



Introduction Note

“Challenges in Applying Principles in Practice: What Standards and Elements for an International Code of Conduct?”

by

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Ladies and Gentlemen,
Friends and Colleagues,

Good morning. In the following I will elaborate briefly on content and added value of an international Code of Conduct.

1. Codes of Conduct for overcoming regulation and implementation shortcomings

Codes of conduct (CoC) are self-imposed corporate obligations for the adoption of usually normative, and therefore not necessarily legally enforceable, standards which are not part of a company's ordinary core business. From a corporate point of view, codes of conduct are part of PR work, risk management and a company's socio-political and social contributions that are described as corporate citizenship, corporate social responsibility, patronage or philanthropy.

A CoC for Private and Military Security Companies (PMSCs) would aim to oblige such companies to comply with duties arising from human rights and with standards of IHL, and to equip these duties with an implementation and enforcement mechanism. The advantage of the CoC resides in the fact that these standards serve as a yardstick for entrepreneurial action on the basis of self-imposed corporate obligations, quite independent of any discussion of companies' direct duty to respect, protect and comply with human rights.

A CoC for Private and Military Security Companies creates clarity concerning the substance and extent of adopted and recognised duties. It serves to confirm and specify these duties, and it defines principles of action for companies and possible framework conditions of government regulation and action models in the face of PMSCs' activities and services. In order to guarantee the universal character of the international standards included in codes of conduct despite their voluntary – and thus selective – acceptance by companies, a suitable implementation and monitoring mechanism should be created in which violations of these standards both inside and outside a company can be addressed, discussed and ultimately also penalised. In this way, a widely recognised code of conduct can represent an international measure that buttresses the universal claim to the validity of human rights as indivisible and inalienable standards with a procedure for their implementation and respect without recourse to the cumbersome and lengthy path of making these standards binding for companies through international law.

In addition a CoC will be complementary to state efforts on regulation of PMSCs and could have the potential to become a standard reference for awarding contracts and contracting practice. Ultimately there is the possibility that recognition of the Code of Conduct could act as a prerequisite in the licensing process, which links up with the issue of States' regulatory duty.

2. Consequences of a human rights approach to a code of conduct

In yesterday's discussion we focussed partly on the question, what kind of services should be addressed by a code of conduct. A human rights based approach, defining a relationship between the rights holder and the possible potential rights violator, commonly referred to as the human rights duty bearer, will help to elaborate

the relevant activities, addressed in a code. The rights holders, or victims perspective will lead to the inclusion of all relevant human rights that might be influenced, challenged, harmed or even violated by corporate activities. This will lead to an elaboration of activities with potential or actual influence on the enjoyment of human rights, the execution of proper due diligence processes in this regard and possible employment of human rights impact assessments.

In this regard a code of conduct becomes a tool for learning and training, focussing on the awareness building within a corporation and change of corporate culture via an alteration of management practices.

3. Code of Conduct – making human rights applicable

Human rights standards have a legal dimension in respect of how they are formulated and implemented at the national, regional and international levels in legal and quasi-legal proceedings. Human rights also have a social dimension when their observance has a legitimising effect, and a moral dimension when violations lead to condemnation and criticism. The same can be said of the political dimension of human rights, which above all reflects the nature of human rights as a standard of international relations. Finally, human rights also have an economic dimension, when their guarantee – for example the right to due process of law through an independent judicial system or are included into contracts and trade agreements.

In formulating a Code of Conduct for the observance of human rights by PMSCs, academic discussion of the direct obligation of non-State actors to respect human rights standards that have been agreed between States will be avoided.¹ The purpose of the Code of Conduct is to ensure that these standards are recognised, regardless of the direct or indirect validity of human rights for businesses. However, since the binding nature of human rights cannot entirely be ignored, a CoC should acknowledge from the outset the lasting validity of human rights.

