
**ARE YOU PART OF THE GLOBAL
WORKFORCE?: AN EXAMINATION OF THE
“DUTY OF CARE” TO BUSINESS TRAVELERS
AND INTERNATIONAL ASSIGNEES UNDER
THE ILO OCCUPATIONAL HEALTH AND
SAFETY CONVENTIONS AND AS EMERGING
INTERNATIONAL CUSTOMARY LAW**

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I. INTRODUCTION

In today’s labor markets, routine business travel and employee assignments abroad are common.¹ This global movement presents unique challenges to governments and employers concerning legal and practical matters that arise from unfamiliar risks to employees abroad.² These risks include disease, natural disasters, terrorist attacks, and kidnappings.³ Considering these risks, the extent to which governments and employers have a duty of care to workers abroad needs examination.⁴ The 1981 and 2006 International Labor Organization Conventions on Occupational Safety and Health mandate that ratifying nations use a preventative approach to occupational safety and health in order to implement measures to ensure a duty of care to “all workers” at the national and employer levels.⁵ Australia, the United Kingdom, and some European

1. See PHILIP M. BERKOWITZ & MICHAEL G. CONGIU, *MANAGING THE GLOBAL WORKFORCE—A LEGAL AND PRACTICAL GUIDE TO DANGEROUS INTERNATIONAL EMPLOYEE ASSIGNMENTS 1* (2011), available at http://www.littler.com/files/press/pdf/WP_IntlAssignments_2-23-11.pdf (explaining how continuing globalization requires increasing employee international travel).

2. See *id.* (emphasizing that the specific risks employees face abroad will vary with location).

3. See, e.g., *id.* (noting that while risks to employees abroad are numerous, all situations require employers to reflect on whether a prevention plan could have successfully been executed).

4. See *id.* at 7–8 (addressing the issue of what the employer’s legal and ethical obligations are to prevent injuries to employees abroad under different national laws and policies).

5. See Promotional Framework for Occupational Safety and Health Convention, Preamble, June 15, 2006, 2564 U.N.T.S. (No. 187) [hereinafter Promotional Framework for Occupational Safety and Health Convention] (calling for a national preventative safety and health culture including at the employer level); Occupational Safety and Health Convention art. 2(1), June 22, 1981, 1331 U.N.T.S. 279 (No. 155) [hereinafter Occupational Safety and Health Convention]

countries, all ratifying parties to the Conventions, have extended the duty of care to international business travelers and assignees through case law and legislation.⁶ As a result, employers have been held liable to employees abroad and their families in situations concerning the duty of care.⁷ However, some parties to the ILO Conventions on Occupational Safety and Health, like China, have yet to extend the duty of care to international business travelers and assignees.⁸

This Comment will argue that the ILO's Occupational Safety and Health Convention of 1981 and the 2006 Promotional Framework for Occupational Safety and Health Convention create a "duty of care" on the part of nations that extends to business travelers and international assignees.⁹ Additionally, this Comment takes the position that given state practice of many ratifying parties and non-ratifying parties, there is an emerging norm under customary international law that all duty-of-care obligations extend to international business travelers and assignees.¹⁰ Moreover, despite

(establishing that the Convention applies to all workers); *see also id.* art. 4 (providing for a national policy, to be created in conjunction with employer and worker representatives, with the aim of preventing all worker safety and health challenges).

6. *See generally* LISBETH CLAUS, INT'L SOS, DUTY OF CARE OF EMPLOYERS FOR PROTECTING INTERNATIONAL ASSIGNEES, THEIR DEPENDENTS, AND INTERNATIONAL BUSINESS TRAVELERS 11, 15–17 (2009), *available at* http://www.internationalosos.com/en/files/Duty_of_Care_whitepaper.pdf (discussing examples of Australian, UK, German, and Spanish legislation and case law that extend the duty of care to workers abroad for matters of health and risk prevention).

7. *See id.* at 12 (describing a case, *Neilson v. Overseas Project Corp. of Victoria LTD* (2005), 223 CLR 331, where an Australian employer was held liable for the injuries of an employee's spouse who fell down a staircase while on assignment in China).

8. *See, e.g.*, INT'L LABOUR ORG. [ILO], NIGERIA: REPORT OF THE NATIONAL OCCUPATIONAL SAFETY AND HEALTH INFORMATION CENTRE 17, 22 (2006), *available at* http://www.ilo.org/legacy/english/protection/safework/cis/about/mtg2006/pnga_mlpid.pdf (demonstrating that Nigerian policy on occupational safety and health applies only in some Nigerian workplaces, while other Nigerian workplaces are not covered under occupational safety and health laws, largely due to employer "apathy and nonchalance" toward enforcement).

9. *See discussion infra* Part III.A (drawing upon the drafting history of the 1981 and 2006 Occupational Safety and Health Conventions to show duty-of-care provisions cover workers abroad).

10. *See discussion infra* Part III.B (detailing trends in Australia, the United Kingdom, the European Union, and the United States to extend the duty of care to workers abroad through legislation and practice).

this emerging norm, the practices of some ratifying parties violate this trend, and their obligations under the 1981 and 2006 Conventions by not extending the duty of care to workers sent abroad. In particular, this Comment will focus on how China violates its treaty obligations under the 1981 ILO Convention by failing to extend the duty of care to workers abroad in some African regions, in particular Nigeria, to safeguard against the risk of kidnapping.¹¹

Specifically, Part II of this Comment addresses how governments and employers often do not extend the duty of care to foreign workers at risk for kidnapping in areas of Africa, namely Nigeria, despite the general trend to extend the duty of care to workers abroad in most situations including healthcare concerns and the provision of adequate insurance.¹² Part II also explains the definition of customary international law, and describes the duty-of-care provisions in the 1981 and 2006 Occupational Safety and Health Conventions.

The analysis in Part III will discuss how the drafting history of the 1981 and 2006 ILO Conventions reveals the drafters' intent that the duty of care under the Conventions would extend to workers abroad, consistent with an emerging norm under customary international law. Part III will conclude by demonstrating how, despite the emerging norm and obligations of the ILO Conventions, China violates the ILO Convention mandate to extend the duty of care to workers in Nigeria.

Part IV provides recommendations for extending the duty of care at the national and employer levels, with a focus on China. Part V will conclude by arguing that although there are states that do not extend the duty of care, there remains an overall trend to extend the duty of care to workers abroad.

II. BACKGROUND

Many countries extend the duty of care to international business travelers and assignees in most circumstances, but by neglecting to

11. See discussion *infra* Part III.C (describing how Chinese law and the lack of enforcement of Chinese law contribute to China's failure to effectively address kidnapping of employees abroad in parts of Africa).

12. See Minnesota Life Insurance Company, *Sending Employees Abroad: Employers Take Steps to Mitigate Risk*, 3 (2010), available at <http://www.lifebenefits.com/lb/pdfs/F62382-27.pdf> (expressing concerns from a telecommunications employer to ensure employees abroad are covered by health insurance).

safeguard against kidnapping, fail to extend the duty of care to workers abroad in the African nations of Nigeria and Sudan.¹³ Indeed, state practice with regard to the duty of care dictates whether there is a norm to extend the duty of care to workers abroad under customary international law.¹⁴ The 1981 and 2006 ILO Conventions on Occupational Safety and Health provide duty-of-care obligations for ratifying governments and employers, but do not explicitly state that these obligations apply to workers abroad.¹⁵ Hence, the application of the Vienna Convention on the Law of Treaties serves to resolve ambiguity in instances where a treaty's meaning is not clear in its provisions.¹⁶

A. GOVERNMENTS AND EMPLOYERS DO NOT EXTEND THE DUTY OF CARE TO WORKERS SENT ABROAD WHO ARE AT RISK FOR KIDNAPPING IN AREAS OF AFRICA, NAMELY NIGERIA

In parts of Africa such as the Niger Delta region, foreign nationals employed by foreign as well as Nigerian companies are targets for kidnapping and crime committed by youth and groups like Movement for the Emancipation of the Niger Delta (MEND).¹⁷ The motivation for these kidnappings is often linked to the lack of gainful employment for youth, and the belief that resources like oil are exploited by

13. See discussion *infra* Parts II.A, II.B (explaining the protection in most countries for workers sent abroad from reasonably foreseeable injuries with the exception of kidnapping in Africa).

14. See discussion *infra* Part II.C (using Article 38 (1)(b) of the ICJ Statute to demonstrate how a norm is defined under international customary law).

15. See discussion *infra* Part II.D (showing how the 1981 and 2006 Conventions' preventative approach to occupational safety and health assists in creating duty-of-care obligations for state parties).

16. See discussion *infra* Part II.E (highlighting the importance of the intentions of the parties to a treaty and the purpose of the document in the treaty's interpretation).

