CHAPTER 27

Positive Obligations under Human Rights Law to Protect against CBRN Risks

Silvia Venier

1 Introduction

In a recent essay on the human rights framework for emergency situations (HRFE), Nickel suggests that there are many grounds for dissatisfaction, including that the rights are undifferentiated (*ie* not targeted to different hazards), mostly negative (*ie* focusing on negative obligations) and rather simplistic (*ie* suggesting that the main danger is overreaction while unpreparedness and inadequate response are never addressed).[1] The traditional way of looking at the interplay between human rights law (HRL) and emergency situations is, indeed, to assess limitations and derogations, *ie* to focus on negative obligations (NO) as duties to refrain from acting in a way that impacts on human rights in a disproportionate or unnecessary manner.[2] However, the State has the responsibility not only to refrain from violating rights when implementing emergency management measures but, more generally, to provide what is needed to protect or secure rights. In other words, under HRL, NO are complemented by positive obligations (PO), as duties to take active steps to protect against violations committed by third parties or deriving from a dangerous situation. As recognised in previous chapters in this volume, HRL is, indeed, one of the most important sources of the obligations to prevent, prepare for, respond to and recover from emergency situations. By clarifying States' duties with respect to the persons under their jurisdiction, PO under HRL complement horizontal obligations enshrined in other relevant areas of international law. The added value of looking at PO is that HRL is endowed with stronger enforcement mechanisms, and this is particularly the case for regional HR courts.

It is now acknowledged that any type of right demands a mix of negative and positive duties for its complete realisation, but the positive dimension took some time to develop. It was first proposed by Shue in 1980, expanded by

1 JW Nickel, 'Two models of normative frameworks for Human Rights during Emergencies', in EJ Criddle (ed.) *Human Rights in Emergencies* (CUP 2016).

2 See ch 28 by Sommario.

Eide in the late 1980s, and then extensively relied upon by the Committee on Economic, Social and Cultural Rights (CESCR), which developed a tripartite typology of obligations (*ie* to respect, protect and fulfil) under the International Covenant on Economic, Social and Cultural Rights (ICESCR).[3] While the positive dimension is explicitly recognised under ICESCR Article 2(1),[4] PO related to civil and political rights are usually seen as implicit in the wording of those provisions requiring States Parties to 'ensure' or to 'secure' human rights.[5] Key challenges in the development of PO include the arbitrariness of the negative/positive distinction or of framing a violation as resulting from an act or an omission; the potentially open-ended scope of PO; the difficulties in adjudicating over resource-demanding obligations; and the potential impact on the separation of powers.[6] As noted by Fredman, 'there is still much to be done to develop a full understanding of the implications of positive duties triggered by human rights, both from a theoretical and practical legal perspective'.[7] An important contribution to this debate was offered by Pisillo Mazzeschi with the categorisation of three types of PO under HRL (obligations of immediate result, of conduct or due diligence, and of progressive realisation, ranging from the most definite and justiciable to the more vague that imply less strict responsibilities) that allow States to understand what is required and according to which timescale.[8] The categorisation is subject to changes over time, as our understanding of the role of the State in relation to HR protection evolves.

3 H Shue, *Basic Rights* (Princeton University Press 1980); UN Special Rapporteur for the Right to Food, 'The right to adequate food as a human right: final report submitted by Asbjørn Eide' (1987) UN Doc E/CN.4/Sub.2/1987/23; International Covenant on Economic, Social and Cultural Rights (1966).

4 Pursuant to ICESCR art 2(1), 'Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures'.

5 See ICCPR art 2(1); European Convention on Human Rights (1951) art 1; American Convention on Human Rights (1969) art 1(1).

6 On the challenges to develop PO, see S Besson, 'Les obligations positives de protection des droits fondamentaux – Un essai en dogmatique comparative' (2003) 1(49) *Revue de droit Suisse* (on the legal basis for PO); D Xenos, *The Positive Obligations of the State under the European Convention of Human Rights* (Routledge 2012) (on PO open-ended scope); L Lavrysen, *Human Rights in a Positive State. Rethinking the Relationship between Positive and Negative Obligations under the European Convention on Human Rights* (Intersentia 2018) (on the negative/positive distinction).

7 S Fredman, *Human Rights Transformed* (OUP 2008) 3.

8 R Pisillo Mazzeschi, 'Responsabilité de l'état pour violation des obligations positives relatives aux droits de l'homme' (2008) 333 *Collected Courses of the Hague Academy of International Law*.

PO applicable to emergency management are currently being identified by human rights' supervising authorities at the universal and regional levels but have not attracted much attention from the academic community. Their exact scope and content and their applicability to specific types of emergency situations are not yet completely clear. More attention to PO is thus required in order to realise the full potential of HRL in relation to emergency situations, also in consideration of the fact that treaties and international instruments directly applicable to CBRN risks are now making explicit reference to HR protection, but this is usually understood only in terms of NO. References to HRL are enshrined in the Sendai Framework on Disaster Risk Reduction (DRR)[9] and in the Draft Articles on the Protection of Persons in the Event of Disasters adopted by the International Law Commission (ILC) in 2016;[10] in the Paris Agreement on Climate Change (and this is also relevant as climate change adaptation implies adapting to disasters resulting from extreme weather events);[11] in the Treaty on the Prohibition of Nuclear Weapons (TPNW);[12] and in the revised International Health Regulations (IHR).[13]

This contribution investigates the role of PO under HRL to enhance protection in relation to emergency situations, including those of CBRN origin. It first looks at the provisions under HRL that enshrine relevant PO and at the practice of UN human rights treaty monitoring bodies and Charter-based mechanisms (2) and at the identification of relevant PO within regional human rights regimes (3). It then classifies PO according to the phase of the emergency management cycle (prevention, preparedness, response and recovery) and the type of obligation (of immediate result, due diligence and progressive realisation), and it finally offers some conclusive remarks on the role of PO under HRL in CBRN protection.