As an aid to this line of argument, there is the aforementioned distinction between general human rights *obligations* and concrete *duties* as primary norms and the secondary, implementing, norms of responsibilities and general accountabilities that serve them. By combining this distinction with the many dimensions of human rights as legal, social, political, moral and economic standards, then one arrives at a variety of levels of duties and protective and implementation procedures. Thus for example, with regard to the duties of PMSCs to respect human rights, one arrives at the conclusion that the legal standards agreed between States¹¹ are legal in character, although legal procedures for their implementation at the international level are often lacking. In contrast, the moral and ethical “duties to respect” benefit from full international recognition and correspond to discursive procedures, within or outside the United Nations.

A Code of Conduct should maintain this distinction. This would make it possible, in a way that is independent from the recognised legal or moral dimension, to formulate a “duty to respect” human rights and subsequently assign it to a formalised procedure. For the practical implementation of the CoC it may in any case be necessary to develop multi-step models, by which PMSCs could for example pledge to respect a number of core norms to begin with; after a certain timeframe, all the norms – including e.g. those of a more social or moral dimension – would become obligatory.

4. Code of Conduct – added value to existing regulation and normative standards

A Code of Conduct for PMSCs for the respect of and compliance with international human rights standards and the norms of IHL can therefore only be of value if it aims such as additional system to combat impunity while it transcends applicable law, expresses norms in more concrete terms, and closes gaps with regard to regulation and implementation. Above and beyond this, a Code of Conduct should register the interests of companies, stakeholders and groups in civil society, and combine them in a political initiative. The higher the number of these various motivations, the greater the chances of a CoC to succeed.

For a Code of Conduct intended to improve the protection of human rights and the respect of IHL, the activities of private military and security companies can be assessed according to the criteria provided by the standards stipulated in the generally recognised International Bill of Human Rightsⁱⁱⁱ and the further internationally formulated requirements^{iv} for companies to comply with human rights and IHL.^v

Whereas the adoption of a Code of Conduct is in principle voluntary, compliance with its precepts is no longer so. For this reason, any obligations laid down in the Code of Conduct should be formulated as bindingly as possible in order to be as effective as possible.

5. Components of a international Code of Conduct

The focus of the morning sessions are standards and principles, not implementation. In this regard, the aim of a international Code of Conduct for PMSCs is first of all to formulate ‘duties to respect’ for businesses based on international standards of human rights protection and IHL from the perspective of the individuals and groups protected by the specific norm. Establishing normative standards is important, since their subsequent implementation ought to serve to safeguard those standards.

The biggest points of intersection shared by human rights standards and IHL norms are to be found in the right to life^{vi}, in bodily integrity^{vii}, in the ban on torture^{viii}, in the right to freedom of movement^{ix} and the ban on discrimination^x. In addition to the areas of protection common to human rights and IHL, the ban on child labour and the ILO’s core labour norms – i.e. the ban on forced labour, freedom from discrimination in the workplace and the right to equal wages, the freedom to enter a trade union and the right to collective bargaining – should be the subject of a CoC, in order to thereby guarantee basic employment standards within the PMSCs and guarantee the human rights of the employees within the operating process.^{xi} Furthermore, the Code of Conduct should contain a statement on the ban on corruption.^{xii}

In view of PMSCs’ volatile area of operations and of the particular threat to women and girls in conflict and war zones, the Code of Conduct should determine particular, gender-specific ‘duties to respect’ and bans on sexual violence and exploitation.^{xiii}

6. Formulation: Principles, Standards and Indicators

The formulation of these norms could be either in a legal language, as an academic text or in “business slang” or as operational guidance.

The ownership and understanding of an international Code of Conduct will depend on the language that will be used. It is therefore suggested to differentiate three different levels: The general principles, could be formulated in a more advocacy and official language. The level of standard formulation, addressing the specific human rights concerned, should use human rights and legal language as much as possible, reformulating these standards into business type of language. The third level are the indicators, being specific rules for actions or non-action which should be written in a comprehensive language, understood by practitioners and employees.