17. See ASI GLOBAL, LLC, *Kidnapping and Insecurity in Nigeria* (2012), <http://www.asiglobalresponse.com/downloads/Nigeria%20Paper.pdf> (explaining that Nigerians and foreigners alike are targets of kidnappings and that at least 140 foreign workers have been kidnapped since 2009, although the number of foreign kidnappings is on the decline); Blessyn Okpowo, *Tackling Youth Restiveness in the Niger Delta: The Shell Example*, ALLAFRICA.COM, July 8, 2003, <http://allafrica.com/stories/200307080350.html> (detailing an incident where youth kidnapped three expatriates working for the Shell Company and demanded ransom money); see also *Nigeria's Shadowy Oil Rebels*, BBC NEWS, Apr. 20, 2006, <http://news.bbc.co.uk/2/hi/africa/4732210.stm> (describing MEND's particular attacks on foreign oil workers from largely foreign corporations).

foreigners for profit without any benefits for locals.¹⁸ British, American, German, Spanish, Italian, Russian, and Chinese nationals working in Nigeria have all been targeted.¹⁹ Nigeria leads Africa in the number of kidnapped expatriates.²⁰ While it is established that foreign workers are particularly vulnerable targets for kidnapping in Nigeria, the trend has been for governments and employers of foreign nationals to have a more reactive role than a preventative function.²¹ News reports reflect that governments and employers often play an essential role in reacting to a crisis by paying ransom or negotiating for kidnapped employees' release.²² Yet preventative and protective measures in these situations remain inadequate.²³

18. Compare Okpowo, *supra* note 17 (describing youth unrest and a need for the federal government to address the issue), with *Nigeria's Shadowy Oil Rebels*, *supra* note 17 (explaining MEND's goal to gain control of the Niger Delta and to give the profits from its resources to locals).

19. See *Nigeria Travel Warning*, U.S. DEP'T OF STATE (Dec. 21, 2012), http://travel.state.gov/travel/cis_pa_tw/tw/tw_5739.html (advising that the risks to foreigners and foreign workers traveling to Nigeria include kidnappings, robberies, and other armed attacks); see also Camillus Eboh, *Kidnappings on the Rise in Nigeria, Over 500 So Far*, REUTERS, July 22, 2009, available at <http://www.reuters.com/article/2009/07/22/us-nigeria-hostages-idUSTRE56L4IC20090722> (reporting 512 kidnappings in Nigeria in 2009 including a multitude of foreign victims).

20. See CLAYTON CONSULTANTS, INC., 2008 KIDNAP RISK BRIEF (2008), http://www.dahlberg2.dk/pdf/Clayton_2008_KidnapRiskBrief.pdf (citing 172 foreigners kidnapped in Nigeria in 2007, ahead of other problem regions like Darfur).

21. See, e.g., *Nigeria Says Spanish Doctor Kidnapped by Gunmen*, REUTERS, Apr. 13, 2012, available at <http://www.reuters.com/article/2012/04/13/nigeria-kidnap-idAFL6E8FD5VD20120413> (conveying action that was taken only after the kidnapping of a Spanish doctor, even though the risk of kidnapping has been well known in Nigeria); see also Peter Shadbolt, *Kidnapped Chinese Workers Released in Sudan*, CNN (Feb. 7, 2012), <http://www.cnn.com/2012/02/07/world/africa/sudan-hostages/index.html> (explaining that rescue efforts by the Chinese and Sudanese governments were taken only after the kidnapping of Chinese workers occurred); *Five Chinese Kidnapped in Nigeria Freed*, CHINA DAILY (Jan. 18, 2007), http://www.chinadaily.com.cn/china/2007-01/18/content_786706.htm (describing procedures by their Chinese employer and the Chinese Embassy in Nigeria to secure the release of the kidnapped Chinese workers only after the incident).

22. See, e.g., *Nigeria Now Kidnap for Ransom Capital of the World – AIO*, BUS. NEWS NIGERIA, Oct. 4, 2012, <http://businessnews.com.ng/2012/10/04/nigeria-now-kidnap-for-ransom-capital-of-the-world-aio/> (citing African Insurance Organization's statistics that Nigeria now accounts for twenty-five percent of kidnap-for-ransom cases involving foreign nationals, by far the highest of any country worldwide).

23. See, e.g., Gillian Bell, *Oil Workers Kidnapped Suing Employer for GBP200,000*, ABERDEEN PRESS & JOURNAL (Dec. 28, 2009) (explaining that

B. AUSTRALIA, THE UNITED KINGDOM, THE EUROPEAN UNION,
AND THE UNITED STATES EXTEND THE DUTY OF CARE TO
WORKERS ABROAD IN MOST SITUATIONS

The legal concept of the duty of care as related to occupational safety and health presumes that both nations and employers have legal obligations to their employees to act prudently and avoid the risk of reasonably foreseeable injury.²⁴ This duty includes liability for traditionally foreseeable injuries related to occupational safety and health, such as disease and workplace accidents.²⁵ For example, an Australian federal court held that a construction manager on assignment in New York who contracted a viral disease could recover because he contracted the disease during the course of his employment.²⁶ In the United Kingdom, a court held an employer liable for breaching the duty of care when an employee was injured in an accident in Swedish waters due to the boat captain's negligence.²⁷

The duty of care concerning international business travelers and assignees, however, often includes risk management that goes beyond the usual safety and health concerns.²⁸ In an Australian case involving a Sydney based employer that sent a sales employee to

kidnapped workers are suing their UK employer for not providing adequate protective measures for their safety while in the Niger Delta).

24. See CLAUS, *supra* note 6, at 8 (explaining that employers need to gauge unfamiliar risks that arise when employees are sent abroad, and that courts and legislation can extend the duty of care to "the dependents accompanying an international assignee.").

25. See *id.* at 9 (stating physical and mental health, and work accidents and injuries including repetitive strain injuries, consequences of workload and stress, and the spread of communicable diseases fall generally under employer-related duty-of-care obligations).

26. See *Favelle Mort Ltd v. Murray* (1976) 133 CLR 580, 589 (holding that the employee would be awarded worker's compensation for contracting a virus while on employment abroad even if the employment did not contribute directly to the acquisition of the disease).

27. See *McDermid v. Nash Dredging & Reclamation Co. Ltd.*, [1987] 3 A.C. (H.L.) 907 (appeal taken from Eng.) (declaring there was a non-delegable duty of care on the employer's part and thus, the duty of care could not be transferred to the Dutch ship captain).

28. See generally CLAUS, *supra* note 6, at 11, 14 (citing incidents where employers owed a duty of care for violent attacks toward their employees on assignment in Africa, and for the avoidable death of employees as a result of a suicide bombing in Pakistan).

Papua New Guinea where a thief attacked her, the employer was liable for breaching the duty of care for not warning the employee about the notoriously dangerous area where she was working.²⁹ The court held that the employer should have obtained expert advice about safeguards for employees in Port Moresby, New Guinea.³⁰ While these warnings would not keep employees completely safe from danger, employees would be in a better position to cope with dangerous situations.³¹ In the United States, the Court of Appeals for the District of Columbia similarly upheld an employee's tort claim against an employer, where the employee was kidnapped while on assignment in the Philippines.³² Additionally, the United Kingdom instituted the Corporate Manslaughter and Corporate Homicide Act of 2007, which imposes criminal liability on employers that commit gross breaches of the duty of care, which result in the death of an employee, including business travelers and assignees.³³ Under such circumstances, a gross breach is conduct that falls below what can reasonably be expected from an organization.³⁴ While the Corporate Manslaughter Act and violent attacks or other unique risks to business travelers and assignees may not be traditionally associated with the duty of care in the field of occupational safety and health, these instances are situated exactly within the definition of duty of care as a legal concept dealing with reasonably foreseeable injury.³⁵ The practice of Australia, the United Kingdom, the European Union, and the United States as described above, reflects this understanding

29. See *Pacific Access Pty Ltd. v. Davies* (2001) NSWCA 218 ¶ 7 (explaining a need for the employer to warn the employee not to carry a bag or purse openly while abroad in Port Moresby, New Guinea, given the ample evidence that it was an unsafe area for foreign workers).

30. *Id.* ¶¶ 24, 46.

31. *Id.*

32. See *Khan v. Parsons Global Servs., Ltd.*, 521 F.3d 421, 429 (D.C. Cir. 2008) (holding that the employee could sue under theories of negligence because worker's compensation laws did not apply).

33. Corporate Manslaughter and Corporate Homicide Act, 2007, c. 19 § 1 (U.K.).

34. See CLAUS, *supra* note 6, at 16, 41 (explaining that a gross breach occurs when a claimant can show unreasonable conduct by senior management was a primary cause of the harm, and death occurred due to the breach).

