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# The Business and Human Rights Review

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

### The Move to Greater Corporate Transparency

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# Foreword

## *The Move to Greater Corporate Transparency*

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Matthew Townsend, Partner, Allen & Overy LLP



*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 The Financial Reporting Council is currently finalising guidance (although the draft guidance received criticism that the materiality test for disclosure goes too far in narrowing the information to be provided).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.

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# Human Rights and the Financial Sector

## *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 earlier. 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 16) 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 to 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 from 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 to 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

*“... 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 of our bank suffering reputational or financial harm from transactions, products, services or activities such as lending, capital raising, advisory services or investments that involve a party associated with environmentally or socially sensitive activities. For products, services and activities identified as having significant environmental and social risk potential, procedures and tools for the timely identification, assessment, escalation and monitoring of such risks are applied and integrated into standard risk, compliance and operations processes.

*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 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 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 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 process 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 bringing 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.

*“We do not see environmental and human rights risks simply or solely as compliance risks. Yet, at the same time, we are convinced that the compliance function does play an important role in the process of detecting and managing such risks.”*



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

Dr David Kinley and Jahan Navidi

Human rights scholars Professor David Kinley and Jahan Navidi describe the dynamic and evolving legal landscape for human rights risks following the Rana Plaza disaster and the U.S. Supreme Court's decision in *Kiobel*.

## Introduction

Nearly two years since the Rana Plaza garment factory collapsed in Bangladesh, this human rights tragedy continues to be a bloody and stark reminder of the real legal, reputational and economic risks facing corporations at the top of supply chains. Marking the worst accident on record for the garment industry, the deaths of approximately 1,135 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<sup>1</sup>) in the Bangladeshi factory complex may have broader litigious consequences for multinational corporations. The current legal landscape presents significant risks for corporations for failing to manage their supply chains and yet their response in wake of the disaster has been largely inadequate.

Exposing the darker side of globalisation, Rana Plaza is emblematic of a long history of human rights infractions in supply chains across a multitude of industries and jurisdictions. 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 and the deaths of scores of workers in fires in South Asian factories manufacturing smartphones, abuses along the supply chain can have legal consequences for corporations with global business operations. The Alien Tort Statute (ATS) judgment of the US Supreme Court in *Kiobel v. Royal Dutch Petroleum Co*<sup>2</sup> may have restricted somewhat the ability of human rights victims to pursue legal remedies against non-US based corporations for conduct that occurs outside of their home jurisdiction, but as we explain in this article, there remains clear supply chain litigation risks for transnational corporations, whether under the ATS or other tortious avenues.

Despite limited host and home country options and penalties such as the *Dodd-Frank Wall Street Reform and Consumer Protection Act* (2010) in the US, it is becoming increasingly clear that the major risk for corporations are the litigious avenues available for victims in their "home" countries. Specifically, the increased prospect of serious home country tortious, contractual and criminal actions related to human rights impacts along global supply chains necessitates greater awareness by corporations of the human rights impacts of their international operations. Even if these actions are not explicitly framed in the language of human rights, they represent a significant risk for corporations in their supply chain management.

## Background

Globalisation has increased awareness of human rights violations perpetrated throughout global supply chains. Likewise, greater shareholder activism and consumer consciousness of the way products are consumed have placed the spotlight on corporate social responsibility. This has been underpinned by the UN-adopted *Guiding Principles on Business and Human Rights* (2011)<sup>3</sup> which stresses the importance of corporations undertaking adequate due diligence in their assessment of human rights risks throughout their supply chains, not merely because that is the responsible thing to do, but because states are and will increasingly require it of them.<sup>4</sup>

## Legal Risks

To date, legal regimes targeting human rights abuses across global supply chains have been limited and relatively ineffective at providing adequate remedies or, relatedly, at providing adequate incentives to proactively mitigate human rights impacts. Host country regulations, to the extent they exist, appear to have their greatest application to local conduct, and seldom provide an effective basis

for holding transnational corporations to account for the host country activities of their suppliers. Home country regulations, in contrast, are grounded more in principles of transparency and reporting, and therefore rely implicitly on market discipline, rather than direct liability, to curb corporate conduct. Although, arguably, neither regime provides sufficient incentives to eliminate human rights abuses, they nevertheless suggest that greater attention is being given to human rights impacts along the supply chain. However, the real action lies in the legal risks facing businesses domestically for human rights infractions arising in their supply chains extraterritorially. It is to this matter of the long arm of human rights risk that corporations must direct their attention.

## Host Country

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 testimony before the 2013 US Senate Foreign Relations Committee Hearing on Labor Issues in Bangladesh, one of the biggest issues facing the authorities in Bangladesh is the enforcement of current building codes.<sup>5</sup> Many residential buildings are constructed illegally as industrial complexes and are prone to disaster. The Rana Plaza building itself was only authorised as a five-floor enclosure, yet an additional three floors were added.

In the wake of the Rana Plaza disaster, there have been limited efforts to review building regulations and codes, such as the Bangladeshi Parliament's legislative reform package of June 2013, which included amendments to labor laws allowing union representation.<sup>6</sup>

Additionally, there have been various reports and enquiries by think tanks that track the progress of the victims' claims, the reforms in the garment sector and the management of supply chains in the aftermath of Rana Plaza.<sup>7</sup>

However, the continuation of deficient infrastructure and poor labor conditions within Bangladesh means there is still considerable scope for improvement in domestic regulations. As stated in the report of the above-mentioned US Senate Committee inquiry, "more efforts are needed to improve labor rights and empower workers to ensure their own safety."<sup>8</sup> Labour laws in Bangladesh still fail to meet internationally recognised standards<sup>9</sup> and whilst local criminal prosecutions against the owners of Rana Plaza have been successful, larger multinational corporations at the top of the supply chain are also being targeted to better manage their supply chains to prevent accidents such as Rana Plaza from occurring.