9 Differently from the previously adopted DRR frameworks, an explicit reference to the requirement for DRR activities to be carried out 'while promoting and protecting all human rights' is included among the Sendai Framework's guiding principles. Sendai Framework for Disaster Risk Reduction 2015–2030 (2015) UN Doc A/CONF.224/L.2, para 19(c).

10 ILC Draft Articles 5 and 6.

11 On the linkages between climate change adaptation and disaster risk reduction, see G Forino, J von Meding, G Brewer, 'A Conceptual Governance Framework for Climate Change Adaptation and Disaster Risk Reduction Integration' (2015) 6 Intl J Disaster Risk Science 372. See also D Cubie, 'Promoting Dignity for all: Human Rights Approaches in the Post-2015 Climate Change, Disaster Risk Reduction and Sustainable Development Frameworks' (2014) 8(36) Human Rights and International Legal Discourse.

12 Treaty on the Prohibition of Nuclear Weapons (2017).

13 B Toebes, 'Human rights and public health: towards a balanced relationship' (2015) 19(4) The International Journal of Human Rights 488.

2 PO Relevant to Emergency Situations Identified within the UN System

Back in 1982, the Human Rights Committee (HRCtee) asserted that a State has to take positive action to protect the right to life, including measures 'to reduce malnutrition and epidemics'.[14] Similarly, the CESCR recently indicated that 'core obligations' under the right to health include 'the creation of a system of urgent medical care in cases of accidents, epidemics and similar health hazards, and the provision of disaster relief and humanitarian assistance in emergency situations'.[15] The General Comment (GC) on the right to life adopted in 2019 by the HRCtee confirmed that PO under that right include to 'develop, when necessary, contingency plans and disaster management plans designed to increase preparedness and address natural and manmade disasters that may adversely affect enjoyment of the right to life, such as hurricanes, tsunamis, earthquakes, radioactive accidents and massive cyberattacks resulting in disruption of essential services.'[16] Among the most serious threats to the right to life, the GC identifies risks of CBRN origin, including CBRN weapons and environmental degradation.[17]

UN human rights Treaty Monitoring bodies are paying increasing attention to the links between HRL and emergency situations and are proposing recommendations to States. Recurring DRR themes in their Concluding Observations refer to taking into account the views and needs of the most vulnerable groups (*ie* persons with disabilities, ethnic minorities, women and children, the elderly, who are likely to be disproportionately affected by disasters); collecting data on disaster losses that are disaggregated by factors of vulnerability; and training emergency service personnel to meet the needs of these groups.[18] The analysis of this practice reveals that a set of HRL recommendations are

14 HRCtee, 'General Comment No. 6, The right to life (Article 6)' (1982) para 6.

15 CESCR, 'General Comment 14, The Right to the Highest Attainable Standard of Health' (2000) UN Doc E/C.12/2000/4, para 12.

16 Ibid para 26.

17 Substantial and procedural obligations related to the right to a healthy environment have been recognised by the Independent Expert on the enjoyment of a safe, clean, healthy and sustainable environment and by the Special Rapporteur on toxic waste. See HRC, 'Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment' (2013) A/HRC/25/53; HRC, 'Report of the Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes' (2017) UN Doc A/HRC/3641.

18 E Sommario and S Venier, 'Human Rights Law and Disaster Risk Reduction' (2018) 49 QIL Zoom-in.

being identified that correspond to some of the priorities put forward by the Sendai Framework.[19]

The most detailed document on DRR measures required under HRL is the General Recommendation no. 37, adopted in 2018 by the Committee on the Elimination of Discrimination against Women (CEDAW),[20] which identifies three different but mutually reinforcing areas for action: (i) the general principles of the Convention applicable to disaster risk and climate change; (ii) specific measures to address disaster risk reduction and climate change; and (iii) specific areas of concern. Key principles applicable to any DRR initiative (i) refer to equality and non-discrimination, participation and empowerment, accountability and access to justice. As far as (ii) is concerned, the document provides recommendations on data collection and information sharing, policy coherence, extraterritorial obligations and international cooperation, resource allocation, capacity development and access to technology. Finally, the last section (iii) discusses the implementation of specific rights, such as to live free from gender-based violence against women and girls, to education and information, to work and social protection, to health, to an adequate standard of living and freedom of movement.

Recent developments within the Convention on the Rights of Persons with Disabilities have to be mentioned, since Article 11 under this treaty explicitly (and uniquely) establishes the obligation to 'take [...] all necessary measures to ensure the protection and safety of persons with disabilities in situations of risk, including situations of armed conflict, humanitarian emergencies and the occurrence of natural disasters'. In addition to the recommendations regularly offered to States by the Committee on the Rights of Persons with Disabilities

19 The need for the continuing implementation of the Sendai Framework and its references to HR was affirmed by the resolution on human rights and climate change adopted by the UN Human Rights Council (HRC) in 2017, which encouraged the UN HR monitoring bodies 'to provide technical assistance to States, upon their request, to help to better promote and protect human rights when taking action to address the adverse impact of climate change'. The resolution called upon States to enhance international cooperation and assistance for adaptation measures to help both developing countries and persons in vulnerable situations 'including migrants and persons displaced across international borders in the context of the adverse impact of climate change'. See UN HRC, Res 35/20 'Human Rights and Climate Change' (2017) UN Doc A/HRC/35/L.32 paras 5 and 6.

20 UN CEDAW, 'General Recommendation No. 37 on Gender-Related Dimensions of Disaster Risk Reduction in the context of climate change' (2018) CEDAW/C/GC/37. It is interesting to note that the Recommendation adopts a very broad definition of disaster situations and explicitly mentions 'environmental, technological and biological hazards and risks [...] as well as any other chemical, nuclear and biological hazards and risks [...] testing and use of all types of weapons by State and non-State actors' (para 13).