35. See *id.* at 16 (expressing that the Corporate Manslaughter Act, as well as United Kingdom case law concerning employee death and injury, turns on whether the employer company should have known that such an incident would occur due to their failure to extend the duty of care).

of the duty of care as it relates to both traditional and unique risks to workers abroad.³⁶

C. ARTICLE 38(1)(B) OF THE ICJ STATUTE AND THE DEFINITION OF CUSTOMARY INTERNATIONAL LAW

Article 38 (1)(b) of the International Court of Justice (ICJ) Statute, the statute for the judicial organ of the United Nations, defines customary international law as evidence of a general practice accepted as law.³⁷ As referred to in the 1969 ICJ *North Sea Continental Shelf Cases*, customary international law derives from a consistent, almost uniform state practice, combined with *opinio juris*, or a state's sense of legal obligation to follow such state practice.³⁸ Moreover, the 1969 *North Sea Continental Shelf Cases* held that a considerable amount of time need not pass for a norm to achieve the status of customary international law.³⁹ Additionally, in the 1985 *Case Concerning the Continental Shelf* between Libya and Malta, the ICJ held that it is "axiomatic that . . . customary international law is to be looked for primarily in the actual practice and *opinio juris* of States, even though multilateral conventions may have an important role to play in . . . defining rules deriving from custom, or indeed in developing them."⁴⁰ Thus, while multilateral conventions may initially conceive of an international custom or lay out more specific rules concerning a custom, the two crucial elements in evaluating a

36. See *id.* at 11, 16–20, 43 (citing cases in Australia, the United States, the United Kingdom, and the European Union that provide for employer liability for failing to extend the duty of care to workers abroad in diverse circumstances including neglecting to address risks to health and violence); see also BERKOWITZ & CONGIU, *supra* note 1, at 1–3 (detailing liability under common law tort theories for employers in the United States and the United Kingdom for failing to extend the duty of care to workers abroad).

37. Statute of the International Court of Justice art. 38(1)(b), June 26, 1945, 59 Stat. 1055, 1060, 33 U.N.T.S. 993.

38. See *North Sea Continental Shelf* (Ger. v. Den.; Ger v. Neth.), 1969 I.C.J. 3, 42, ¶ 71 (Feb. 20) (holding that customary international law binds all states, even if an individual state does not follow that international norm and does not feel a sense of legal obligation to adhere to the practice); see also RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(4) (1987) [hereinafter RESTATEMENT OF FOREIGN RELATIONS LAW] (stating that customary international law results from consistent state practice and a sense of legal obligation).

39. See *North Sea Continental Shelf*, 1969 I.C.J. 42, ¶ 72.

40. *Continental Shelf* (Libyan Arab Jamahiriya/Malta), 1985 I.C.J. 13, 29–30, ¶ 27 (June 3).

norm's status as customary international law are state practice and *opinio juris* of states.⁴¹

D. DUTY-OF-CARE PROVISIONS IN THE 1981 AND 2006 OCCUPATIONAL SAFETY AND HEALTH CONVENTIONS

The International Labor Organization (ILO) was created in 1919 as part of the Treaty of Versailles. The ILO serves as a United Nations Agency that expresses international labor standards, and serves as a mechanism for governments, employers, and workers' rights groups to develop labor policy and practice.⁴² Additionally, the ILO established Conventions on Occupational Safety and Health in 1981 and 2006 during its annual International Labor Conferences where state, employer, and worker representatives meet to discuss labor policies.⁴³ Provisions in these Conventions address the legal concept of the duty of care as related to occupational safety and health, which presumes that nations and employers have legal obligations to avoid the risk of foreseeable injury.⁴⁴

1. The 1981 Occupational Safety and Health Convention's Preventative Approach to Occupational Safety and Health and the Duty of Care

The 1981 ILO Occupational Safety and Health Convention demonstrated a shift in approach to occupational safety and health from promulgating measures to issuing preventative mechanisms.⁴⁵

41. See, e.g., Jeremy Pearce, *Customary International Law—Not Merely Fiction or Myth*, 2003 AUSTL. INT'L L.J. 125, 133–34 (2003) (claiming most modern concepts of customary international law center on whether states undertake a particular practice out of a sense of legal obligation, or whether it relates to fulfilling a state's own interests).

42. See *About the ILO*, ILO, <http://www.ilo.org/global/about-the-ilo/lang-en/index.htm> (last visited Nov. 27, 2012) (outlining the purpose of the ILO, which is to promulgate laws balancing governments', workers', and labor unions' interests).

43. *International Labour Conference*, ILO, <http://www.ilo.org/global/about-the-ilo/how-the-ilo-works/international-labour-conference/lang-en/index.htm> (last visited Nov. 27, 2012).

44. See CLAUDIA *supra* note 6, at 8 (declaring duty-of-care obligations may come in the form of actions or omissions).

45. See INTERNATIONAL LABOUR CONFERENCE 98TH SESSION 5 (2009), http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_103485.pdf (explaining that the 1981 Convention

The 1981 Convention provides a framework of prevention by defining the terms and scope of the document, the implications for national laws and policy, and employer responsibility.⁴⁶ The provisions in these three areas relate to the legal concept of the duty of care, and use an attitude of prevention to describe national obligations under the duty of care.⁴⁷

The Convention's scope and definitions of key terms provided in Articles 1 through 3 demonstrate the broad reach of the Convention and the approach of prevention toward issues of occupational safety and health.⁴⁸ Article 2, concerning scope, states that the Convention applies to "all workers in the branches of economic activity covered."⁴⁹ In this way, Article 2 allows for ratifying countries to exclude some workers in certain branches of economic activity after "consultation . . . with the representative organizations of employers and workers concerned."⁵⁰ This provision shows that the Convention's duty-of-care obligations to workers are only limited by the economic activity the worker is involved in, and worker exclusion is not allowed on any other grounds.⁵¹

Article 3 of the 1981 Convention defines workplace as "all places where workers need to be or to go by reason of their work and which are under the direct or indirect control of the employer."⁵² Thus, the other provisions of the Convention including those concerning the duty of care in regard to occupational safety and health apply exclusively in those workplaces "under the direct or indirect control of the employer."⁵³

required a constant effort to improve worker protection as total prevention is an "ideal goal").

46. See Occupational Safety and Health Convention, *supra* note 5, arts. 1–5, 9, 18 (providing for preventative measures like training and inspection of the working environment).

47. See *id.* arts. 4(2), 5(c), 14, (listing training and other precautions as part of a national policy that strives to "prevent accidents and injury to health arising out of, linked with, or occurring in the course of work").

48. See *id.* arts. 4(2), 16(3) (placing heavy restrictive criteria for any parties to the treaty wishing to exclude classes of workers from the treaty's application).

49. *Id.* art. 2(1).

50. *Id.* art. 2(2).

51. Cf. *id.* art. 2 (failing to list any other modification to the treaty's application and coverage of all workers).

52. *Id.* art. 3(c).

53. *Id.*

National policy and action at the national level, addressed in Articles 4 through 15 of the 1981 Convention, contain explicit provisions related to prevention and the duty of care in the confrontation of challenges to occupational safety and health.⁵⁴ Article 4 calls for ratifying nations to implement a policy in light of national conditions and practice that aims “to prevent accidents and injury to health arising out of, linked with or occurring in the course of work . . . so far as reasonably practical. . . .”⁵⁵ Moreover, Article 5 covers the national policy’s “main spheres of action” including training in relation to occupational health and safety.⁵⁶ These two Articles represent the duty of care under the Convention at the national level, calling for national policy and training to prevent reasonably foreseeable injury to workers.⁵⁷ Indeed, the commentary on the 1981 Convention in the ninety-eighth session of the International Labor Conference reinforced the ongoing commitment to training under the Convention with respect to new prevention techniques, technological progress, and new workplace hazards.⁵⁸ The Convention also calls for enforcement of laws and regulations on occupational safety and health to be secured by an appropriate system of inspection.⁵⁹ These provisions show how the 1981 Convention’s preventative approach to occupational safety and health and the duty of care at the national level is an ongoing endeavor.⁶⁰

Part IV of the Convention contains provisions related to employer responsibility, and demonstrates how national governments should outline the role of employers in the preventative approach to

54. *See id.* arts. 4–15 (mentioning that to comply with the duty-of-care obligations set forth, guidance will be given to employers and workers).

55. *Id.* art. 4.

56. *Id.* art. 5 (“the policy . . . shall take into account . . . training including necessary further training, qualifications and motivations of persons involved, in one capacity or another, in the achievement of adequate levels of safety and health”).

57. *Id.* arts. 4–5.

