Human Rights and the Financial Sector

An Interview with Dr Christian Leitz, UBS AG

The Move to Greater Corporate Transparency

Foreword by Matthew Townsend, Allen & Overy LLP

The Long Arm of Human Rights Risk: Supply Chain Management and Legal Responsibility

By Dr David Kinley and Jahan Navidi

Human Trafficking in Supply Chains: How to Identify and Mitigate the Risk

By Susanne Gebauer

Guarding the Guards: The Regulation of Private Military and Security Contractors

By Jamie A. Williamson

Human Rights in a Post-Kiobel Landscape

By Daniel Grimwood

Published by Allen & Overy LLP's Human Rights Working Group
The exponential growth in global business activity over the last 20 years has been quickly followed by demands for greater transparency on the conduct, and impacts, of corporates. This is being witnessed across a wide range of areas. Compare the annual report of a FTSE 100 company even a few years ago to what it would typically say today about issues such as environmental compliance, carbon emissions, human rights, political donations and directors’ remuneration and the differences are stark. This is part of a much deeper trend to improve corporate governance and transparency. Some see this as a welcome and longer-term shift to more responsible (or even ethical) business behaviour, while others believe it is a shorter-term reaction to the economic downturn and recent political and business scandals.

In Europe, there have been two recent developments on corporate transparency. In June, the European Parliament adopted changes to the Transparency and Accounting Directives which, once implemented, will impose requirements on the extractive industries to disclose payments exceeding EUR100,000 made to government entities globally. This will apply to both EU-listed and large non-listed companies. This follows similar requirements imposed in the U.S. through Dodd-Frank, although the SEC is now reconsidering the restrictions due to a legal challenge. The UK has also introduced obligations on listed companies to report on human rights issues to the extent necessary for an understanding of the development, performance or position of the business. Information must also be provided on the company’s human rights policies and the effectiveness of those policies. This is a significant step forward. Given the very broad language of the law, the immediate challenge for companies is to determine the scope of what should be reported on and how to benchmark progress. The Financial Reporting Council is currently finalising guidance (although the draft guidance received criticism that the materiality test for disclosure goes too far in narrowing the information to be provided).

The use of disclosure and greater supply chain transparency as a way of regulating businesses is relatively new. Take environmental controls as an example. In the 1980s and 1990s, many European and other developed countries were building their regulatory frameworks on a classic command and control structure. Limits on emissions were imposed and criminal offences for pollution and breaches of permits created.

For a variety of reasons, including demands for a more flexible approach from businesses, this form of regulatory control evolved. Europe’s emissions trading scheme, introduced in 2005, is a classic example. Carbon emission limits are imposed on businesses but, in the event those limits are exceeded, operators can purchase and surrender carbon allowances equal to their total emissions. This has provided a flexible regulatory model, albeit not to everyone’s liking.

Mandatory disclosure requirements are a further step in this process and are proving to be an attractive regulatory weapon for governments. The end objectives are clear and legislators and NGOs are simply becoming smarter about how they get there. It is recognised, for example, that to prohibit legitimate payments by the extractive industries to host governments would be legally and politically difficult to achieve in the short term, particularly on a global scale. Instead, requiring the public disclosure of such payments is likely to achieve the same result, although it may take longer to get there. A number of these developments are examined further in Dr David Kinley and Jahan Navidi’s article on human rights risk in supply chains.

The drive towards much greater transparency can be both a challenge and opportunity for businesses. Many are embracing it and see it as an opportunity to differentiate. For others, it presents a much greater challenge and adapting to greater stakeholder, customer and NGO demands will take time. The direction of travel is, however, clear. Regulatory and societal pressures for greater corporate transparency are here to stay.
Contents

Human Rights and the Financial Sector
An Interview with Dr Christian Leitz, UBS AG

The Long Arm of Human Rights Risk: Supply Chain Management and Legal Responsibility
Dr David Kinley and Jahan Navidi, University of Sydney Law School

Human Trafficking in Supply Chains: How to Identify and Mitigate the Risk
Susanne Gebauer, UL Responsible Sourcing Inc.

Guarding the Guards: The Regulation of Private Military and Security Contractors
Jamie A. Williamson, Legal Advisor, International Committee of the Red Cross

Human Rights in a Post-Kiobel Landscape
Daniel Grimwood, Allen & Overy LLP
An Interview with Dr Christian Leitz, UBS AG

Dr Christian Leitz, head of corporate responsibility at UBS AG, speaks to The Review about the Thun Group of Banks’ Discussion Paper on the Guiding Principles.

“… the Discussion Paper is exactly what we called it, a discussion paper. It provides thoughts on what the topic of human rights might mean for banks in practice and initial guidance…”

The Thun Group of Banks (Barclays, BBVA, Credit Suisse, ING, RBS, UBS, UniCredit) recently released its Discussion Paper on the UN Guiding Principles on Business and Human Rights. UBS was one of the founding members of the Thun Group. Tell us why you decided to co-establish the Thun Group. At a high level, how does UBS see the work of the Thun Group and the Discussion Paper contributing to the emerging conversation on the UN Guiding Principles?

First of all, I would like to thank you for your interest in the Thun Group of Banks and its Discussion Paper on banking and human rights. As you clearly launched your Review with the UN Guiding Principles in mind, I don't need to tell you that the topic of business and human rights has been receiving substantially more attention globally since their publication in June 2011. However, most large banks commenced analysing and acting upon the topic of human rights early. UBS, for instance, publicly acknowledged the importance of human rights in our Statement on Human Rights in 2007, ie prior to the establishment of the “Protect, Respect and Remedy” Framework and the publication of the Guiding Principles. Without any doubt, however, the work of Professor John Ruggie and his team on the Framework and the Guiding Principles advanced considerably the discussions on the topic. UBS therefore regarded it as important to consider these developments and conclusions together with other banks. This reflects responsible business practice (by minimising related risks) and underlines our desire to manage our impacts on society responsibly.

The Thun Group acknowledges that the due diligence activities required of banking institutions should be tailored to the type of client or product involved and focuses on three particular product lines as examples:

(1) retail and private banking;
(2) corporate and investment banking; and
(3) asset management.

Why have you chosen these particular products? Are there other financial product lines or relationships which may require alternative diligence strategies?

The Discussion Paper covers the core business activities of universal banks, including retail and private banking, corporate and investment banking, and asset management. We took a conscious decision to focus on those elements that are most relevant for the business of a bank, such as developing a policy statement (Guiding Principle 10) and especially establishing measures for appropriate human rights due diligence (Guiding Principles 17 to 21). Deliberately, we did not venture into business areas that are not core business activities of the banks involved in the Thun Group. And, also deliberately, we did not address issues that are non-specific for the banking industry, such as supply chain screening or employment practices.

Is there a tension between legal compliance and human rights obligations? For example, the Discussion Paper acknowledges that it is not always helpful in the advancement of human rights to avoid operating in jurisdictions which do not conform to international standards. How do international banks manage human rights risks where international standards are lacking?

On the topic of legal compliance, let me stress first that the Discussion Paper contains measures and actions that are voluntary. Moreover, the UN Guiding Principles, on which the Discussion Paper is based, are recommendations but not a legally binding document. The Guiding Principles firmly state that states are the primary bearers of responsibility for protecting the human rights of their citizens, and it is in the interest of everybody (including banks) that state governments are capable of fulfilling that duty. Some governments have started working on national strategies for implementing the “State duty to protect” part of the Guiding Principles, and some of the Thun Group banks are in close contact with the respective government agencies. Having said that, sadly there are countries where human rights are either denied by oppressive regimes or not enforced due to weak governance. In countries where there are human rights issues, UBS seeks to actively promote human rights by implementing appropriate practices. These include enhanced due diligence standards that we deploy in connection with clients from such jurisdictions; human rights criteria in our industry sector guidelines and our Position on Controversial Activities as applied in transactions; and a responsible supply chain guideline to ensure that human rights are respected when we source vendors located in such countries.

