

State duty to protect

The relevance of private finance

A BankTrack discussion paper

BankTrack is a network of 26 international civil society organisations with an interest in private finance. This discussion note explores select issues we believe are relevant to private finance and the state duty protect. We welcome the invitation to make this material available at the time of the "Duty to protect" meeting on 9 November 2007 in Copenhagen, convened by the Special Representative of the Secretary-General on human rights and business (SRSG), John Ruggie. We hope this paper will contribute to the SRSG's final views and recommendations on both part (b) state duty to protect, and part (c) "sphere of influence" and "complicity" of his mandate.

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Leverage gained by regulating private finance

Private financial institutions, unlike state driven export credit agencies or international financial institutions, operate without the pretext of state obligations and are almost always present in all trans-national business transactions. As true and far-reaching business entities, private financial institutions deserve proportionate attention in the discussion on human rights and business. Given the extensive reach of private finance it is clear that improved regulation of this sector will invoke significant leverage, enabling states to significantly advance obligations under the duty to protect.

Private financiers provide vital investment capital and necessary financial services which can enable both state and non-state actors perform acts inconsistent with human rights. Private financial institutions also provide essential services to individuals acting as agents for states, agents who may be prone to corruption and dubious behaviour both inside and outside of conflict zones. Private financiers and financial services can facilitate capital flight from state coffers, diminishing a state's ability to protect. Private finance can also influence state actions by lobbying governments for legal reform promoting favourable investment climates, often without regard for human rights issues.

A span of regulations exists for private finance, although these laws are typically restricted to a purely financial ambit. Whilst human rights considerations are typically not incorporated into the regulatory framework, states should intervene to correct the market which currently fails to adequately address these issues. Victims of human rights abuses are oftentimes ill-informed about financial mechanisms that enable abuses to occur and are unable to access remedies relative to financial institutions that may profit from misconduct. To this end, BankTrack believes that enforcement of existing international human rights standards in addition to adequate transparency requirements for private finance is overtly lacking.

The existence of a state's duty to protect is beyond doubt.ⁱ BankTrack has previously elaborated on expectations of private financial institutions in *Human Rights, Banking Risks* which was submitted to the SRSG in February 2007.ⁱⁱ Subsequently, expectations placed on institutions will not be dealt with further here. We however do believe it is of vital importance that, corresponding to the leverage and reach of private finance, states are to be encouraged to wield regulation of the financial industry as a valuable tool for fulfilling the duty to protect.

The nexus between a duty to protect and voluntary initiatives

The SRSG's 2007 interim report reveals that of those states responding to the questionnaire on policies and practices regulating business, a common absence of specific policies or tools was ameliorated by state reliance on corporate responsibility framework.ⁱⁱⁱ Further, the 2007 interim report recognises the inherent weakness and

limitations in the corporate responsibility framework.^{iv} Also noted by Professor Ruggie were variations in sector specific standards and regional expectations.^v All these findings indicate inadequacies and profound inconsistencies of the current framework with desirable uniform and enforceable standards reflecting standards espoused in existing human rights instruments.

Current voluntary initiatives appear to be introducing human rights considerations into management decisions and exploring the extent of self-imposed human rights obligations inspired by 'business-case' reasoning. However our experience with the private financial sector leads us to the conclusion that voluntary initiatives, as well-intentioned as they might be, offer little in the way of protection for victims of human rights abuses. Adequate deterrents and adjudicable standards, both vital elements of the state duty to protect, are not provided by voluntary standards and states should work to fill this void. Regulation of private finance provides a convenient vehicle by which this may be achieved.

When private finance conduct fails to align with state duty

Many examples of corporate responsibility failure appear as so called "Dodgy Deals" on BankTrack's website (www.banktrack.org). We invite you to peruse these deals which illustrate a range of involvement by private financiers in a variety of situations which feature alleged rights violations, often in contrast with stated corporate responsibility commitments.^{vi}

One example of the triangular disconnect between the state duty to protect, business conduct and voluntary standards, is illustrated by an instance of slave labor in Brazil and the financing of a company called Pagrisa.^{vii} In June 2007, 1108 workers were freed from slave-like conditions imposed upon them by Pagrisa, an ethanol producing company. Workers were trapped into debt servitude for overpriced transport, food and medicines, earning less than €4 a month. Many were found mal-nourished and without access to drinking water.