(CRPD),[21] a recent report by the Special Rapporteur on the rights of persons with disabilities recalled the importance of international cooperation to support the implementation of rights and provided guidance to States on how to ensure that international cooperation is inclusive of and accessible to persons with disabilities.[22] The year 2019 was also important as the Security Council adopted a landmark resolution on the situation of persons with disabilities in armed conflicts and humanitarian crises, which emphasised the need to ensure both access to emergency assistance and participation in recovery and reconciliation efforts.[23]

With regards to response and recovery, the obligation to ensure that emergency response efforts are carried out in a non-discriminatory manner was pointed out by the HRCtee while commenting on the United States' response to Hurricane Katrina[24] and on the denial of assistance to undocumented migrants in Thailand during the 2004 Indian Ocean Tsunami.[25] UN human rights monitoring bodies have stressed the need to ensure genuine consultation and participation of victims of disasters in the design and implementation of all decisions affecting them and to guarantee that the rights of the most marginalised groups are fully taken into account in reconstruction plans, with particular attention to access to housing, education and healthcare.[26] Of note is also the research-based report presented in 2015 by the HRCtee on best practices and main challenges in the promotion and protection of HR in post-disaster and post-conflict situations.[27]

---

21 For an overview, see Sommario and Venier (n 16).

22 Special Rapporteur on the rights of persons with disabilities, 'Right of persons with disability' (2020) UN Doc A/75/186. The report notes that international cooperation 'includes a wide range of activities between States, such as development assistance, humanitarian aid, economic and trade cooperation, military aid, counter-terrorism, peacebuilding assistance and cultural exchanges' (para 18).

23 SC Resolution 2475 (2019). The same year, the Inter-Agency Standing Committee adopted its first set of guidelines on the inclusion of persons with disabilities in humanitarian action, see Inter-Agency Standing Committee, *Guidelines: Inclusion of Persons with Disabilities in Humanitarian Action*.

24 HRCtee 'Concluding Observations of the Human Rights Committee on the United States of America' (2006) UN Doc CCPR/C/USA/CO/3/Rev.1, para 26.

25 HRCtee, 'Concluding Observations Thailand' (2005) UN Doc CCPR/CO/84/THA, para 23.

26 See eg HRCtee, UN Doc. CCPR/C/USA/CO/3/ Rev.1 (n 861) para 26; CERD, 'Concluding observations of the Committee on the Elimination of Racial Discrimination on the United States of America' (2008) UN Doc CERD/C/USA/CO/6 para 28; CESCR, 'Concluding Observations Japan' (2001) UN Doc E/C.12/1/Add.67, para 27.

27 HRCtee, 'Final research-based report of the Human Rights Council Advisory Committee on best practices and main challenges in the promotion and protection of human rights in post-disaster and post-conflict situations' (2015) UN Doc A/HRC/28/76.

Human rights monitoring bodies and Special Rapporteurs have looked at CBRN emergencies more specifically. Looking at the obligations to mitigate the risks posed by CBRN weapons, only very recently the HRCtee clarified the incompatibility of 'the threat or use of weapons of mass destruction, in particular nuclear weapons' with the right to life and related obligations.[28] As far as nuclear weapons (NW) are concerned, it has been noted that '[t]he existence of international human rights mechanisms means that the adverse effects of these weapons are directly justiciable'.[29] This would also be relevant in respect to PO to protect the right to life against the likely negative impacts of nuclear testing and the risks inherent in the mere possession of NW. The practice of the HRCtee on NW, however, has been rather controversial especially when the Committee was confronted with individual complaints.[30] Recent developments in terms of chemical weapons (CW) include instead the establishment of the Independent International Commission of Inquiry on the Syrian Arab Republic by the HRC, which has being reporting on CW use against civilians since the first attack occurred in the Ghouta district in 2013 and has been complementing the work carried out by the UN-OPCW Joint Investigative Mechanism (JIM) since 2015.[31] The Commission was tasked with investigating and recording all violations of HRL and allegations of crimes against humanity and war crimes and with identifying, where possible, those responsible for these violations, but it has never addressed PO enshrined under HRL to protect against the development and use of CW.

Turning our attention to industrial accidents, while commenting on the response to the Fukushima disaster, the CESCR raised the concern that 'the specific needs of disadvantaged and vulnerable groups, such as older persons, persons with disabilities, and women and children, were not sufficiently met during the evacuation and in the rehabilitation and reconstruction efforts' and requested Japan to provide comprehensive data disaggregated by factors of vulnerability, as well as information on how victims' right to justice has

28 HRCTee, 'General comment no. 36, Article 6 (Right to Life)' (3 September 2019) CCPR/C/GC/35 para 66. This obligation also covers the prohibition of the use of chemical agents in individual poisoning cases, as occurred in the Skrypal and Navalny cases.

29 L Doswald-Beck, 'Human Rights Law and Nuclear Weapons' in Nystuen G, Casey-Maslen S and Golden Bersagel A (eds), *Nuclear Weapons under International Law* (CUP 2014).

30 T Wright, 'Do Nuclear Weapons Violate the Right to Life under International Law?' (2008) 3 *Australian Journal of Peace Studies*.