Beyond the garment industry, China's prosecution and execution of two individuals involved in the 2008 Melamine baby milk scandal has not prevented similar milk-based poisoning from occurring or resulted in substantive supply chain changes.<sup>10</sup> As China's largest manufacturer of milk powder, the Sanlu Group and its partner at the time, the New Zealand group Fonterra, maintained largely decentralised networks of milk supply chains across China,<sup>11</sup> contributing to what the UN's Food and Agriculture Organization has described as the largest food safety crisis in recent years.<sup>12</sup> The continued poor regulatory framework in China maximizes the likelihood of further human rights abuses through supply chain mismanagement.<sup>13</sup>

It is precisely in this context that developments in extending *home* country jurisdictional reach to target corporations at the top of the supply chain are emerging.

## Home Country

Several home countries have taken progressive steps toward preventing human rights issues occurring extraterritorially in the supply chains of companies based in their jurisdiction. For example, the trade of "conflict minerals" which fund armed groups in the DRC is the subject of substantial reporting requirements under section 1502 of the US *Dodd-Frank Act* – namely, that publicly traded companies must disclose whether a metal derived from any of the four conflict minerals from the DRC is used in their products. This, together with certain due diligence requirements as prescribed under the Security and Exchange Commission's Final Rule issued pursuant to the above section of the Act,<sup>14</sup> is certainly a positive response to stakeholder and

consumer pressure to address the use of such conflict minerals in the supply chain. These also reflect the broadly similar conflict mineral 'Guidance' for companies issued by the OECD which, "provides a framework for detailed due diligence as a basis for responsible global supply chain management" of the four conflict minerals.<sup>15</sup>

Similarly, the introduction of the *California Transparency in Supply Chains Act 2010* imposes requirements on local companies to disclose their policies to combat human rights abuses in their supply chains. And more recently, the UK's *Bribery Act 2010* places extraterritorial responsibility on UK-based corporations to combat bribery including in their overseas supply chain which may often have indirect negative impacts on human rights landscape.

Whilst these initiatives are certainly welcome, their effectiveness in dealing directly with human rights abuses extraterritorially is indirect and therefore necessarily limited. Still, the very fact that they target those at the top of the supply chain may contribute to the possibility of civil litigation or prosecutions concerning corporate liabilities located beyond the boundaries of the legislating state for alleged human rights abuses, whether committed directly or indirectly by the corporation concerned.

## Litigation

In the main, under well-established principles of corporate liability many multinational corporations have been effectively shielded from claims involving the in-country conduct and activities of their global suppliers. Therefore, while local suppliers have been pursued in lawsuits relating to alleged corporate human rights abuses, the incentive effects these lawsuits have generated for multinationals have been indirect or reputational, rather than immediate and sanctionable.

The prospect of home country litigation involving human rights allegations is poised at an interesting inflection point. On the one hand, the U.S. Supreme Court's 2013 decision in *Kiobel* has been viewed by many as the end of extraterritorial remedies available under the ATS for human rights abuses alleged to have been committed by non-US corporations outside of the U.S. But on the other, the story may be less pessimistic for human rights claimants when considering the use of litigation avenues outside the much-vaunted ATS. Courts in the US and Europe have increasingly entertained claims in (ordinary) tort or breach of contract, or allegations of criminal behaviour that are based on conduct involving purported human rights abuses.

These domestic law regimes have at least as much potential to provide access to home country courts as does the ATS in the US, especially as expanded boundaries of extraterritorial liability are being asserted before them which may yet develop into established and powerful remedies for supply chain human rights violations.<sup>16</sup>

## Host Country Litigation

Host country litigation has, naturally targeted domestic-based businesses rather than the overseas parent companies even when it is possible that the relevant executive decisions have been made in the latter. Similarly, corporations at the top of the supply chains may escape censure for their failure to conduct supply chain due diligence. For example, after the Rana Plaza disaster while it was known that international companies had sourced clothing from the factories located in the building,<sup>17</sup> the Bangladesh Legal Aid and Services Trust (BLAST) and Ain o Salish Kendra (ASK) petitioned the High Court Division of the Supreme Court of Bangladesh to issue orders dealing only with those directly responsible in Bangladesh for the building's collapse.<sup>18</sup> Whatever the success such domestic litigation has had in imposing liability on local defendants, it has had little, if any, impact on their overseas client corporations.

An important impetus for why host state litigation is pursued is when defendant corporations have successfully repelled attempts to litigate the parent corporation in their own home states, thereby leaving the host state courts as the only option. This is, however, a high-risk strategy. Thus while, for example, in the case of *Bhopal*,<sup>19</sup> the parent company, Union Carbide (USA), sought successfully to avoid litigation in the US by claiming that India was the correct forum, in *Lubbe & Ors v Cape Plc*, the UK parent company (Cape Plc) was unsuccessful in its bid to persuade the UK courts that the proper forum was South Africa where its subsidiary was located.<sup>20</sup> As many Western courts (with US courts being the notable exception) now restricting access to *forum non conveniens* as an effective shield to protect corporations against suit in their home jurisdictions for alleged human rights abuses abroad,<sup>21</sup> the prospects of successfully employing such a defensive device in future appear to be substantially reduced.

## Home Country Litigation

The prospect of litigation pursued within the countries of those corporations at the head of the supply chain for human rights abuses is an increasingly topical and realistic prospect. Extraterritorial civil claims, tortious actions,

contractual and perhaps even criminal claims suggest that companies must be aware of the international ramifications of actions taken along their supply chains. This is evident when the parent company itself may be held liable for overseas infractions – as in the *Cape* case above – but also when an overseas subsidiary is held liable under host state law, but 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*, invoking Nigerian tort law before a Dutch District Court.<sup>22</sup> And even if the track record of success of these actions has been limited, the reputational and economic ramifications associated with these litigious claims are pertinent and warrant serious attention to be paid by corporations to their supply chain management.

