tool to minimize the security risk and to equip the personnel with the necessary skills and knowledge for avoiding security problems and dealing with them in a professional manner should they arise. Very much in line with this trend is the 2008 "Report on the Implementation of the European Security Strategy – Providing Security in a Changing World"<sup>114</sup>, in which the EU confirms that for civilian mission "(...) we must be able to assemble trained personnel with a variety of skills and expertise, deploy them at short notice and sustain them in theatre over the long term".

In many Calls for Contribution made by the EU, it is specifically mentioned that for certain missions the normal requirements<sup>115</sup> are not sufficient, and some kind of training is an essential pre-requisite<sup>116</sup>. Therefore, in most of the EU application forms to be filled in by candidates there is a request to clearly indicate which training courses they have attended<sup>117</sup>.

The requirement that pre-deployment training for personnel sent to EU-led operations must be carried out by Member States seconding the personnel, unfortunately, is not very respected. According to the Missions, about 45% of the incoming personnel have not attended a specific pre-deployment training course. The efforts of the EU Commission to provide complementary pre-deployment training course free of charge for personnel seconded to EU and non-EU operations<sup>118</sup> is a positive step although, owing to the limited number of places available at those courses, it cannot be considered adequate to meet existing training needs. The EU and its Member States must clearly improve their performance in this respect in order to fulfil their obligations arising from the "duty of care" to properly train their personnel.

A positive aspect which deserves to be mentioned in this connection is the EU's ongoing effort to harmonize the content of the various training curricula in order to improve the quality and credibility of the entire training system. This is in keeping with fulfilling the

<sup>110</sup> Council Joint Action 2005/889/CFSP of 12 December 2005, *OJEU* L 347, 14 December 2005: art. 12.4. states that "EU BAM Rafah staff members shall undergo mandatory security training".

<sup>111</sup> Council Joint Action 2007/369/CFSP of 30 May 2007, *OJEU* L 139, 31 May 2007. Art. 11.4 states that: "[a]ppropriate security training will be provided, in accordance with the OPLAN, for all Mission staff. They shall also receive regular in-theatre refresher training organized by the SMSO".

<sup>112</sup> Council Joint Action 2007/405/CFSP of 12 June 2007, *OJEU* L 151, 13 June 2007. Art 14.3 reiterates that: "[a]ppropriate training in security measures will be carried out for all staff in accordance with the OPLAN. A reminder of the security regulations will be provided regularly by the EUPOL RD Congo officer in charge of security".

<sup>113</sup> According to Article 10, letter c) of Council Decision 2011/270/CFSP of 5 May 2011 appointing the European Union Special Representative in Kosovo, *OJEU* L 119, 7 May 2011, one of the tasks assigned to the EUSR is to "ensuring that all members of his team to be deployed outside the Union, including locally contracted personnel, have received appropriate security training before or upon arriving in the mission area, based on the risk ratings assigned to the mission area".

<sup>114</sup> The Report is available at [www.consilium.europa.eu](http://www.consilium.europa.eu).

<sup>115</sup> Such as citizenship, integrity, negotiation skills, flexibility and adaptability, availability, physical and mental health, ability to communicate effectively in English, computer skills.

<sup>116</sup> Most often the required training is the "e-REST" training, while to have attended a Civilian Crisis Management Course is considered merely desirable.

<sup>117</sup> See e.g. the 2012 application form for EUPOL Afghanistan prepared by the EEAS, available at [www.consilium.europa.eu](http://www.consilium.europa.eu).

<sup>118</sup> See more on these courses at [www.entriforccm.eu](http://www.entriforccm.eu).

"duty of care", as it reinforces the ability of the personnel to deal in a professional manner with the situations they are likely to face while on mission. This has occurred especially in the areas of the EU Civil Protection Mechanism<sup>119</sup>, Election Observation Missions<sup>120</sup> and CSDP Missions (for all the relevant component such as military, police and civilians). As to CSDP Missions, which represent the most sensitive and difficult cases considering the regions in which they are usually deployed, at the meeting of 1 December 2011, the Foreign Affairs Council adopted the Conclusions on CSDP in which it took note of the 2011 comprehensive Annual Report on the Common Security and Defence Policy (CSDP) and CSDP-related training<sup>121</sup>. Both documents call for more sophisticated and coordinated training to equip CSDP missions with highly qualified and motivated personnel. In addition to this, there are several internal documents adopted within CIVCOM which highlight the key importance of training<sup>122</sup>.

Finally, the activities carried out within the European Security Defence College (ESDC)<sup>123</sup> and the ENTRi project<sup>124</sup>, supported by the European Commission, also seem relevant, as one of the aims of both ESDC and ENTRi is to standardise the content of training curricula and, in the case of ENTRi, to certify those courses which are run according to the minimum requisites and agreed content.

Influenced by the recent judgment of the EU Civil Service Tribunal in the *Missir Mamachi di Lusignano* case, various EU Institutions and internal bodies are at present promoting the idea of making standardized security and safety training a compulsory requisite for serving in EU-led crisis management operations, at least in high risk and critical risk areas. This seems perfectly coherent with their "duty of care".