The Discussion Paper recognises that one of the ways that financial institutions are exposed to human rights impacts is through the operations of their clients. As a result, many of the proposed diligence exercises are client-focused. How does this emphasis influence a bank’s approach to assessing human rights impacts and the leverage it has to take in prevent and mitigate adverse human rights impacts? Can you shed some light on the practical experience of UBS in conducting human rights due diligence on a client or a particular transaction?

In the Discussion Paper, we make it very clear that it is the provision of products and services which may expose financial institutions to the human rights issues of the operations of their clients. Exposure to human rights issues arising from client operations may entail risks to a bank’s own operations, such as reputational, legal, operational and financial risks.

With regard to a bank’s leverage, this is a topic that was discussed at length in the group. As we argue in the Paper, there is a common public perception that banks have strong leverage over their clients’ behaviour and can, and should, seek to influence client actions to promote good practice. We conclude, however, that, in practice, the degree of leverage is often a great deal less than popularly believed – and the degree to which it is feasible for banks to exert influence on their clients’ behaviour is a matter of complexity.”
which it is feasible for banks to exert influence on their clients' behaviour is a matter of complexity. UBS applies a risk framework to all transactions, products, services and activities in order to identify, assess and manage environmental and social (including human rights) risks, which are broadly defined as the possibility that was turned down a client relationship on (solely) account of a human rights risk?

The Discussion Paper suggests that banks should walk away from client or potential client relationships upon discovering human rights risks that cannot be properly mitigated. Are you aware of an instance when a bank turned down a client relationship on account of a human rights risk?

In the case of UBS, we do not single out one particular risk area when we assess a client relationship (transaction, onboarding, etc), but approach it from a broader risk management perspective. This perspective also includes an assessment of environmental and social risks, including human rights risks. In this comprehensive approach, it is therefore impossible to single out an example for a client relationship that was turned down due (solely) to a human rights risk.

The Discussion Paper deliberately focuses on Guiding Principles 17 to 21 (and also Principle 16 – Policy Commitment) as they were seen as most relevant for the business of a bank. This does not mean that the group views the third pillar of the framework – access to remedy – as unimportant. During our discussions the group acknowledged that this is a responsibility which governments and corporations share. However, it was also noted that in most cases where a bank is potentially linked to a human rights impact, the impact will have been caused not by the bank itself, but by its client. Therefore, the client is in a better position to provide access to remedy, and depending on the type of its relationship with or its service to the client, the bank may be able to exert influence on the client's approach to access to remedy.

The Discussion Paper focuses on Guiding Principles 17 to 21 which relate to the due diligence process. The so-called “Third Pillar” of the Guiding Principles relates to providing access to remedies. Is there any reason you decided not to address the question of remedies in this report?

The Discussion Paper recommends that banks conduct a preliminary gap analysis to determine whether their existing compliance systems (AML, PEP, others) are sufficient to identify and mitigate human rights risks. Who within your organisation is tasked with conducting this gap analysis? Are human rights risks properly considered another type of compliance risk to be managed by the compliance department or another internal function?

At UBS, clients, transactions or suppliers potentially in breach of our Position on Controversial Activities, or otherwise subject to significant environmental and human rights controversies, are, in fact, identified as part of our know-your-client compliance processes. This was made possible by integrating advanced data analytics on companies associated with such risks into the web-based compliance tool used by UBS staff before they enter a client or supplier relationship, or a transaction. The systematic nature of this tool vastly enhances our ability to identify potential reputational risk, and is evidenced by the increasing number of cases referred for assessment to our environmental and social risk units in 2012.

What are the key lessons from the Thun Group process?

Each participating bank could probably come up with its own set of lessons. Not surprisingly, one of the experiences we have had is that it is easy to underestimate the time it takes for developing a common understanding and for agreeing on the wording. And the more definite the wording becomes, the more it comes under scrutiny. On the other hand, the group benefited from expert input from the Zurich Competence Center of Human Rights and from a joint lead by banks who coordinated the meetings and the conference calls and led the editing of the Discussion Paper towards completion.

What practical advice would you give to banks who are still establishing a human rights due diligence programme on how to manage that process within their organisation? What resources are available to them?

We published the Discussion Paper on the website of the Business & Human Rights Resource Centre for the benefit of all interested stakeholders, including other banks. We are also being the paper to other appropriate fora, such as the UNEP FI or working groups of the Equator Principles, thereby spreading the knowledge about the paper within the banking industry and making it available for use by other banks. We are convinced that as part of this distribution and discussion process, we will consider these kinds of questions (ie establishment and implementation of human rights due diligence) with other banks.

As regards resources, we have included a list of useful sources and tools in the Appendix of the Paper.

What's next for the Thun Group? Are there any follow-on projects currently in the works?

Let me emphasise that the Discussion Paper is exactly what we called it, a Discussion Paper. It provides thoughts on what the topic of human rights might mean for banks in practice and initial guidance to banks keen to address human rights issues in their core business activities. It is not a norm or standard for compliance. The application of the various elements of the discussion paper is left up to each individual bank.

Now that the Discussion Paper is public, feedback and sharing of experiences would be welcome – I mentioned forthcoming discussions at various fora. At this stage, however, we do not foresee a formal role by the Thun Group of Banks.
The recent Rana Plaza factory disaster in Bangladesh is yet another reminder of the real legal, reputational and economic risks facing corporations at the top of the supply chain. Marking the worst accident on record for the garment industry, the deaths of at least 1,129 people (hundreds of bodies are still unidentified and there exists no complete register of all employees in the building at the time of the building’s collapse) in the Bangladeshi factory complex may in fact have broader litigation consequences for multinational corporations.

Rana Plaza is emblematic of the difficulties of managing human rights compliance across global supply chains. From the “conflict minerals” such as gold and tin funding the purchase of weapons and supplies by armed groups in the Democratic Republic of Congo (DRC), to the contamination of baby milk formula in China, to the fires in South Asian factories involved in smartphone manufacturing, human rights impacts can give rise to significant legal consequences for corporations with global operations. Even if such actions are not explicitly framed in the language of human rights, they present an emerging risk which necessitates close attention to supply chain management.

Background

Globalisation has increased awareness of the human rights impacts of global supply chains. Likewise, greater shareholder activism and consumer consciousness of the ways in which products are sourced and manufactured have placed a spotlight on corporate social responsibility. This has been underpinned by the UN-adopted Guiding Principles on Business and Human Rights (2011) which stress that corporations should conduct adequate due diligence on the potential human rights risks caused by their global supply chains, not merely because that is the responsible thing to do, but because states are requiring it and will require it of them.

An assessment of the legal risks in host and home states demonstrates the long arm of human rights and the risks that multinational companies may face as a result of their global supply chains. While there have been some regulatory inroads in both home and host states – for example the reporting requirements under the Dodd-Frank Act – the real action lies in the litigation risks facing businesses domestically for human rights impacts resulting from or connected to their supply chains extraterritorially. It is in this area that corporations increasingly may be vulnerable to litigation.

To date, legal regimes targeting human rights abuses across global supply chains have been limited and relatively ineffective at providing adequate remedies or, relatedly, adequate incentives to proactively mitigate human rights impacts. Host country regulations, to the extent any exist, typically have their greatest application...
to local conduct, and do not provide effective grounds for holding transnational corporations to account for the host country activities of their suppliers. Home country regulations, by contrast, are grounded more in principles of transparency and reporting, and therefore rely more directly on market discipline, rather than the potential for liability, to influence corporate conduct.

Although, in our opinion, neither regime provides sufficient incentives to eliminate human rights impacts along global supply chains, they nevertheless positively suggest that greater attention is being given to these issues.