31 Independent International Commission of Inquiry on the Syrian Arab Republic, 'Human rights abuses and international humanitarian law violations in the Syrian Arab Republic' (2017) UN Doc A/HRC/34/CRP.3. See ch 23 by Poli.

been guaranteed.[32] The Special Rapporteur on the right to health identified several aspects in which the action of the Japanese government could have been (or could be) improved, which may be understood in terms of PO as they point out some recommendations on steps that have to be taken to ensure respect of the right to health. The recommendations referred to the nuclear emergency response system; the scope and extent of the basic and detailed health management surveys; the dose limits of radiation and relevant decisions on evacuations and decontamination; access to accurate information on radiation and its health effects; transparency and accountability of the nuclear industry and regulatory authority; and participation of affected communities and vulnerable groups in decision-making processes (including those related to recovery).[33] More recently, UN human rights experts have called on the Japanese government 'to delay any decision on the ocean-dumping of nuclear waste water from the reactors at Fukushima Daiichi until after the COVID-19 crisis has passed and proper international consultations can be held'.[34]

Finally, the Office of the High Commissioner for Human Rights (OHCHR), while commenting on the responses to the Ebola outbreak in 2014, called for the adoption of a human rights-based approach (HRBA) 'to analyse and revise the actions taken by State authorities to contain and combat the Ebola outbreak, thus considering the individual as a rights holder and correlate her/his rights with the State's obligation to respect, fulfil and protect life, as embodied in international human rights conventions'.[35] PO are identified as referring to the duties to provide adequate healthcare, food and education; to ensure adequate working conditions for health workers; and to ensure that information is provided in an accurate and timely manner, targeted to the needs of the local audience, accessible from a wide variety of sources, and disseminated with the support of the local population and the press.

The COVID-19 pandemic is offering the opportunity to clarify requirements under HRL related to a public health emergency. UN human rights actors have provided guidance notes, detailed advice and statements on how to ensure a

32 CESCR, 'Concluding Observations on the third periodic report of Japan' (2013) UN Doc E/C.12/JPN/CO/3 para 24.

33 HRC, Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. Mission to Japan' (2013) UN Doc A/HRC/23/41/Add.

34 OHCHR, 'Fukushima: Japan must not ignore human rights obligations on nuclear waste disposal' (2021) <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25940&LangID=E>.

35 OHCHR West Africa Regional Office, 'A human rights perspective into the Ebola outbreak' (OHCHR 2014) 3.

HRBA to the global health crisis, and respect of PO in preparedness, response and recovery. The OHCHR has made available a compilation of these guidance documents[36] and has issued a Guidance on COVID-19 that puts emphasis on the need to adopt specific measures to protect the most vulnerable, to share relevant information on the emergency response and to ensure participation of all persons in the decision-making that affects their lives.[37] The OHCHR also prepared a 'toolkit on treaty law perspectives and jurisprudence in the context of COVID-19' that offers an operational contribution to strengthen the HRBA to both UN and States' responses to the COVID-19 pandemic.[38]

To sum up, UN human rights supervising authorities are dealing with PO under HRL applicable to emergency management and are starting to take into consideration the human rights implications of specific emergency situations. Recommendations are being proposed to States on how to implement PO in these contexts in Concluding Observations, General Comments, and Reports. The recommendations identified by UN human rights monitoring mechanisms have, however, some limitations. First, they specifically cover DRR activities, while other phases of the emergency management cycle do not receive the same attention. To date, they have not heard any individual complaints on disaster-related matters, which would help to further crystallise and apply these requirements to real-life situations. Such complaints would also help to focus more attention on analysing to what extent States are actually implementing, for instance through legal and policy instruments, international recommendations offered. Finally, as noted by Cubie and Hesselman, this effort remains ad hoc and there might be the 'need for a coordinated international approach to recognise and enumerate the rights-holders and duty-bearers in disaster settings, and to provide practical support and guidance to States and humanitarian actors on how best to ensure all human rights are respected in the complex context of disaster preparation and response'.[39]

36 OHCHR, 'Compilation of statements by human rights treaty bodies in the context of COVID-19' (September 2020).

37 See <https://www.ohchr.org/EN/NewsEvents/Pages/COVID19Guidance.aspx> (last accessed January 2020).

38 OHCHR, 'Internal HRTB toolkit of treaty law perspectives and jurisprudence in the context of COVID-19' (May 2020).

39 D Cubie and M Hesselman, 'Accountability for the Human Rights Implications of Natural Disasters: A Proposal for Systemic International Oversight' (2015) 33(1) Netherlands Quarterly of Human Rights.

3 PO Identified within Regional Human Rights Regimes

Regional human rights instruments include provisions on the wide variety of rights that have to be protected against emergency situations and some PO to act in a certain way have been identified within these regional regimes.[40] In Africa, the Kampala Convention on the Protection and Assistance of Internally Displaced Persons includes provisions on early warning systems, the establishment and implementation of DRR strategies and disaster preparedness. The African Charter on Human and Peoples' Rights has been made relevant to disasters in the context of its Reporting Guidelines[41] and under Article 24 which establishes that '[a]ll peoples shall have the right to a general satisfactory environment favourable to their development'. The African Commission on Human and Peoples' Rights (ACHPR) underscored the different obligations stemming from this provision, including the obligation to take reasonable measures to prevent pollution and ecological degradation and to monitor projects that could affect the environment,[42] and to provide access to information on activities that are hazardous to health and the environment, in the understanding that this gives communities exposed to a specific risk the opportunity to take part in the decision-making that affects them.[43]

A number of disaster settings have been immediate cause for discussion within the Inter-American human rights system, such as in the US, Venezuela and Haiti.[44] Within the Inter-American Court of Human Rights (IACtHR) system, recent decades have seen the emergence of a growing body of substantive rules related to environmental protection, including rules on preventing and investigating environmental harm. In 2017, the landmark Advisory Opinion OC-23/17 and the *Lhaka Honhat* case represented turning points in the Court's jurisprudence as they establish the autonomous right to a healthy environment.

40 For an overview, see M Hesselman, 'Regional human rights regimes and humanitarian obligations of states in the event of disaster', in Zwitter et al (eds) *Humanitarian Action: Global, Regional and Local Legal Responses* (CUP 2014).

41 See ibid 213. African Union Convention for the Protection and Assistance of Internally Displaced Persons (2009); African Charter on the Rights and Welfare of the Child (1986); African Charter on Human and Peoples' Rights (1981).

42 ACHPR, Case of the Social and Economic Rights Center (SERAC) and Center for Economic and Social Rights (CESR) v. Nigeria, Communication 155/96 (2001), paras 52 and 53.

