

Alliance Against Trafficking in Persons
Ethical issues in Preventing and Combating Human Trafficking

Wien, 4-5 November 2014

Panel 2. Codes of conduct and zero tolerance policies in conflict and crisis situations. Capt. Sinconi. Introduction to the topic.

1. Although the legal framework and documental reference in conflict and in Crisis Management Operations (CMO) are different, ethical and fundamental principles governing the prevention and fight on THB are the very same. A phenomenon affecting 27 million human beings and representing the second largest income for the organized crime impacts on peacekeepers deployed in peacekeeping Operations, both in terms of prevention and repression, and, unfortunately, as possible boosting phenomenon. The first dimension is detailed in the mission mandate and subsequent planning documents (Concept of Operation, Operation Plan, etc). After the experiences of the '90s, in Kosovo and East Timor, with executive powers allowing to enforce the law, and by this repressing the THB, in the last 10 years, the international community, based on the principle of local ownership, decided to play only an indirect role, by monitoring, mentoring, advising, training or reforming the local Law Enforcement Agencies (LEAs) and Rule of Law (RoL) sector (although recent intermediate cases form UN, AU and EU that can be defined as partial executive). The second dimension (peacekeepers branded as more part of the problem than the solution), instead, is the one we will have to address in this panel: how to limit the negative impact Peace Support Operations (PSO) personnel may have on THB through Code of Conduct and zero tolerance policies.
2. The norms guaranteeing the *primus non nocere* (do not harm) principle, are ethical norms, administrative regulations and criminal provisions and are set forth in International legal instruments, domestic legislation (both of the contributing country and of the host nation) and mission and/or contributing country regulations, all of them applicable simultaneously, and constituting the overall legal framework in the mission. The codes of conduct are administrative regulations in character, therefore, located at a lower level of the pyramid of the legal sources in comparison to international legal obligations or domestic legislation. CoC and zero tolerance policies fix rules for the conduct/behavior of the peacekeepers, merging ethical principles and legal obligations and are generally referred as "soft law". Due to the possible consequences in case of breach (such as repatriation or financial liability of the peacekeeper), they can effectively deter and have a positive impact in minimizing possible unintended adverse consequences of PSOs on THB.
3. For these reasons, every IOs engaged in PKOs has established CoC and zero tolerance policies. Their valuable impact can be properly measured only when the data are made available by the relevant international organization. This is the case of the UN, thanks to the OIOS reports (*last one in August 2014*). In this case the adoption of strict policies in addition to CoC proves to be effective and to diminish the overall number of misconduct cases reported. Any analysis with reference to THB is, nevertheless, quite complex, as, in addition to the lack of available data from other IOs, the dimension of the "gray area" of not reported cases is probably still very wide (Csàky).

4. a) The **UN** has adopted the most comprehensive approach to address the negative impacts on the populace. Ranging from Code of Conduct for Law Enforcement Officials to measures for protection from SEA, to the establishment of procedures and mechanisms to investigate and keep track of the cases, to specific policy paper on THB (2004).
- b) **NATO** has a NATO-wide Code of Conduct (2010) that establishes five core values of the Organization (integrity, impartiality, loyalty, accountability and professionalism), but also adopted a policy on counter THB (2004) with guidelines on combating THB in NATO-led ops; on preventing its promotion and facilitation by the staff and on developing relevant training programs. NATO essentially relies on national governments codes of ethical conduct and legislation that governs its civil service and/or military. The code, in fact, is not intended to serve as a set of rules and regulations that can be “enforced” by management; rather it is considered a guiding document. In addition to it there are various regulations of interest (for instance on procurement, etc...).
- b) **EU**. The European Code Of Police Ethics (2001), adopted by the Committee of Ministers of the Council of Europe, continent's leading human rights organisation, is considered a key reference document also for the police component in EU CSDP missions. The EU PSC also adopted Generic Standards of Behavior for ESDP Operations (2005) that repeatedly refers to THB. Normally to every OPLAN is annexed a document detailing the CoC for the relevant mission.
- c) **OSCE**, besides underlining the Participating States obligations to hold accountable the personnel of the respective armed forces (*nr. 30-31 of CoC on politico-military aspects on security of 1994*), in the OSCE CoC for OSCE Mission Members (art. 4), stresses that officials shall adopt exemplary standards of personal behavior to ensure the OSCE is contributing to combating THB, and is not exacerbating the problem. OSCE Ministerial Decision nr. 16 (2005) in reaffirming its commitment in THB and recalling the 2003 OSCE Action Plan to combat THB, stresses the detrimental effect of peacekeepers misconduct on the fulfillment of the mission mandate, calling for implementation of the CoC and for the sharing of training materiel and information on THB. OSCE has also adopted Anti-trafficking guidelines and staff instructions on preventing promotion/facilitation of THB and published studies and reports on the matter (organ removal, torture, domestic servitude, non-punishment of the victims, etc.).
- d) **private security companies**. Blames on media for serious misconduct cases and the financial liability of some PSC for acts committed by their contracted personnel with subsequent risk of MSs who have contracted the PSC in support of PSOs/military operations to be hold responsible along with the PSC, led to adopt reference documents such as the Montreux Document (*On Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies During Armed Conflict 2008*), and the 2010 Code of Conduct for Private Security Service Providers in which THB is specifically addressed establishing in 2013 an Oversight Mechanism of the International Code of Conduct for Private Security Service Providers. MS are consequently contracting preferably PSC who signed and are parties to the ICoC.