58. *See* INTERNATIONAL LABOUR CONFERENCE 98TH SESSION, *supra* note 45, at 16 (emphasizing the “progressive nature” of Occupational Safety and Health as a whole and encouraging dialogue between governments, employers, and workers to address new developments).

59. Occupational Safety and Health Convention, *supra* note 5, art. 9.

60. *Id.* arts. 4–15; *see also id.* art. 4 (“Each member shall . . . formulate, implement and periodically review a coherent national policy . . .”).

occupational safety and health and their duty-of-care obligations to workers.⁶¹ Where necessary, nations should require employers to provide measures to address emergencies and accidents.⁶² Under the Convention, employer duty of care should include arrangements at the level of the undertaking be in place to ensure workers and their representatives are given appropriate training in occupational safety and health.⁶³ Workers also should be accorded the right to “enquire into and are [to be] consulted by the employer on all aspects of occupational health and safety associated with their work.”⁶⁴ These employer obligations along with national policy and action establish the pillars of the 1981 Convention’s preventative approach to challenges of occupational safety and health and the duty of care.⁶⁵

2. The 2006 Promotional Framework for Occupational Safety and Health Echoes the 1981 Convention’s Preventative Approach to Occupational Safety and Health and the Duty of Care

The 2006 Promotional Framework for Occupational Safety and Health notes in its preamble the importance of the 1981 Occupational Safety and Health Convention, and echoes the 1981 convention’s purpose of advancing a preventative approach to occupational safety and health.⁶⁶ Article 1 defines the Convention’s key term, national preventative safety and health culture, as a culture in which a right to a safe and healthy working environment is ensured through “a system of defined rights, responsibilities and duties, and where the principle of prevention is accorded the highest priority.”⁶⁷ Article 2 states that nations will promote “continuous improvement of occupational safety and health to prevent occupational injuries, disease, and deaths, by the development and consultation with the

61. *Id.* Part IV (listing the duties of the employer that should be included in state parties’ national policy, such as providing for protective gear, safe equipment, and training).

62. *Id.* art. 18.

63. *Id.* art. 19(d).

64. *Id.* art. 19(e).

65. Occupational Safety and Health Convention, *supra* note 5, Parts III–IV (describing actions that states should take to ensure occupational health and safety at national and employer levels).

66. Promotional Framework for Occupational Safety and Health Convention, *supra* note 5, pmb1.

67. *Id.* art. 1(d).

most representative organizations of employers and workers, of a national policy, national system, and national programme.”⁶⁸ Article 2 lists the Convention’s national duty-of-care obligations in its calling for a national policy, system, and program that prevents not only worker injuries, disease, and death, but also other obstacles to occupational safety and health.⁶⁹

The role of risk assessment and establishment of laws are also detailed in the Promotional Framework’s vision of national involvement in occupational safety and health.⁷⁰ Article 3 emphasizes assessing and combating occupational risks with respect to national policy, which is at the center of the legal concept of the duty of care.⁷¹ Article 4, referring to national systems, requires the incorporation of laws and regulations in regards to occupational health and safety.⁷² Part V of the Promotional Framework Convention also calls on members to establish a national program to promote the development of a national preventative safety and health culture.⁷³

As a continuation of the preventative approach of the 1981 Occupational Safety and Health Convention, the Promotional Framework advances more national involvement and ensures continual evaluation of challenges and risks in the field of occupational safety and health.⁷⁴ These objectives establish an ongoing national duty of care under the Convention to prevent reasonably foreseeable injuries to workers.⁷⁵

68. *Id.* art. 2(1).

69. *See id.* (referring to a preventative approach to occupational health and safety in line with the concept of the duty of care as safeguarding against reasonably foreseeable injury).

70. *Id.* art. 3(3).

71. *Id.* (“In formulating its national policy, each Member . . . shall promote basic principles such as assessing occupational risks or hazards; combating occupational risks or hazards at source; and developing a national preventative safety and health culture that includes information, consultation and training.”).

72. *Id.* art. 4(2)(a).

73. *Id.* arts. 5–5(2)(a) (calling for each member to the Promotional Framework to “formulate, monitor, evaluate, and periodically review” national programs in conjunction with workers, and employers representatives).

74. *Id.* art. 5 (requiring members to the Framework to submit indicators of progress with regard to the national program).

75. *Id.* (providing for training, testing of equipment, and communication as ongoing endeavors).

E. THE VIENNA CONVENTION ON THE LAW OF TREATIES

The Vienna Convention on the Law of Treaties lends guidance to the interpretation of treaties between states.⁷⁶ Article 31 on the general rules of interpretation provides that “a special meaning shall be given to a term if it is established that the parties so intended.”⁷⁷ Moreover, the Vienna Convention allows for the supplementary means of interpretation including preparatory work of the treaty to determine the meaning of a treaty when it is “ambiguous or obscure,” or leads to an unreasonable result.⁷⁸ Under the Vienna Convention, a treaty binds its parties to its terms, and requires members to perform obligations under the treaty in good faith.⁷⁹ The Convention also provides that the terms of a treaty shall be interpreted in light of the “object and purpose” of a treaty.⁸⁰

III. ANALYSIS

The drafting history of the 1981 and 2006 ILO Conventions demonstrates that the duty of care under those Conventions extend to international business travelers and assignees.⁸¹ Moreover, the examination of state practice shows the extension of the duty of care to workers abroad is an emerging norm under customary international law. China violates the 1981 and 2006 ILO Conventions’ obligations to extend the duty of care to workers in Nigeria.

A. THE 1981 AND 2006 ILO OCCUPATIONAL SAFETY AND HEALTH CONVENTIONS’ PREVENTATIVE APPROACH TO OCCUPATIONAL SAFETY AND HEALTH EXTENDS THE DUTY OF CARE TO WORKERS ABROAD

There is no explicit provision in the 1981 Convention on

76. Vienna Convention on the Law of Treaties arts. 30–33, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention on the Law of Treaties].

77. *Id.* art. 31(4).

78. *Id.* art. 32 (including consideration of the conditions of the treaty’s conclusion to determine a treaty’s meaning when it is unclear).

79. *Id.* art. 26 (“Every treaty in force is binding upon the parties to it and must be performed by them in good faith.”).

80. *Id.* art. 31(1).

81. See discussion *infra* Part III.A (referring to drafter commentary from the 67th and 95th International Labor Conferences).

Occupational Safety and Health or the 2006 Promotional Framework that extends the duty of care detailed in these Conventions to workers abroad, creating ambiguity; thus, the intentions of the parties and the drafting history of the Conventions must be used to resolve this issue.⁸² The Vienna Convention on the Law of Treaties provides that the intentions of the parties and the preparatory work can be used in the interpretation of a treaty in case of ambiguity.⁸³ The ambiguity in the ILO Occupational Safety and Health Conventions from 1981 and 2006 regarding whether the duty of care extends to workers abroad can be resolved from the Conventions' drafting history, contained in the sixty-seventh and ninety-fifth International Labor Conferences.⁸⁴

1. The Drafting History of the 1981 Occupational Safety and Health Convention Confirms the Duty of Care Extends to Workers Abroad

The preparatory work and drafting history of the 1981 Occupational Safety and Health Convention in the sixty-seventh International Labor Conference demonstrate through the Convention's provisions on scope and definitions, national policy and action, and employer responsibility, that the Convention extends the duty of care to workers abroad.⁸⁵ The sixty-seventh International

82. See Vienna Convention on the Law of Treaties, *supra* note 76, art. 31 (providing that the intentions of the parties as well as prior and subsequent agreements between parties are used in treaty interpretation).

83. See *id.* art. 32 (noting that the context of the treaty's conclusion should be considered in finding the treaty's meaning where it is "obscure" or causes a nonsensical outcome in application); see also Malgosia Fitzmaurice, *Book Review*, 20 EUR. J. INT'L L. 919, 952 (2009) (reviewing RICHARD K. GARDINER, *TREATY INTERPRETATION* (2008)) (stating the International Law Commission and the Vienna Convention on the Law of Treaties permits "text, preamble, annexes, related agreements, preparatory work, etc." to be taken into consideration in treaty interpretation).

84. See ILO, INTERNATIONAL LABOR CONFERENCE 95TH SESSION 20/1, 20/2, 20/3 (2006), <http://www.ilo.org/public/libdoc/ilo/P/09616/09616%282006-95%29.pdf> (detailing the input of the drafters at each stage of the drafting process of the 2006 Convention, ranging from enhancing awareness around occupational safety and health to the importance of international collaboration on the matter of occupational safety and health); ILO, INTERNATIONAL LABOR CONFERENCE 67TH SESSION 25/1 (1981), <http://www.ilo.org/public/libdoc/ilo/P/09616/09616%281981-67%29.pdf> (providing opinions from representatives of States, and suggestions for each provision of the 1981 Convention).