43 ACHPR, Social and Economic Rights Center (SERAC) and Center for Economic and Social Rights (CESR) v. Nigeria. Communication 155/96. Decision of October 27, 2001, para 53.

44 OAS, Inter-American Commission on Human Rights, Hearing on 'Protection of Human Rights in Natural Disasters' (3 March 2006); OAS, Inter-American Commission on Human Rights, 'Human Rights Situation during the Natural Disaster in Venezuela' (2000); OAS, 'Economic and Social Rights in Haiti following the Earthquake', 138th Period of Sessions (2010).

In the Advisory Opinion, the Court not only affirmed the existence of the right to a healthy environment but also provided a systematic account of States' obligations in environmental protection, by incorporating environmental law principles and rules within HRL.[45] States have not only a primary obligation of prevention (to adopt adequate legislative and administrative frameworks and monitor their implementation; to require and approve environmental impact assessments; to prepare a contingency plan; and to mitigate impacts if environmental damage occurs), but also duties to adhere to the precautionary principle and to cooperate in environmental protection. Procedural obligations include the duty to provide access to information, public participation in decision making, and access to justice.

Turning our attention to the European system, the European Court of Human Rights (ECtHR) is the authority that has contributed the most to clarifying the scope and content of obligations to take active steps to protect in emergency situations. Since the notion of PO under the European Convention on Human Rights (ECHR) appeared for the first time in the *Belgian linguistic case* in 1968, the ECtHR has broadened this category of obligations and expanded its rulings against States, to the point where it is recognised that 'all the standard setting provisions of the Convention have now a dual aspect in terms of their requirements, one negative and one positive'.[46] The imposition of PO is inextricably linked with the effective application of the Convention, which 'is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective',[47] and a constant recalibration of the scope and content of PO may be required in light of the Court's interpretation of the Convention as a 'living instrument'.[48] Interestingly, the ECtHR has explicitly refused to propose a clear theoretical basis for the development of PO under the ECHR,[49] while always emphasising the need not to impose an impossible or disproportionate burden upon public authorities.

The ECtHR jurisprudence relevant to the present discussion includes cases related to individual exposure to dangerous activities conducted by the State;[50] public concern over exposure to an actual risk; loss of life due to disasters

45 IACtHR, 'The Environment and Human Rights Advisory Opinion' (15 November 2017).

46 JF Akandji-Kombe, 'Positive obligations under the European Convention on Human Rights. A guide to the implementation of the European Convention on Human Rights' (Council of Europe 2007).

47 ECtHR, *Airey v Ireland* (1979–80) 2 EHRR 305 para 24.

48 *Tyrer v. United Kingdom* (1979–80) 2 EHRR 1.

49 *Plattform Ärzte für das Leben v. Austria* (1991) 13 EHRR 204.

50 *L.C.B. v. The United Kingdom* (1999) 27 EHRR 212 and *McGinley and Egan v the United Kingdom* (1999) 27 EHRR concerned the atmospheric tests of NW carried out in the Christmas Islands by the United Kingdom (1952–1967).

caused by natural or man-made hazards; and counter-terrorism operations. Within the ECtHR jurisprudence, PO emerge from the rights to life (Article 2), to private and family life (Article 8) and to the right of access to justice (Article 6). As far as prevention is concerned, the criteria for State responsibility include the existence of a life-threatening risk (*ie* real and immediate and concerning an identifiable individual or group) and the knowledge element (the authorities knew or ought to have known about the risk and 'failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk').[51]

Along with previous cases on CBRN weapons testing, in the *Roche* case (concerning CW tests carried out on service personnel in the early 1960s as part of the UK's chemical and biological warfare research programme) the Court found that the UK had not fulfilled its PO under Article 8 to ensure that the applicant had access to relevant and appropriate information on the risks.[52] A similar case, *Burdov* (the applicant was called on to take part in emergency operations at the site of the Chernobyl nuclear disaster in 1986, was entitled due to health problems to social benefits, but the authorities failed to pay those fully or on time), may be read as highlighting 'the importance of having proper mechanisms in place for the compensation of victims of catastrophes, including the use of the insurance schemes'.[53]

In the sub-set of cases concerning public concerns over present risks, the ECtHR has shown increasing interest in taking into consideration the environmental dimension under the ECHR, especially in terms of procedural obligations under Article 8. In the well-known cases of *Lopez Ostra* and *Guerra*, the Court, for the first time, pointed out that severe environmental pollution may affect individuals' well-being and private and family life[54] and found a

51 *Osman v. the United Kingdom* (2000) 29 EHRR 245 para 116. The application of the Osman test to scenarios for which it was not originally conceived has given rise to conceptual confusion, and a more coherent doctrine of risk prevention is needed also in consideration that the importance of PO is likely to increase. FC Ebert and RI Sijniensky, 'Preventing Violations of the Right to Life in the European and Inter-American Systems: From the Osman test to a coherent doctrine of risk prevention?' (2015) 15 HRLRev. For a discussion of the knowledge element, see V Stoyanova, 'Fault, knowledge and risk within the framework of positive obligations under the European Convention on Human Rights' (2020) 33 LJIL.

52 *Roche v The United Kingdom* (2006) 42 EHRR 30 para 157.

53 E Sommario, 'Conclusions. One law to bind them all: International Law and Disaster Resilience', in Herwig and Simoncini (eds), *Law and the management of disasters. The challenge of Resilience* (Routledge 2016), 348.