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<sup>119</sup> The Civil Protection Mechanism training program was launched in 2004 aiming at reinforcing and facilitating European co-operation in civil protection assistance interventions. The current training program includes basic courses introducing the mechanism as well as specialist courses for particular aspects of missions such as international coordination, extending to high-level courses for future mission leaders. To date, approximately 1,800 experts representing almost all participating states have attended the trainings courses. The target group is wide, which opens the training program to many different categories of experts. These can range from assessment and coordination experts to specialists within a certain field of work, such as marine pollution experts, environmental experts (landslide waste management, dam stability etc.), experts in geo-hazards or logistics in emergency operations, and medical staff.

<sup>120</sup> The major program financed by the European Commission to deal with the training needs of Election Observations Missions is the "Network for Enhanced Electoral and Democratic Support" (NEEDS) under which several Training Courses have been designed and delivered. See more on the efforts carried out in this area on the NEEDS webpage at [www.needsproject.eu](http://www.needsproject.eu).

<sup>121</sup> See the Press Release, 3130th Council meeting, Foreign Affairs, Brussels, 30 November and 1 December 2011, available at [www.consilium.europa.eu](http://www.consilium.europa.eu).

<sup>122</sup> See e.g. the recent documents No. 16849/06, CivCom advice on the Report from the training workshop "Future training needs for personnel in civilian crisis management operations. Mission Specific Pre-Mission Training"; and No. 15567/2/09, Enhancing civilian crisis management pre- deployment training: "generic or pre-deployment training".

<sup>123</sup> The European Security and Defence College (ESDC) was established in 2005, with the aim of providing strategic-level education in European Security and Defence Policy, now Common Security and Defence Policy (CSDP). The personnel to be trained includes civil servants, diplomats, police officers, and military personnel from the EU Member States and EU institutions involved in CSDP. The objective of the ESDC is to provide Member States and EU Institutions with knowledgeable personnel able to work efficiently on CSDP matters. In pursuing this objective, the College makes a major contribution to a better understanding of CSDP in the overall context of CFSP and to promoting a common European security culture. So far ESDC has designed and developed about 20 different Standard Curricula devoted to issues such as Civilian Crisis Management, SSR, Peace-building, etc.

<sup>124</sup> So far about 12 courses (from the core courses to the specialization courses) are available for ENTRi Certification with great benefit to the training providers (as they know the minimum requirements), to the trainees (as they have some guarantee about the correspondence of the training with the needs in the Missions) and to the EU which can better evaluate the competence and skills of the potential applicants who have attended certified training courses. See more on the ENTRi project at [www.entriforccm.eu](http://www.entriforccm.eu).

## 7. Conclusions

Although it seems quite evident that stressful and risky situations are almost inevitable in international field operations (civil protection, CSDP, humanitarian missions, development cooperation etc.), there is increasing awareness and concern that recruiting Institutions and States deploying their personnel in these operations must improve their commitment to safeguard their personnel.

There are two legal bases for this development: the evolving concept of "duty of care" whose content and scope has become more precise thanks to the significant contribution of international tribunals, and the more general duty incumbent on State and International Organisations to adopt an active policy to protect life. The practical implications of these two rules which have been discussed in this article requires the European Union Institutions and its Member States to be extremely careful in planning international operations and in dealing with their staff and personnel sent on mission. This will place additional financial and organisational burdens on the employing Institutions.

Costs must be considered, but the primary objective is "ensuring that staff are able to deliver the services organisations require in the most challenging environments"<sup>125</sup>. Failing to obey to these rules may have negative consequences for the employing Institutions; they may go far beyond the cost of implementing reasonable measures which take due account of the specificity of each given mission and existing case-law commented on in this contribution.

Finally, it seems obvious that a special effort has to be made within the EU system to develop a new culture of security<sup>126</sup>: without this culture, there is a risk that all the measures described in the previous paragraphs will remain fruitless.

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<sup>125</sup> C. WILLIAMSON, *Personnel Management and Security*, in *Humanitarian Exchange Magazine*, June 2010, p. 4, available at [www.odihpn.org](http://www.odihpn.org).

<sup>126</sup> This aspect has been underlined in the already mentioned 2011 Report by the High Representative to the European Parliament, the Council and the Commission, in which it is clearly stated that "[t]he increased political profile of the EEAS and growing instability in many parts of the world (Libya, Syria, Ivory Coast, Yemen, Iraq, Afghanistan etc.) underline the need for the EEAS to have a highly developed security culture, in particular for staff in EU delegations" (emphasis added).

