Chapter 13
The Duty of Care as a Corollary of
International Organizations’ Human Rights Obligations

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Abstract
The Duty of Care can be considered a corollary of positive obligations, requiring International Organizations to take appropriate steps to safeguard the lives of their staff members, as well as their health and safety. This Chapter explores the different sources of human rights obligations for International Organizations, with reference to both treaty law and customary law. It is argued then that human rights obligations bearing upon International Organizations include a positive dimension as well. Positive obligations are in fact addressed as inherent in the nature of substantial human rights rules, rather than as the outcome of the interpretation of human rights treaties by regional courts or UN Committees. Finally, after a tentative definition of the main features and content of Duty of Care, the Chapter clarifies to what extent the principle of specialty might affect International Organizations’ human rights positive obligations.

Keywords: International organizations; duty of care; human rights; positive obligations; due diligence; duty to prevent; duty to investigate; duty to punish; duty to provide reparation

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13.1 Introduction

The Duty of Care can be considered a corollary of positive obligations, requiring international organizations not only to refrain from the intentional and unlawful taking of life (or from the violation of physical and moral integrity) of their civilian personnel sent on mission, but also to take appropriate steps to safeguard their lives, as well as their health and safety.¹

A major problem with this construction is that positive obligations commonly refer to the duty of States over people under their ‘jurisdiction’. While international tribunals, and primarily the European Court of Human Rights (ECtHR) in its case law concerning the extraterritorial application of the European Convention on Human Rights (ECHR), contributed to defining the scope and meaning of ‘jurisdiction’ and to elaborating on the contents of positive obligations, more uncertainty surrounds the likelihood to attribute similar obligations to International Organizations. The present Chapter explores this possibility in detail.

It begins with a preliminary issue, namely whether - and to what extent – International Organizations are bound by international human rights law. Once it has been argued that the evolution of International Organizations, on the one hand, and the progressive ‘humanization’ of international law, on the other, explain the relevance of human rights with regard to the International Organizations’ scope of action (Sect. 2), the Chapter will explore the different sources of human rights obligations for International Organizations, with reference to both treaty law and customary law (Sect. 3). Positive obligations - as developed in the case law of regional human rights courts and in the Human Rights Committee’s jurisprudence - are then analysed and their applicability to International Organizations is explained (Sect. 4). Finally, after having provided a tentative definition of the main features and content of Duty of Care as a corollary of human rights positive obligations to protect life, health and safety (Sect. 5), the Chapter clarifies to what extent the principle of specialty might affect International Organizations’ positive human rights obligations (Sect. 6).

13.2 Humanization, institutionalisation and the relevance of International Organizations in the protection of human rights

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1 De Guttry 2012, p 276.
Some scholars voice a certain hesitation in identifying a framework of human rights binding for International Organizations stressing the ‘difficulties in thinking of human rights as owed by anything but sovereign states’.\(^2\) Indeed, it is true that the same idea of fundamental rights is traditionally tangled with the concept of State and that rights have historically described the relationship between the sovereign and the citizens.\(^3\) However, a more attentive analysis explains how human rights are currently pivotal in any Organization’s scope of action.

Since the end of World War II, the international legal order has undergone two major developments: first, a constantly growing process of permeation of international law by human rights and, second, an increasing institutionalisation of the cooperation among States.

The mainstreaming of human rights into all the aspects and dynamics of the international community is now undeniable. Not only has international law gradually become a catalyst for the protection of individuals from governments,\(^4\) fuelled by a phenomenon identified by some Scholars as ‘human-rightism’,\(^5\) but, in a more macroscopic perspective, human rights have exercised and continuously sustain a profound transformation on general international law.\(^6\) As Meron stresses, ‘humanization of public international law under the impact of human rights has shifted its focus above all from State-centered to individual-centered’.\(^7\)

On the other hand, international law has also moved from being a law of ‘co-existence’, i.e. a body of rules pursuing the main aim of bounding spheres of influence between States,\(^8\) to representing the legal foundation of an intense and growing cooperation among States. Such international cooperation has gradually assumed an institutionalised nature, with International Organizations being established for different purposes and accredited with competencies adequate to perform specific functions. Over time International Organizations – originally tasked with managing problems common to many States, working as ‘purely “vehicles” of their member states’ interests in narrowly determined areas\(^9\) - have become multifunctional entities assigned with functions and competencies affecting vital interests for the entire community of States.

As a result of the interaction of these two processes, ‘humanization’ and ‘institutionalisation’ of public international law, International Organisations are constantly gaining broader competences and increased ability to directly impact individuals and their legal position. In

\(^2\) Mégret and Hoffmann 2003, p 320.
\(^3\) Ibid.
\(^4\) Cogan 2011, p 323, quoting Higgins 1994, p 105.
\(^5\) Pronto 2007, p 754; see for an argument \textit{a contrario}, Pellet 2000.
\(^6\) Tzevelekos 2013, p 62. See also Pisillo-Mazzeschi 2008, p 199 ff.
\(^7\) Meron 2006, Introduction.
\(^8\) Klabbers 2015, p 16.
fact, not only are human rights at the top of the agenda of many International Organizations\(^\text{10}\) - entitled, as they are, to promote, encourage and sometimes even monitor the protection of fundamental rights by their member States - but also International Organizations themselves are urged to guarantee human rights in performing their functions.

There is no doubt, therefore, that International Organizations can breach human rights in their operational actions,\(^\text{11}\) as well as in their normative activity.\(^\text{12}\) Unsurprisingly, then, scholars have focused on issues of responsibility of International Organizations for violations of human rights law, sometimes denouncing a disturbing lack of accountability.\(^\text{13}\) The present Chapter, however, will focus exclusively on the sources and the nature of human rights binding International Organizations, with the intention to explore the Duty of Care as a corollary of positive obligations, requiring International Organizations to take appropriate steps to safeguard the lives, health and security of civilian personnel sent on mission.