With International Labor Organization assistance, Brazil's government took steps towards fulfilling its duty to protect by creating the Task Force for the Elimination of Forced Labor and a National Commission for the Eradication of Slave Labor. Sectors and regions characterised by a high-risk of slave labor practices are identified and subject to investigation. Upon discovery of slave-like conditions, culpable companies face court, and if successfully charged like Pagrisa, they are placed on a black list. The Federation of Brazilian Banks (FEBRABAN) is committed to disseminate the Pact for the Eradication of Slave Labor, and pact signatories pledges to refrain from doing business with these black listed companies. Signatory Brazilian banks, including state owned banks and UK bank HSBC (affiliated to FEBRABAN) provided specific loans for machinery essential for the operation of Pagrisa's ethanol production plant. The banks however have not yet completely cut ties with the black-listed company.

HSBC is also signatory to the UN Global Compact which asserts the bank's intention to avoid complicity in human rights abuses. No enforceable legal instrument exists in Brazil, nor indeed in most countries, to ensure that commitments like the Global Compact and the Pact for the Eradication of Slave Labor are met. Without adequate state regulation linking corporate conduct to voluntary initiatives, experience shows these well meaning aspirations are likely to remain unfulfilled.

Duties of private banks and other corporations when states fail to protect

As noted in the SRSG's interim report, national jurisdictions are developing jurisprudence on the human rights obligations of corporations and private finance. When states fail in their duty to protect, remedies may provide consequences for business and limited access for victims. In the USA, private financiers and corporations supporting states that carry out grave violations of human rights can be found liable for damages to victims by aiding and abetting.

The USA's Second District Court of Appeal on October 12 2007 ruled in the Khulumani case that reparations from banks and other corporations may be sought by victims of the apartheid regime under the *Alien Tort Claims Act* (ATCA).^{viii} Many private financial institutions were named as defendants resulting from loans, services and financial assistance provided to the apartheid government. The court established that where sufficient links exist between the assistance of corporations and the acts carried out by the state, a corporation may be held liable for damages suffered by victims. The standard by which a corporation is judged under ATCA refers to the universal wrongs typically assigned to states by international law. Regarding complicity, the court considered aiding and abetting as defined by the *Rome Statute* as current customary international law, and in this case, applicable to non-state actors.

Imposing corporate liability for the actions of state actors means that corporate and state legal accountability are increasingly indivisible. Private financial institutions providing loans and assistance to governments now have a legal duty to avoid aiding and abetting states' wrongful acts or risk being sued by victims. One might even consider the state duty to protect to encompass a duty to protect corporations assisting states from liability arising from a state's own wrongful acts.^{ix}

Select points relative to state duty to protect and private finance

The following points (a) to (e) are select, non-exhaustive points to prime discussion on the state duty to protect relative to financial institutions.

(a) creation of exclusion lists for private investors which refer to companies and regimes involved or linked to human rights abuses

The Pagrisa slave labor deal sheds light on how exclusion criteria can be created, and how opportunity exists for black lists to be more effectively incorporated into legal frameworks thereby protecting citizens by punishing principal company offenders and obliging investors to withdraw assistance.

Belgium has recently enacted a law to prevent private finance investment in cluster munitions producers.^x Cluster munitions' indiscriminate submunition explosions breach the *Geneva Convention* Protocol I test of proportionality. The convention states 'an attack is disproportionate, and thus indiscriminate, if it "may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated."^{xi} Cluster munitions victims are 98% civilians.^{xii} Belgium is now finalising a list of cluster munitions producer which will be made public. It will then be illegal for financial institutions to finance cluster munitions producers, striking root of the issue. States should be encouraged to enact similar legislation to prevent investment in and proliferation of these and other weapons.

(b) increased transparency

A requisite step for states to be able to fulfill their duty to protect is to enable victims or potentially affected parties to identify financial mechanisms enabling human rights abuses. Bank secrecy laws however construct a barrier that all too regularly prevents an intelligible discussion on resolving questions of human rights responsibility. Concepts of complicity and sphere of influence regarding to the source of finance for human rights breaches therefore cannot then be explored. States should be encouraged to seek opportunities to delineate information linked to human rights concerns, inclusive of broad social and environmental themes, from sensitive business information subject to secrecy provisions.

(c) incorporating corporate responsibility into ambit of a state appointed ombudsman

Many states' banking regulatory frameworks feature an ombudsman function to attempt to resolve retail or service based disputes. Corporate responsibility instruments, especially bank specific codes (or internal) of conduct, lack vehicles for complaint or redress by victims. Typically lacking is also a means simply to discuss implementation. An ombudsman or similar may provide an *interim* step towards compliance with international human rights standards, which should preferably be incorporated into transnational corporations' legal obligations. Similarly, improved disclosure requirements regarding human rights impacts and obligations may be linked into distinct financial regulatory frameworks such as stock market listing rules.