85. INTERNATIONAL LABOR CONFERENCE 67TH SESSION, *supra* note 84, at 25/1–25/2 (expressing drafters' intentions to be inclusive in the 1981 Convention's

Labor Conference provisional record reflects that the 1981 Convention's provisions on scope and definitions are intended to include international business travelers and assignees.⁸⁶ Even though on its face the Convention's scope excludes some workers because it excludes some branches of economic activity, the record provides that the intention is to include, over time, all workers in all branches of economic activity.⁸⁷ The Convention is structured in this way to allow for more flexibility with the aim of encouraging nations to ratify the Convention as soon as possible.⁸⁸ Moreover, the restriction on workers covered under the Convention does not relate to territorial confines, and this shows that the drafters did not intend to exclude workers based on their status as international business travelers or assignees.⁸⁹

The drafting history and the definition of "workplace" under the Convention both demonstrate that the Convention covers individuals working abroad so long as those workplaces are under the employer's "direct or indirect control."⁹⁰ The drafting history focused on employer control as opposed to limiting the territory or locations that could be considered as part of the workplace.⁹¹ There was no intention to exclude those places under the indirect or direct control of the employer, and this applies to those places the employer

definition and provisions, and to address issues of occupational safety and health beyond occupational accidents and diseases).

86. *See id.* at 25/2 (explaining the drafters' intentions to have broad definitions of workplace, and branches of economic activity to include the maximum amount of workers in the treaty's application).

87. *See id.* (mentioning employer representatives were in agreement with the principle of the treaty "covering all workers").

88. *See id.* (denying the suggestion to include explicit references to workers in the non-profit sector for fear that this would lead to a misinterpretation that would exclude workers in other sectors).

89. *Cf. id.* (demonstrating that the drafters focused on only excluding workers due to the nature of their profession or the "branch of economic activity" at issue, not the separate category of discrimination based on business travel or assignments abroad).

90. *See id.* at 25/2–25/3 (rejecting an amendment to the definition of workplace because the drafters had come to an agreement on this matter and changing any wording would make ratification difficult); *see also* Occupational Safety and Health Convention, *supra* note 5, art. 3(c) (defining the term "workplace" as covering "all places where workers need to be or to go by reason of their work and which are under the direct or indirect control of the employer").

91. *See id.* at 25/2–25/3 (describing that the drafters found it unreasonable to hold an employer liable for a situation not under the employer's control).

controls abroad.⁹² If the definition of workplace excluded any places under the employer's control, it would violate the object and purpose of the Convention to take preventative measures to occupational safety and challenges at national and employer levels.⁹³ Additionally, ratifying countries are prohibited from violating the object and purpose of a treaty under the Vienna Convention on the Law of Treaties.⁹⁴

The Convention's national policy and action requires parties to extend duty-of-care obligations including prevention efforts in regards to work related accidents, and injury to workers abroad.⁹⁵ Even though the Convention states that the preventative national policy and action toward occupational safety and health must comply with the objectives of the ILO Convention "so far as reasonably practical," the drafting history shows that this wording was included only for "abnormal or exceptional situations."⁹⁶ Risks to international business travelers and assignees, like kidnapping, are often foreseeable and location specific, and thus in line with the legal concept of the duty of care that covers reasonably foreseeable risks.⁹⁷

92. *See id.* at 25/3 (noting that employer representatives and governments objected to reopening debate about the term "workplaces" and rejected the mention that there needed to be a purely geographical definition).

93. *See* Occupational Safety and Health Convention, *supra* note 5, art. 4(2) (instructing that national policies must aim to prevent accidents and injury relating to occupational safety and health). *See generally* Luigi Crema, *Disappearance and New Sightings of Restrictive Interpretation(s)*, 21 EUR. J. INT'L L. 681, 689–90 (2010) (explaining that the meaning of the object and purpose of a treaty no longer used "to prefer a reasonable meaning over an absurd one but to prefer the most effective [interpretation] in relation to a purpose of the treaty.").

94. *See* Vienna Convention on the Law of Treaties, *supra* note 76, art. 31(1) (providing that terms of a treaty will be read in context of the treaty at large).

95. *See* INTERNATIONAL LABOR CONFERENCE 67TH SESSION, *supra* note 84, at 25/5 (noting the compulsory nature with which the objectives of the national policy on occupational safety and health were to apply including prevention of accidents and injury).

96. *See id.* (explaining that the national legislation of some states parties had similar wording allowing for abnormal situations).

97. *See, e.g.,* CLAUS, *supra* note 6, at 18–19 (surveying the legal standard for duty of care in the United States, including OSHA's requirement that "Employers must furnish their employees with a place of employment that is free from recognized hazards that cause, or are likely to cause, death or serious physical harm to their employees"); *see also* *Nigeria Travel Warning*, *supra* note 19 (highlighting specific parts of Nigeria where kidnapping and crime are considered real threats to foreigners and in particular foreign workers); 2008 KIDNAP RISK

In many circumstances, occupational safety and health challenges to international business travelers and assignees are not exceptional, and risks of confronting these challenges can be reduced.⁹⁸ Therefore, the duty of care under the Convention applicable to national policy and action extends to international business travelers and assignees because while the risks these employees face may be unique to their location, they are not exceptional.⁹⁹

Moreover, the 1981 Convention's drafting history reflects an intent for employees to undergo continuous training (an element of the duty of care), and for State Parties to implement new preventative techniques for challenges in occupational safety and health as new situations arise.¹⁰⁰ Because the number of international business travelers and assignees has continually increased since the 1981 Convention went into force, extending the duty of care and prevention in the area of occupational safety and health challenges to workers abroad aligns with the flexibility the drafters intended when they emphasized training as an ongoing endeavor.¹⁰¹ Under the Convention, national policy also obliges employers to provide adequate training as part of their duty of care for new challenges to occupational safety and health, and to consult workers on all aspects of occupational safety and health.¹⁰² Thus, preventative training for international business travelers and assignees on both national and employer levels supports the drafters' intention to have a working Convention that would accommodate future occupational safety and health challenges.¹⁰³

BRIEF, *supra* note 20 (pinpointing the severity of the risk of kidnapping to workers abroad in areas of Africa, South America, Asia, and the Middle East).

98. See BERKOWITZ & CONGIU, *supra* note 1, at 5–6 (advising employers to identify location specific threats, and to obtain security consulting before sending employees abroad).

99. See *id.*

100. See INTERNATIONAL LABOR CONFERENCE 67TH SESSION, *supra* note 84, at 25/6 (explaining a proposal to add the word “replenishing” after training to show a continuous commitment to training).

101. *Id.* at 25/1, 25/5–25/6; see BERKOWITZ & CONGIU, *supra* note 1, at 1 (arguing the need for employers to be prepared for the continuing globalization of labor markets and unique risks of dangerous international employee assignments).

102. Occupational Safety and Health Convention, *supra* note 5, art. 19 (d)–(e).

103. See INTERNATIONAL LABOR CONFERENCE 67TH SESSION, *supra* note 84, at 25/6 (explaining that the drafters decided there was no need for the word “retraining” and training was sufficient to understand the intention of an ongoing

2. *The Drafting History of the 2006 Promotional Framework Confirms That the Duty of Care Extends to Workers Abroad*

In the drafting stage of the 2006 Promotional Framework, government and worker representatives further stressed the need for continual improvement of preventative measures designed to improve occupational safety and health.¹⁰⁴ Specifically, the Promotional Framework provides that there should be ongoing improvement to occupational safety and health, and a duty of care to prevent “occupational injuries, disease, and deaths” on employer and national levels.¹⁰⁵ Regarding the duty of care, the 2006 Convention also calls for assessing and combating new risks.¹⁰⁶ The 2006 Convention’s focus on continuing improvements to occupational safety and health through preventative measures, as reflected in the drafting history of the Convention, and in the explicit reference to the assessment of new risks, confirm that the duty of care protects against non-traditional yet foreseeable challenges to workers abroad.¹⁰⁷

B. THE STATE PRACTICE AND *OPINIO JURIS* OF AUSTRALIA, THE UNITED KINGDOM, THE EUROPEAN UNION, AND THE UNITED STATES SHOW AN EMERGING NORM TO EXTEND THE DUTY OF CARE TO WORKERS ABROAD

While the 1981 and 2006 Conventions prescribe a duty of care that extends to workers abroad, this is not sufficient to establish an emerging norm under customary international law.¹⁰⁸ Treaties like

process).

104. See INTERNATIONAL LABOR CONFERENCE 95TH SESSION, *supra* note 84, at 20/3 (recognizing the 1981 Convention’s provisions are too general and the need for clearer recognition in the Framework to continuously promote occupational safety and health).