## Alien Tort Statute

Historically, in the US (as in the UK) tort law has provided one of the most important instruments for holding major corporations accountable for extraterritorial human rights abuses in their global supply chains. And while the federal ATS has attracted most attention, the fact that in cases brought against corporations in US courts, ordinary state torts laws have almost always been pleaded alongside the federal statute has often proved critical.<sup>23</sup>

That said, by providing that foreign plaintiffs may bring suits in the US against defendants wherever they are located for violations of the “law of nations,” the ATS has been used as a potent litigation tool against corporations since the 1980s. Notable examples have included *Doe v Unocal Corp.*,<sup>24</sup> *Sinaltrainal v. Coca-Cola Company*,<sup>25</sup> and *Flomo v. Firestone Nat. Rubber Co.*,<sup>26</sup> which involved accusations of the complicity of US-based corporations in tortious actions undertaken abroad. Admittedly, of the 120 or so ATS suits involving corporate respondents, few reached a final trial stage, and none as yet recording judgment against a corporation. However there has certainly been reputational and financial damage for the corporations involved, with settlements and default judgments attracting highly undesirable attention as well as some significant settlement sums.<sup>27</sup>

Even after the notable conditionalities imposed by the US Supreme Court on the jurisdictional reach of the ATS, first in *Sosa* (2004) – that the international law norms must be “specific, universal and obligatory”,<sup>28</sup> and most recently in *Kiobel* (2013) – that in order to rebut the presumption against the extraterritorial application of the statute, the litigated matter must “touch and concern the

territory of the United States [with] sufficient force”,<sup>29</sup> the statute nonetheless remains a viable impost on corporate actions that might infringe human rights overseas. In respect of the latter case, the reaction to the judgment by some lower courts has been extraordinary, if not inexplicable, as, for example, in the interpretation of *Kiobel* applied by an Alabama US District Court in its dismissal of (yet another) ATS suit against Drummond, a US-based coal corporation, regarding the murder of three trade unionists in its Colombian operations.<sup>30</sup> To be sure, the eye of the jurisdictional needle through which ATS litigation must pass has been progressively narrowed (now, effectively, excluding all non-US corporations, or at least those without a substantial presence or decision-making capacity in the US),<sup>31</sup> but it is certainly not shut. The determination that under the statute US District Courts must satisfy themselves that they have both personal and subject matter jurisdiction according to the relevance or association of the case to the US is hardly novel. It is standard fare in tort law, whether involving actions executed overseas or at home.

Ongoing litigation against multinational corporations, especially in tort law, is, as Cees van Dam argues, a potentially powerful deterrent against corporate wrongdoing.<sup>32</sup> It represents an increasingly tried and tested means by which to hold companies accountable for their human rights abuses in a litigious context. Corporations at the top should seek to avoid such abuses, and thereby the litigation that follows, by managing their supply chains through proper, proactive due diligence.

## European Experience – Tort Law

European jurisdictions have also provided home country alternative routes to the ATS in terms of litigation against corporations for direct or indirect involvement in human rights 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.<sup>33</sup> Whilst these claims have not been directly expressed in terms of international human rights language or standards, these may certainly be implied and thereby act as an important complimentary private law enforcer of human rights against corporations.<sup>34</sup>

The UK experience in the use of tort law, which has achieved multiple settlements, indicates that such litigation can target home-based corporations regarding human rights abuses arising from the actions of their subsidiaries, partners or suppliers overseas.<sup>35</sup>

## 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 palpable litigation risk for Western-based corporations, including those headquartered in the US or with significant US interests. And even if any such civil suits are unsuccessful in obtaining a judgment, as the torts and ATS experiences have shown, the reputational and commercial costs associated can certainly be significant, warranting close attention to preventive measures such as voluntary accords and agreements.

As such, it is not therefore all that surprising that many leading retail corporations have sought to establish binding cross-border agreements regarding their supply chains<sup>36</sup> that include human rights due diligence procedures. Notably, 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*,<sup>37</sup> was developed committing retailers to help finance safety upgrades in Bangladeshi factories. Gaining more than 150 signatories including retailers, union leaders and government officials and spanning over 20 countries,<sup>38</sup> the Accord represents an attempt to better manage the risks of supply chain infractions caused by the inadequate maintenance of health and safety standards. The imposition of inspection and public reporting requirements for buyers and suppliers entering into or embracing the plan is an important initiative that helps to ensure more effective supply chain management.

Even so, some corporations have simply refused to enter any accords or potentially binding agreements. Rather than seeking to better manage their supply chains to avoid the risk of future human rights abuses, they risk being exposed to the consequences of existing and future human rights infractions. As the legal adviser to the National Retail Federation Johan Lubbe testified before the US Senate, the “legal enforceable obligations” emerging from the Accord have evoked an evident sense of fear that some corporations will be held liable for a variety of human rights infringements that might occur throughout the supply chain.<sup>39</sup> Whilst such corporations are in the minority, it nevertheless reflects some residual level of resistance to, or denial of, suggestions that their existing supply chain management systems may fail to ensure against such abuses occurring and that thereby they are exposed to consequent reputational damage or litigation, or both.