### 13.3 Sources of human rights obligations for International Organizations

As stated by the International Court of Justice (ICJ), in the advisory opinion on the *Interpretation of the Agreement of 25 March 1951 Between the WHO and Egypt*\(^\text{14}\), International Organizations enjoy an international legal personality. Sources of law applicable to International Organizations can be classified in three categories: 1) treaty law, including constitutive instruments and human rights treaties; 2) general law, comprising customary law and general principles of law; 3) and, finally, internal acts.

#### 13.3.1 Treaty Law

\(^\text{10}\)Faix 2014, p 274.

\(^\text{11}\)As underlined by Mégret and Hoffmann 2003, p 316 ff., this is patently evident in the case of the UN international transitional civil administration in East Timor or in Kosovo.

\(^\text{12}\)Le Floch 2015, p 381, referring to the side effects over the population of UN sanctions against Iraq in the ’90s.

\(^\text{13}\)Le Floch 2015, p 383.

\(^\text{14}\)ICJ, Interpretation of the Agreement of 25 March 1951 Between the WHO and Egypt, Advisory Opinion, 20 December 1980, I.C.J. Rep. 1980, p 90, para 37: ‘international organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties’. The same principle was implied in the Court’s argument in the Reparation for injury case, where it stated that, being a subject of international law, any international organization is ‘capable of possessing international rights and duties’: ICJ, Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 11 April 1949, I.C.J. Rep. 1949, p 179.
Human rights obligations may arise either from the treaty establishing the Organization, defining its aims and regulating its functioning and main activities, or from other human rights treaties.

13.3.1.1 Constitutive instruments

International Organizations are certainly bound by obligations arising under their constituent instrument, notwithstanding the fact that they are not a party to it.\(^{15}\) However, it is not always easy to define how obligations to respect human rights can be distilled from their founding treaties, since these constitutive instruments very rarely impose in explicit terms on the Organizations themselves an obligation to respect human rights.

The Constitution of the International Criminal Police Organization (Interpol) represents an exception.\(^{16}\) Art 2 para 1 states that the action of Interpol - and in particular, the promotion of ‘the widest possible mutual assistance between all criminal police authorities’ - is carried out, not only within the limits of the law existing in the different countries, but also ‘in the spirit of the Universal Declaration of Human Rights’. The respect of human rights is thus considered a clear parameter for the activity of the Organization. While it is clear that the Declaration remains a non-binding document, the reference to its spirit as a guidance for Interpol activities, signifies the intention to bind the Organization to human rights.

Nevertheless, constitutive instruments do not usually include the respect of human rights among the principles governing the action of the International Organization, even when they insert the promotion of these fundamental rights within the aims or activities of the Organization. In the case of the United Nations (UN), for example, Art 1 para 3 of the San Francisco Charter lists the promotion of ‘respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion’ among the main aims of the Organization, while Art 55 imposes on the UN a duty to promote ‘universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion’.

However, as argued by Verdirame, human rights obligations can be always derived implicitly by constitutive instruments, once it is accepted that these documents could accommodate implied terms. In fact, ‘there is no reason in principle why only terms that confer powers on the organisations should be susceptible to implication. Obligations can be implied too’.\(^{17}\) In this

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\(^{15}\) Verdirame 2011, p 73.

\(^{16}\) On the qualification of Interpol as an International Governmental Organization, see Runavot 2015, pp 26 ff.

\(^{17}\) Verdirame 2011, p 81.
perspective, implied obligations are a mirror of implied powers.18

This conclusion finds a corroboration in the advisory opinion of the ICJ on the Effect of Awards of Compensation Made by the United Nations Administrative Tribunal. According to the Court,

it would [...] hardly be consistent with the expressed aim of the Charter to promote freedom and justice for individuals and with the constant preoccupation of the United Nations Organization to promote this aim that it should afford no judicial or arbitral remedy to its own staff for the settlement of any disputes which may arise between it and them.19

While the Court, in justifying the establishment of an Administrative Tribunal by the General Assembly, did not explicitly declare that the UN had the implied duty to provide its personnel with a remedy of dispute settlement, it did admit that failure to offer such remedy would be incompatible with the Charter.20 It thus derived from the general engagement in the field of human rights of the Organization a clear guidance for its activity.

13.3.1.2 Human Rights Treaties

Some authors consider that human rights obligations bearing upon International Organizations might derive from the pre-existing treaty-based duties of their member States.21 This idea is alternatively developed referring to the derivative or secondary nature of the international legal personality of International Organizations, or to the rules governing succession of States in respect of treaties.

It has been asserted that, since the legal personality of International Organizations is derivative (as they are established by other subjects of law), they would necessarily be bound by the obligations of the member States, at least according to a due diligence obligation, impeding them from hindering their member States from fulfilling their treaty obligations.22 While this position might seem appealing, it encounters a number of practical problems. First, it would cover only obligations existing before the transfer of powers from States to the International Organization, excluding any agreement concluded after it.23 Second, the definition of extension of the obligations bearing upon International Organizations could potentially lead to an untenable situation, with some

18 Verdirame 2011, p 75.
20 Verdirame 2011, p 71.
21 Le Floch 2015, p 389.
23 Naert 2010, p 134.
members not accepting that the Organization is bound by treaties ratified by other States parties but not by themselves.24