54 *Lopez Ostra v. Spain* (1995) 20 EHRR 277 para 49; *Guerra and others v. Italy* (1998) 26 EHRR 357 para 60.

violation of Article 8, considering the lack of information provided that would have enabled citizens to assess the relevant risks. The duties to assess environmental and health implications of hazardous activities and to share relevant information with the public were confirmed in recent case law.[55] In *Cordella* (concerning the lack of measures to protect the environment around the Ilva factory in Taranto), the Court expanded the scope of these obligations by integrating the broad concept of 'community welfare'.[56] However, in the sub-set of cases involving nuclear risks (*ie* rail transport of nuclear waste in *L.M.R* and the extension of the licence of an ageing nuclear power plant in *Balmer-Schafroth* and *Athanassoglou*), the Court took a more cautious approach, finding no violations of Article 6 on access to justice, which was invoked by the applicants with the aim of finding avenues to revise the government's decisions.[57]

Looking at the cases related to loss of life due to technological and natural risks, in *Öneryildiz* (involving the death of 39 people caused by a methane explosion at a municipal rubbish tip close to a slum area of Istanbul), the Court stated that the primary duty is 'to put in place a legislative and administrative framework designed to provide effective deterrence against threats to the right to life'.[58] More precisely, in this field, domestic regulations must govern 'the licensing, setting up, operation, security and supervision of the activity and must make it compulsory for all those concerned to take practical measures', while 'particular emphasis should be placed on the public's right to information' and on 'appropriate procedures for identifying shortcomings in the processes concerned and any errors committed by those responsible at different levels'.[59]

In *Budayeva* (involving deaths caused by a mudslide), the authorities failed to comply with PO under Article 2, since they omitted to implement land planning and emergency relief policies, despite the fact that that area was particularly vulnerable to mudslides.[60] Similarly to *Öneryildiz*, PO were identified in all phases of the emergency management cycle. In the *ex-ante* phase, PO include not only to put in place an adequate legislative framework but also more concrete ad-hoc risk mitigation measures (eg engineering works to

55 *Fedayeva v Russia*, App. n. 55723/00 (ECtHR 30 November 2005); *Dubetska and others v Ukraine* (2015) 61 EHHR 11; *Tatar c. Roumanie*, App n. 67021/ 01 (ECtHR 27 January 2009) para 88.

56 *Affaire Cordella Et Autres C. Italie*, Requêtes nos 54414/13 et 54264/15 (ECtHR, 24 January 2019) para 174.

57 *Balmer-Schafroth v. Switzerland* (1998) 25 EHRR 598; *Athanassoglou v Switzerland* (2001) 31 EHRR 13.

58 *Öneryildiz v. Turkey* (2005) 41 EHHR 20, para 89.

59 Ibid para 90.

60 *Budayeva and others v Russia* (2014) 59 EHRR 2 paras 135–136.

maintain protection structures). Furthermore, the Court found that States have 'a positive obligation to adequately inform the public about any life-threatening emergency' and that there was a 'causal link between the serious administrative flaws, including the lack of early warning, and the death of and injuries to the applicants'.[61] After the calamitous event, PO include the primary duty to carry out an independent and effective investigation. All these requirements were confirmed and further clarified in more recent case law.[62] Considering the Court's finding in *Budayeva* that natural hazards are 'beyond human control', it has recently been proposed that the Court should more explicitly adopt an 'all-hazards approach' towards protecting human life in the face of all hazards, since the difference between man-made and natural hazards is less clear-cut than one might assume. When determining the required level of protection, the Court should instead rely 'on three basic criteria: the foreseeability, gravity and mitigability of the threat/hazards in question',[63] which are already traceable in the Court's case law but have not been systematically set out yet.

Looking at counter-terrorism operations, *Finogenov* concerned the use of an anaesthetic gas by Russian authorities in October 2002, when storming a theatre in Moscow where hundreds of civilians had been taken hostage by Chechen terrorists.[64] Russian authorities killed all the terrorists and rescued hundreds of hostages but approximately 130 hostages died due to adverse reactions to the incapacitating chemical agent used. The Strasbourg Court clarified that 'it was not in a position to indicate to member States the best policy in dealing with a crisis of this kind' and found that the use of the chemical agent was not in breach of Article 2 ECHR.[65] However, interestingly, it affirmed that this conclusion 'does not preclude the Court from examining whether the ensuing rescue operation was planned and implemented in compliance with the authorities' positive obligations under Article 2 of the Convention, namely whether the authorities took all necessary precautions to minimise the effects

61 Ibid para 182.

62 *Kolyadenko and others v Russia* (2013) 56 EHRR 2; *Ozel and others v Turkey*, App. n 14350/05 and 2 others (2 May 2016).

63 K Cedervall Lauta and J Elo Rytter, 'A Landslide on a Mudslide? Natural Hazards and the Right to Life under the European Convention on Human Rights' (2016) 7(1) Journal of Human Rights and the Environment.

64 *Finogenov v. Russia* (2015) 61 EHRR 4.

65 Ibid para 223. Rietiker however suggests that the Court should have been keen to discuss the use of incapacitating agents under HRL in law enforcement operations, see D Rietiker, 'Strange Bedfellows? The Cross-Fertilization of Human Rights and Arms Control. The European Court of Human Rights on Cases Involving Chemical Weapons and Anti Personnel Mines' (2014) 3 Cyprus Human Rights Law Review.

of the gas on the hostages, to evacuate them quickly and to provide them with necessary medical assistance'.[66] Indeed, the Court found a violation of PO under Article 2 because of the inadequate planning and conduct of the rescue operation, including in consideration of the limited on-site coordination between various services ('the absence of any centralised coordination on the spot');[67] the inadequate information exchange on the type of gas that was used ('the original evacuation plan did not appear to contain any instructions as to how information on the victims and their condition was to be exchanged between members of various rescue services'); and the lack of appropriate medical treatment ('it is unclear what order of priorities was set for the medics', no medical assistance was provided on the bus from the theatre to the hospitals, and 'everything suggests that there was no clear plan for the distribution of victims amongst various hospitals').[68]

Finally, in *Tagayeva* (concerning a dramatic hostage taking that occurred in 2004 in a school in the town of Beslan, North Ossetia, which lasted three days and involved at least 1,100 persons, including more than 700 children, and ended with the death of more than 300 persons), the Court found unanimously that there had been a violation of Article 2 of the Convention because of the authorities' failure to try to prevent an event which had been planned days before and about which they had knowledge and because of the inadequacy of the response operation.[69] More precisely, the Court found that '[n]o single sufficiently high-level structure was responsible for the handling of the situation, evaluating and allocating resources, creating a defence for the vulnerable target group and ensuring effective containment of the threat and communication with the field teams'.[70]