## Appendix – Good practice in the Duty of care: twelve tips

Twelve recommendations for good practice in the duty of care towards personnel deployed abroad

1. Increase awareness at all levels within the organisation
2. Involve all the key stakeholders in planning the duty of care
3. Expand policies and procedures for travel risk management
4. Audit service providers from the duty of care perspective
5. Communicate, educate and train staff and stakeholders
6. Assess risk prior to every employee trip and mission
7. Track travelling employees at all times
8. Implement an employee emergency response system
9. Implement additional management controls
10. Ensure that service providers are fully involved and coordinated
11. Provide a working environment conducive to the health and safety of the staff
12. Implement sound administrative procedures and properly functioning internal investigation mechanisms in order to address requests and complaints by the employee within a reasonable period



## Appendix – Duty of Care checklist<sup>‡</sup>

As a practical follow up to the outcome of this article, the checklist below provides an overview of the competencies organizations have put into place to successfully manage their responsibilities to care for personnel deployed abroad:

<b>Development of Policies &amp; Procedures</b>	<b>Strategic planning: Risk Assessment</b>	<b>Communicating, Educating &amp; Training their personnel</b>	<b>Maintaining contact</b>
<ul style="list-style-type: none"> <li>• Be up-to-date on national occupational health and safety requirements (the legal framework) where the individual will be assigned.</li> <li>• Through a travel security policy, take an integrated approach to manage incidents involving departments such as security, travel, legal, health, human resources, and social services.</li> <li>• Develop contingencies in case travelers and workers need to be protected, moved or evacuated from their assigned living/working environment</li> </ul>	<ul style="list-style-type: none"> <li>• Identify and assess the risks, the tools for mitigation, responsibilities for action and means for evaluating measures taken.</li> <li>• Determine the individual's medical, psychological and social fitness for travel or assignment.</li> <li>• Perform and maintain a dynamic risk assessment (that is continually reviewed) by a competent person or organization</li> </ul>	<ul style="list-style-type: none"> <li>• Raise the individual's awareness about the cultural, social and legal norms at the destination.</li> <li>• Provide training for the individual with a view towards preventing an incident as well as protection from, response to and mitigation of a potential incident.</li> <li>• The competency to assure the health, safety and security of the individual on assignment or while traveling for emergency issues as well as preventative, routine advice</li> </ul>	<ul style="list-style-type: none"> <li>• Locate and communicate with the individual during an emergency, as well as to provide up-to-date information on local health, medical, security, social and legal issues.</li> <li>• Locally manage employees or others during incidents or crisis.</li> <li>• Maintain a system to document that international assignees and travelers know and understand daily health, safety, security and legal issues as well as emergency procedures</li> </ul>

In certain locations, which should be flagged by the risk assessment, personnel deployed abroad may also need:

<ul style="list-style-type: none"> <li>• A system for the traveller to have secured (safe) copies of essential travel documents, medical information, emergency contact information, and insurance contact information.</li> </ul>	<ul style="list-style-type: none"> <li>• A fit-to-travel medical evaluation.</li> <li>• Periodic health checks and up-to-date vaccinations.</li> <li>• A continuously updated written travel plan.</li> </ul>	<ul style="list-style-type: none"> <li>• A list of transportation and hotel facilities based on safety, health and security criteria.</li> <li>• An emergency medical kit and first aid training to address general situations as well as situations the individual may face during travel and assignment.</li> </ul>	<ul style="list-style-type: none"> <li>• A 24 hour point-of-contact for relevant up-to-date information</li> </ul>
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<sup>‡‡</sup> Source: <http://internationalsosfoundation.org/wp-content/uploads/2012/03/International-SOS-Foundation.pdf>

### About the author

Andrea de GUTTRY is full professor of Public international Law at the Scuola Superiore Sant'Anna, Pisa, Italy, a public university which promotes education and research in the field of Social and Experimental Sciences. He is the founder and Director of the International training Programme for Conflict Management (ITPCM), a post-graduate program of the Scuola Superiore Sant'Anna. The ITPCM was established in 1995 with the aim to meet the training needs of personnel involved in international field operations. Professor de GUTTRY has authored several books and articles: among them one of the most recent is the book on International Disaster Response Law (together with Marco Gestri and Gabriella Venturini), published by ASSER TMC and Springer Verlag in 2012.

### About Prevent

Prevent is committed to improving working conditions in companies and organisations and to improving the employability of workers. It has expertise in wellbeing and prevention at work, and in employability and reintegration. Prevent offers products, services and solutions to optimise relations between people and work and sustainably improve the safety, health and wellbeing of the staff. The approach is based on scientifically-proven facts and practical relevance. The structure of Prevent consists of three layers:

- Prevent-Factory is a solutions provider focused on the support and accompaniment of companies and organisations that want to improve the relations between people and work.
- Prevent-Academy is a training centre with a wide range of training courses.
- Prevent-Foundation is a knowledge centre that develops and disseminates knowledge about sustainable work.

### About the International SOS Foundation

The International SOS Foundation ([www.internationalsosfoundation.org](http://www.internationalsosfoundation.org)) has the goal of improving the safety, security, health and welfare of people working abroad or on remote assignments through the study, understanding and mitigation of potential risks. The escalation of globalisation has enabled more individuals to work across borders and in unfamiliar environments; exposure to risks which can impact personal health, security and safety increases along with travel. The foundation is a registered charity and was started with a grant from International SOS. It is a fully independent, non-profit organisation

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