To date, attempts at regulating complex supply chains within host countries such as Bangladesh and China have been limited and largely reactionary. There have been some notable attempts at regulating local supply chains within the garment industry in particular, but these have often been ineffective, slow and subject to high levels of bureaucracy. For example, as recognised in the recent U.S. Senate Foreign Relations Committee Hearing on Labor Issues in Bangladesh, one of the biggest issues in Bangladesh in the aftermath of Rana Plaza is the enforcement of current building codes. Many residential buildings in Bangladesh are constructed illegally as industrial complexes. The Rana building itself was only authorised to be built to five stories, yet an additional three floors were added. In the wake of the Rana Plaza disaster, there has been an effort to review building regulations and codes and, in June 2013, the Bangladeshi Parliament introduced a legislative reform package that includes amendments to labor laws allowing union representation. However, the persistence of deficient infrastructure and poor labor conditions suggest to us that there are not effective domestic incentives to prevent such accidents occurring in the future. While criminal actions have been pursued against the local owners of Rana Plaza, these legal actions have not directly targeted the top of the supply chain. As a result, in our opinion, there has been little significant change in the management of supply chains.

Several “home countries” have taken positive steps toward closing this gap by encouraging greater sensitivity to human rights issues in supply chain management. Most notably, the trade of “conflict minerals” to fund armed groups in the DRC is subject to a significant reporting requirement under the U.S. Dodd-Frank Act. The requirement for publicly traded companies to disclose whether a metal derived from “conflict minerals” sourced from the DRC is used in their products is certainly a positive response to stakeholder and consumer pressure for supply chain diligence and transparency. Similarly, the California Transparency in Supply Chains Act has imposed requirements on local companies to disclose their policies to combat human rights abuses in their supply chains. More recently, the UK’s Bribery Act places extraterritorial responsibility on UK-based corporations to combat bribery, which often has indirect negative impacts on human rights. While these initiatives are certainly positive, their effectiveness in dealing with human rights abuses extraterritorially has been limited to date. They do, however, represent attempts to encourage corporations with global supply chains to take responsibility for human rights impacts abroad.

**Human Rights Litigation Risk**

In the main, well established principles of corporate liability have effectively shielded many transnational corporations from claims involving the conduct and activities of remote global suppliers. Therefore, while local suppliers have been ensnared in local lawsuits relating to alleged human rights abuses, the incentive effects of these lawsuits have generated for multinationals have been largely indirect or reputational, rather than legal per se. The prospect of home country litigation involving human rights allegations is therefore poised at an interesting inflection point. On the one hand, the U.S. Supreme Court’s recent decision in Kiobel has been viewed by many as the end of extraterritorial remedies for human rights abuses alleged to have been committed outside of the U.S. But the story may be less pessimistic for human rights claimants. Courts in the U.S. and Europe increasingly have entertained tort, breach of contract and even criminal claims that are based on conduct involving alleged human rights abuses. While none of these domestic legal regimes provides the sort of unfettered access to home country courts as the U.S. ATS prior to Kiobel, new theories of liability under domestic law nevertheless eventually may provide powerful remedies for supply chain human rights violations.

The prospect of home country litigation against corporations at the top of the supply chain for human rights abuses is an increasingly realistic prospect. Although the ATS has attracted the most attention, ordinary state tort laws often have been pleaded alongside the federal statute in cases brought against corporations as alternative grounds for liability. Historically, in the U.S. (as in the UK) tort law has provided one of the most significant theories of liability for seeking to hold major corporations accountable for human rights abuses in their global supply chains. Ongoing litigation against multinationals, especially in tort law, is, as Cees van Dam argues, a potentially powerful incentive to encourage greater attention to supply chain risks. This is evident not only when the parent company itself may be held liable for overseas conduct but also when an overseas subsidiary is held liable under state law in the home jurisdiction of the parent company. As was the case in Friday Alfred Akpan & Milieudefensie v Royal Dutch Shell Plc and Shell Petroleum Development Co Nigeria Ltd. and even if the track record of success of these actions has been limited, the reputational and economic ramifications are pertinent and warrant serious consideration. It is in this context that corporations must properly manage their supply chain to prevent human rights infractions from occurring.

Europe has also provided a home country alternative route to the ATS in terms of litigation against corporations for direct or indirect involvement in violations. As van Dam points out, this has been achieved on the basis of negligence claims in tort, rather than any statutory equivalent of the ATS. While these claims have not been directly expressed in terms of international human rights language or standards, these may certainly be implied. Indeed, in the UK in particular, the tort route has proved to be a productive path towards holding corporations liable for human rights abuses in their supply chain, comparing quite favourably with the ATS. Symptomatic of the European embrace, the UK experience, which has achieved multiple settlements, indicates that litigation for human rights abuses is certainly conceivable.

**Accord on Fire and Building Safety**

So with the expanded appetite for pursuing ordinary tortious actions against corporations in various jurisdictions, together with the still available option of invoking the extraordinary ATS, there remains a very palpable litigation risk for Western-based corporations, including those headquartered in the U.S. or with significant U.S. interests. As such, it is not therefore all that surprising – and especially after the watershed event of the Rana Plaza disaster – that many leading retail corporations have sought to enter into binding cross-border agreements relating to their supply chains.
In the aftermath of Rana Plaza, an international plan to improve safety conditions at garment factories in Bangladesh, known as the Accord on Fire and Building Safety, has been developed that commits retailers to help finance safety upgrades in Bangladesh factories. Created by retailers, union leaders and government officials, the Accord presents the potential risks that buyers and suppliers entering into or embracing this plan may be subjected to legal liability for human rights infractions which occur throughout their supply chains should they fail to fulfill the demands made of them in the Accord. The fact that the Accord creates “legal enforceable obligations” therefore has generated additional human rights risks for signatory companies. Even if civil suits based on such theories fail to result in a judgment, the potential reputational consequences are sufficiently significant to warrant close attention to preventive measures.

The Future

The fact that human rights abuses often occur in foreign jurisdictions is no shield against liability. Litigation under the ATS, as well as other tort-based theories of liability in the U.S., UK and Europe, gives claimants several options for seeking remedies for human rights impacts occurring abroad. Further, corporations are increasingly expected to abide by the UN Guiding Principles, home-state regulations, and various binding agreements and accords. In this environment, it is essential for corporations to implement enhanced human rights due diligence procedures and stay alert to the range of legal actions that may be taken against them in jurisdictions around the world.

Dr David Kinley is Chair in Human Rights Law at Sydney Law School and is an Academic Panel Member of Doughty Street Chambers, London.

Jahan Navidi is an Associate of the Sydney Centre for International Law, Sydney Law School.

1 Kiobel v Royal Dutch Petroleum Co., 133 S.Ct. 1659 (2013).
3 This, incidentally, is a clear example of how the seemingly less onerous corporate responsibility to respect under the second pillar of the “Protect, Respect and Remedy” Framework, can in fact be made obligatory when the State takes seriously its duty to protect under the first pillar by enacting appropriate legislation that implements its international human rights obligations. See further, Daniel Augusteen & David Kinley, “When human rights ‘responsibilities’ become ‘duties’: the extra-territorial obligations of states that bind corporations”, in David Bilchitz & Surya Deva (eds) Human Rights Obligations of Business: Beyond the Corporate Responsibility to Protect? (2013), 271-94.
4 U.S. Senate Committee on Foreign Relations, Labor Issues in Bangladesh.
5 As noted by Earth Rights International (which has acted in many of the most significant ATS cases), in its excellent post-Kiobel review of litigation, in which it notes that the settlement in the iconic Unocal case was prompted directly by the fact that the state court tortious liability claim was just months away from trial, not the ATS claim, which had at that stage been dismissed and was on appeal, see Out Of Bounds: Accountability for Corporate Human Rights Abuse after Kiobel (Sept. 2013), 76.
6 Cees van der Pijl, “Tort Law and Human Rights: Brothers in Arms on the Role of Tort Law in the Area of Business and Human Rights” at 254.
8 For example, Abercrombie & Fitch, Adidas, American Eagle, Benetton, Carhart, Matalan and Spencer, John Lewis, Puma, Primark, Primark (owner of the Cabin Klein and Tommy Hilfiger brands), Tasso and Woolworth Australia, have all recently signed the Accord on Fire and Building Safety in Bangladesh.
After the formal introduction of anti-trafficking legislation over a decade ago, the United States is considering a host of new measures which would specifically address trafficking-related activities in the recruitment and hiring of labourers. If adopted, these measures would require businesses to look beyond the employment site itself and evaluate the potential risks of human trafficking abuses during recruitment – a process often handled by both domestic and foreign labour contractors.