Other scholars consider that International Organizations are called to respect human rights treaties in the areas in which they replace States’ activity, in view of the competences attributed to them.25 An analogy with the rules of State succession with respect to treaties has been suggested to substantiate this conclusion.26 Such analogy, however, is highly problematic, since International Organizations do not entirely replace their member States ‘in the responsibility for the international relations’, as provided by Art 1 para 2 (b) of the Vienna Convention 1978 on succession of States in regard to treaties.27 More generally, this idea is not convincing: first, only rarely is there a real transfer of powers, rather than the creation of new ones28 and, even more rarely, States confer exclusive competences to International Organizations. Additionally, as explained by Faix, the transfer of powers does not necessarily imply the transfer of human rights obligations.29

It is worth noting that the main reason why attempts are made to extend to International Organizations the duties in the field of human rights protection bearing upon States is to avoid the circumvention by the States of their own treaty obligations. However, this goal is better enforced through mechanisms relying on State responsibility.30

Any International Organization, therefore, needs to explicitly adhere to human rights treaties to be bound by the obligations envisaged in them. It is true that human rights treaties are generally and traditionally open to States only. In fact, the same idea of human rights protection comes from the urgency to preserve some basic needs and interests of individuals from interferences and even breaches committed by the State in the exercise of its sovereign powers. However, the situation might change in future, since the enlargement of International Organizations’ competences, on the one hand, and their voluntary acceptance of certain human rights obligations in the fields of their

24 Naert 2010, p 134.
26 Klein 1998, p 331 ff., mainly referring to the case law of the European Court of Justice.
28 Naert 2010, p 132.
29 Faix 2014, p 283.
30 Art 61 of the draft articles on responsibility of International Organizations makes it clear, stating that any State member of an International Organization incurs international responsibility if, by taking advantage of the fact that the Organization has competence in relation to the subject-matter of one of the State’s international obligations, it circumvents that obligation by causing the Organization to commit an act that, if committed by the State, would have constituted a breach of the obligation (Draft articles on the responsibility of international organizations, with commentaries 2011, adopted by the International Law Commission at its sixty-third session, in 2011, and submitted to the General Assembly as a part of the Commission’s report covering the work of that session (A/66/10)) This rule, as the commentary well explains, derives from the case law of the ECtHR on equivalent protection (De Schutter 2010, pp 78-86). See Spagnolo, Chap. 3.
activities\textsuperscript{31} might encourage greater participation of International Organizations in human rights treaties. This would probably require some time, as most of the treaties would need to be modified to make accession by International Organizations concretely achievable.\textsuperscript{32} For the time being, the only example of an Organization party to a human rights treaty is represented by the European Union’s (EU) accession to the UN Convention on Person with Disabilities, while - as is well known - the more ambitious project of the EU accession to the ECHR has definitely failed.\textsuperscript{33}

13.3.2 General Law

Most of the human rights obligations bearing upon International Organizations have their legal foundation in general law, namely customary law and/or general principles of law.

13.3.2.1 Customary Law

Custom requires both a general practice among States and the belief that a rule of law requires it.\textsuperscript{34} One may wonder whether International Organizations are bound by any rule of customary international law, or if there is the need for a specific institutional practice and an assessed \textit{opinio juris} in respect of each customary rule.\textsuperscript{35} According to the already mentioned advisory opinion of the International Court of Justice on the \textit{WHO-Egypt Agreement}, the fact of being subjects of international law implies that International Organizations would be ‘bound by any obligations incumbent upon them under general rules of international law’.\textsuperscript{36} Therefore, neither ascertaining the specific adherence to a certain practice by each International Organization, nor determining its \textit{opinio juris} are necessary steps. This is consistent with the approach taken towards new independent States in the 1950s and 1960s.\textsuperscript{37} It would not be acceptable, and ‘extremely disruptive

\textsuperscript{31} De Schutter 2010, p 110.
\textsuperscript{32} See, for a different opinion: Poretto and Vitè 2006, pp 43-44.
\textsuperscript{33} With the Opinion no. 2/13, delivered on 18 December 2014, the Court of Justice of the European Union excluded the compatibility with EU law of the draft agreement on the accession of the European Union to the European Convention on Human Rights. While noticing that the lack of a legal basis for the EU’s accession - previously stressed in the Opinion no. 2/94 of 28 March 1996 - has been resolved by the Treaty of Lisbon, the Court insisted on the special features of the EU referring, in particular to the autonomy of the EU legal order.
\textsuperscript{35} Verdirame 2011, p 56.
\textsuperscript{36} ICJ, Interpretation of the Agreement of 25 March 1951 Between the WHO and Egypt, pp 89-90.
\textsuperscript{37} Verdirame 2011, p 71.
for the international system’, 38 to admit the presence on the international plane of subjects enjoying a legal personality, but exempt from generally accepted rules.

Worth mentioning is also the role that International Organizations play in the emergence and consolidation of customary law rules. In fact, they represent incredibly fecund fora where States can develop a ‘usus’, while the practice of International Organizations themselves might also be relevant for customary law. This is in particular evident considering the contribution provided by International Organizations in the codification of general international law or in its improvement, through the adoption of soft law documents that might guide, legitimate and reinforce States’ behaviour.