105. Promotional Framework for Occupational Safety and Health Convention, *supra* note 5, art. 2(1).

106. See *id.* art. 3 (stating national policy should facilitate risk assessment as well as promote “information, consultation, and training” concerning occupational safety and health).

107. INTERNATIONAL LABOR CONFERENCE 95TH SESSION, *supra* note 84, 20/3; see Promotional Framework for Occupational Safety and Health Convention, *supra* note 5, art. 3 (calling for a national preventative health and safety culture).

108. See *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, 1985 I.C.J. 13, 29–30 ¶ 27 (June 3) (holding that while treaties may help define the rules of custom, alone they are insufficient to establish custom).

the 1981 and 2006 Conventions may aid in developing more specific rules concerning custom, but state practice and *opinio juris* of states establish norms of customary international law.¹⁰⁹ The state practice and *opinio juris* of Australia, the United Kingdom, the European Union, and the United States reflect, through case law and legislation, a custom of extending the duty of care as related to occupational safety and health to safeguard against traditional and unique risks that face international business travelers and assignees.¹¹⁰ For instance, courts in Australia and the United Kingdom have recognized a legal obligation to hold employers liable when employees encounter reasonably foreseeable risks, including diseases or accidental injuries, while abroad.¹¹¹ Moreover, courts in the United States and Australia held employers liable for neglecting to safeguard employees against unique risks to international business travelers and assignees, such as violent attacks and kidnapping.¹¹² Indeed, in an Australian case, an employer was liable for not providing adequate training concerning location specific risks to an employee, who was attacked by a thief, when sent to Papua New Guinea.¹¹³ The Australian, European, and American courts'

109. See *North Sea Continental Shelf* (Ger. v. Den; Ger v. Neth.), 1969 I.C.J. 3, 42 ¶ 71 (Feb. 20) (stating that while it is possible for a practice described in a treaty to become a legal obligation for states and thereby achieve the status of customary international law, such a result "is not lightly to be regarded as having been attained").

110. See BERKOWITZ & CONGIU, *supra* note 1, at 1 (describing a complaint by two Scottish oil workers against their employer, alleging that the employer breached its duty of care toward its employees); CLAUS, *supra* note 6, at 11, 15–17 (detailing cases in which courts have found employers liable for disease, and workplace accidents, and violence).

111. See *Favelle Mort Ltd v. Murray* [1976] 133 CLR 580 (Austl.) (holding an employer liable for breaching the duty of care it owed a worker who contracted a disease while on an international assignment); see also *McDermid v. Nash Dredging & Reclamation Co. Ltd.*, (1987) 1 A.C. (H.L.) 906 (appeal taken from Eng.) (finding that an employer breached its duty of care where an employee incurred a work injury on a ship due to the captain's negligence).

112. See *Khan v. Parsons Global Serv., Ltd.*, 521 F.3d 421 (D.C. Cir. 2008) (allowing an employee to sue an employer under common law tort theories after being kidnapped while on assignment); see also *Pac. Access Pty Ltd. v Davies* [2001] NSWCA 218 ¶ 7 (Austl.) (finding the employer liable for not extending the duty of care to an employee abroad who suffered a knife attack, and claiming training about how to conduct oneself in Port Moresby would have put the employee in a safer position).

113. See *Pac. Access Pty Ltd.* [2001] NSWCA 218 ¶ 7 (concluding the employer

recognition of the legal necessity for employers to provide training for traditional and unique risks to workers abroad mirrors the duty of care outlined in the 1981 and 2006 ILO Conventions.¹¹⁴ Therefore, the extension of the duty of care to international business travelers and assignees, including the duty to provide training, has become a part of customary international law.¹¹⁵

Legislation in the United Kingdom and the European Union that extends the duty of care to international business travelers and assignees also demonstrates a sense of legal obligation that evidences an emerging norm of customary international law.¹¹⁶ The United Kingdom's Corporate Manslaughter and Corporate Homicide Act of 2007 imposes criminal liability on employers for gross breaches of the duty of care that result in the death of an employee, including international business travelers and assignees.¹¹⁷ Likewise, European Union Directive 89/391 outlines employer obligations to prevent occupational risks and promote occupational health and safety.¹¹⁸ The Directive applies throughout the European Union.¹¹⁹ Although these initiatives were instituted at different times, no considerable amount of time needs to pass for a norm under customary international law to be established.¹²⁰ This national and regional

needed to train employees not to openly carrying bags and purses in Port Moresby).

114. See CLAUS, *supra* note 6, at 4, 11, 15–17 (highlighting how courts have found employer liability for diverse challenges to occupational safety and health faced by employees abroad, and the need for multinational corporations and governments to be aware of these issues).

115. See *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, 1985 I.C.J. 13, 29–30 ¶ 27 (June 3) (setting forth that treaties help develop rules of custom, but do not constitute custom without state practice and *opinio juris*).

116. See *North Sea Continental Shelf (Ger. v. Den; Ger v. Neth.)*, 1969 I.C.J. 3, 42 ¶ 71 (Feb. 20) (holding state practice and *opinio juris* determines international customary law); see also *RESTATEMENT OF FOREIGN RELATIONS LAW*, *supra* note 38 § 102(4) (requiring a sense of legal obligation on behalf of a government to establish custom).

117. Corporate Manslaughter and Corporate Homicide Act, § 1.

118. See BERKOWITZ & CONGIU, *supra* note 1, at 4 (explaining how European Union Council Directive 89/391, art. 6 calls for avoiding risks and replacing the dangerous with the non-dangerous or less dangerous in regards to occupational safety and health).

119. *Id.* at 4 (noting the Directive applies directly to all EU employers).

120. See *North Sea Continental Shelf*, 1969 I.C.J. 3, 42 ¶ 71 (“[T]o become a general rule of international law, it might be that, even without the passage of any considerable amount of time, a very widespread and representative participation in

legislation, and the aforementioned case law, evidence an emerging norm of extending the duty of care as related to occupational safety and health to workers abroad.

C. RATIFYING GOVERNMENTS AND EMPLOYERS VIOLATE THE
1981 AND 2006 ILO OCCUPATIONAL SAFETY AND HEALTH
CONVENTIONS BY SENDING WORKERS ABROAD TO AFRICA
WITHOUT EXTENDING THE DUTY OF CARE

China and other signatory countries to either the 1981 or the 2006 ILO Occupational Safety and Health Conventions violate Convention obligations by sending workers abroad to Nigeria without extending preventative duty of care measures to these workers as detailed in the Conventions. China's responsive approach to its kidnapped workers abroad in Nigeria is representative of other nations that have also had nationals kidnapped in the country.¹²¹ Instead of training and preparing workers for the unique risk of kidnapping in areas like the Niger Delta, governments and employers of foreign nationals often combat this issue after the fact by asking for local aid and sending in teams to ensure safe release.¹²² This reactive approach contrasts sharply to the 1981 and 2006 ILO Conventions' preventative approach to occupational safety and health.¹²³ Turning specifically to the Chinese example, the structure

the convention might suffice of itself, provided it included that of states whose interests were specially affected.”).

121. See *Nigeria Says Spanish Doctor Kidnapped by Gunmen*, *supra* note 21 (describing only responsive actions by Spain to a Spanish doctor's kidnapping); see also *Abducted German Engineer Killed in Nigeria*, BBC NEWS (May 31, 2012), <http://www.bbc.co.uk/news/world-africa-18278740> (detailing only the measures taken after the kidnapping of a German engineer working in Nigeria including military intervention).

122. See *Militants Abduct 6 Russians, Kill One*, ALLAFRICA.COM (June 4, 2007), <http://allafrica.com/stories/printable/200706040266.html> (reporting that the Russian Ambassador demanded aid from local authorities when employees of the Moscow-based company ALSCON were kidnapped in Nigeria); see also *Abducted German Engineer Killed in Nigeria*, *supra* note 121 (describing the dispatch of a crisis team to secure the release of a kidnapped German engineer in Nigeria); Ofonime Umanah, *Gunmen Kidnap 3 Britons, Kill Policeman in Port Harcourt*, ALLAFRICA.COM (Jan. 13, 2010), <http://allafrica.com/stories/printable/201001130473.html> (describing efforts to secure the release of the kidnapped Britons and to apprehend their kidnappers).