By expanding the scope of formal corporate diligence obligations, these requirements, if adopted, would go a long way toward formalising the principle that corporations should act to prevent or mitigate adverse human rights impacts that are directly linked to a business’ operations by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation or the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.”

Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (2000, Article 3(j))

In simple terms, human trafficking involves:
(a) the acquisition of people by (b) improper means, such as force, fraud, coercion, receipt of payments, or deception, for (c) the purpose of exploitation.

Taking Action Against Human Trafficking in Supply Chains

Because of its very nature, the human rights impacts of human trafficking are often felt not only at the ultimate employment site, but also through the practices and conduct of local recruitment agencies or foreign labour contractors. As the examples below suggest, this reality is now being captured in executive action and proposed legislation, especially in the United States.

U.S. Executive Order – Strengthening Protections Against Trafficking In Persons In Federal Contracts

On September 25, 2012, President Obama introduced improved safeguards to strengthen the United States’ zero-tolerance policy for human trafficking in federal government procurement through an Executive Order applicable to federal contractors and their subcontractors. Provisions to prevent trafficking-related activities in labour recruitment constitute a significant focal point of these safeguards. Under the Executive Order, federal contractors and their subcontractors are prohibited from engaging in the following recruitment practices usually associated with trafficking: deception, fraud, employee payment of recruitment fees, denying employee access to identity documents, and non-payment of return transportation costs for foreign imported workers. In addition, federal contractors and their subcontractors must subject themselves to regular audits and investigations that assess compliance with any law or regulation establishing restrictions on human trafficking or the use of forced labour.

The Executive Order also acknowledges the high risk of trafficking abuses outside the United States, requiring federal contractors who source goods or services exceeding USD500,000 in value from abroad to maintain and publicly share a compliance plan. This plan must include, at a minimum: contractor and subcontractor employee training; recruitment and wage guidelines to prevent trafficking-related recruitment practices and ensure adherence to legal minimum wage payments; a housing plan (if the contractor or subcontractor provides employee housing) that ensures legal
Legislative Developments

Stephanie Richard, Policy & Legal Services Director, Coalition to Abolish Slavery & Trafficking (CAST)

California enacted the California Transparency in Supply Chains Act, which came into effect in January 2012. The Act requires specific retailers and manufacturers doing business in the State of California to publicly disclose their efforts towards the eradication of human trafficking and slavery from their supply chains. The Act only requires public disclosure and does not mandate businesses to actually engage in supply chain efforts.

Earlier this year, the California Senate introduced legislation aimed at reducing the risk of trafficking for foreign migrant workers by requiring registration of foreign labour recruiters. As California receives the largest number of temporary foreign workers in the United States, Senate Bill 477 is seen as an important milestone in drawing attention to anti-trafficking regulations. A similar bill passed in the U.S. Senate proposing even broader regulations on foreign labour recruiters. In addition to the registration requirement, the bill provides, among other things, the bill would require foreign labour contractors to provide a number of disclosure documents – written in both English and in the primary language of the worker – at the time of recruitment. These disclosures would include the terms and conditions of employment, establish a contractual agreement between the worker and the employer based on those terms, and provide an itemised list of costs or expenses charged to the worker in the course of employment. In addition, the bill prohibits both the foreign labour recruiter and the domestic employer from discriminating against a worker based on race, colour, creed, sex, national origin, religion, age, or disability; and both the recruiter and the employer are prohibited from changing any fees to a worker for recruitment or hire.

With proposed state and federal legislation that seeks to impose requirements on recruitment activity that may occur partially or wholly outside of the United States, legislatures are sending a strong message that labour abuses in the recruitment process by those doing business with or in the United States will not be tolerated.

These legislative initiatives have also garnered interest outside of the United States. In the United Kingdom, there has been discussion about including elements of the California Transparency in Supply Chains Act in a bill that would address modern-day slavery. According to Theresa May, Home Secretary, the bill will be introduced before the current session of parliament. Among other requirements, the bill would seek a commitment from businesses against the use of slave labour.

Responsibility of Business to Address Human Trafficking Abuses in Supply Chains

Although several countries have introduced anti-trafficking legislation in the past decade, low prosecution rates for human trafficking do not match the statistics on the prevalence of the issue worldwide. For example, the U.S. Department of State’s Trafficking in Persons Report 2013 notes that in 2012, there were 7,765 prosecutions globally, of which 1,153 related to labour trafficking. These prosecutions stand in stark contrast to statistics from the International Labour Organisation, which estimates that 20.9 million people are currently victims of forced labour, including human trafficking, and 18.7 million of these victims of labour exploitation. Human trafficking affects the labour force globally and across all industries, with the total number of victims highest in the Asia and Pacific region at 11.7 million.

Despite the limited prosecution of human trafficking abuses in the labour force to date, businesses are encouraged to engage in a proactive manner to address this human rights abuse. As outlined in the UN Guiding Principles, the responsibility to respect human rights is a global standard that exists over and above compliance with national laws and regulations.

“The California Transparency in Supply Chains Act was a cutting edge piece of legislation that helped start an important dialogue with businesses on the issue of trafficking in supply chains. Now we need to go further by fully implementing the legislation with California’s Attorney General Office pursuing enforcement. We also need to support the coming re-introduction of the Federal Business Transparency on Trafficking and Slavery Act.”

Stephanie Richard, Policy & Legal Services Director, Coalition to Abolish Slavery & Trafficking (CAST)
Step One – Assessing Supply Chain Risk

Human rights due diligence should begin with mapping the supply chain to analyse its breadth and depth, and proceed to assessing risk with the use of standardised parameters. Risk parameters can include country of manufacture, country of origin, type of product or service, manufacturing process, length of supplier relationship, contract volume, direct brand exposure on the supplied product, and personnel composition (for example the percentage of migrant, temporary, or contract workers). Reports by organisations such as the International Labour Organisation, the U.S. Department of Labor can aid in the identification of high-risk industries, countries with a high prevalence of human trafficking abuses and the specific nature of such abuses, as well as specific goods and countries associated with child and/or forced labour. Businesses may also choose to directly contact their identified suppliers to complete self-assessments that may aid in the risk evaluation process. Targeted questions can provide insight into the supplier’s supply chain, management systems, and personnel composition. It may also be valuable to identify and reach out to international and local stakeholders such as community organisations, industry associations, and labour organisations to evaluate supply chain risk and potential operational impact.

Step Two – Determining Scope of Programme

Depending on the outcome of the risk analysis, a business should identify the scope of its programme and set programme values and objectives. The scope of a business’ programme should take into account the size of the operation, level of identified risk, level of influence a business has on preventing or mitigating the risk, and resources available to the business. It is recommended to at least include direct business partners related to the provision of materials, products and services. To address human trafficking, the programme scope should at least cover contractors or brokers supplying the labour force. Businesses should be aware that stakeholders are increasingly looking into the entire supply chain from raw material to finished product, thus increasing the pressure for businesses to engage in due diligence activities beyond their direct suppliers.