13.3.2.2 General Principles

Some scholars consider it more appropriate to refer to general principles of law as the main source of human rights obligations for International Organizations. 39 The reference would be, therefore, to the ‘general principles of law recognized by civilized nations’ mentioned under Art 38 ICJ Statute, namely principles common to the main legal traditions, enshrined in domestic legal orders and absorbed into international law. General principles had (and still play) a fundamental role in the formulation of human rights standards, as well as in their interpretation and application. 40

According to Le Floch, it is even possible to argue - at least in the field of human rights protection - a new understanding of the general principles of law and to identify them in the principles common to the various international conventions on human rights. 41 This interpretation is closer to a different notion of general principles, covering autonomous principles of international law, expressing the essence of the international legal system. In this sense, the advantage of positing general principles as sources of human rights obligations would consist in encouraging a profitable interpretation of human rights, insisting on the existing connections between various conventional systems. 42

13.3.3 Internal acts and self-regulation

38 Ibid.
39 De Schutter 2010, p 68. Amerasinghe, as well, considers that the respect of human rights is founded on general principles (Amerasinghe 2010, pp 528-529).
40 O’Boyle and Lafferty 2013, p 195.
41 Le Floch 2015, p 392.
42 Ibid.
A further possible source of human rights obligations for International Organizations is represented by internal acts as a form of self-regulation. As De Schutter notes, many International Organizations are currently developing procedures to ensure compliance with human rights standards in their specific fields of activity.43

While many documents are prescriptive in nature, at least considering the internal legal order of the Organization, not all institutional or internal acts have the explicit effect of binding the International Organization on the international level.44 The principles concerning unilateral acts adopted by States - which have been detailed by the International Court of Justice in its case law - appear certainly applicable by analogy to those internal acts binding the Organization on the international plane.

Therefore, the form in which the statement is made is not essentially relevant. As the Court underlined in its Judgment on the preliminary objections in the case concerning the Temple of Preah Vihear, international law ‘places the principal emphasis on the intentions of the parties’ and therefore ‘the law prescribes no particular form, [and] parties are free to choose what form they please provided their intention clearly results from it’.45

In fact, exactly as with unilateral acts of States, the principle of good faith explains the binding nature of internal acts:

trust and confidence are inherent in international cooperation, in particular in an age when this cooperation in many fields is becoming increasingly essential. Just as the very rule of pacta sunt servanda in the law of treaties is based on good faith, so also is the binding character of an international obligation assumed by unilateral declaration. Thus interested States may take cognizance of unilateral declarations and place confidence in them, and are entitled to require that the obligation thus created be respected.46

In other words, even if these rules appear to be internal, to the extent they make clear the intention of the International Organization to respect human rights and - as a consequence - generate legitimate expectations at the international level, they are sources of human rights obligations for the Organization.

43 De Schutter 2010, p 104, referring, on the one hand, to the operational policies integrating human rights issues developed by the World Bank and the International Monetary Fund, along with mechanisms for monitoring compliance and, on the other, to UNIMIK accession to monitoring mechanisms established within the Council of Europe.
13.4 Positive obligations and the Duty of Care

Now it has been ascertained that human rights obligations for International Organizations might derive from treaties, as well as from general law, and can also be enshrined in institutional acts having the same nature and effect as States’ unilateral declarations, it is now necessary to consider in more detail positive obligations as they have been developed in the case law of regional courts as well as by the Human Rights Committee. The aim of the present Section is to assess whether positive obligations can also bind International Organizations.

The Duty of Care can be described as a corollary of human rights positive obligations to protect life, health and safety of staff members. While the right to life is explicitly envisaged in numerous treaties,\(^47\) the protection of health and safety derives from different provisions. Along with a specific provision on the right to the enjoyment of the highest attainable standard of physical and mental health, envisaged under Art 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR),\(^48\) it derives also from the prohibition of torture and inhuman degrading treatments\(^49\) and the right to private life,\(^50\) to the extent that these provisions protect the physical and moral integrity of individuals. Additionally, relevance is to be attributed to the right to the enjoyment of just and favourable conditions of work, envisaged by Art 7 ICESCR, explicitly referring to the right to safe and healthy working conditions.

It is commonly accepted that the effective exercise of freedoms and the genuine enjoyment of rights do not depend merely on the State’s duty not to interfere, but may rather require positive measures of protection, even in the sphere of the relations between individuals. In particular, international law rules protecting life and/or physical and moral integrity imply not only that States have to refrain from intentional and unlawful deprivation of life, from committing torture, inhuman or degrading treatments, or from arbitrarily interfering in the private life of people, but also that they must take appropriate steps to safeguard the lives and the integrity of those within their jurisdiction.\(^51\) In fact, protection of human rights needs to be ‘practical and effective’.\(^52\)


\(^{49}\) ICCPR art 7; ECHR art 3; ACHR art 5; AfrCHR art 5.

\(^{50}\) ICCPR art 17; ECHR art 8; ACHR art 11.

\(^{51}\) See Macchi, Chap. 14.
As is well known, a large contribution to the definition and regulation of positive obligations comes from the case law of the ECtHR. While some provisions of the ECHR might appear *per se* as setting a positive action by the State, the legal basis of positive obligations is more properly identified in the provision contained in Art 1 ECHR. To the extent that this provision requires States to ensure the concrete and effective enjoyment of the rights and freedoms enshrined in the Convention, it enlarges its scope to include positive obligations. Positive obligations also underpin the so-called ‘horizontal effect’ of the Convention, which permits the extension of its guarantees to interpersonal relationships. Any State might be held responsible by the EctHR whenever it fails to (legally or materially) prevent or punish a violation of the ECHR committed by individuals. As such, the emergence and the development of the horizontal effect of the Convention derives from and is a consequence of the theory of positive obligations, but it is not extraneous to other instruments. Moreover, its relevance needs to be understood in view of its meaning and impact on human rights protection: as Pisillo-Mazzeschi explains, the effective enjoyment of a large number of human rights would be seriously threatened if States were not obliged to prevent and respond to abuses committed in the sphere of relations between private individuals.

While the major contribution on the development of the notion of positive obligations is laid down in the case law of the EcHHR, positive obligations might be derived from other human rights instruments, including the American Convention on Human Rights (ACHR), the African Charter on Human and Peoples Rights (AfrCHR), the International Covenant on Civil and Political Rights (ICCPR) and the ICESCR.

