



Special Representative of the Secretary-General for Business and Human Rights

14 July 2009

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Dear Mr. Bethlehem,

Thank you for your letter of 9 July 2009, concerning the State duty to protect against human rights abuses by third parties, including business. Although I received it only yesterday I am responding quickly because I see little difference between our positions.

Your letter cites my 2007 report while stating that the 2008 and 2009 reports “for the most part” reiterate the earlier assessment. In fact, my 2009 summary statement on the duty to protect is subtly but significantly different. This is in part thanks to communications similar to yours that had I received previously from two other governments, which caused me to reflect on the original formulation. As a result, the 2009 report in particular draws more clearly on treaty language.

1. Paragraph 13 of my 2009 report (A/HRC/11/13) states in full: “The State duty to protect against third party abuse is grounded in international human rights law. The specific language employed in the main United Nations human rights treaties varies, but all include two sets of obligations. First, the treaties commit States parties to refrain from violating the enumerated rights of persons within their territory and/or jurisdiction. Second, the treaties require States to “ensure” (or some functionally equivalent verb) the enjoyment or realization of those rights by rights holders. [20] In turn, ensuring that rights holders enjoy their rights requires protection by States against other social actors, including business, who impede or negate those rights. Guidance from international human rights bodies suggests that the State duty to protect applies to all recognized rights that private parties are capable of impairing, and to all types of business enterprises.

Footnote 20 reads as follows: “For example, the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child use “respect and ensure”, with “respect” in the State context meaning that the State must refrain from violating the

rights. The Convention on the Rights of Persons with Disabilities requires States parties to “ensure and promote”, and to take appropriate measures to “eliminate” abuse by private “enterprises”. The International Convention on the Elimination of All Forms of Racial Discrimination requires that States parties “shall prohibit and bring to an end ... racial discrimination by any persons, group or organization”. The Convention on the Elimination of All Forms of Discrimination against Women requires States parties “to take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise”. In the International Covenant on Economic, Social and Cultural Rights, States parties undertake “to take steps ... achieving progressively the full realization of rights”, while its rights-specific provisions, such as those dealing with labour, refer to States “ensuring” those rights.”

Thus, even where the State duty to protect against third party abuse is not expressly stipulated in a treaty, it is logically implied by the requirement that States “ensure” (or an equivalent verb) the enjoyment/realization of rights by rights holders. I have no idea what other practical meaning this term could have.

Furthermore, my 2009 report reiterates that the State duty to protect is a duty of conduct, not result: “States are not held responsible for corporate-related human rights per se, but may be considered in breach of their obligations where they fail to take appropriate steps to prevent it and to investigate, punish and redress it when it occurs” (paragraph 14).

In short, my sense is that the 2009 report, and already the 2008 report before it, is responsive to and essentially takes care of your major concern.

2. I certainly would agree that there is no State duty to protect in cases where the rights are not applicable to non-state actors. That is why we included the sentence that the “duty to protect applies to all recognized rights that private parties are capable of impairing” in paragraph 13 of the 2009 report. Having said that, our empirical surveys have shown that businesses are capable of impairing a considerably wider set of rights than is generally believed, even if only indirectly—for example, by a bribing a judge or juror and thereby impairing the right to a fair trial (for a summary of this research, please see paragraphs 52-53 of my 2008 report, A/HRC/8/5).

3. You also note that the State duty to protect in some circumstances may be partial, and as an example you point out that freedom of association has limits. Again I agree. But is it not the case that the scope of the *right* itself has some limits—in other words, that it is qualified? Ipso facto, therefore, the duty to protect is correspondingly limited. In other words, the limit is intrinsic to the right; it is not an independent limit of the *duty*.

4. Being a political scientist—and American-trained to boot—I share some of your skepticism about exaggerated customary international law claims. I do not rely on CIL in relation to the basis of the State duty to protect in my 2009 report. I believe the language of the treaties and its logical implications, as discussed above, is sufficient. And where there are references to CIL in the 2009 report they are quite cautious and, I believe, uncontroversial.

5. Finally, both the 2008 and 2009 reports are explicit about where the law as a whole remains murky—and I have been criticized by some civil society actors for being too conservative for doing so. One notable example is on the extraterritorial scope of the duty to protect, where I rely heavily on what I call “strong policy reasons” for advocating certain positions—for example, that export credit agencies should require adequate due diligence from companies they support when those companies operate in conflict zones.

Please let me know if I have missed any point or nuance in your letter. Many thanks again for sending it. And a special thanks to the UK for its consistent and supportive engagement with my mandate.

Yours sincerely,



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