Step Three – Creating Governance and Oversight Structure

After determining the programme scope, values, and objectives, a business should assign responsibilities and reporting structures for identifying and escalating human rights risks along its supply chain. It is important that the programme receives executive approval and is embedded throughout the organisation with appropriate staff expertise and capacity. Each employee has the responsibility to uphold the values of the programme. Grievance mechanisms and internal accountability measures will assist with the implementation of the programme throughout the organisation and the supply chain.

Capturing a grievance can take many forms, from sophisticated, multilingual telephone hotlines to drop boxes placed in a facility. The minimum requirements for a grievance mechanism are that individuals in any way affected by the company’s business operations (employees, business partners and their employees, the greater community, and other stakeholders) feel comfortable voicing their concerns, trust that their complaint will be heard and receive due and fair procedure, and that the complainant will not be subject to any retaliation. The mechanism should be well documented and every complaint should be addressed. Transparency about the mechanism and any possible public demonstration of remediation or due process will enforce accountability, build more trust around the procedure, and encourage stakeholder participation in the process.

Step Four – Setting Standards for Suppliers and Employees

Businesses can capture the programme scope, values and objectives in codes of conduct for both suppliers and...
employees. These codes should provide clear definitions and address legal compliance, but also go beyond laws and regulations and include industry best practices. In going beyond compliance to local laws and regulations, it is important to educate suppliers and employees on such applicable global standards. As, for example, definitions on child labour, forced labour, debt bondage, and human trafficking differ from one country to another, the code should explain which definition the business shall adopt. In this process, businesses should consider industry standards adopted by social compliance initiatives and international conventions.

Codes should also determine applicability and consequences of non-compliance. To address the growing pressure on businesses to engage in due diligence activities along the whole supply chain, the code should not only apply to the supplier, but also to its suppliers and contractors. Also, to address human trafficking-related activities, the code should require suppliers to manage potential human rights abuses during the recruitment and hiring process of workers. Consequences of non-compliance may depend on the risk of the finding. Some businesses may choose to introduce zero-tolerance thresholds that result in immediate suspension or termination of the supplier or employee when human trafficking abuses are identified. In determining the consequences for a supplier, both business risk but also the impact on the supplier and its workers should be taken into account. Incentives for employees and suppliers to comply with the standards should also be a consideration for a business’ programme.

Businesses should adopt the code principles in their operations and, importantly, in relevant legal documents, such as purchase orders and employee contracts. The code should be embedded in all operations related to the supply chain, from sales to procurement and quality. The quality of the product, material, or service and the conditions under which the product was manufactured, the service provided, or the material sourced should be equally important to a business.

Step Five – Establishing a Supply Chain Monitoring Protocol

A business may choose to create its own monitoring protocol based on the outcome of its supply chain risk assessment. It may select to implement an industry-led protocol that addresses a specific industry, such as the electronics, jewellery or toy industry. Or a business may choose a protocol that spans multiple industries, such as the Global Social Compliance Programme (GSCP), or the Sedex Members Ethical Trade Audit (SMETA).

Regardless of whether a business implements its own model or an industry-led monitoring protocol, it is important to examine the following operational issues which are germane to human trafficking: recruitment, hiring and termination procedures; wage deductions and employer-provided housing policies; special focus on vulnerable employees, such as contract, temporary or migrant workers; and conducting employee interviews and documentation review in such a manner so as to uncover possible human trafficking and other human rights abuses. Furthermore, to assist with the remediation process, the protocol should not only identify the problem but also gather data to enable identification of the root cause and reveal sustainable solutions to the problem.

Step Six – Communicating the Programme to Stakeholders

A business should communicate the programme to its entire organisation and train those with direct responsibility for supply chain management. Communication and training are important tools to embed the programme standards in the organisation and its operations. In addition, suppliers can become effective partners by sharing the business’ programme values with them, and providing suppliers with the resources and tools to meet the business’ goals. Apart from the code of conduct that shall apply to suppliers, businesses may choose to provide code-specific training or manuals that explain applicable laws and best practice around human rights, the risk of human rights abuses at the supplier site and in its supply chain, and the benefits of risk management through prevention and mitigation. Outreach to community and industry organisations may also garner valuable insights. Especially at the local level, community actors may take part in the education of suppliers on human rights risks and abuses, and such actors may prove valuable in potential remediation activity.

Lastly, a business may consider communicating its programme publicly, especially emphasizing the established grievance mechanism for stakeholders.

Step Seven – Conducting Supplier Assessments

The business, in conjunction with the assessment body, should determine the assessor competency (for example, years of experience, specific training related to human rights, language skills), the assessor team composition (for example, number, gender, different skill set), assessment timeframe (which may depend on factors such as the size of the facility to be assessed, the number of employees, and the amount of documentation to review), and assessment methodology (which may include announced or unannounced assessments, interviews with employees, management, contractors, community actors and other stakeholders, documentation review, visual observations, or the requirement to triangulate findings). These assessment requirements will depend on the result of the business’ risk assessment. If the business chooses to follow an industry-led monitoring protocol, requirements for such an assessment will usually already be in place.

Regardless of the assessment standards, the assessment should be conducted in a manner so as to provide the most valuable and actionable data that will aid with root cause analysis. This requires the assessor to gather details of the circumstances on the ground, for example, the management systems in place, the management personnel involved, exact details of the workers affected by the finding (for example, type of department, shift, employee status), and the date and frequency of the findings. It may be necessary to conduct follow-up visits to arrive at a sustainable solution. It is important to recognise that due diligence is a long-term commitment, not only because of potential follow-up remediation, but also because suppliers and their supply chains evolve constantly, possibly shifting and creating new risks. An assessment only presents an evaluation of a supplier at a specific point in time.

Step Eight – Remediation

The data resulting from the assessment will assist the business and the supplier in identifying a long-term solution. Corrective action requirements should be discussed between the business and the supplier to set clear expectations and action timeframes, and identify appropriate personnel responsible for remediating the finding. This will enable businesses to monitor progress and determine consequences in situations where a supplier does not demonstrate commitment to continuous improvement. Not only does the supplier have to correct the finding, but the business should
also assist the supplier in identifying the root cause and implementing systems to prevent the problem from recurring.

Businesses also should be aware that some findings occur at a location different from the original onsite assessment. Especially considering human trafficking-related activity in hiring and recruitment, the human rights abuse can occur in the country of recruitment which may differ from the country of employment. Depending on the specific finding, a business may choose to involve external stakeholders to assist with remediation. Data can also be used to identify trends in non-conformances and create targeted engagements with suppliers to improve management processes.

Step Nine – Review and Measurement of Programme

Businesses may be obliged to keep performance metrics to meet public disclosure obligations or they may participate in voluntary reporting mechanisms. Regardless of those public reporting frameworks, a business should maintain performance metrics related to the established programme objectives and targets as well as the specific components of the programme. For example, the provision of training to stakeholders on the programme (step six) is as important as the evaluation of the success of that training with regards to communication method and content.

Furthermore, a business should review the entire due diligence programme on a regular basis depending on the programme’s general and specific metrics, as well as the outcome of due diligence activities, new legislation, changes in best practice, business risk or stakeholder composition.

Step Ten – Reporting on Programme Progress to Stakeholders

In light of increased legislation on supply chain transparency, a business should consider publicly sharing its programme details and progress. An example of a voluntary reporting mechanism is the Global Reporting Initiative (GRI).

Reporting through formal and informal channels will also foster dialogue among businesses and with stakeholders to improve supply chain due diligence and elevate adherence to human rights worldwide.

