



Foreign &  
Commonwealth  
Office

Daniel Bethlehem QC  
Legal Adviser  
King Charles Street  
London, SW1A 2AH

Tel: 020 7008 3052  
Fax: 020 7008 3071  
Email: Daniel.Bethlehem@fco.gov.uk  
www.fco.gov.uk

9 July 2009

Professor John Ruggie  
Special Representative on Human Rights and Transnational  
Corporations and other Business Enterprises  
Office of the High Commissioner for Human Rights  
Palais des Nations, 8-14 Avenue de la Paix, 1211 Geneva 10  
Switzerland

Dear Professor Ruggie,

I am writing to you to record the position of the United Kingdom of Great Britain and Northern Ireland on your analysis of the State duty to protect against human rights abuses by non-State actors under international law.<sup>1</sup>

Before addressing this issue, however, I would like to record the United Kingdom's appreciation for the valuable work you have undertaken since you were appointed as the Special Representative of the UN Secretary-General on business and human rights in 2005. The reports and related materials that you have submitted to the Human Rights Council have been of high quality and the work you have undertaken in engaging the business and human rights community on the issues relating to your reports has been impressive. In particular, the United Kingdom supports the 'Protect, Respect and Remedy' framework that you formulated in your 2008 report to the Human Rights Council. The United Kingdom also looks forward to continuing our support to your recent initiative on looking at ways to promote policy innovation in reducing the risk of human rights violations in conflict zones. The calibre and broad experience of panellists willing to lend their support is impressive and will, we hope, help you reach a successful conclusion in the next stage of your work.

The purpose of this letter is to clarify some of the legal issues underlying the concept of the State duty to protect against human rights abuses by non-State actors under international law.

The United Kingdom notes that in your 2007 report you say that:

*....international law firmly establishes that states have a duty to protect against non-State human rights abuses within their jurisdiction, and that this duty extends to protection against abuses by business entities. The duty to protect exists under the core United Nations human rights treaties as elaborated by the treaty bodies, and is also generally agreed to exist under customary international law.  
(A/HRC/4/035 - par. 10)*

---

<sup>1</sup> This letter does not discuss the potential application of international law on state responsibility.

We note that you have, for the most part, reiterated this assessment in paragraphs 12 and 13 of your 2009 report '*Business and human rights: Towards operationalizing the "protect, respect and remedy framework"*' (A/HRC/11/13).

The United Kingdom agrees that certain treaty provisions may impose an express or implied duty on States to protect against non-State human rights abuses. However, it does not consider that there is a general State duty to protect under the core United Nations human rights treaties, nor that such a duty is generally agreed to exist as a matter of customary international law.

As your 2007 report and its Addendum indicate, none of the United Nations human rights treaties expressly create a general State duty to protect against human rights abuses by non-State actors. In contrast, there are a number of treaty provisions which expressly establish that a State party is under a duty to protect against non-State abuses of *specific* rights. Examples are Article 2(1)(d) of the Convention on the Elimination of All Forms of Racial Discrimination and Article 2(e) of the Convention on the Elimination of All Forms of Discrimination Against Women. Further, while other provisions in UN human rights treaties do not expressly establish such a duty, some of them imply one. The scope of these duties will depend primarily on the wording of the treaty provision in question and their proper interpretation. In other words, whether a duty exists and the scope of that duty will depend on a case-by-case analysis of a particular right.

On the other hand, there are certain human rights which are by their very nature not amenable to the establishment of a duty to protect against non-State abuses. For example, it is not accepted that the right to freedom of association requires States to ensure that membership or participation in every private organisation is unrestricted. Furthermore, many other rights simply have no application to non-state actors, such as provisions on expulsion of aliens, equality before the courts and retroactive application of criminal law in Articles 13, 14 and 15 of the International Covenant on Civil and Political Rights (ICCPR).

The Human Rights Committee, in paragraph 8 of its General Comment no. 31, has perhaps gone furthest in asserting general positive obligations on State parties to the ICCPR to protect individuals against "acts committed by private persons or entities that would impair the enjoyment of Covenant rights". However, the Committee recognised that positive obligations only apply "insofar as they are *amenable* to application between private persons or entities". We note that in your 2009 Report you have also acknowledged this important distinction when stating at paragraph 13 that the 'state duty to protect applies to all *recognised* rights that private parties are capable of impairing...' (emphasis added). The United Kingdom's comments above in relation to positive obligations apply equally to this General Comment.

As regards customary international law, the United Kingdom would not rule out the possibility that in respect of certain rights there may be the required degree of state practice and *opinio juris* to conclude that a rule of customary international law has emerged which imposes a duty on a State to protect against non-State human rights abuses. However, the United Kingdom has not seen sufficient evidence of state practice or *opinio juris* to indicate that there is a *general* duty on States to protect against human rights abuses by non-state actors.

The United Kingdom notes that the Addendum to your 2007 report focuses entirely on evidence of treaties and treaty bodies and does not provide any evidence of state practice or *opinio juris* for a rule of customary international law establishing such a general duty.

For the avoidance of doubt, the United Kingdom agrees that States cannot avoid their human rights obligations by outsourcing public functions to the private sector. The State continues to owe its human rights obligations as a matter of international law regardless of how it chooses to deliver its public functions.

It is not the purpose of this letter to go into detail about the far reaching and complex issues raised by this topic. If it would be useful, my colleagues and I would be more than happy to meet with you to convey in greater depth the United Kingdom's views on these issues.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'D Bethlehem', enclosed within a hand-drawn oval border.

Daniel Bethlehem QC  
Legal Adviser