

# The Impact of the United Nations Secretary-General's Special Representative & The UN Framework on the Development of the Human Rights Components of ISO 26000



## The New Guidance Standard on Social Responsibility Developed and Adopted by the International Organization of Standardization

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*THE IMPACT OF THE UNITED NATIONS SECRETARY-GENERAL'S  
SPECIAL REPRESENTATIVE & THE UN FRAMEWORK ON THE DEVELOPMENT OF  
THE HUMAN RIGHTS COMPONENTS OF ISO 26000—*

*THE NEW GUIDANCE STANDARD ON SOCIAL RESPONSIBILITY DEVELOPED AND  
ADOPTED BY THE INTERNATIONAL ORGANIZATION OF STANDARDIZATION*

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## **EXECUTIVE SUMMARY**

This paper examines how the work of the UN Special Representative for Business and Human Rights (SRSG) impacted the development and finalization of the ISO 26000 Guidance Standard on Social Responsibility—which was adopted in 2010 with the support of 94 percent of ISO national member bodies. Specifically, it looks at the impact of the UN ‘Protect, Respect and Remedy’ Framework, which the SRSG proposed and the Human Rights Council welcomed unanimously in 2008, as well as the SRSG’s report on ‘complicity’ and ‘sphere of influence’ and his and his team’s engagement in the ISO process.

The paper demonstrates that the UN Framework helped decisively to establish in ISO 26000 the baseline responsibility of organizations to respect human rights; to introduce the elements of human rights due diligence as the appropriate means for organizations to know and show that they respect rights; and in clarifying the concepts of complicity and sphere of influence. Moreover, the support for the Framework helped resolve a number of differences among participants in the ISO 26000 process, and increased their overall level of support for the human rights component of the standard. The ISO 26000 was developed through a double-consensus process – where stakeholders and countries participated in the work.

## DEFINITIONS AND ABBREVIATIONS

- **Applicability to all organizations:** Since ISO decided to make ISO 26000 applicable to all organizations, the term "organization" is used to refer to any and all organizations except state and government. The formal definition contains the following note:  
*"For the purposes of this International Standard, organization does not include government acting in its sovereign role to create and enforce law, exercise judicial authority, carry out its duty to establish policy in the public interest or honour the international obligations of the state."*<sup>1</sup>
- Furthermore, the standard expresses its applicability to state actors in the following way:  
*"This International Standard cannot replace, alter or in any way change the duty of the state to act in the public interest. [...] [It] does not provide guidance on what should be subject to legally binding obligations; neither is it intended to address questions that can only properly be resolved through political institutions. Because the state has the unique power to create and enforce the law, it is different from organizations. For instance, the duty of the state to protect human rights is different from those responsibilities of organizations with regard to human rights that are addressed in this International Standard. [...] Governmental organizations, like any other organizations, may wish to use this International Standard to inform their policies, decisions and activities related to aspects of social responsibility. Governments can assist organizations in their efforts to operate in a socially responsible manner in many ways, such as in the recognition and promotion of social responsibility. However, promoting the social responsibility of organizations is not and cannot be a substitute for the effective exercise of state duties and responsibilities."*<sup>2</sup>
- **Abbreviations:** The various steps in the making of an ISO standard are: WD- Working Draft, CD – Committee Draft, DIS- Draft International Standard, FDIS- Final Draft International Standard. The published standard is referenced: ISO 26000:2010, E. **The UN Framework** refers to the SRSRG's main report of 7 April, 2008 (A/HRC/8/5) and its companion reports on sphere of influence and complicity (A/HRC/8/16).
- **Human Rights** is one out of seven *Core Subjects* in the standard. A *Core Subject* is contained in a *clause*, and the Human Rights clause is 6.3. Each *Core Subject* has a number of *Issues*, addressed in *sub-clauses*.
- **Numbers** referred to in brackets identify the relevant clause in the particular mentioned draft or if nothing else is mentioned, in the finally published standard.
- **Quotations:** If quotes are given without references, they are found in the same reference as mentioned *ibid*.
- **Stakeholder and country perspective:** Throughout the process, stakeholders participated as experts but through country delegations. Each country delegation had one vote,

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<sup>1</sup> ISO 26000:2010, E, para 2.12, p 3.

<sup>2</sup> ISO 26000:2010, E, para 3.4, p 10.

and each country delegation consisted of 6 stakeholder experts (NGO, Industry, Government, Labor, Consumer and Others) who then also had to agree. Tensions would at times arise between the stakeholder perspective and country delegation perspective. The strength of the work once approved, is that it was based on “double level of consensus” where both countries and stakeholders had to agree.