To sum up, this section has discussed the practice of regional human rights courts relevant to PO applicable to emergency situations. The European context is the most developed, with the Strasbourg Court being very active in the identification of PO in all phases of the emergency management cycle. A number of disaster settings have been discussed within the Inter-American human rights system, which develops PO particularly in relation to protection of the environment. Along similar lines, the African system also imposes on States obligations to act in the face of environmental risks, such as the duties to take reasonable measures to prevent pollution and ecological degradation, to

66 Ibid para 237.
67 Ibid para 247.
68 Ibid paras 250–251.
69 *Tagayeva and others v. Russia* App. n 26562/07 and 6 other applications (ECtHR 18 September 2017).
70 Ibid para 491.

monitor projects that could affect the environment and to provide the potentially affected population with relevant information.

4 Classification of PO under HRL Relevant to CBRN Protection

The analysis in the previous sections suggests that PO relevant to all phases of the emergency management cycle (prevention, preparedness, response and recovery) and of all types (of immediate result, of conduct and of progressive realisation) are currently being identified by HR supervising authorities, both at the universal and regional levels. The following paragraphs present an overview of such PO.

Generally speaking, the adoption of a HRBA to emergency management means to mainstream in all relevant activities key principles deriving from HRL, such as equality and non-discrimination (with particular regard to the needs and views of the most vulnerable groups); participation and empowerment (through the adoption of effective processes and the allocation of necessary resources); and accountability and access to justice (requiring the provision of appropriate and accurate information and mechanisms to ensure that victims have access to adequate remedies).[71] Furthermore, the duty to cooperate at the international level has been discussed by UN human rights monitoring bodies, and has been included in ILC Draft Articles 7 (Duty to cooperate) and 8 (Forms of cooperation in the response to disasters) and in the Sendai Framework's guiding principles.[72] States have to devote efforts to cooperating with other States (especially in view of common threats) and with international organisations (IOs), not only in the acute response phase but in DRR initiatives and in recovery efforts. For instance, in relation to the current pandemic outbreak, the CESCR has affirmed that 'international cooperation is critical in preventing, addressing and following up to the effects of the pandemic, in medical, economic, social and other areas'.[73] The ILC classifies the duty to cooperate as an obligation of conduct.[74]

71 On integrating a HRBA into disaster management, see A Creta, 'Integrating human rights into disaster management: normative, operational and methodological aspects', in F Z Giustiniani et al (eds), *Routledge Handbook of Human Rights and Disasters* (Routledge 2018).

72 Sendai Framework para 19(l) and Section VI.

73 OHCHR (n 37) 7.

74 ILC, 'Fifth report on the protection of persons in the event of disasters, by Mr. Eduardo Valencia-Ospina, Special Rapporteur' (2012) UN Doc A/CN.4/652, ch III(B).

Looking at PO applicable to the pre-disaster phase, States are under the primary obligation to prevent disasters by adopting, amending and implementing adequate laws and policies, and by ensuring their independent supervision, which can be understood as primarily obligations of immediate result with some components of due diligence.[75] Prevention obligations of due diligence include performing accurate and timely risk assessments, which should take into consideration the worst-case scenarios and all potential implications on the wide variety of human rights that may be impacted by emergency situations. As suggested by UN human rights monitoring bodies, risk assessment should be based on the collection of data on disaster losses that should be disaggregated according to different factors of vulnerability. Once the results of the risk assessment are available, ad hoc risk mitigation measures should be adopted, targeted to the threat under consideration. As indicated by both UN actors and regional human rights courts, the outcomes of risk assessments must be widely disseminated: particular attention has to be paid to keeping the population regularly informed of any life or health-threatening risks. The ECtHR has clarified that the scope of relevant PO depends on the origin of the risk (is this beyond human control?), the extent to which it is foreseeable (can the threat be anticipated? is this a regularly recurring calamity or is its occurrence unpredictable?) and whether it is susceptible to mitigation (would risk mitigation measures have served the aim of avoiding harm?).

Preparedness obligations under HRL include having in place a contingency plan (which shall take into account the views and needs of vulnerable populations) and conducting training and education programmes. The IACtHR has indicated that emergency plans must be elaborated in cooperation with other potentially affected States and with responsible IOs. The ECtHR case law also emphasised the importance of having in place early warning systems, which according to the Sendai Framework should be multi-hazard and people-centred. In general, preparedness duties also appear to be a mix of obligations of immediate result and due diligence.

In the acute emergency response phase, human rights actors have pointed out that having in place a system of urgent medical care is a 'core obligation' to protect the rights to life and to health.[76] The contingency plan must be implemented with due diligence, with particular attention paid to those

75 See ch 3.

76 Although there is no authoritative distinction of core/peripherical duties under HRL, core obligations generally refer to duties that are more immediate and more compelling than other obligations that are of a more flexible or programmatic nature. See M Scheinin, 'Core Rights and Obligations', in D Shelton, *The Oxford Handbook of International Human Rights Law* (OUP 2011).

marginalised groups that are likely to be the most affected during emergency situations. The ECtHR has indicated that lack of coordination among different authorities during the response operation may also amount to a violation of the right to life. Furthermore, particularly serious emergencies, such as nuclear accidents or public health crises, may imply more specific obligations, such as obligations to protect health care workers or to ensure adequate working conditions. In any case, throughout the crisis, PO under HRL require that information is provided in an accurate and timely manner, targeted to the needs of the local audience, accessible from a wide variety of sources, and disseminated with the support of the local population and the press. PO applicable to the response phase are generally to be understood as obligations of conduct.

