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INTERNATIONAL: Rights and business

SUBJECT: The second report of the UN special representative on human rights and business.

SIGNIFICANCE: The second report provides indications that the special representative, when coming up with recommendations next year, may point towards the formation of international standards on business and human rights.

ANALYSIS: Professor John Ruggie was appointed special representative to the secretary-general (SRSG) in July 2005, charged with exploring human rights in a corporate context (see INTERNATIONAL: Human rights and business pose dilemmas – November 7, 2005). His interim report, published in March 2006, contained numerous open questions and assumptions and it was foreseen that the UN was unlikely to receive clear and definitive recommendations by the end of his two-year term (see INTERNATIONAL: Human rights/business report divides – March 14, 2006).

His second report was published in March 2007, and contains no recommendations at all. Before delivering it, Ruggie had applied to the new Human Rights Council to extend his mandate. The Council in June gave the SRSG an extra year to finalise the work under the mandate, leaving open the possibility of a general extension for another three years. The second, now non-final, report paints a contemporary picture of human rights and business with a range of inadequacies.

The report. With the report the SRSG seeks to provide for "a comprehensive mapping of international standards and practices regarding business and human rights". Two-dozen research papers, three regional multi-stakeholder forums and numerous meetings, corporate visits and workshops provide the basis for the report. It is structured around five themes, namely:

- state duties to protect against human rights violations by business;
- corporate responsibility and accountability for international crimes;
- corporate responsibility for other human rights violations under international law;
- 'soft law' mechanisms; and
- self-regulation.

The report seeks to determine standards and practices governing corporate responsibilities and accountability. Responsibility is defined as the legal, social and moral obligations of a corporation; accountability as the mechanisms for holding corporations to such obligations.

Human rights duties. The report points out that state duty to protect human rights "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". However, states appear not to live up to their responsibilities to protect individuals from violations by corporations.



Another central point of the report is the current trend in international law towards an extension of the concept of complicity. This has consequences primarily for corporations being held accountable for complicity in international crimes. However, this trend is not to be found in relation to "other human rights violations". According to the report, "it does not seem that the international human rights instruments... impose direct legal responsibilities on corporations".

The most important developments in business and human rights are found in a number of soft law initiatives. Ruggie found "considerable innovation" in such initiatives and indicates that despite "obvious weaknesses" they could in time crystallise into harder forms of law.

Finally, the report turns to voluntary initiatives. There are a number of these; while some show potential, the overall picture is of fragmentation, lack of consensus and inadequacy. Based on the findings, Ruggie considers the most fundamental issues to be the trend in relation to the extension of complicity in international crimes; the developments of soft law mechanisms; the gaps in state commitment to fulfil their duty to protect human rights; and the inadequacy of voluntary initiatives.

General conclusions. All areas investigated demonstrate obvious weaknesses. The biggest challenge of the SRSG will be to advise the UN on how to bring the relatively limited efforts to a level where they actually make a difference globally. It would appear from the mapping exercise in the second report that the SRSG will advise states to become more proactive in structuring business incentives and disincentives -- thus combining global standards with accountability practices, some of which could be rooted in existing market mechanisms, while encouraging rewards and other voluntary systems.

Public policies could support market-based incentives and a level playing field could be secured through developments in international law, possibly through a convention. However, in order to ensure that corporations meet their commitments and to protect victims of violations, accessible procedures have to be established to hold corporations accountable:

- The only existing international avenue today is the National Contact Points (NCP) under the OECD guidelines.
- However, the OECD forum is not global and most NCPs do not function efficiently or independently.
- Strengthening the OECD guidelines could be received by non-OECD members as another 'imperialistic' approach.

Further, the human rights part of the guidelines is poorly described and would not offer corporations the needed guidance for compliance. Other procedures could be considered at UN level such as an ombudsperson, alternative dispute resolution mechanisms or a court.

Specific challenges. The touch of common law bias that appeared in the first report remains present in this report. Sentences throughout the analysis indicate that the common law comprehension of legal developments through practice -- rather than active legislation -- prevails. To wait for 'hard law' to emerge through case law or via attempts to elevate standards for business behaviour to international customary law would appear insufficient, considering rapidly rising public expectations for good corporate citizenship. Also, that emergence is difficult to expect when considering the most obvious obstacle: that corporations and not states would be subject of such rules.

The SRSG also points towards the establishment of processes for effective measuring of human rights impact by business. Social impact assessment has been developed by extractive industries, but methodologies for integrating or using human rights for this purpose have not yet been finally



developed. One reason would be that an optimal human rights impact assessment process would require the establishment of basic human rights standards for business.

Outlook. It is still too early to predict the final direction of the recommendations to be presented next year. Although a few states expressed disappointment that those recommendations were not made now, most agreed to extend the mandate. The SRSG cleverly managed to engage business in a constructive dialogue around human rights. In particular, he follows closely the work of the Business Leaders Initiative on Human Rights, chaired by Mary Robinson. The group of 14 multinational corporations stated their desire for the establishment of a global level playing field in their third report.

It is expected that the SRSG in the final year will concentrate fully on floating and testing policy areas where states could contribute to strengthen the accountability of business towards basic human rights. Based on the thorough work so far it is not to be expected that the SRSG will come up with final solutions; but directions for further work will most likely be laid out. Following the SRSG's pragmatic approach, suggested options will most likely be assessed for their economic and political viability.

CONCLUSION: The SRSG's second report points towards gaps and inadequacies in the protection of human rights for persons under impact from business. In the remainder of the mandate it is expected that he will concentrate efforts on developing recommendations for the UN Human Rights Council. Policy options are likely to be proposed in relation to international regulation, the establishment of global accountability procedures and the creation and enabling of market mechanisms.

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