## The Future

It is now clear that the fact of alleged human rights abuses occurring outside one's home jurisdiction does not constitute a shield against liability under home state laws. The reputational, economic and legal risks facing corporations at the top of the supply chain for human rights infractions compel such corporations to assess and reassess their supply chain management systems. Litigation under the ATS, as well as other tort-based theories of liability in the US, UK and Europe provide claimants with several options for seeking

remedies for human rights abuses occurring abroad. Furthermore, corporations are increasingly expected to abide by the UN Guiding Principles (not least because so many corporations have voiced their enthusiastic support of them), home-state regulations and various binding agreements and accords. In this post-Rana Plaza legal environment, therefore, it is essential that corporations and their legal advisors to implement enhanced human rights due diligence procedures and be aware of the risk of legal action being taken against them in any of the jurisdictions in which, or out of which, they operate.

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*The version of this article which was included in this edition of the Business and Human Rights Review when it was first published incorporated a number of changes to the text which, due to editorial error, were not approved by the authors. We sincerely apologise to the authors for this mistake. The final text of the article which appears above has been fully approved by the authors.*

- 1 Centre for Policy Dialogue, "One Year after the Rana Plaza Tragedy: Where Do We Stand? The Victims, the Sector and the Value Chain, Third Monitoring Report" (2014), 12.
- 2 *Kiobel v. Royal Dutch Petroleum Co* 133 S.Ct. 1659 (2013)
- 3 The "Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework" formulated by the UN Secretary-General's Special Representative on Business and Human Rights, John Ruggie, were adopted by the UN Human Rights Council on 6 July 2011; UN doc. A/HRC/RES/17/4.
- 4 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. That is, when the State takes seriously its duty to protect under the first pillar by enacting appropriate legislation that implements in domestic law its international human rights obligations. See further, Daniel Augenstein & 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
- 5 Johan Lubbe, "For the Record for the Senate Foreign Relations Committee Hearing on Labor Issues in Bangladesh" (2013) <[http://www.foreign.senate.gov/imo/media/doc/Lubbe\\_Testimony.pdf](http://www.foreign.senate.gov/imo/media/doc/Lubbe_Testimony.pdf)>
- 6 *Ibid* 5.
- 7 See for example above n 1, Centre for Policy Dialogue.
- 8 Majority Staff Report, Committee on Foreign Relations United States, "Worker Safety and Labor Rights in Bangladesh's Garment Sector" (2013), v. < <http://www.foreign.senate.gov/imo/media/doc/85633.pdf>>
- 9 Sarah Labowitz & Dorothee Baumann-Pauly, "Business as Usual is Not an Option: Supply Chains and Sourcing after Rana Plaza", Center for Business and Human Rights at NYU Stern (2014), 30
- 10 See, for example, Lily Kuo, Why Chinese parents are still so paranoid about made-in-China baby formula, Quartz (9 August 2013), <<http://qz.com/113508/why-chinese-parents-are-still-so-paranoid-about-made-in-china-baby-formula/>> and Ben Bouckley, Fonterra never checked Sanlu's dairy products prior to deadly China melamine crisis, study warns, Dairy Reporter.com (20 June 2014), <<http://www.dairyreporter.com/Regulation-Safety/Fonterra-never-checked-Sanlu-s-products-in-China-melamine-scare-Study>>
- 11 Asia Case Research Centre, The University of Hong Kong, "Sanlu's Melamine-Tainted Milk Crisis in China" (2009).
- 12 Food and Agriculture Organization of the United Nations, Melamine <<http://www.fao.org/food/food-safety-quality/a-z-index/melamine/en/>>
- 13 See, for example, in respect of food supply chain management, Adam Jourdan and Lisa Baertlein, Yum, McDonald's apologize as new China food scandal hits, Reuters (21 July 2014), <<http://www.reuters.com/article/2014/07/21/us-yum-brands-food-safety-idUSKBN0FQ01P20140721>>
- 14 SEC, Final Rule on Conflict Minerals, 17 CFR PARTS 240 and 249b (22 August 2012), see 'Summary', at 25-32; available at <<http://www.sec.gov/rules/final/2012/34-67716.pdf>>
- 15 OECD, Due Diligence Guidance For Responsible Supply Chains Of Minerals From Conflict-Affected And High-Risk Areas, (2013, 2nd edn), at 12; available at <<http://www.oecd.org/corporate/mne/GuidanceEdition2.pdf>>
- 16 See Daniel Augenstein & David Kinley, "Beyond the 100 Acre Wood: In which International Human Rights Law Finds New Ways to Tame Corporate Power Overseas" (2015) 18 *International Journal of Human Rights*, available at <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2501876](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2501876)>
- 17 The Guardian, Rana Plaza Factory Disaster: Victims still waiting for compensation (23 October 2013), <<http://www.theguardian.com/world/2013/oct/23rana-plaza-factory-disaster-compensation-bangladesh>>
- 18 International Commission of Jurists, Bangladesh: Public interest litigation (24 June 2013) < <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2013/06/Rana-Plaza-background.pdf>>
- 19 *In re Union Carbide Corporation Gas Plant Disaster at Bhopal*, 634 F Supp 842 (1986).
- 20 Lubbe and Others and Cape Plc. and Related Appeals [2000] UKHL 41
- 21 See Erin Foley Smith, "Rights to Remedies and the Inconvenience of Forum Non Conveniens: Opening US Courts to Victims of Corporate Human Rights Abuses", *Columbia Journal of Law and Social Problems* 44 (2010), 145. The decline of the device in respect of human rights issues has been especially marked within the EU, but is also apparent in many other OECD jurisdictions (*ibid*, 187-91). The United States is an exception where it still constitutes a "significant obstacle to victims of human rights abuses perpetrated by U.S. corporations"; *ibid*, 169.
- 22 Friday Alfred Akpan & Milieudefensie v Royal Dutch Shell Plc & Shell Petroleum Development Co Nigeria Ltd C/09/337050 / HA ZA 09-1580 (30 January 2013), District Court of The Hague; <[http://www.menschenrechte.uzh.ch/entscheide/Friday\\_Alfred.pdf](http://www.menschenrechte.uzh.ch/entscheide/Friday_Alfred.pdf)>
- 23 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), 79.
- 24 *Doe v Unocal Corp*, 395 F.3d 932 (9th Cir 2002).
- 25 *Sinaltrainal v. Coca-Cola Co.* 256 F. Supp. 2d 1345 (S.D. Fla. 2003).
- 26 *Flomo v. Firestone Nat. Rubber Co., LLC*, 643 F.3d 1013, 1021 (7th Cir. 2011).
- 27 The settlement in *Licea v. Curaçao Drydock Co.*, 584 F. Supp. 2d 1355, 1366 (S.D. Fla. 2008), was for \$80 million.
- 28 *Sosa v Alvarez-Machain*, 542 US 692, 732 (2004)
- 29 *Kiobel*, above n 2, per Kennedy CJ.
- 30 Proctor J granted summary judgment to the defendants in *Balcerio, et al v Drummond Company Inc. , et al* , No. 2:09-CV-1041-RDP (N.D. Ala.) (25 July 2013), on the ground that that plaintiffs had failed to provide any admissible evidence capable of substantiating the existence of a US nexus. He went on to find that "the seismic shift that *Kiobel* has caused on the legal landscape" meant that, in his opinion, even if the plaintiffs had been able to present evidence of actions taken by Drummond officials on US soil that lead directly to the murders in Colombia this would not substantially "touch and concern" the territory of the US, and that the only matter of concern was where the murders took place. As such, he reasoned, the ATS claim failed on this basis as well. On appeal, this decision was upheld by the US Court of Appeals, 11th Circuit: *John Doe et al v Drummond Company Inc. , et al* , No.13-15503 2:09-CV-1041-RDP (25 March 2015).
- 31 Thus, for example, whereas the US Supreme Court has held German-based *Damlier AG* not to be amenable to suit in the US under the ATS because the alleged tortious conduct occurred "entirely outside the United States" (*Damlier AG v Bauman et al*, 134 S.Ct. 746 (2014), at 1.), the Ninth Circuit Court of Appeals, has permitted an ATS claim to proceed against a group of USA-based companies (including Nestle USA) because part of the alleged tortious conduct, the plaintiffs claim, "occurred within the United States", and as such, in the Court's opinion, there are grounds to believe that it may fulfill *Kiobel*'s "touch and concern" test (*Doe v Nestle USA, Inc., et al*, No. 10-56739, D.C. No.2:05-CV-05133-SVW-JTL (C.D. Calif.) (4 September 2014), at 31.
- 32 Cees van Dam, "Tort Law and Human Rights: Brothers in Arms on the Role of Tort Law in the Area of Business and Human Rights" (2011) 2 *JETL* 211, 254.
- 33 *Ibid* 253-254.
- 34 *Ibid* 254.
- 35 See, e.g., *Ngcoobo v. Thor Chems. Holdings Ltd*, T.L.R. 10 (Eng.); *Sithole v. Thor Chems. Holdings*, [1999] EWCA (Civ) 706, (appeal taken from Eng.). See further, Richard Meeran, "Tort Litigation Against Multinational Corporations for Violation of Human Rights: An Overview of the Position Outside the United States" (2011) 3 *City University of Hong Kong Law Review*, 1.
- 36 For example, *Abercrombie & Fitch*, *Adidas*, *American Eagle*, *Benetton*, *Carrefour*, *Marks and Spencer*, *John Lewis*, *Puma*, *Primark*, *PVH* (owner of the *Calvin Klein* and *Tommy Hilfiger* brands), *Tesco* and *Woolworth Australia*, have all recently signed the *Accord on Fire and Building Safety in Bangladesh* (see following footnote).
- 37 *Accord on Fire and Building Safety in Bangladesh* (May 2013) < [http://bangladeshaccord.org/wp-content/uploads/2013/10/the\\_accord.pdf](http://bangladeshaccord.org/wp-content/uploads/2013/10/the_accord.pdf)>
- 38 *Accord on Fire and Building Safety in Bangladesh*, Signatories: <<http://bangladeshaccord.org/signatories/>>
- 39 Lubbe testimony above, n 5.