123. See Promotional Framework for Occupational Safety and Health Convention, *supra* note 5, art. 1(d) (calling for a national preventative safety and

of Chinese law along with the lack of enforcement of national law explain the reactive approach to the risk of kidnapping to Chinese employees abroad in Nigeria.¹²⁴

1. The Structure of Chinese Law Contributes to China's Violation of the 1981 ILO Convention for Failure to Extend Preventative Measures to Protect Workers in Nigeria Against Kidnapping

Two Chinese laws are relevant to the discussion of China's violation of the 1981 ILO Convention for failing to extend the duty of care in regards to the unique risk of kidnapping posed to workers abroad in regions of Nigeria.¹²⁵ First, the Production Safety Law is the primary law that details rights and obligations of employees regarding occupational safety.¹²⁶ While this law does provide for training and preventative measures in occupational health and safety in accordance with Articles 5 and 19 of the 1981 ILO Convention, it applies only domestically and does not extend the duty of care to international business travelers or assignees.¹²⁷ However, the

health culture that accords prevention "the highest priority"); Occupational Safety and Health Convention, *supra* note 5, art. 2 (providing for prevention measures like training and continuous inspection of workplaces for occupational safety and health challenges)

124. See (中华人民共和国安全生产法) [Production Safety Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong, Jun. 29, 2002, effective Nov. 1, 2002), art. 2, 21, 50, (June 29, 2002, effective Nov. 1, 2002) (Lawinfochina) (China) (excluding workers sent abroad from a law that covers general principles, emergency rescue, investigation, and handling of production safety accidents, and legal liabilities in regards to occupational safety and health); see also Notice on Issuing the Provisions on the Safety Management of Overseas Chinese-funded Enterprises, Institutions and Personnel (promulgated by the Ministry of Commerce, the Ministry of Foreign Affairs and the National Development and Reform Commission, Aug. 13, 2010, effective Aug. 30, 2010) (Lawinfochina) (China) [hereinafter Notice on Safety Management] (addressing the kidnapping of employees abroad by mandating response only after the kidnapping has taken place).

125. See generally Production Safety Law of the People's Republic of China, *supra* note 124, art 2, 21, 50 (governing occupational health and safety within China); Notice on Safety Management, *supra* note 124, arts. 3-7 (examining occupational health and safety concerns for workers sent abroad).

126. Production Safety Law of the People's Republic of China, *supra* note 124, arts. 2, 21, 50.

127. *Id.* art. 2 ("The present law shall be applicable to the production safety of the entities that are engaged in to the production and business operation activities within the territory of the People's Republic of China.").

Provisions on the Safety Management of Overseas Chinese-funded Enterprises, Institutions, and Personnel issued by the Ministry of Commerce, the Ministry of Foreign Affairs, and the National Development and Reform Commission apply directly to the management of enterprises and workers abroad.¹²⁸ The Provisions' focus on training of employees for risks abroad is consistent with China's obligations in relation to the duty of care under the 1981 ILO Convention.¹²⁹ But the framing of the risk of kidnapping as an unexpected or abnormal overseas safety incident is problematic.¹³⁰ The provisions on unexpected incidents including kidnapping only explain how enterprises should cooperate with Chinese authority in response to such an incident.¹³¹ While the law places importance on preventative training for occupational safety and preparation for management in high-risk regions in sections 2 and 5, chapter 4 on unexpected incidents refers only to response protocol.¹³²

Because China's principal occupational safety and health legislation does not extend the duty of care to international business travelers or assignees, and the law that applies to overseas workers frames the risk of kidnapping as an unexpected incident, this understanding of the duty of care reflects the reactive approach to the risk of kidnapping, in Africa generally, of Chinese workers at the national and employer levels.¹³³ For example, twenty-nine Chinese workers in Sudan employed by the Power Construction Corporation of China were kidnapped, and the situation was referred to the

128. See Notice on Safety Management, *supra* note 124, art. 2 (establishing that "overseas Chinese-funded enterprises, institutions and personnel refers to enterprises and institutions formed overseas, and personnel assigned to outside China by overseas investment and cooperation enterprises").

129. See *id.* arts. 5–7 (providing that whoever assigns employees abroad will be responsible for their safety and must provide safety education training before leaving the country).

130. See *id.* art. 16 (listing provisions on the risk of kidnapping under the heading concerned with emergency response to unexpected overseas incidents).

131. See *id.* arts. 16–17 (outlining the steps that should be taken after an unexpected incident occurs and is reported to the embassy or consulate).

132. *Id.*

133. See, e.g., Andrew Jacobs & Jeffrey Gettleman, *Kidnappings of Workers Put Pressure on China*, N.Y. TIMES (Jan. 31, 2012), <http://www.nytimes.com/2012/02/01/world/africa/china-says-29-workers-still-missing-in-sudan.html> (detailing that only response efforts were implemented after Chinese workers were kidnapped in Sudan, while no preventative measures were in effect, which is consistent with Chinese law on unexpected overseas incidents).

Chinese embassy and government as prescribed in the Provisions on the Safety Management of Overseas Chinese-funded Enterprises, Institutions and Personnel in relation to unexpected incidents.¹³⁴ Similarly, in Nigeria in 2007 when five Chinese telecom workers were kidnapped, the telecommunications company cooperated with the Chinese embassy to secure their release.¹³⁵ In both of these situations, China used a reactive approach in accordance with the national law and policy on unexpected incidents instead of following a preventative approach to the risk of kidnapping.¹³⁶ The structure of Chinese law in regard to the unique risk of kidnapping workers overseas would be consistent with the preventative approach of the Convention if it were not discussed as an unexpected risk that deserves a primarily reactive approach.

2. China Is Not Upholding Its Obligations Under the 1981 ILO Occupational Safety and Health Convention Because Its Laws Regarding Worker Training About Kidnapping Risks Are Not Properly Enforced

While Chinese law provides for overseas workers' safety education and training in line with the 1981 ILO Convention, the lack of enforcement of these laws violates the 1981 ILO Convention Articles 5(c), 10, 14 and 19(d) concerning preventative training for occupational safety and health challenges at the national and employer levels.¹³⁷ News reports reflect that more security efforts need to be in place to combat the risk of kidnapping of Chinese

134. *Id.* (reporting statements from the Chinese embassy in Sudan and explaining how Chinese diplomats met with Sudanese rebel leaders after the kidnapping).

135. *See, e.g., Five Chinese Kidnapped in Nigeria Freed, supra* note 21 (explaining that China's President ordered the Chinese Foreign Ministry along with China's embassy and consulate in Nigeria to do everything possible to secure the release of the kidnapped Chinese employees).

136. *See* Notice on Safety Management, *supra* note 124, art. 17(3) ("The Chinese Embassy or Consulate in that country shall direct the overseas Chinese-funded enterprise or institution on how to deal with the incident . . .").

137. *See* Occupational Safety and Health Convention, *supra* note 5, arts. 5(c), 10, 14, 19(d) (proposing preventative occupational safety and health training, including necessary further training for employees at the national and employer levels, and providing guidance at the national level to help employers and workers comply with these legal obligations).

workers abroad in Africa.¹³⁸ Moreover, reports indicate that most Chinese international business travelers and assignees have a poor awareness of security risks in Africa.¹³⁹ This demonstrates how the Chinese national policy advocating safety training of employees even before they are sent abroad is not being fulfilled. Indeed, the ILO's Committee of Experts on the Application of Convention and Recommendations' (CEACR) report on China's compliance with the 1981 Convention on Occupational Safety and Health declares further efforts are needed in China's enforcement of occupational health and safety laws and regulations.¹⁴⁰ The report asks for a public educational campaign on occupational health and safety to be instituted.¹⁴¹ The Committee also noted the need for continuous training on the introduction of new techniques, new technology, new material, and new challenges to occupational health and safety.¹⁴² The Committee's demand for more enforcement of the laws pertaining to training on the national and employer levels speaks directly to China's violation of the 1981 Convention in Africa, that is, not giving preventative training to safeguard against kidnapping of overseas workers.¹⁴³ Without enforcing the provisions of law that provide for preventative training to safeguard against the unique risk of kidnapping to Chinese employees abroad in Nigeria and Sudan,

138. See, e.g., *25 Workers Kidnapped in Egypt*, CHINA DAILY (Feb. 1, 2012), http://www.chinadaily.com.cn/cndy/2012-02/01/content_14514495.htm (noting that Chinese nationals sent to work abroad are at risk for kidnapping in Africa, and that they take their safety for granted due to the amicable relationship between China and Africa).

139. See *id.* (quoting the opinion of He Wenping, an expert on African Studies at the Chinese Academy of Social Sciences).

140. See *Direct Request (CEACR) – adopted 2010, published 100th ILC Session (2011)*, ILO, http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:2335030 (last visited Nov. 29, 2012) [hereinafter *CEACR Direct Request (China)*] (“The Committee also notes that the ITUC considers that further efforts are needed in the area of enforcement of OSH laws and regulations in the country and calls on the Government to undertake a widespread public educational campaign on OSH legislation and associated rights and duties.”).

141. See *id.* (asking the government to continue reporting efforts made in educating employers, workers, and the general public about occupational safety and health laws).