In particular, the Inter-American Court of Human Rights (IACtHR) has described the obligations contained in Art 1 of the ACHR – namely the duty to ‘respect’ the rights and freedoms recognised in the Convention and the duty to ‘ensure’ to all persons the free and full exercise of these rights and freedoms – as ‘the prism through which [recognizing] concrete obligations under specific human rights’. Therefore, these two duties, read in conjunction with specific rights, might generate positive obligations, whose content depends upon the circumstances and features of each case, but in general involve the duty to prevent, investigate and punish any violation of the rights and, furthermore, restore the right violated providing compensation. Additionally, the obligation

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52 van Dijk and van Hoof 1998, p 74.
53 For example, the first sentence of the first paragraph of Art 2 ECHR, stating that ‘everyone’s right to life shall be protected by law’, clearly requires a positive intervention by the State to protect the right to life.
54 Art 1 ECHR: ‘the High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention’.
57 Lavrysen 2014, p 95.
contained in Art 2 ACHR, according to which States Parties ‘undertake to adopt, [...] such legislative or other measures as may be necessary to give effect to those rights or freedom’, implies the obligation to refrain from enacting norms or practices that violate human rights, but also the positive obligation for the State to ‘adopt all measures so that the provisions of the Convention are effectively fulfilled in its domestic legal system’. 59  

Art 1 of the AfrCHR is perfectly in line with the approach of the ACHR, as it stresses the need for the States parties not only to recognise the rights, duties and freedoms enshrined in the instrument, but also ‘to undertake to adopt legislative or other measures to give effect to them’. In its general comment no. 3 on the on the right to life, guaranteed by Art 4 of the AfrCHR, the African Commission on Human and Peoples’ Rights (ACmHPR) affirmed that ‘the right to life should be interpreted broadly. The State has a positive duty to protect individuals and groups from real and immediate risks to their lives caused either by actions or inactions of third parties’. 60  

Unsurprisingly, the ACmHPR has derived positive obligations from Art 1 of the AfrCHR in a number of cases, 61 in particular, in the cases *SERAC v. Nigeria*, 62 and *Zimbabwe Human Rights NGO Forum v. Zimbabwe*. 63  

Finally, positive obligations derive also from the ICCPR and ICESCR provisions, as confirmed by the Human Rights Committee and the Committee on Economic, Social and Cultural Rights in their general comments and jurisprudence.  

In particular, the Human Rights Committee’s General Comment no. 3 on the nature of States parties obligations clarified that the obligation to respect and ensure the rights recognised in the ICCPR ‘is both negative and positive in nature’, as States parties not only have to refrain from violation of the rights recognised by the Covenant, but they are also called to ‘adopt legislative, judicial, administrative, educative and other appropriate measures in order to fulfil their legal

60 ACmHPR 2015, para 41.  
61 Mba 2009.  
62 ACmHPR, The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria, Decision 27 October 2001, Communication no 155/96, para 44: ‘internationally accepted ideas of the various obligations engendered by human rights indicate that all rights - both civil and political rights and social and economic - generate at least four levels of duties for a State that undertakes to adhere to a rights regime, namely the duty to respect, protect, promote, and fulfil these rights. These obligations universally apply to all rights and entail a combination of negative and positive duties. As a human rights instrument, the African Charter is not alien to these concepts’.  
63 ACmHPR, Zimbabwe Human Rights NGO Forum v. Zimbabwe, Decision 15 May 2006, Comm. No. 245/2002, para 143: ‘[...] human rights standards do not contain merely limitations on State’s authority or organs of State. They also impose positive obligations on States to prevent and sanction private violations of human rights. Indeed, human rights law imposes obligations on States to protect citizens or individuals under their jurisdiction from the harmful acts of other’.
obligations’. In the same document, the Committee underlined that some articles of the Covenant envisage ‘areas where there are positive obligations on States Parties to address the activities of private persons or entities’. Reference is made in particular to Art 7, stating that ‘States Parties have to take positive measures to ensure that private persons or entities do not inflict torture or cruel, inhuman or degrading treatment or punishment on others within their power’. The point is also stressed in General Comment no. 20 on the prohibition of torture and other ill-treatment.

Additionally, dealing with the right to life, enshrined in Art 6 of the ICCPR, the Human Rights Committee has clarified, in its General Comment no. 6, that: ‘the right to life has been too often narrowly interpreted. The expression “inherent right to life” cannot properly be understood in a restrictive manner, and the protection of this right requires that States adopt positive measures’. Lastly, positive obligations and the ‘horizontal effect’ of the Covenant have been recognised with reference to right to liberty and security guaranteed under Art 9 of the ICCPR and the right to privacy envisaged under Art 17 of the ICCPR.

Similarly, the Committee on Economic, Social and Cultural Rights has stressed the positive dimension of the right to health and of the right to enjoy just and favourable conditions of work.

The Human Rights Committee has also been called many times to decide on positive obligations deriving from the ICCPR, in its jurisprudence on individual communications. From its views, it clearly emerges that the right to life, the prohibition of torture, and other cruel, inhuman or degrading treatment, as well as the right to liberty and security of person require positive measures of protection ‘irrespective of whether the actual atrocity is connected to the State party’.