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

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Susanne Gebauer

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Susanne Gebauer, Program Manager for Labor Practices & Human Rights Verification Services at UL Responsible Sourcing Inc., discusses the growing global concern over human trafficking.

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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 their business relationships.<sup>1</sup> Although these latest requirements are likely to emerge, in the first instance, from the United States, businesses should take this as an opportunity to evaluate their human rights impacts in all countries in which

they do business. By gaining a thorough understanding of the risk of human trafficking to business operations and adopting stricter internal standards consistent with proposed United States legislation and industry best practices, businesses can better identify and mitigate associated risks.

## Human Trafficking Explained

The international community introduced the term *trafficking in persons*, or *human trafficking* as it is more commonly known, at the beginning of this century. The United Nations General Assembly adopted “the first global legally binding instrument with an agreed definition on trafficking in persons” through the November 2000 Convention against Transnational Organized Crime, and its “Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children.”<sup>2</sup>

Human trafficking, forced labour, slavery, and practices similar to slavery, such as debt bondage, are all distinct

human rights abuses that occur in today's global supply chains. Human trafficking, however, is the one term that connects these abuses, capturing the process by which an individual is led into and kept in a state of exploitation, such as forced labour, slavery, or debt bondage.<sup>3</sup>

Growing international awareness of the factors that may result in an individual being exploited in these ways has expanded the scope of supply chain due diligence. Accordingly, best practice today requires businesses to investigate not only occurrences of exploitation at the production site, but also potential abuses that individuals may have suffered during the recruitment and hiring process.