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- i Rosemann, Nils: The UN Norms on Corporate Human Rights Responsibilities – An Innovating Instrument to Strengthen Business' Human Rights Performance, Friedrich Ebert Foundation, Dialogue on Globalization No. 20 (August 2005), Geneva 2005
- ii ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up, adopted at the 86th session , 18. June 1998; ILO Doc. GB.279/12 (http://www.ilo.org/dyn/declaris/DECLARATIONWEB.INDEXPAGE?var_language=EN – 2004-07-22) and OECD Guidelines for Multinational Enterprises, Global Instruments for Corporate Responsibility, Annual Report 2001, Paris 2001, Annex II Page 127f. (127),
- iii The International Bill of Human Rights includes the Universal Declaration of Human Rights of 10 December 1948 (GA RES 217 A (III)), the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights, as well as its 1st Additional Protocol of 10 December 1966 (GA RES 2200 A (XXI)) and its 2nd Additional Protocol (Death Penalty) of 15 December 1989 (GA RES 44/128).
- iv What must be taken into account here first of all are the normative standards drawn up in cooperation with government: ILO Core Work Standards: ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up, adopted at the 86th session , 18 June 1998; ILO Doc. GB.279/12 (http://www.ilo.org/dyn/declaris/DECLARATIONWEB.INDEXPAGE?var_language=EN – 2004-07-22) and the OECD's Guidelines for Multinational Enterprises, in: OECD (ed.), OECD Guidelines for Multinational Enterprises, Global Instruments for Corporate Responsibility, Annual Report 2001, Paris 2001, Annex II, pp. 127f. (127).
- v Cf. brief expert opinion "Kurzgutachten zu Regelungs- und Implementierungslücken im internationalen Recht menschenrechtlicher Verantwortung von PMSC".
- vi Right to life: Article 3 Universal Declaration of Human Rights (UDHR), adopted by General Assembly Resolution 217 A (III) of December 10, 1948), Article 6 ICcpr, Common Article 3 a) to Geneva Convention I-IV
- vii Right to personal integrity: Article 3 UDHR, Article 9 ICcpr, Common Article 3 a) to Geneva Convention I-IV
- viii Freedom from torture and degrading treatment: Article 5 UDHR, Article 7 ICcpr, International Convention against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment adopted by General Assembly Resolution 39/46 of December 10, 1984 and entered into force on June 26, 1987, Common Article 3 a) and c) to Geneva Convention I-IV
- ix Article 9 UDHR, Article 9 Para. 1, Sentence 2 ICcpr, Common Article 3 b) to Geneva Convention I-IV
- x Right to be free from discrimination: Article 2, 7 UDHR, Article 2 Para. 2, 3 ICescr, Article 2 Para. 1, 3 ICcpr, International Convention on the Elimination of All Forms of Racial Discrimination adopted by General Assembly Resolution 2106 A (XX) of December 21, 1965 and entered into force on January 4, 1969
- xi In accordance to the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, adopted on November 16, 1997 and revised by November 17, 2000 (www.ilo.org) (2005-09-23) in connection with the ILO Declaration on Fundamental Principles and the Rights at Work and its Follow Up, adopted on June 18, 1998 the fundamental labour standards are: prohibition and abolishment of forced labour (ILO Conventions 29 and 105), prohibition of discrimination and unequal remuneration (ILO Conventions 100 and 111), the ban on child labour (ILO Conventions 138 and 182), the affirmation of the freedom of association and the right to collective bargaining (ILO Conventions 87 and 98)
- xii United Nations Convention against Corruption, adopted by General Assembly Resolution 58/4 of October 31, 2003 and entered into force on December 14, 2005
- xiii Security Council Resolution 1325 (2000) of October 31, 2000: Para. 10: The Security Council "Calls on all parties to armed conflict to take special measures to protect women and girls from gender-based violence, particularly rape and other forms of sexual abuse, and all other forms of violence in situations of armed conflict."; Para. 11: The Security Council "Calls upon all parties to armed conflict to respect the civilian and humanitarian character of refugee camps and settlements, and to take into account the particular needs of women and girls, including in their design, and recalls its resolutions 1208 (1998) of 19 November 1998 and 1296 (2000) of 19 April 2000."