5. **Accountability.** Disciplinary action in conflict and crisis situations is not hampered by substantive technical/juridical issues. Obviously there should never be reluctance by Mission leadership on tacking action when it comes to the accountability of the personnel. With reference to criminal proceeding SOFA/SOMA, instead, shield, with personal immunity, from local jurisdiction military personnel belonging to military units, while the other personnel of the mission enjoy only functional immunity. Nevertheless, the cases in which the IOs leading the mission remove the functional immunities are really rare (also due to the weakness of the host government judicial system). The obligation of MS to proceed for criminal charges is limited sometime by lack of extraterritorial jurisdiction, by procedures on the spot that are not abiding by the criminal procedural codes (and therefore do not permit to use the evidence collected) and, eventually, by the difficulties to bring the evidence before a Court in the PCC/TCC. Additionally, also the most serious breaches of the code of conduct and the gravest violations of criminal law never amounts to crimes that can fall under the jurisdiction of the ICC (*different opinion: M. O'Brian*). There is, consequently, a risk of impunity that could adversely affect the PSO also on THB.
6. **How OSCE participating States can better tackle the phenomenon?** The development and implementation of national and international code of conducts, procedures and standards that pay due regard to SEA, THB, and procurements and establish appropriate oversight mechanisms and enforcement of the provisions, proved to be effective (UN) and should be encouraged. Both HRs based approach policies (on how to protect the victims) and Law and Order approach policies (on fighting the traffickers), should be adopted. Oversight mechanisms and policies should focus not only on SAE but also on labor exploitation, that represents the larger figure in terms of trafficked persons. In particular, at the outset of the deployment of a PSOs, when there is not enough knowledge on local contractors and regulations, the procurement of goods, equipment or the works for the establishment of bases and facilities could indirectly boost THB by contracted companies. The establishment of norms concerning the extraterritorial jurisdiction for all personnel deployed in an area of intervention avoids impunity and maintains credibility. Doctrinal (Knoops) and institutional (UN) efforts have been done to draft a possible criminal code for peacekeepers or to create a tribunal for peacekeepers. The idea is very interesting (and would allow to address in the same manner identic cases despite the nationality of the peacekeeper), but is unlikely to be accepted by the international community. The establishment of fair and unbiased complaint procedure and reporting mechanisms is of help. Transparency, with periodic release of data concerning major misconduct cases (OIOS) would have a valuable positive impact. Training on CoC, SEA and THB is key. The EUPST example, with specific cells in the exercised mission HQ can be considered a good example. The ToT IOM-CoESPU course on THB in Nairobi is also a good example (any visits from your side to see what is the training activity at CoESPU in Vicenza is more than welcome). The ideal would be to move forward, from codifying standards to appropriately disseminate their knowledge, assure their application and repress their violations.