Conclusion

To mitigate the risk of labour abuses in supply chains, it is no longer enough to assess labour conditions at the employment site. The activity that occurs prior to a worker arriving at the employment site, namely the recruitment process, constitutes a high-risk area for trafficking-related activity as well. The United States is introducing new anti-trafficking measures to address this risk area, especially related to the use of foreign labour contractors in recruitment. This new legislative pressure provides businesses with an opportunity to re-evaluate their supply chain due diligence programmes, follow the UN Guiding Principles, and adopt best practices that go beyond compliance with existing laws and regulations to develop a programme that identifies and mitigates the risks of human trafficking in supply chains globally.

---

3 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (1956) Article 1 (a): Debt bondage, that is to say, the status or condition arising from a pledge by a debtor of his personal services or of those of a person under his control as security for a debt, if the value of those services as reasonably assessed is not applied towards the liquidation of the debt or the length and nature of those services are not respectively limited and defined. Available at http://www.ohchr.org/
10 The Federal Acquisition Regulatory Council promulgates regulations with respect to federal procurement law. The Council issued a proposed rule (FAR Case 2013-001), but the final rule is still pending.
d-id=B2S607&id=200920100SB657
14 Theresa May, “Theresa May: Modern slave drivers, I’ll end your evil trade” (The Sunday Times, Columns, 25 August 2013)
16 Ibid.
18 Ibid., page 16 and following.
26 “Theresa May: Modern slave drivers, I’ll end your evil trade” (The Sunday Times, Columns, 25 August 2013)
27 Ibid.
29 Ibid., page 16 and following.
32 The catalogue of publications by the International Labour Organisation on issues related to human rights abuses is available at http://www.ilo.org/publicان/TOC oblivious.pdf
Guarding the Guards: The Regulation of Private Military and Security Contractors

Jamie A. Williamson

When hostilities broke out in Iraq and Afghanistan in 2003, coalition forces were augmented by an extensive deployment of private security and military contractors (PMSCs). Most of these private contractors were able to operate outside of the public glare and fulfill their contractual obligations unhindered. However, allegations later emerged that some PMSCs were possibly using excessive force, leaving a destructive trail in the wake of a “shoot first, ask questions later” policy. The well-publicised incidents at Abu Ghraib, Fallujah, and Nisour Square came to epitomise the perception of the PMSC industry as a murky world of “guns for hire” and “mercenaries”. At the same time, however, PMSC personnel themselves were victims of violence, kidnapping and execution. With the negative headlines, and humanitarian consequences, an international debate naturally ensued regarding the activities, accountability and oversight of PMSCs.

Understandably, the significance of these new actors to contemporary armed conflicts has given rise to substantial concerns in the international humanitarian community regarding the impact of PMSCs on civilian populations. Moreover, the novelty of PMSCs has sparked debate on their status under international law and the apparent ability of PMSCs to operate unhindered in conflict regions despite the tremendous arsenals often at their disposal. This prompted the Government of Switzerland and the International Committee of the Red Cross (ICRC) in 2006 to initiate a consultative, multi-stakeholder process with governmental experts around the world to address the regulation of the activities of PMSCs in armed conflicts. Following meetings from 2006 to 2008, and after consultations with representatives of PMSCs and from across civil society, the ICRC and the Swiss Government published in September 2008 the “Montreux Document on pertinent international legal obligations and Good Practices to States related to operations of private military and security companies during armed conflict” (Montreux Document).

The Montreux Document now includes 47 State Signatories, including the European Union. The Montreux Document proposes a number of good practices that are of interest and value to States, PMSCs, NGOs and other entities. It clarified the legal status of PMSCs operating in armed conflicts, and reaffirmed that anyone violating international humanitarian law (IHL) can be held criminally responsible. Although non-binding in nature, the Montreux Document is an important restatement of existing international legal obligations of States and PMSCs and their personnel. It is a reminder that, in times of armed conflict, IHL applies to all concerned, protecting persons not taking part in hostilities and limiting the means and methods of warfare.

In some sense, it was perhaps inevitable that PMSCs operating in the midst of hostilities in Iraq and Afghanistan – many staffed by former soldiers bearing an impressive array of weapons and receiving substantial financial reward – would be perceived as mercenaries. As the public discourse and disquiet evolved from 2003 onwards, this label was likely to stick, especially when it appeared that the personnel of PMSCs were acting with impunity and unchecked by any form of regulation. As both a legal and practical matter, however, the mercenary tag for most, if not all, PMSCs was misplaced.
and consequently, detrimental to the industry as a whole.

Mercenaries have long existed. Historically, the hiring of mercenaries was condoned as a form of legitimate military entrepreneurship, vital to advancing the commercial, political and land interests of noblemen and merchants. Modern-day incarnations of these so-called soldiers of fortune are said to have included the likes of Executive Outcomes, 3 Bob Denard (aka champagne Bob), 3 plotters of the “Wonga Coup”, 3 and fighters from the former Yugoslavia operating in Libya on Gadhafi’s behalf. 3

Under contemporary international law, the definition of mercenary is broad and yet quite precise: The 1977 Additional Protocol I to the 1949 Geneva Conventions defines “mercenary” as any person who: (a) is specially recruited locally or abroad in order to fight in an armed conflict; (b) does, in fact, take a direct part in the hostilities; (c) is motivated to take part in the hostilities essentially by the desire for private gain or a share of the functions or income from which they receive compensation; (d) is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict; (e) is not a member of the armed forces of a Party to the conflict; and (f) has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces. 1

All elements of the definition must be satisfied for an individual to be considered a mercenary. Similar definitions are found in the 1977 OAU/AU Convention on the Elimination of the Mercenarism in Africa 1 and the 1989 United Nations Convention against the Recruitment, Use, Financing and Training of Mercenaries. 

At a minimum, then, a mercenary under international law is one who is hired to and participates in armed conflict and who is not a national of one of the parties to the armed conflict. A mercenary under IHL is not entitled to combatant or prisoner of war status in international armed conflicts. In both international and non-international armed conflicts, a mercenary remains, to all intents and purposes, a civilian, who can be prosecuted under domestic law for, inter alia, threatening the security of a State. Applying these definitions to PMSC personnel, it would be unlikely that the label of mercenary would attach itself to any PMSC operating in Iraq, Afghanistan and Somalia. Indeed, based on public-source material, although it cannot be ruled out that certain PMSC personnel may have directly participated in hostilities in the exercise of their functions, it would seem that no PMSC was specifically hired to take part in hostilities. Thus at least one of the cumulative prongs of the Additional Protocol I definition would not be met. This begs the question, if PMSCs are not mercenaries, what is their status?

The Montreux Document makes clear, personnel of PMSCs must comply with IHL, and human rights law, as well as applicable national law including criminal law, tax law, immigration law, and labour law, not only of the State in which they operate, but also, where applicable, the law of the States of their nationality and incorporation.

Regulation and Accountability
Irrespective of their contractual functions, PMSC personnel operating in conflict zones are obliged to comply with international humanitarian law, and human rights law, where relevant. Individuals who transgress these laws may be held accountable. It is therefore essential that States – through robust enforcement and regulatory mechanisms – and PMSCs – through vetting, oversight and adoption of best practices – create an environment conducive to the rule of law.

A lynchpin of international humanitarian law is the obligation of States to repress war crimes, whether they are committed in international or non-international armed conflicts. By becoming party to the 1949 Geneva Conventions and their 1977 Protocols, nearly all States have undertaken this obligation. The 122 States that have joined the International Criminal Court are likewise committed to do so with respect to the crimes detailed in its Statute, namely crimes against humanity, genocide and war crimes. To fulfill these obligations, States must incorporate these treaty obligations into domestic law, and provide for mutual legal assistance in criminal matters with other States.

As proceedings concerning events in Iraq and Afghanistan have shown, there are often significant jurisdictional hurdles to bringing cases relating to armed conflicts under domestic law. Which State is best placed to regulate and/or prosecute PMSCs and their personnel, if the said employee is a citizen of State A, working for a company of State B, contracted by the department of defence of State C, operating in a conflict occurring in State D?