Finally, in the post-disaster phase, UN human rights monitoring bodies have stressed the need to ensure genuine consultation and participation of victims of disasters in the design and implementation of all decisions affecting them and to guarantee that the rights of the most marginalised groups are fully taken into account in reconstruction plans, with particular attention to access to housing, education and healthcare. Regional human rights courts have put emphasis on the procedural obligation to conduct effective investigations in cases of alleged violations of rights during emergency situations.[77] While these duties can be considered as PO of immediate result, it may be expected that PO of progressive realisation will also be involved in recovery efforts, especially for those duties related to the fulfilment of economic, social and cultural rights that might have been impacted by disaster situations and might need long-term projects for their complete realisation.

5 Concluding Remarks

This chapter has reviewed the practice of international and regional human rights supervising authorities, which offers abundant references to the rights of persons and to the corresponding States' obligations in all phases of the emergency management cycle. These references are dispersed among a wide range of general comments (providing guidance on obligations as resulting from treaty provisions); recommendations, concluding observations and special reports (providing guidance on specific themes or country situations); as well as in advisory opinions and the jurisprudence of regional courts (identifying human rights standards under regional instruments). It may reasonably be expected that some matters will be subject to further crystallisation and

77 On prosecutions and remedies in the context of CBRN events, see Part 5.

clarification in the near future, as our understanding of human rights implications raised by risk and emergency management evolves and the opportunities for hearing individual complaints on these matters emerge.

It has been argued that PO under HRL deserve deeper attention in order to realise the full potential of HR in relation to emergency situations. Detailed analysis of the scope and content of PO under specific circumstances; of their role in protecting against serious risks; and of their interplay with NO can make a valuable contribution by offering greater conceptual and operational clarity on what is needed to implement a HRBA to emergency management. PO as identified in this chapter include a mix of obligations of immediate result, due diligence and progressive realisation that are applicable to the different phases of the emergency management cycle. The analysis has shown that specific types of PO may be applicable to specific types of emergency situations. Through the overview of PO relevant to disaster situations, as developed within the global and regional systems, it is hoped that this chapter has contributed to the discussion on how to elaborate a more positive, differentiated and complex HRFE.

Bibliography

Akandji-Kombe JF, 'Positive obligations under the European Convention on Human Rights. A guide to the implementation of the European Convention on Human Rights' (Council of Europe 2007).

Besson S, 'Les obligations positives de protection des droits fondamentaux – Un essai en dogmatique comparative' (2003) 1(49) Revue de droit Suisse 49.

Cedervall Lauta K and Elo Rytter J, 'A Landslide on a Mudslide? Natural Hazards and the Right to Life under the European Convention on Human Rights' (2016) 7(1) Journal of Human Rights and the Environment 111.

Creta A, 'Integrating human rights into disaster management: normative, operational and methodological aspects', in Giustiniani FZ et al(eds), *Routledge Handbook of Human Rights and Disasters* (Routledge 2018).

Cubie D and Hesselman M, 'Accountability for the Human Rights Implications of Natural Disasters: A Proposal for Systemic International Oversight' (2015) 33(1) Netherlands Quarterly of Human Rights 9.

Cubie D, 'Promoting Dignity for all: Human Rights Approaches in the Post-2015 Climate Change, Disaster Risk Reduction and Sustainable Development Frameworks' (2014) 8(36) Human Rights and International Legal Discourse 36.

Doswald-Beck L, 'Human Rights Law and Nuclear Weapons' in Nystuen G, Casey-Maslen S and Golden Bersagel A (eds), *Nuclear Weapons under International Law* (CUP 2014).

Ebert FC and Sijniensky RI, 'Preventing Violations of the Right to Life in the European and Inter-American Systems: From the Osman test to a coherent doctrine of risk prevention?' (2015) 15 HRLRev 343.

Forino G, von Meding J, Brewer G, 'A Conceptual Governance Framework for Climate Change Adaptation and Disaster Risk Reduction Integration' (2015) 6 Intl J Disaster Risk Science 372.

Fredman S, *Human Rights Transformed* (OUP 2008).

Hesselman M, 'Regional human rights regimes and humanitarian obligations of states in the event of disaster', in Zwitter et al (eds) *Humanitarian Action: Global, Regional and Local Legal Responses* (CUP 2014).

Lavrysen L, *Human Rights in a Positive State. Rethinking the Relationship between Positive and Negative Obligations under the European Convention on Human Rights* (Intersentia 2018).

Nickel JW, 'Two models of normative frameworks for Human Rights during Emergencies', in EJ Criddle (ed.) *Human Rights in Emergencies* (CUP 2016).

Pisillo Mazzeschi R, 'Responsabilité de l'état pour violation des obligations positives relatives aux droits de l'homme' (2008) 333 Collected Courses of the Hague Academy of International Law.

Rietiker D, 'Strange Bedfellows? The Cross-Fertilization of Human Rights and Arms Control. The European Court of Human Rights on Cases Involving Chemical Weapons and Anti Personnel Mines' (2014) 3 Cyprus Human Rights Law Review 130.

Scheinin M, 'Core Rights and Obligations', in D Shelton, *The Oxford Handbook of International Human Rights Law* (OUP 2011).

Shue H, *Basic Rights* (Princeton University Press 1980).

Sommario E and Venier S, 'Human Rights Law and Disaster Risk Reduction' (2018) 49 QIL Zoom-in 29.

Sommario E, 'Conclusions. One law to bind them all: International Law and Disaster Resilience', in Herwig and Simoncini (eds), *Law and the management of disasters. The challenge of Resilience* (Routledge 2016).

Stoyanova V, 'Fault, knowledge and risk within the framework of positive obligations under the European Convention on Human Rights' (2020) 33 LJIL 601.

Toebes B, 'Human rights and public health: towards a balanced relationship' (2015) 19(4) The International Journal of Human Rights 488.

Xenos D, *The Positive Obligations of the State under the European Convention of Human Rights* (Routledge 2012).