While the analysis of regional human rights courts’ case law, as well as the Human Rights Committee’s jurisprudence, might suggest that positive obligations are a ‘judge-made opus or structure’, it is maintained here that they are rather inherent in the nature of substantial human

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64 Human Rights Committee 1981, paras 6-7.
65 Ibid., para 8.
66 Ibid.
67 Human Rights Committee 1992, para 2: ‘it is the duty of the State party to afford everyone protection through legislative and other measures as may be necessary against the acts prohibited by Art 7, whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity’.
69 Human Rights Committee 2014.
70 Human Rights Committee 1988, para 9.
71 CESCR 2000, para 33.
72 CESCR 2016, para 61.
75 Akandji-Kombe 2007, p 6. The first two cases in which the Court developed the notion are Marckx and Airey, both adopted in 1979, where – dealing with Art 8 ECHR – the Court stated that, although the object of such provision ‘is essentially that of protecting the individual against arbitrary interference by the public
rights rules. As such, these obligations have not been conceived and designed by regional courts or the Human Rights Committee, but they have rather found a clear identification under their impetus, driven by the need to provide an effective guarantee to convention rights. Therefore, even if the trigger for their emergence within the regional human rights systems has been the existence of an explicit convention duty to assure these rights, positive obligations are not necessarily conditioned by such a treaty provision, since this positive dimension describes the content of the rights to life and to physical and moral integrity \textit{per se}. It is therefore possible to argue that, as long as the fundamental rights to life and to physical and moral integrity are customary law – and, as such, binding on International Organizations as well – they necessarily imply a positive dimension.

In line with this argument, it has also been stressed that the horizontal effects of human rights treaties, traditionally considered to derive from the judicial activism of human rights courts, should be rather considered as an application, to human rights, of principles governing State responsibility with regard to acts of individuals, widely developed in other fields of international law, such as the treatment of aliens.\footnote{Pisillo-Mazzeschi 2008, p 228: ‘[…] les actes des particuliers ne sont pas attribués à l’Etat, mais peuvent seulement représenter l’occasion extérieure pour un fait illicite différent, commis par les organes étatiques qui n’ont pas prévenu ou réprimé ces actes. En substance, l’Etat répond seulement si ses propres organes ont violé, par leur conduite d’omission, leur devoir de protection. […] [C]ette orientation doit être étendue du secteur de la protection des étrangers au secteur des droits de l’homme et elle constitue la base théorique pour justifier la théorie des effets horizontaux des droits de l’homme. Lorsque certains droits de l’homme imposent, explicitement ou implicitement, des obligations positives à effets horizontaux à la charge de l’Etat, la responsabilité de ce dernier ne naît que lorsqu’on démontre que les organes étatiques n’ont pas rempli leur devoir de protéger, par le biais de mesures de prévention ou de répression, les individus destinataires de ces obligations contre des immixtions arbitraires de la part d’autres individus privés’.}

13.5 Positive obligations and due diligence: a tentative definition of the contents of International Organizations’ Duty of Care

Exactly as with States, the scope of positive obligations bearing upon International Organizations can vary significantly, not only with reference to different rights, but also in view of ‘the diversity of situations […], the difficulties involved in policing modern societies and the choices which must be made in terms of priorities and resources’\footnote{Council of Europe/European Court of Human Rights, Research Report: Positive obligations on member States under Art10 to protect journalists and prevent impunity, December 2011, p 4.}.
This section will tentatively provide some guidelines in defining the contents of the Duty of Care of International Organizations as a corollary of positive obligations to protect the right to life, health and safety of civilian personnel sent on mission.

In line with what the IACtHR has stressed in the case Velásquez-Rodríguez v. Honduras, we assume here that International Organizations’ positive obligations to protect the life, health and safety of their personnel imply four separate dimensions. First, the duty to prevent harmful acts by individuals against personnel; second, the duty to investigate harmful acts; third, the duty to punish persons responsible for harmful acts; and fourth, the duty to provide reparation.\(^78\) Worth noting is that each of these duties includes an obligation of result (possessing the necessary legal/administrative apparatus to prevent, investigate, punish and provide reparation) and an obligation of conduct (i.e. use this apparatus with due diligence).\(^79\)

The duty to prevent certainly plays a central role, as it is a prerequisite to successfully accomplish other obligations of investigation, punishment and reparation.\(^80\) For this reason, ‘the general protection offered by the legal and administrative framework must be “integral”: it requires both the prevention of risk factors and the strengthening of institutions that could provide an effective response to human rights violations’.\(^81\)

It is therefore pivotal to underline that the duty to possess the necessary legal and administrative apparatus to prevent (which is clearly confirmed by the ECtHR\(^82\) and the ACtHR\(^83\)

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\(^78\) A similar detailed list is contained under Art. 5.2 of the Istanbul Convention on preventing and combating violence against women (opened for signature on 11 May 2011, CETS no 210, entered into force on 1 August 2014), which distinguishes between negative and positive obligations and connects positive obligations with due diligence.

\(^79\) This distinction is drawn - *mutatis mutandis* - from the work of Pisillo-Mazzeschi (1992) on the State’s duty to protect aliens and foreign States representatives from harmful acts committed by private individuals. The Author explains that this duty includes two dimensions (the duty to prevent harmful acts and the duty to punish those responsible whenever a harmful act has occurred), stressing that each of them includes an obligation of conduct and an obligation of result. In particular, the duty to prevent is divided into the obligation to possess the necessary legal and administrative apparatus ‘normally able to guarantee respect for the international norm on prevention’ (p 26), namely an obligation of result, and into the obligation to use such apparatus with due diligence, an obligation of conduct. The duty to punish also includes the duty to possess a minimum apparatus, which is not conditioned by due diligence requirement, and the duty to use it this enforcement mechanism, which depends only in part on due diligence. In fact, Pisillo-Mazzeschi additionally distinguishes between the duty to investigate, pursue and apprehend persons responsible for the harmful acts (which is subjected to due diligence) and the duty to try such persons, inflict a penalty and make sure this is properly carried out, which he considers an obligation of result (pp 28-29). See also Pisillo-Mazzeschi 2008, pp 390 ff.

