

ICRC Duty of Care: elements of definition

Definition

“*Duty of care*” (DoC) is a legal concept that comes from common law and can be defined as a legal obligation requiring adherence to a standard of reasonable care while performing any acts that could foreseeably harm others. Another definition of DoC would be a legal obligation to act towards others with prudence and vigilance in order to prevent any risk of foreseeable damage.

The (legal) consequence of a breach of such a duty is a legal liability imposed upon the author (of the breach) to compensate the victim for any losses they incur.

DoC entails an obligation of means (*obligation de moyens*) as opposed to an obligation of result (*obligation de résultat*). This means that the author must take all appropriate measures and behave in an appropriate way in order to avoid causing harm to third parties. This being said, the fact that harm *is* done does not necessarily mean that the duty of care was breached (or, in other words that the author was negligent), as certain events are beyond the control of the author (because they were unforeseeable or unavoidable despite proper care being taken).

The ICRC’s DoC obligations towards the defined population hence depend on the nature of the relationship between the ICRC and the concerned population (employees, accompanying dependents, Movement partners, external contractual partners) and the relevant (legal and contractual) provisions applicable to such relationship.

Content

The actual measure, scope or content of the “care” that is required in each situation depends primarily on two factors: (i) the relationship between the parties and (ii) the applicable law.

(i) *Relationship between the parties*

In a nutshell, if the parties are within a certain (legal or contractual) relationship, the care that is required from one party towards the other will be defined by the *specific* (legal or contractual) criteria applicable to such relationship. On the other hand, if harm is done to a victim by an author outside any pre-existing relationship between the parties, the care will be defined by *general* principles applicable to any person placed in the same circumstances. While certain relationships are precisely regulated by law (like employment but also, for example, family relationships), which limits the freedom of the parties with respect to DoC obligations, other relationships offer a wider discretion to the parties to define the applicable DoC obligations.

Based on the above, Swiss law distinguishes between two types of civil liability: (a) contractual liability (*responsabilité contractuelle*) and (b) liability based on tort (*responsabilité délictuelle*).

- (a) Contractual liability arises when the author causes harm to the victim through the faulty violation of a pre-existing obligation, usually provided in a contract. The contract is generally concluded between the author and the victim but it can also be concluded between the author and a third party and contain obligations towards the victim (e.g. an agreement between the ICRC and a NS containing obligations to protect the employees of the NS, who are formally not party to the agreement). In this context, the fault is defined as the breach of the duty of care that is expected from the author on the basis of the contract.

If a contract has been concluded, the measure of the care that is expected from the parties will be (implicitly or explicitly) defined by the nature and particularities of the relationship between the parties and the interpretation of the rights and obligations contained in the contract; the author’s liability results hence from the breach by the author of a relative obligation towards his/her counterparty. In this context, expectations in terms of duty of care are usually higher when a service is offered in a professional quality (i.e. by an individual or legal entity whose profession is to offer such service).

- (b) Tort liability arises when the author causes harm to a third party through the faulty commission of an unlawful act. Insofar as bodily injury or death (which is the most relevant harm in the context of the ICRC’s activities) is concerned, the harm is always considered unlawful, unless it is justified by the consent of the victim. In order to be considered liable the author must have committed a fault, which can be defined as a breach of the duty of care that is expected from a reasonable person in the same circumstances. Such breach can be intentional or due to negligence.

In the absence of contract, the extent of the duty of care that is expected will result from general principles applicable to anyone placed in the same circumstances; the author’s liability results hence from the breach of a general obligation towards the victim. As an example, a criminal offence (entailing the criminal liability of its author) is always constitutive of a tort, as criminal/penal rules apply to everyone towards everyone, regardless of the existence of a contract between the author and the victim.

It should be noted that the same act can be constitutive of simultaneously tort and contractual liability. Under Swiss law, in such a case, the victim has the choice to claim damages on the basis of either liability.

(ii) *Applicable law*

The content or scope of DoC, the conditions of liability, the possibilities to limit it and the modalities of its application are always defined by the (usually national) applicable law, which in turn may be determined by (i) the agreement between the parties to a contract or, (ii) in the absence of contract, by several factors (such as the nationality or domicile of the victim, the place where the incident occurred, the seat of the employer or author), which are set by the private international law of the place where the claim is made, as the case may be.

In international contexts where several national laws could be applicable, it is advisable to include in the agreements between the ICRC and its partners a clause on governing law, which should preferably be Swiss law. This being said, despite the definition of applicable law included in the agreement, one cannot exclude that a different law be applied to a specific case, for example if the case constitutes a criminal offence, in which case it is likely that the law of the place where the offence occurred will be applicable, regardless of what is provided in the agreement.

When assessing the ICRC's DoC obligations towards different types of population, the starting point should be Swiss law and principles, bearing however in mind that foreign rules and standards can apply, which could render necessary the consultation of local lawyers in certain circumstances.

The employer's DoC under Swiss law in particular

Certain types of (legal or contractual) relationships are precisely regulated by applicable law. This is typically the case of the *employment* relationship/contract, which concerns the largest part of the concerned population.

The employer's DoC under Swiss law is defined in Article 328 of the Swiss Code of Obligations as follows:

"1. In their work relationship the employer shall protect and respect the person of the worker; he shall show due consideration for his health and shall ensure respect for morality. In particular, he shall see to it that the workers are not sexually harassed and that, if they are, they are not put at a disadvantage as a result.

2. To protect a worker's life, health and personal wellbeing he shall adopt the measures dictated by experience, applicable measures corresponding to the state of the art and adapted to the conditions of the holding or household, insofar as may be fairly required of him having regard to the work relationship and to the nature of the work."

Article 328 CO imposes no obligation as to result: the employer's priority must therefore be to meet their *obligation of diligence* (a synonym of DoC, underlining an obligation to take all necessary measures) in order to avoid being *legally liable* for the damage caused.

Protection of the person within the meaning of Article 328 CO encompasses mainly the following aspects:

- The protection of overall health, both physical and mental, including a duty of prevention in relation to the work environment;
- The safeguarding of personal and professional honour;
- An employer's duty of aid and assistance, for example in the event of interpersonal disputes within the enterprise;
- A ban on psychological and sexual harassment;
- The protection of privacy;
- Equal treatment.

Article 328 CO thus has a very wide scope, going beyond the duty of care as it is understood in other legal systems. The extent of the protection effectively provided by Article 328 CO must be examined on a case-by-case basis, however, having regard especially to the work environment and the risks run, together with the worker's experience and knowledge.