### 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.<sup>4</sup>





*“Our fight against human trafficking is one of the great human rights causes of our time (...).”*

Barack Obama, President of the United States of America<sup>6</sup>

*“Trafficking in persons’ shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, 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(a)<sup>5</sup>

### 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

compliance with housing and safety standards; and a plan to monitor, detect, and terminate any subcontractors that engage in trafficking or certain trafficking-related recruitment practices.<sup>8</sup>

Since the 2006 introduction of the requirement for federal contractors to abide by the zero-tolerance policy for human trafficking, “no contract has been terminated, no contractor has been debarred and no broader implementation or enforcement was behind the regulation.”<sup>9</sup> The historical lack of enforcement activity, however, may change with this Executive Order and the forthcoming rule.<sup>10</sup> Businesses directly or indirectly engaged in government contracting should be aware of this increasing pressure to engage in supply chain due diligence and transparency.

### Legislative Developments

Globally, foreign migrant labour remains one of the groups most susceptible to human trafficking, as migrant workers are often exposed to the illegal activity of labour contractors. Lured by the promise of better employment, temporary foreign workers are often subject to trafficking, which results in debt bondage or forced labour.

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 contractors with a state agency, and disclosure of the use of foreign labour contractors by entities seeking to employ foreign workers, and by setting penalties for hiring unregistered foreign labour contractors. As California receives the largest number of temporary foreign workers in the United States, Senate Bill 516 is seen as an important milestone in drawing attention to anti-trafficking regulation.

A similar bill introduced in the U.S. Senate<sup>11</sup> proposes even broader regulations on foreign labour recruiters. In addition to the registration and disclosure requirements covered by the California bill, the Border Security, Economic Opportunity, and Immigration Modernization Act addresses the recruitment process itself. 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 identify 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 proposed

law would prohibit 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 would be prohibited from charging any fees to a worker for recruitment or hire.<sup>12</sup>

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 they hope to curb potential labour abuses that may occur during the recruitment process by those doing business with or in the United States.

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.<sup>13</sup> According to Theresa May, Home Secretary, the bill will be introduced before the current session of parliament. Among other requirements, the bill will seek a commitment from businesses against the use of slave labour.<sup>14</sup>

*“The United States has long had a zero-tolerance policy regarding Government employees and contractor personnel engaging in any form of this criminal behavior. As the largest single purchaser of goods and services in the world, the United States Government bears a responsibility to ensure that taxpayer dollars do not contribute to trafficking in persons.”*

Executive Order – Strengthening Protections Against Trafficking In Persons In Federal Contracts (2012)<sup>7</sup>

*“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.”*

### 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 7,705 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 thereof are 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.<sup>15</sup>

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.<sup>17</sup> Although the U.S. Executive Order only applies to federal contractors, and the presented federal and state legislation has not been adopted yet, the proposed anti-trafficking requirements pose an opportunity for businesses to proactively evaluate their due diligence efforts and to be ahead of regulatory developments, rather than simply responding to them. At the same time, businesses can better mitigate the risks human trafficking poses to their business and operations.

## Human Trafficking Worldwide Statistics 2012<sup>16</sup>

Prosecutions

7,705

related to labour trafficking

1,153

estimated victims of labour trafficking

18.7 m



*Globally accepted and recommended best practices, such as the corporate operational principles outlined in the UN Guiding Principles,<sup>18</sup> are useful guides to help businesses establish a due diligence programme, and can be informed by the recent legislative proposal in the U.S. legislature.<sup>19</sup> The following ten steps summarise best practice for due diligence activity, especially with regard to addressing the risk of human trafficking in supply chains:*

1. Assess supply chain risk
2. Determine scope of programme
3. Create governance and oversight structure
4. Set standards for suppliers and employees
5. Establish a supply chain monitoring protocol
6. Communicate programme to stakeholders
7. Conduct supplier assessments
8. Remediate assessment findings
9. Review and measure programme
10. Report on programme progress to stakeholders

### 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 State and 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.<sup>20</sup> 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.

*“Human trafficking has necessitated a broadening of the scope of supply chain due diligence. Today, businesses must investigate occurrences of exploitation at the production site, as well as potential abuses that individuals may have suffered during the recruitment and hiring process.”*

### 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 practice. 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.<sup>21</sup> 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

*“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)



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 might relate to activity conducted outside of the country of production or service. This may require remediation to 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.