\(^80\) Lavrysen 2014, p 100.


case law) is derived from human rights law as a comprehensive set of rules, since it is necessary to achieve the general purpose of the respect and protection of fundamental rights.\(^8^4\)

The fourfold structure sketched by the ACtHR in *Velásquez-Rodríguez v. Honduras*, is certainly useful to identify the different components of the positive obligations bearing upon International Organizations. However, it is obvious that none of these components (the duty to prevent, the duty to investigate, the duty to punish and the duty to provide reparation) has exactly the same content as the similar obligations bearing upon the State. This is particularly evident in the case of investigation and punishment, where the apparatus and the activity required by an International Organization is not comparable to that which is expected from a State. However, this should not be understood as preventing the Organization from having a role in investigating and/or punishing the harmful acts. This will simply imply that the Organization is expected to perform different actions from the territorial and sending States, but still in the same direction, namely with the aim of ascertaining the facts, finding those responsible and ensuring they are properly sanctioned.

This conclusion is also consistent with a principle clearly outlined in international case law, and in particular by the ECtHR in the case *Osman v. United Kingdom*.\(^8^5\) The so-called ‘Osman test’ was formulated by the Court at para. 117, when it stated that, to determine whether the British government had violated its duty to prevent violations of the right to life committed by an individual,

it must be established to its satisfaction that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.\(^8^6\)

As explained by Ebert and Sijniensky, this simple formula implies a set of criteria.\(^8^7\) A first step consists in assessing whether the State (but this is certainly applicable to International Organizations by analogy) had any preventative duties with reference to the violation of the right to life at issue. The answer might be in the affirmative, as long as there was a risk of a violation of the right to life, which could be considered ‘real’, ‘immediate’, ‘against identifiable individuals’ and that State knew or, given the circumstances of the case, was expected to know. A second step is to understand the scope of the duty to prevent. The ECtHR considers that the measures to be adopted

\(^8^5\) ECtHR, Osman v. UK.
\(^8^6\) Ibid., para 117.
\(^8^7\) Ebert and Sijniensky 2015, p 347.
by the State, first, have to remain within the scope of its powers\textsuperscript{88} and, second, need to be reasonably useful to avoid the risk of a violation of the right to life. In any case, positive obligations could not be interpreted to impose an impossible or disproportionate burden on the domestic authorities.\textsuperscript{89} The same approach was adopted by the IACtHR in the judgment on the case \textit{Pueblo Bello massacre v. Colombia}, when the Court held that the State’s ‘obligations to adopt prevention and protection measures for individuals in their relationships with each other are conditioned by the awareness of a situation of real and imminent danger for a specific individual or group of individuals and to the reasonable possibilities of preventing or avoiding that danger’.\textsuperscript{90} Again, this step is applicable by analogy to International Organizations, as the analysis on the principle of specialty in the next Section clearly confirms.

\textbf{13.6 The principle of specialty and the distinction between negative and positive obligations}

We have ascertained that International Organizations are bound by human rights obligations as far as these are also enshrined in customary law (unless the Organization accedes to a human rights treaty). We have also argued that human rights obligations concerning the right to life and to physical and moral integrity do imply an inherent positive dimension, which does not necessarily depend on a provision in a convention. A last crucial issue concerns how the peculiarities of the legal personality of International Organizations may affect an International Organization’s human rights obligations.

In fact, since any International Organization enjoys a functional legal personality, i.e. delimited by the powers it has been granted to achieve its objectives,\textsuperscript{91} it is clear that International Organizations do not possess the whole set of rights and duties recognised by international law, but only those deriving from their purposes and functions ‘as specified or implied in [their] constituent documents and developed in practice’\textsuperscript{92} (so-called principle of specialty). In other words, human rights rules bind an International Organization only if (and to the extent which) they are relevant to the Organization’s purposes and functions.\textsuperscript{93}

In this regard, one may first wonder whether the principle of specialty limits the accession of each International Organization to those treaties strictly coming within its domain. However, as explained by De Schutter, the two different issues at stake, accession to treaties, on the one hand,  

\textsuperscript{88} See the following Section for a focus on the principle of specialty.  
\textsuperscript{89} European Court of Human Rights, Osman v. UK, para 116. See Macchi, Chap. 14, Sect. 14.3.2.  
\textsuperscript{90} A\textit{CtHR}, Pueblo Bello Massacre v. Colombia, 31 January 2006, App. No. 10566, 11748.  
\textsuperscript{91} Frid 1995, p 16.  
\textsuperscript{92} ICJ, Reparation for Injuries Suffered in the Service of the United Nations, p 180.  
\textsuperscript{93} Le Floch 2015, p 393.
and attribution of competences, on the other, need to be kept separated. Indeed, an International Organization does not need to have competences in the specific domain of a human rights treaty, in order to accede to it. Rather, its competences will affect the way the Organization might accomplish the obligations contained in the treaty, as will be explained.

A similar doubt may arise in assessing which customary rules concretely bind each International Organization, in view of its legal capacities and the sphere of its competences. Since International Organizations have a ‘functional’ legal capacity, are they bound only by human rights obligations coming under their domain of functions? To answer the question, again, a distinction is needed. In particular, we need to distinguish between specific activities to be performed in the field of human rights protection and promotion, on the one hand, and the need to respect human rights standards in completing other tasks, on the other. No doubt the activity of any Organization depends on the principle of specialty (therefore they can set up activities to ensure human rights protection, only if such action fits with their purposes and functions). In achieving their mission, though, International Organizations ‘have their freedom of action limited by certain rules of international law other than their own legal systems’.