These cases also pose thorny conflicts of law questions. In terms of criminal prosecution, the law of the jurisdiction where the crime occurred normally would prevail (lex loci delicti commissi). The existence of an armed conflict creates practical difficulties with this approach however, as the rule of law in-country is often strained during the course of hostilities. Indeed, it would have been unrealistic to have expected Afghan or Iraqi domestic criminal processes to take on the task of
prosecuting private contractors who had allegedly transgressed international humanitarian law at the height of the conflicts in Afghanistan and Iraq.12

The Montreux Document endeavours to resolve these jurisdictional and conflicts of law problems by assigning responsibility for pursuing IHL violations by PMSCs to three groups of States:

(i) States that directly contract the services of PMSCs (Contracting States);
(ii) States on whose territory PMSCs operate (Territorial States); and
(iii) States of incorporation or registration of the PMSC, or where said PMSC has its principal place of management (Home States).

This approach, which is broadly reflective of the aims of IHL, is intended to close any impunity gap that might exist by recalling that all States have a responsibility to prevent and punish violations of IHL, irrespective of where the crime is committed. While complicated and multilayered corporate structures might make it more difficult to identify which State is best placed to act, these should not detract from State oversight and repression.11

Thus, all three categories of States are expected “to enact any legislation to provide effective penal sanctions for persons committing or ordering to be committed, grave breaches of the Geneva Conventions and where applicable. Additional Protocol I. They have an obligation to search for persons alleged to have committed or ordered such grave breaches of IHL and bring such persons, regardless of their nationality, before their own courts.”

In application of the principle of actus deeder aut judicatur, a State also has the option, to the extent that its domestic laws permits, to hand over individuals for trial to another State “provided that such a State has made out a prima facie case”, or alternatively to an international criminal tribunal, presumably the International Criminal Court.12 States are required to “take measures to suppress violations of IHL committed by personnel of PMSCs through appropriate means, such as military regulations, administrative orders and other regulatory measures as well as administrative, disciplinary or judicial sanctions as appropriate.”

Similarly, States are expected to implement their obligations under international human rights law through domestic legislation and other measures, to prevent, investigate and to provide effective remedies for relevant conduct of PMSCs and their personnel.17

In addition to the above, the Montreux Document underscores that Contracting States may not contract with PMSCs to carry out activities that IHL explicitly assigns to States. These include the exercise of certain responsibilities over prisoner of war camps or places of civilian internment.18

Various approaches are being taken by States to regulate the private security industry and to provide for greater accountability for their activities. While some countries, though not many at this stage, have adopted legislation and regulations relevant to operations in hostile- or armed-conflict-type situations, the focus of most other countries has been on the commercial regulation and functioning of domestic security firms, including those providing maritime or mining security services.

For instance, South Africa adopted stand-alone legislation with its Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act, 2006, repealing its Regulation of Foreign Military Assistance Act 1998. The United Kingdom has no specific regulation addressing activities of PMSCs but turns to various other laws as required, including the UK Foreign Enlistment Act, 1870, the Human Rights Act, 1998 and the International Criminal Court Act 2001. The United States, likewise, has a mixture of Federal Statutes and Agency rules to oversee the activities. Sierra Leone has relied on its National Security and Intelligence Act of 2002. For its part, Afghanistan, which had been a breeding ground for PMSCs since 2003, is implementing a strategy to phase out certain PMSCs and to reassert its sovereignty over the remainder.


With this mixed bag of approaches, and in order to better assess where States stand on the adoption of the necessary national laws and regulations relating to the PMSC industry, notably operating in conflict zones, Switzerland and the ICRC are organising a “Montreux +5” Conference, to be held in December 2013. The aim of this event will be to enable State Signatories as well as the European Union to share their experiences in the implementation of the obligations and best practices contained in the Montreux Document. It is hoped that this conference will help identify current legislative and regulatory challenges and existing good practices, and to develop concrete tools and approaches that may help States and international organisations.

An International Code of Conduct

As mentioned above, States have an obligation to prosecute any individual who commits war crimes. Under international law, criminal responsibility lies not only with the “trigger puller” as such, but can also make its way up the hierarchical ladder, through the principle of “superior responsibility”. The Montreux Document is unambiguous in this regard, noting that superiors of personnel, including governmental officials and directors of managers of PMSCs, can be held liable if they fail to exercise proper control over the offending personnel.19

From a law of war perspective, this form of liability is seen as essential to ensure effective compliance with IHL in the midst of hostilities. In practice, this responsibility requires commanders not only to take punitive actions, where appropriate, but also to create an environment conducive to enforcing respect of the law. It is incumbent on directors and managers to exercise due diligence in recruiting personnel and to establish robust oversight mechanisms to limit the risk that personnel stray from the law. In doing so, they would be mitigating the risks of themselves being held criminally responsible for crimes committed by their staff.
As one of the offshoots of the Montreux Document, in 2010 a number of States and representatives of the PMSC industry adopted an International Code of Conduct for Private Security Providers. This Code of Conduct, described as a “multi-stakeholder initiative convened by the Swiss government”, aims to establish industry standards based on international human rights and humanitarian law and to put into place an external independent oversight mechanism as a means to improving accountability. As of 1 September 2013, the Code had been signed by 708 companies, of which nearly 60% are from Europe, 11% from South America, 16% from Asia and 8% from Africa.21

Signatory companies are expected to exercise due diligence in the recruitment, selection and vetting of personnel and subcontractors, as well as to ensure appropriate training in “all applicable international and national laws, including those pertaining to international human rights, international humanitarian law, international criminal law and other relevant laws.”22 Signatory companies are committed to establish grievance procedures, open to claims by personnel of PMSCs or by third parties, and to cooperate with competent national authorities where necessary. Once Signatory Companies have put in place the required internal processes, the Code contemplates certification and ongoing independent auditing by an oversight mechanism. Work to establish the latter is in progress. In September 2013, the Articles of Association for the International Code of Conduct for Private Security Service Providers were adopted by stakeholders.23 The Articles lay out the functions of the Association, which is subject to Swiss law, and labelled an independent governance and oversight mechanism.24 The Grievance Procedures contemplated for by Articles 66 to 68 of the Code25 are implemented through a detailed complaints process. The ultimate sanctions are the suspension or termination of a Signatory company’s membership of the Association.26 In terms of certification and auditing requirements, a number of initiatives are underway to develop a series of ISO and ANSI standards to guarantee that PMSCs comply with both the Montreux Document as well as the Code of Conduct.27

While the Code of Conduct is no substitute for effective domestic prosecution, signatories hope that it will reduce the risks of PMSC personnel committing war crimes when operating in conflict zones, by having PMSCs and the industry assuming their responsibilities through self-regulation.

Conclusion

With the downsizing and streamlining of many professional militaries, the trend of outsourcing certain security activities to PMSCs is likely to continue, and possibly accelerate. As a consequence, PMSCs will remain omnipresent in conflicts for the foreseeable future. While the adoption of the Montreux Document and ongoing work on the International Code of Conduct are important steps in the right direction, States as well as PMSCs need to continue putting in place the necessary legal and regulatory frameworks, as well as effective oversight mechanisms, to further strengthen compliance with the law.

1 Available at http://www.montreux-doc.org. Signatory States are: Afghanistan, Angola, Australia, Austria, Canada, China, France, Germany, Iraq, Poland, Sierra Leone, South Africa, Sweden, Switzerland, United Kingdom, Ukraine, United States of America, Former Yugoslavian Republic of Macedonia, Eczacibasi, Albania, Netherlands, Bosnia and Herzegovina, Greece, Portugal, Chile, Uruguay, Liechtenstein, Qatar, Jordan, Spain, Italy, Uganda, Cyprus, Georgia, Denmark, Hungary, Costa Rica, Finland, Belgium, Norway, Lithuania, Slovenia, Island, Belgium, Kuwait, Croatia and New Zealand.