- <sup>1</sup> "Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework" (2011), principle 13(b), page 14, available at [http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR\\_EN.pdf](http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf)
- <sup>2</sup> United Nations Office on Drugs and Crime, UNODC available at <http://www.unodc.org/unodc/en/treaties/CTOC/index.html>
- <sup>3</sup> 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/EN/ProfessionalInterest/Pages/SupplementaryConventionAbolitionOfSlavery.aspx>
- <sup>4</sup> United Nations Office on Drugs and Crime, UNODC available at <http://www.unodc.org/unodc/en/human-trafficking/index.html?ref=menuside>
- <sup>5</sup> United Nations Convention Against Transnational Organized Crime And The Protocols Thereto available at <http://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf>
- <sup>6</sup> Speech by President Obama at the Clinton Global Initiative Annual Meeting (25 September 2012) available at <http://www.whitehouse.gov/photos-and-video/video/2012/09/25/president-obama-speaks-clinton-global-initiative-annual-meeting#transcript>
- <sup>7</sup> Executive Order – Strengthening Protections Against Trafficking In Persons In Federal Contracts (2012) available at <http://www.whitehouse.gov/the-press-office/2012/09/25/executive-order-strengthening-protections-against-trafficking-persons-fe>
- <sup>8</sup> Ibid.
- <sup>9</sup> Kelly Heinrich and Kavitha Sreeharsha, "Opportunity for Federal Contractors to Lead on Human Trafficking" (Huffington Post, 11 June 2013) available at [http://www.huffingtonpost.com/kelly-heinrich/opportunity-for-federal-c\\_b\\_3415284.html](http://www.huffingtonpost.com/kelly-heinrich/opportunity-for-federal-c_b_3415284.html)
- <sup>10</sup> The Federal Acquisition Regulatory Council promulgates regulations with respect to federal procurement law. Although the Council was scheduled to publish a proposed rule in September 2013, this has not yet occurred.
- <sup>11</sup> Note that the House version of the bill is currently under consideration.
- <sup>12</sup> S. 744 Border Security, Economic Opportunity, and Immigration Modernization Act available at <https://www.govtrack.us/congress/bills/113/s744/text>
- <sup>13</sup> Nicola Phillips, "Lessons from California: why compliance is not enough" (*The Guardian*, Modern-day slavery hub, 19 September 2013) available at <http://www.theguardian.com/global-development-professionals-network/2013/sep/19/why-compliance-isnt-enough>
- <sup>14</sup> Theresa May, "Theresa May: Modern slave drivers, I'll end your evil trade" (*The Sunday Times*, Columns, 25 August 2013)
- <sup>15</sup> Trafficking in Persons Report 2013, Global Law Enforcement Data available at <http://www.state.gov/j/tip/rls/tiprpt/2013/210757.htm>; ILO 2012 Global estimate of forced labour, Executive Summary (1 June 2012) available at [http://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---declaration/documents/publication/wcms\\_181953.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_181953.pdf)
- <sup>16</sup> Ibid.
- <sup>17</sup> Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework (2011), principle 11, page 13, available at [http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR\\_EN.pdf](http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf)
- <sup>18</sup> Ibid., page 16 and following.
- <sup>19</sup> Best practice can also be referenced here: Supply Chain Sustainability – A Practical Guide for Continuous Improvement, available at [http://www.unglobalcompact.org/docs/issues\\_doc/supply\\_chain/SupplyChainRep\\_spread.pdf](http://www.unglobalcompact.org/docs/issues_doc/supply_chain/SupplyChainRep_spread.pdf); Reducing Child Labor and Forced Labor – A Toolkit for Responsible Business available at <http://www.dol.gov/ilab/child-forced-labor/index.htm>
- <sup>20</sup> The catalogue of publications by the International Labour Organisation on issues related to human rights abuses is available at <http://www.ilo.org/global/topics/lang--en/index.htm>; U.S. Department of Labor issues multiple annual publications on child and forced labour, available at <http://www.dol.gov/ilab/programs/ocft/>; U.S. Department of State Trafficking in Persons Report, published annually, available at <http://www.state.gov/j/tip/rls/tiprpt/index.htm>
- <sup>21</sup> See for example Electronic Industry Citizenship Coalition available at <http://www.eicc.info/>; Responsible Jewellery Council available at <http://www.responsiblejewellery.com/>; International Council of Toy Industries CARE Process available at <http://www.icti-care.org/e/default.asp>



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

Jamie A. Williamson

Jamie A. Williamson, legal advisor to the International Committee of the Red Cross, discusses the legal status of private military and security contractors and examines the industry's recent self-regulatory initiatives.

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 fulfil 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.<sup>1</sup>

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.<sup>2</sup>

## PMSCs = Mercenaries?

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,<sup>3</sup> Bob Denard (aka champagne Bob),<sup>4</sup> plotters of the “Wonga Coup”,<sup>5</sup> and fighters from the former Yugoslavia operating in Libya on Gadhafi’s behalf.<sup>6</sup>

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 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 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.<sup>7</sup> All elements of the definition must be satisfied for an individual to be considered a mercenary.<sup>8</sup> Similar definitions are found in the 1977 OAU/AU Convention on the Elimination of the Mercenarism in Africa<sup>9</sup> and the 1989 United Nations Convention against the Recruitment, Use, Financing and Training of Mercenaries.<sup>10</sup>

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.<sup>11</sup> 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 takes a pragmatic approach to this question by clarifying that the legal status of PMSCs operating in armed conflict situations must be determined on a case-by-case basis, by considering not only the nature of the functions for which they were



hired, but also the activities they actually undertake in situ. This means that personnel of PMSCs could be granted the status of protected civilians, in that they are civilian contractors providing standard support services, not combat functions, or civilians accompanying the armed forces, if they are identified as such by the contracting State.

Understanding these distinctions is therefore vital to PMSCs looking to operate in conflict situations, as each gives rise to specific issues in terms of protection against attack, entitlement to use force and status to be given if detained. At a minimum, as 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 fulfil these obligations though, 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, and 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.<sup>12</sup>

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 PMC, 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.<sup>13</sup>

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.”<sup>14</sup>

In application of the principle of *aut dedere aut judicare*, 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.<sup>15</sup> 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.”<sup>16</sup> 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.<sup>17</sup>

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.<sup>18</sup>

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.

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By comparison, and by way of example: Ireland regulates private security firms operating domestically in its 2004 Private Security Services Act, as does Kenya, through notably its “Guidelines on the Requirements Related to Handling of Privately Contracted Armed Security Personnel (PCASP), Weapons and Security Related Equipment”, and Lesotho with its 2002 Private Security Officers Act. Liberia issued in 2011 “Piracy: Guidance for Liberian Flagged Vessels Regarding 3rd Party Security Teams” and Angola a Mining Law no 16/94 in 1994.<sup>19</sup>

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.<sup>20</sup>

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 enhancing 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 North America, 16% from Asia and 8% from Africa.<sup>21</sup>

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 law.”<sup>22</sup> Signatory companies are committed to establish grievances 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.<sup>23</sup> The Articles lay out the functions of the Association, which is subject to Swiss law, and labelled an independent governance and oversight

mechanism.<sup>24</sup> The Grievance Procedures contemplated for by Articles 66 to 68 of the Code<sup>25</sup> are implemented through a detailed complaints process. The ultimate sanctions are the suspension or termination of a Signatory company’s membership of the Association.<sup>26</sup> 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 the both the Montreux Document as well as the Code of Conduct.<sup>27</sup>

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.