This argument helps us to properly frame the problem. In fact, the distinction between competences attributed to the Organization and constraints to its activity deriving from international law does not exhaustively solve the issue. Rather, a more accurate analysis focusing on the nature (negative or positive) of each obligation is deemed necessary to fully understand the impact of the specialty principle on human rights duties. In particular, the principle of specialty does not affect negative obligations, but it has a relevance only with regard to the positive ones. As stated by De Schutter ‘insofar as the undertaking is purely negative [...], it is irrelevant whether or not the Party has the competence to take measures which implement the given standard. It is only where the undertaking is also to adopt certain measures – to fulfil positive obligations (to act) – that the question of competences may play a role’.

Indeed, International Organizations do not exist in a legal vacuum, and, consequently, they are bound by international law rules - requiring abstaining from directly violating human rights - in pursuing their mandate, also when they have very limited (or, even, completely lack) competencies in human rights protection and promotion. At the same time, though, whenever the Organization is called by human right norms to adopt certain positive measures, it would have to respect the

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94 De Schutter 2010, p 116.
95 Le Floch 2015, p 394. According to this author, ‘with respect to human rights, all IOs have a duty of vigilance. Thus international financial institutions must ensure that their actions do not have an effect on the human rights situation in their borrowing members’ (ibid.).
96 De Schutter 2010, p 114.
principle of specialty,\(^97\) which will in particular affect obligations of conduct and due diligence, as a variable standard, required by the Organization.

This is a key point in our reconstruction, as the main aim of this Chapter is to explore the possibility of considering the Duty of Care as a corollary of positive obligations. In other words, concluding that positive obligations can bind an International Organization strictly depending on its competences would be tantamount to circumscribing the possibility of tracing the origins of the Duty of Care only in those cases in which the International Organization has been attributed specific competences in the field of human rights protection.

However, it is argued here that the principle of specialty does not affect, in the same way, the International Organizations’ activity on the international plane, on the one hand, and its relationship with staff, on the other. While the principle of specialty explains the (limited) powers and competences of each Organization within the international community, according to the common interest it is called to pursue, the relationship between the Organization and its staff does not strictly depend upon the functions attributed by the States to the Organization. Here lies one of the main differences between positive obligations bearing upon States and those bearing upon International Organizations. While there is no distinction between what States are called to (positively) do to respect the human rights of one of their organs or agents, and what they are called to do for the benefit of other individuals under their jurisdiction, on the contrary, in the case of International Organizations, the principle of specialty might limit positive obligations, but only with reference to the possible role of the Organization in guaranteeing fundamental rights to individuals other than its personnel. It is true, obviously, that some activities might not be immediately practicable even for the benefit of staff members (in particular, civilian personnel sent on mission), but this would not depend on the competences attributed by States in the founding treaty, but rather on the material instruments available to each International Organization.\(^98\)

Macchi in the following Chapter provides a detailed analysis of the relationship that brings an International Organization’s personnel within its human rights jurisdiction.\(^99\) For the purposes of this Chapter, it is sufficient to recall some of the arguments Eagleton developed in identifying the bases for a UN claim for reparation in case of injuries suffered by UN agents.\(^100\) According to this author, ‘the Charter creates a bond between itself and its agents which, is superior to, and

\(^{97}\) Ibid.
\(^{98}\) See Gasbarri, Chap. 15 and Buscemi, Chap. 16.
\(^{99}\) See Macchi, Chap. 14.
\(^{100}\) See Capone, Chap. 17, Sect. 17.3.2.
exclusive of, the bond of nationality between the agent and his own state. More precisely, ‘the United Nations exercises a control over the individual (agent) which the state of which he is a national does not have; the individual is independent of his own state so far as his work and official actions are concerned, and the usual considerations based on national character are excluded’. Such an advantaged relationship between the International Organization and its personnel is further confirmed by the law on immunities and diplomatic privileges, attesting the existence of a special duty to protect International Organizations’ agents and a corresponding right of staff protection enjoyed by the Organization itself. Eagleton derives from these premises that ‘the relationship of control and protection which the United Nations exercises over its agents furnishes a more sound basis for claims than does national character; and, likewise, a sound basis for responsibility on the part of the United Nations for acts done by its agents’. We argue here that this can be pushed further to stress that, since the capacity to impact human rights is connected to the control over individuals, considering that such control ‘simultaneously creates a potential for, and a duty to avoid, human rights abuse’, International Organizations have positive obligations to guarantee some basic human rights (life, health and security) to their staff, irrespective of their functions.

13.7 Concluding remarks

The analysis demonstrates that the Duty of Care can be correctly considered a corollary of positive obligations, requiring International Organizations to take appropriate steps to safeguard the life of their staff members, as well as their health and safety. While positive obligations commonly refer to the duty of States over people under their ‘jurisdiction’, International Organizations are also bound by customary law human rights obligations requiring concrete measures of protection. Actually, human rights obligations concerning the right to life and to physical and moral integrity imply an inherent positive dimension, which does not depend on a convention provision.

The principle of specialty, which moulds the legal personality of International Organizations, does not undermine this reconstruction, as it does not affect the positive human rights obligations of the Organization towards its personnel: in fact, the relationship between the

101 In particular, the author refers to Art 100 of the UN Charter. Such provision ‘not only requires the agent to reject instructions from his state and to accept only those from the United Nations, but it also requires States Members to exercise no control over their nationals in their work as officials of the United Nations’: Eagleton 1950, p 356.
102 Eagleton 1950, p 357.
103 See, mutatis mutandis, Eagleton 1950, p 357.
104 Eagleton 1950, p 358.
105 Mégret and Hoffmann 2003, p 323.
Organization and its staff does not strictly depend upon the functions attributed by the States to the Organization.

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