(d) compliance mechanisms

The Equator Principles (EPs) are limited in application and scope, applying only to project finance loans.^{xiii} EPs envelop International Finance Corporation (IFC) Performance Standards which include, to a limited extent, human rights obligations. IFC compliance with its Performance Standards is overseen by the Compliance Advisor Ombudsman, yet no accountability mechanism exists for affected persons to seek justice from Equator banks set to profit from development projects.^{xiv} EPs offer project affected communities absolutely no recourse to adopting financial institutions, despite the EPs clear, self-imposed obligations which over 50 banks and two export credit agencies are committed to. States should explore their duty to protect, and in accordance with Article 8 of the *Universal Declaration of Human Rights*, look to the provision of effective remedies by competent tribunals for fundamental rights.^{xv}

(e) legally enforceable corporate responsibility requirements

One option available to states is to make implementation of corporate responsibility requirements legally enforceable. Indonesia is the first such country to enact such legislation.^{xvi} In parallel with the growing number of bank corporate responsibility statements that indicate support for key international human rights instruments^{xvii}, legislation of this kind may provide states with a powerful mechanism to ensure obligations arising from state duty to protect are addressed relative to financial institutions.

We hope that information and suggestions included in this paper will contribute to the discourse on state duty to protect and the SRSG's views and recommendations.

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References

ⁱ “In sum, the state duty to protect against nonstate abuses is part of the international human rights regime’s very foundation. The duty requires states to play a key role in regulating and adjudicating abuse by business enterprises or risk breaching their international obligations.” Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts, Report of the Special Representative of the Secretary-General (SRSG) on the issue of human rights and transnational corporation and other business enterprises, February 2007, paragraph 18.

ⁱⁱ Human Rights, Banking Risks, BankTrack, February 2007.

http://www.banktrack.org/doc/File/banks%20and%20human%20rights/banktrack%20on%20human%20rights/0_0_070213%20human%20rights%20Banking%20risks.pdf

ⁱⁱⁱ Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts, Report of the Special Representative of the Secretary-General (SRSG) on the issue of human rights and transnational corporation and other business enterprises, February 2007, paragraph 17

^{iv} as above, paragraph 74

^v as above, paragraph 75

^{vi} A range of “Dodgy Deals” can be found at BankTrack’s website:

www.banktrack.org/?show=167&visitor=1 You can follow links to financial institutions involved and the corporate responsibility instruments they aspire to.

^{vii} BankTrack’s Pagrisa Dodgy Deal: www.banktrack.org/index.php?show=dodgy

^{viii} Khulumani v. Barclay National Bank, Ltd., Ntsebeza v. Daimler Chrysler Corp., Case Nos. 05-2141-cv, 05-2326-cv (2d Cir., October 12, 2007)

www.ca2.uscourts.gov:8080/isysnative/RDpcT3BpbnNcT1BOXDA1LTIxNDEtY3Zfb3BuLnBkZg==/05-2141-cv_opn.pdf#xml=http://www.ca2.uscourts.gov:8080/isysquery/irl35f7/1/hilite

^{ix} The SRSG expressed concern about the current reticence of states to fulfill treaty obligations regarding the duty to protect (2007 interim report, paragraph 86). The inclination to suppress the duty to protect and access to justice for victims is also evidenced in the Khulumani case by South Africa and the United States of America. Both countries submitted documents to the court expressing their views that it should not be possible to hold companies liable for aiding and abetting in this case.

^x BankTrack’s website on banks and arms: www.banktrack.org/?show=179&visitor=1

^{xi} Protocol Additional to the Geneva Convention of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1977, At. 51(5)(b)

^{xii} Fatal Footprint: The Global Human Rights Impact of Cluster Munitions, Handicap International, Brussels, November, 2006.

^{xiii} www.equator-principles.com

^{xiv} Equator Principles re-launched: Improvements made, but principles fail to live up to their potential, BankTrack letter to Equator Principle Financial Institutions, 7 July 2006.

www.banktrack.org/doc/File/policies%20and%20processes/Equator%20Principles/060706%20EP%20relaunched.doc

^{xv} Article 8. Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law. *Universal Declaration of Human Rights*

^{xvi} CSR Asia Weekly, Vol 3, week 30. www.csr-asia.com/upload/csriasiaweeklyvol3week30.pdf

^{xvii} A list of bank policies referring to human rights can be found at www.banktrack.org/?show=137&visitor=1