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- 1 Available at <http://www.eda.admin.ch/psc>. 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 Yugoslav Republic of Macedonia, Ecuador, 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, Iceland, Bulgaria, 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.
- 3 See for instance <http://www.crimesofwar.org/a-z-guide/mercenaries/>
- 4 See for instance <http://www.independent.co.uk/news/obituaries/bob-denard-396988.html>
- 5 See for instance <http://www.guardian.co.uk/books/2006/aug/12/politics1>
- 6 See for instance <http://www.time.com/time/world/article/0,8599,2090205,00.html>
- 7 Article 47 Additional Protocol I reads: 1. A mercenary shall not have the right to be a combatant or a prisoner of war.  
2. A mercenary is 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 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 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.
- 8 For more on the drafting history of Article 47 see ICRC Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, available at <http://www.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=D5A9293CFC91142341256650004C96C3&action=openDocument>
- 9 Signed in Libreville, Gabon on 3 July 1977 and entered into effect on 22 April 1985.
- 10 Adopted and opened for signature and ratification by UN General Assembly resolution 44/34 of 4 December 1989.
- 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 Missions and Personnel and Iraq, 2004, granted immunities from prosecution to PMSC hired notably by the U.S. Department of Defense.
- 13 In addition to criminal repression, victims have pursued civil litigation against PMSCs in the U.S. See for instance *Al Shimari v CACI Intl. et al* (E.D. Va.). However, the recent decision by the U.S. Supreme Court in *Kiobel v Royal Dutch Petroleum* 133 S.Ct. 1659 (2013) on the extraterritorial reach of the Alien Tort Statute may limit number of civil litigations matter involving non-U.S. PMSCs that are brought in U.S. Courts.
- 14 Montreux Document, paras. 4, 11, and 16.
- 15 *Ibid.*
- 16 Montreux Document, paras. 3(c), 9(c), and 14 (c).
- 17 Montreux Document, paras. 4, 10, 15.
- 18 Montreux Document, para. 2.
- 19 For an overview of various regulatory initiatives see the Private Security Monitor, run by the University of Denver, available at [http://psm.du.edu/national\\_regulation/](http://psm.du.edu/national_regulation/), as well as the publication *Beyond Market Forces: Regulating the Global Security Industry*, available at [http://www.ipinst.org/media/pdf/publications/beyond\\_market\\_forces\\_final.pdf](http://www.ipinst.org/media/pdf/publications/beyond_market_forces_final.pdf), published in 2009.
- 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.icoc-psp.org/>
- 22 International Code of Conduct, Article 55.
- 23 See [www.icoca.ch](http://www.icoca.ch)
- 24 Available at [http://www.icoc-psp.org/uploads/ICoC\\_Articles\\_of\\_Association.pdf](http://www.icoc-psp.org/uploads/ICoC_Articles_of_Association.pdf)
- 25 *Ibid.*, Article 13.
- 26 *Ibid.*, Article 13.2.7.
- 27 See for instance ISO/PAS 28007:2012, Ships and marine technology -- Guidelines for Private Maritime Security Companies (PMSC) providing privately contracted armed security personnel (PCASP) on board ships (and pro forma contract), ANSI/ASIS PSC.1-2012:Management System for Quality of Private Security Company Operations – Requirements with Guidance, ANSI/ASIS PSC.2-2012: Conformity Assessment and Auditing Management Systems for Quality of Private Security Company Operations.

# Human Rights in a Post-*Kiobel* Landscape: *More Questions than Answers*

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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*<sup>1</sup> 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 *Mwani v Bin Laden*<sup>2</sup> 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 fit 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 Livey*<sup>3</sup> 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 "[d]efendant'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."

*Abmed v Magan*<sup>4</sup> 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 *Abmed* found sufficient nexus to the United States based solely on the defendant's residency in Ohio, despite 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 U.S. Court of Appeals for the Second Circuit's decision in *Balintulo v Daimler AG*,<sup>5</sup> in which the court held that the presumption against extraterritoriality





cannot be rebutted where the alleged illegal conduct occurs entirely in the territory of another sovereign.

The *Abmed* 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 *Abmed* 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 corporates 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.<sup>6</sup> 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 th[is] uninhibited approach to personal jurisdiction.”<sup>7</sup>

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.

<sup>1</sup> *Kiobel v Royal Dutch Petroleum Co.*, 133 S.Ct. 1659 (2013).

<sup>2</sup> *Mwani v Bin Laden*, F.Supp.2d, 2013 WL 2325166 (D.D.C., May 29, 2013).

<sup>3</sup> *Sexual Minorities Uganda v Lively*, F.Supp.2d, 2013 WL 4130756 (D. Mass., Aug 14, 2013).

<sup>4</sup> *Ahmed v Magan*, 2013 WL 4479077 (S.D. Ohio, Aug 20, 2013).

<sup>5</sup> *Balintulo et al. v Daimler AG et al.*, 727 F.3d 174, C.A.2 (N.Y., Aug 21, 2013).

<sup>6</sup> *Daimler AB v Bauman*, 571 U.S. \_\_\_\_ (2014).

<sup>7</sup> *Id.*, slip op. at 23.

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