2 The main international instruments are the four 1949 Geneva Conventions and their three Additional Protocols of 1977 and 2005, the Hague Declarations of 1899 and the Hague Conventions of 1907.


4 See for instance http://www.independent.co.uk/news/obituaries/bob-denard-396988.html

5 See for instance http://www.crimesofwar.org/a-z-guide/mercenaries/


7 Article 47 Additional Protocol I reads: 1. A mercenary shall not have the right to be a combatant or a prisoner of war.

8 A mercenary is any person who: (a) is especially recruited locally or abroad in order to fight in an armed conflict; (b) does, in fact, take a direct part in the hostilities; (c) is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party; (d) is a member of the armed forces of a Party to the conflict; (e) is a resident of territory controlled by a Party to the conflict; (f) has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces.

9 Signed in Libreville, Gabon on 3 July 1977 and entered into effect on 22 April 1980.

10 Article 68 of Protocol I reads: 1. Any torture or inhuman treatment or punishment shall be considered a war crime.

11 For more on the concept of “direct participation in hostilities”, see ICRC Interpretive guidance on the notion of direct participation in hostilities under international humanitarian law, available at http://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf

12 Moreover, the U.S. Coalition Provisional Authority, Order 17, Status of the Coalition Provisional Authority MNF: Certain Militias and Personnel has, 2004, granted immunity from prosecution to PMSC hired locally by the U.S. Department of Defense.

13 S.Ct. 1659 (2013) on the extraterritorial reach of the Alien Tort Statute may limit number of civil litigation matters involving non-U.S. PMSCs that are brought in U.S. Courts.

14 Montreux Document, paras. 4, 1 15.

15 Ibid.

16 Montreux Document, paras. 3(6), 9(1), and 14 (c).

17 Montreux Document, paras. 4, 10, 15.

18 Montreux Document, para. 2.


20 See Article 27 of the Montreux Document. Superior responsibility is not engaged solely by virtue of a contract, however.

21 For full statistics, see http://www.icco-psp.org/

22 International Code of Conduct, Article 95.

23 See also Article 27 of the Montreux Document. Superior responsibility is not engaged solely by virtue of a contract, however.

24 See Article 27 of the Montreux Document. Superior responsibility is not engaged solely by virtue of a contract, however.

25 Article 3 of the Montreux Document.


27 Article 47 Additional Protocol I reads: 1. A mercenary shall not have the right to be a combatant or a prisoner of war.

28 A mercenary is any person who: (a) is especially recruited locally or abroad in order to fight in an armed conflict; (b) does, in fact, take a direct part in the hostilities; (c) is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party; (d) is a member of the armed forces of a Party to the conflict; (e) is a resident of territory controlled by a Party to the conflict; (f) has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces.

29 Montreux Document, paras. 4, 1 15.

30 See for instance http://www.crimesofwar.org/a-z-guide/mercenaries/

31 See for instance http://www.independent.co.uk/news/obituaries/bob-denard-396988.html

32 The Business and Human Rights Review | Issue 3 | Winter 2013/14
Human Rights in a Post-Kiobel Landscape: 
More Questions than Answers

Daniel Grimwood, Allen & Overy LLP

Daniel Grimwood, a member of Allen & Overy’s Human Rights Working Group on secondment to the Washington, D.C. office, offers his thoughts on the future of human rights litigation in U.S. courts after the U.S. Supreme Court’s decision in Kiobel v Royal Dutch Petroleum.

The U.S. Supreme Court’s recent decision in Kiobel unquestionably altered the global landscape of human rights litigation. By applying the general presumption against extraterritoriality to the U.S. Alien Tort Statute (ATS), the Supreme Court has closed the door to many foreign plaintiffs who would otherwise pursue remedies in U.S. courts for human rights abuses committed abroad. But Kiobel did not dispose of the ATS in its entirety, and more questions remain for litigants in the decision’s aftermath.

Although Kiobel will prevent certain ATS cases that involve purely extraterritorial conduct (i.e., the facts of Kiobel itself), non-U.S. litigants may still bring claims that “touch and concern” the territory of the United States with “sufficient force to displace the presumption against extraterritorial application.” While the majority of ATS cases have been dismissed for lack of jurisdiction, three post-Kiobel cases have survived threshold challenges by demonstrating sufficient territorial nexus to the United States. Collectively, these cases demonstrate the simple point that Kiobel is not an insurmountable obstacle for human rights-based ATS claims.

The facts of Mounir v Bin Laden are perhaps uncontroversial from a jurisdictional perspective. The case involved an attack on the U.S. embassy in Kenya that was plotted, in part, from the United States. The court held that these facts easily satisfied Kiobel’s territorial nexus standard, concluding that “if any circumstances were to fix the Court’s framework of ‘touching and concerning the United States with sufficient force,’ it would be a terrorist attack that 1) was plotted in part within the United States, and 2) was directed at a United States Embassy and its employees.”

The court in Sexual Minorities Uganda v Lennv similarly found a territorial nexus based on allegations that a U.S. evangelical minister organised and directed a campaign of persecution against the LGBT community in Uganda from a location in the United States, rarely visiting Uganda himself. In its judgment, the court reasoned that the “[defendant’s] alleged actions in planning and managing a campaign of repression in Uganda from the United States are analogous to a terrorist designing and manufacturing a bomb in this country, which he then emails to Uganda with the intent that it explode there.”

Ahmed v Magan involved a somewhat different fact-pattern. That case was brought against a former Somali official (now living permanently in the United States) on behalf of a law professor who was tortured in Somalia. In contrast to the cases above, the court in Ahmed found sufficient nexus to the United States based solely on the fact that all of the alleged conduct and harm occurred in Uganda. This decision is contradicted by several other post-Kiobel decisions, including the United States Court of Appeals for the Second Circuit’s decision in Balintulo v Daimler AG, in which the court held that the presumption against extraterritorial conduct cannot be rebutted where the alleged illegal conduct occurs entirely in the territory of another sovereign.

The Ahmed case highlights an interesting question left open by Kiobel’s territorial nexus requirement. Whereas the Court cautioned that “mere corporate presence” was not sufficient to overcome the presumption against extraterritoriality, it did not address whether the presence of an individual in the United States might be. The Ahmed case suggests, perhaps unremarkably, that individual defendants who commit human rights abuses abroad and flee to the United States may be subject to ATS claims based on non-U.S. conduct involving a non-U.S. defendant. Despite the growing number of post-Kiobel decisions, important questions remain for corporate defendants. As a practical matter, it is not clear what level of corporate contact with the United States is sufficient to give rise to jurisdiction. Kiobel gives little guidance on this. Indeed, it all but assumes the answer to the question on which it originally granted certiorari: whether corporations could be sued for human rights abuses under the ATS at all. Some answers may come later this Supreme Court term.

For example, in DaimlerChrysler AG v Bauman, a case involving claims under the ATS, the Court recently held that a U.S. court could not exercise general personal jurisdiction over a non-U.S. corporation for conduct that took place outside the United States based solely on the contacts of an indirect corporate subsidiary. Relying on Kiobel, the Court expressly rejected an expansive view of general jurisdiction based on the asserted ATS claims noting, among other things, that “[o]ther nations do not share this unabridged approach to personal jurisdiction.”

We are still in the early days of the post-Kiobel litigation landscape. Many commentators have predicted that, when faced with a tougher territorial nexus requirement, human rights litigants will seek out more favorable venues in Europe or the state courts of the United States. As recent cases suggest, however, Kiobel did not close the book on ATS but merely opened a new chapter in its application, and therefore the role of the ATS in future human rights-related litigation remains unclear.

---

1 Kiobel v Royal Dutch Petroleum Co., 133 S.Ct. 1689 (2013).
7 55, slip op. at 23.