142. See *id.* (emphasizing continuous training for management as well as employees).

143. See *id.* arts. 5(c), 10, 14, 19(d) (asking the Chinese government to provide further information on the application of article 19(d) concerning training).

China will continue to violate its obligations under the 1981 ILO Convention.¹⁴⁴

IV. RECOMMENDATIONS

A. TO COMPLY WITH ITS OBLIGATIONS UNDER THE 1981 AND 2006 CONVENTIONS, CHINA SHOULD EXTEND THE DUTY OF CARE TO INTERNATIONAL BUSINESS TRAVELERS AND ASSIGNEES IN ITS PRIMARY LAW ON OCCUPATIONAL HEALTH AND SAFETY, AND RECLASSIFY KIDNAPPING AS AN ANTICIPATED RISK

China should revisit its national law and policy in two ways in order to comply with the 1981 and 2006 ILO Conventions. First, China should extend the primary legislation on occupational safety and health, the Production Safety Law, to international business travelers and assignees so that training and other preventative measures guaranteed in the law apply to workers overseas.¹⁴⁵ Other countries, such as the United Kingdom, have extended the duty of care to workers abroad in their primary legislation concerning occupational health and safety.¹⁴⁶ In so doing, the extension of the duty of care to international business travelers and assignees becomes a national standard.¹⁴⁷

The second proposed change to Chinese law concerns the reformation of the 2010 Provisions on the Safety Management of Overseas Chinese-funded Enterprises, Institutions and Personnel that apply directly to overseas workers. These provisions frame the risk of kidnapping as an unexpected incident despite having reports of

144. See Occupational Safety and Health Convention, *supra* note 5, art. 5(c) (requiring that “training, including necessary further training” be part of the Convention’s demand for a national policy of prevention with regard to occupational safety and health).

145. See Production Safety Law of the People’s Republic of China, *supra* note 124, art. 45 (detailing the rights and obligations of employees in domestic employment regarding occupational safety and health, including the right to preventative training).

146. See CLAUS, *supra* note 6, at 16 (stating that the UK Health and Safety at Work Act provides that the employer must extend the duty of care to workers overseas if “the situation in the host country was reasonably foreseeable”).

147. See discussion *supra* Part III.B (citing Australia, the United Kingdom, the European Union, and the United States as States that have developed, through case law and legislation, a standard practice of extending the duty of care to workers abroad in line with what is required under the 1981 and 2006 ILO Conventions).

Chinese nationals kidnapped in parts of Africa since 2007.¹⁴⁸ Reclassifying the risk of kidnapping from an unexpected to an anticipated risk would help to change the approach to kidnapping from reactive in nature to preventative in nature.

In addition to restructuring the law, China must also enforce the 2010 Provisions on the Safety Management of Overseas Chinese-funded Enterprises, Institutions and Personnel. In their report on China's compliance with the 1981 Convention, the ILO's Committee of Experts on the Application of Conventions and Recommendations (CEACR) calls for the government to undertake a widespread public education campaign on occupational safety and health legislation, and associated rights and duties.¹⁴⁹ In this way, employers and employees alike would become more aware of the extension of the duty of care to employees abroad. Moreover, the campaign would educate employers and employees about the preventive approach to occupational health and safety, addressing both the traditional and unique risks posed to international business travelers and assignees.¹⁵⁰

**B. CHINA, AS WELL AS OTHER MEMBERS TO THE 1981 AND 2006
OCCUPATIONAL HEALTH AND SAFETY CONVENTIONS, CAN
DEVELOP A PREVENTIVE APPROACH TO OCCUPATIONAL HEALTH
AND SAFETY BY ACTIVELY ADDRESSING KNOWN RISKS TO
WORKERS ABROAD AT THE EMPLOYER LEVEL**

There are various measures at the employer level that national governments should instruct employers to take to comply with the 1981 and 2006 ILO Conventions' preventative approach to occupational safety and health by extending the duty of care to workers abroad for unique and traditional risks. First, employers must gauge specific threats in host countries, such as the threat of kidnapping in the Niger Delta region, and develop targeted plans

148. See, e.g., *Five Chinese Kidnapped in Nigeria Freed*, *supra* note 21 (recounting an incident in 2007 where Chinese workers were kidnapped in the Niger Delta, a region where expatriates in general are at risk for kidnapping).

149. See *CEACR Direct Request (China)*, *supra* note 140 (affirming the importance of continuous education on occupational safety and health for workers and employers).

150. See *id.* (suggesting the awareness campaign would also give the general public information about occupational safety and health).

based on those particular risks.¹⁵¹ Next, when looking at specific risks like kidnapping, retaining a security consultant can prove to be a valuable safety measure.¹⁵² Security consultants can work with an employer to provide table-top simulations of kidnapping or extortion situations, review travel security programs, and conduct training on how to respond to the threat of kidnapping or extortion.¹⁵³ Furthermore, training assignees on the necessary skills for responding to the specific threat of a country, including language and cultural skills, can prove essential in navigating emergency situations.¹⁵⁴

More general measures at the employer level include communicating contact points and phone numbers in the host country.¹⁵⁵ Conducting emergency evacuation briefings can also be a preventative tactic, especially in areas of potential conflict situations.¹⁵⁶ Lastly, equipping employees with GPS devices and designating a series of locations that can be used as meeting points in case of emergency are also helpful occupational safety and health

151. See BERKOWITZ & CONGIU, *supra* note 1, at 5 (advocating that employers should identify dangerous situations by considering factors like the existence of war, lack of infrastructure, and extreme physical and weather conditions); see also INT'L SOS, SURVEY: ASIA SPECIFIC CORPORATE TRAVEL EXECUTIVES ON MANAGING THE RISKS OF A GLOBAL WORKFORCE 4, 7 (2010), available at http://www.internationalsos.com/en/files/ACTE-IntlSOS_Report_Final.pdf [hereinafter ASIA SPECIFIC CORPORATE TRAVEL EXECUTIVES] (distinguishing countries with low risk of incident from countries with high risk of incident on the basis of “profiles on personal safety, petty crime, kidnapping, violent crime, social unrest, rule of law and corruption; situational developments, special incident advisories and travel alerts”).

152. See BERKOWITZ & CONGIU, *supra* note 1, at 6 (explaining that security consultants can also put in place travel security programs if the employer does not have such programs available).

153. See *id.* (claiming that a kidnap and ransom policy is not sufficient to guard against the risk of kidnapping to employees abroad).

154. See *id.* at 7 (indicating that employers should provide training that is responsive to a country’s particular threats, incorporating survival as well as language and cultural skills).

155. See *id.* (advising employers to keep phone numbers on record both in the home office and with a contact person in the host country).

156. Compare BERKOWITZ & CONGIU, *supra* note 1, at 7 (proposing mock evacuations be conducted periodically throughout an international assignment), with ASIA SPECIFIC CORPORATE TRAVEL EXECUTIVES, *supra* note 151, at 9 (summarizing a survey’s findings that “44.6% [of responding employers] said that there was an emergency response plan in case things took a turn for the worse . . .”).

measures that extend the duty of care to workers abroad.¹⁵⁷

V. CONCLUSION

Although the state practice of China fails to extend the duty of care to workers overseas to safeguard against kidnapping risks, there remains an overall trend to extend the duty of care to workers abroad to address traditional and unique risks as prescribed in the 1981 and 2006 ILO Occupational Safety and Health Conventions. Indeed, the legislation and case law of Australia, the United Kingdom, the European Union and the United States reflects the 1981 and 2006 ILO Conventions' preventative approach to occupational safety and health, including preventative training at the national and employer levels. Because employee international travel and assignments are increasing, the issue of the extension of the duty of care for these workers will continue to surface in judicial decisions, policy, and overall public consciousness.¹⁵⁸ Moreover, as China continues to send more employees to Africa as a result of future investment endeavors, the nation will be compelled to reevaluate its handling of location-specific risks.¹⁵⁹ In recognition of this evolving nature of the global workforce, government and employers have an ongoing responsibility to assess challenges and risks to occupational health and safety as highlighted in the 1981 and 2006 ILO Conventions.

157. BERKOWITZ & CONGIU, *supra* note 1, at 7.

158. *See id.* at 1 (explaining the rising frequency with which workers are sent abroad leads to legal duty-of-care issues).

159. *See, e.g.*, Jane Perlez, *With \$20 Billion Loan Pledge, China Strengthens Its Ties to African Nations*, N.Y. TIMES, July 19, 2012, <http://www.nytimes.com/2012/07/20/world/asia/china-pledges-20-billion-in-loans-to-african-nations.html> (announcing that China will send 1,500 medical personnel to help provide developmental assistance in African countries, among them Sudan).