

## INTERNATIONAL: Crisis raises business, rights focus

Thursday, May 14 2009

**SUBJECT:** The new report of the UN Special Representative on human rights and business.

**SIGNIFICANCE:** The unanimous three-year extension in 2008 of the special representative's mandate signifies the importance that the UN assigns to the issue of corporate conduct in relation to human rights. His fourth report -- the first under the new mandate -- underlines the urgency of the issue during the financial crisis. [Go to conclusion](#)

**ANALYSIS:** Professor John Ruggie was appointed Special Representative of the Secretary General (SRSG) on human rights and business in July 2005 ([see INTERNATIONAL: Human rights and business pose dilemmas - November 7, 2005](#)):

- His first report in March 2006 contained numerous open questions, and it was foreseen that the UN was unlikely to receive definitive recommendations by the end of his two-year term ([see INTERNATIONAL: Human rights/business report divides - March 14, 2006](#)).
- Ruggie's second report, in March 2007, contained no recommendations but highlighted a range of inadequacies; his mandate was extended for another year ([see INTERNATIONAL: Human rights and business issues remain - July 19, 2007](#)).
- The third report was unanimously approved by the UN Human Rights Council in June 2008 ([see INTERNATIONAL: Business/human rights framework mooted - May 16, 2008](#)). It outlined an overall framework for business and human rights based on three pillars -- state duties to protect against human rights abuses, corporate responsibilities to respect human rights, and effective access to remedies.

The framework was supported by most civil society organisations and major business associations. With all major stakeholders supporting the framework, the UN Human Rights Council issued a new three-year mandate, tasking the SRSG with "operationalising" the framework.

**Fourth report.** In his latest report, the SRSG reflects on the impact of the current financial crisis on business and human rights, stressing that the international reconstruction of the global economic system should incorporate social concerns. The SRSG notes that "the business and human rights agenda is tightly connected to these shifts, it both contributes to and gains from a successful transition toward a more inclusive and sustainable model of economic growth". Thereafter the SRSG elaborates further on the direction of his new mandate in relation to the three-pillar framework:

1. **State duty to protect.** The framework had already identified areas of concern where the SRSG encouraged states to align policies with the business and human rights agenda, including investment treaties, corporate culture, areas of state influence and international organisations. In addition to the question of policy incoherence in and between these areas, the SRSG specifically will seek to address business and human rights in the context of:
  - **Corporate law.** Following the results of an ongoing survey of corporate law in 40 jurisdictions worldwide, the SRSG expects to provide governments with recommendations on how to strengthen the business and human rights agenda in this policy area. The survey will reveal whether corporate legal regimes pose barriers or enablers for corporate considerations of human rights.
  - **Investment and trade agreements.** The SRSG explores the possibility of developing guidance on "responsible contracting" for host government agreements in relation to human rights. A Norwegian commentary on bilateral investment treaties serves as best practice. In addition, the SRSG intends to conduct extensive consultations with experts on the role of business and human rights in relation to trade.
  - **International cooperation.** The SRSG framework placed business and human rights solidly on the development agenda. Following stakeholders' wishes, it appears that the SRSG is seeking to deliver specific guidance on how to prevent corporate-related abuse in conflict-affected areas. The SRSG aims to establish an informal working group of home and host states to generate ideas on effective approaches and tools.
2. **Business responsibilities to respect.** The SRSG proposes a 'near'-universal responsibility to respect all international human rights. Living up to such responsibility requires corporate due diligence processes, whereby companies become aware of, prevent and mitigate adverse human rights impacts. The SRSG maintains four core elements of corporate due diligence: having a human rights policy; assessing human rights impacts of company activities; integrating those values and findings into corporate cultures and management systems; and tracking as well as reporting performance. The new report elaborates on the scope of such due diligence in three areas: the country and local context; the nature of the business undertaking; and the relationship to third parties.

The area is uncharted and the new report demonstrates the massive task that lies ahead for the SRSG. Whereas the state duty to protect appears straightforward as a recognised element of international law, a range of issues emerge in this area, including:

- what acts are entailed by the responsibility to respect;
- whether business and human rights translate to responsibilities only, or whether corporations could find value within a human rights framework for corporate contributions to sustainable social development;
- whether state-owned enterprises or corporations performing public services have special responsibilities; and
- how corporations manage conflicts or lack of protection of international human rights obligations in national law.

The SRSG points to the human rights due diligence process as the crucial element of the 'responsibility to respect'. However, due diligence in itself raises a series of questions:

- Firstly, the SRSG expands the normal corporate understanding of the term, as a transactional undertaking, to a process of continuous assessment and mitigation.
- Secondly, the intention to address variations across sectors and business sizes raises questions over the process required by a small or medium-sized company.
- Finally, and closely linked to the third pillar -- access to remedies -- the SRSG will devote attention to the role of human rights due diligence processes in relation to corporate liability.

3. **Access to remedies.** The third pillar of the framework is based on the premise that if persons suffer human rights violations they need effective access to remedies. The SRSG aims to provide guidance in relation to interventions ranging from judicial to non-judicial grievance mechanisms, and in future intends to explore options for such mechanisms at international, national and corporate levels. It appears that the recommendations for making access to remedies operational will concentrate on the elaboration of key principles for establishing such mechanisms and collecting best practice examples.

**Outlook.** The framework adopted and supported by all major stakeholders in 2008 held no specific obligations for business or governments, but rather presented a policy framework based on input from major actors in the field. The first report under the new mandate indicates that the SRSG will continue exploring the field by conducting extensive stakeholder consultations, investigations and surveys. It should be expected that by the end of this three-year term he will seek to establish some basic principles under each of the three pillars. The SRSG will rely on other actors to develop and test actual tools, processes and mechanisms. Governments and corporations may influence the coming policy advice by demonstrating best practices exploring the application of the framework as it stands today.

**CONCLUSION:** The first report under the new mandate indicates that the SRSG plans to dig one level deeper, seeking to address issues not explicitly discussed in the adopted framework. Governments and corporations should not expect a formula to address business and human rights, but possibly a set of principles and references to best practices that may be applied in developing their approaches.

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