- **Consensus:** Consensus did not mean unanimity. Consensus in the ISO process is defined as: “*general agreement, characterized by the absence of sustained opposition to substantial issues by any important part of the concerned interests and by a process that involves seeking to take into account the views of all parties concerned and to reconcile any conflicting arguments*”. Note that consensus need not imply unanimity. Decision was always taken by consensus of the Working Group. Voting took place at specific stages of the process by correspondence only, to decide when the draft should proceed to the next formal level (Committee Draft, Draft International Standard, Final Draft International Standard). When there was voting, it happened on the base of countries taking into account liaison support, and the decision finally made by the chairs of the Working Group.

## **Introduction**

This paper looks at how the work of the UN Special Representative for Business and Human Rights (SRSG), the UN ‘Protect, Respect and Remedy’ Framework Report (2008), and the subsequent mandate output impacted the development of the ISO 26000 standard—which was adopted in 2010 with the support of 94 percent of national standards bodies.

The paper considers the SRSG’s impact on process and substance: in effect how ISO experts and its consensus process were supported and affected by the work of the SRSG and his team, and how the content of the ISO 26000 standard evolved in line with the content of the UN Framework Report itself. The paper’s thesis is that the UN Framework Report and the SRSG process impacted ISO 26000 positively in many respects, in that ISO 26000’s human rights content became more robust, while support for the human rights component of the standard increased greatly.

## **Organization of this paper**

In order to be able to trace the impact of the UN Framework Report and the SRSG process on the ISO 26000 standard, I analyzed not only subsequent ISO drafts after 2008, but in effect all such drafts of the standard since the beginning of the process. This paper consists of three parts.

The first is a historical screening of drafts for human rights contents; how the issue was addressed, how guidance (if any) was framed, and the type of responsibility that is attributed to actors. This paper summarizes where the drafts were before the publication of the UN Framework in 2008 (Working Draft 4.1.), and compares that with how it changed thereafter (Working Draft 4.2. and subsequent drafts). In assessing what changed, I give particular attention to whether the SRSG process or the UN Framework (or any of the subsequent reports) impacted the development of the ISO standard draft. I draw on my own understanding of and participation in the ISO process.

Secondly, to get an overview of the content of each draft, I compiled the elements of the human rights components of the standard drafts in a table. This provides an opportunity to analyze impact and how content changed over time.

Based on these two analyses, and my own experience, I then draw my conclusions.

## **I. DEVELOPMENT OF ISO 26000 : HUMAN RIGHTS BEFORE 2008**

In 2005, ISO began actual work to produce a social responsibility standard. At the first stage, there were “issue papers” that outlined what concepts, terms and content should be in the standard. One can compare them to initial brainstorming documents. Through various rounds of expert comments, an index – a Design Specification was eventually produced.

A brief note about ISO 26000; it is an international guidance standard on social responsibility. It is not designed or intended for certification purposes. It provides guidance rather than specifying required actions. The guidance is applicable to all organizations, regardless of size, location, context, activity. It is not only for companies but for all types of organizations (see definition above). The standard aims to assist organizations to be socially responsible. The ISO Working Group that developed the standard had the largest membership and contained the broadest stakeholder representation in ISO history.<sup>3</sup> The normative principles in the document are derived largely from the content of authoritative international instruments and work. The references used for the content are found in a bibliography. Readers can also find voluntary initiatives referenced in Annexure A of the standard.

This paper will not explain how the content of the standard developed between 2004 and 2008. A summary of this can be found through the annex to this paper. I describe how the ISO content looked before the release of the UN ‘Protect, Respect and Remedy’ Framework. i.e. ISO Working Draft 4.1 (published March 2008).

The Working Draft 4.1 had come pretty far in including core elements of human rights and key references or sources. However, there was also considerable confusion as to the content.

### **A. Human rights as separate theme**

Human rights was mentioned as a subject under social responsibility from the start. In WD 4.1 this is addressed as a principle to social responsibility – as a kind of universal value. It is also addressed as a core subject – in effect as a particular subject that a socially responsible organization needs to address. Also from early on, the standard dealt with labour and employee issues in human rights terms as well as in a separate section called Labour Practices.

### **B. Character of non-state actor responsibility**

There was confusion about what type of responsibility an organization has for human rights. In comparison to later drafts, the writings at this stage were inconsistent and incoherent. The text proposed that organizations should support, respect, promote, advance, contribute to the full realization / securing human rights, and to refrain from certain acts.

Under Civil and Political Rights, Working Draft 4.1, there is reference to the “primary” responsibility of the state. But it does not say anything about non-state actors having a secondary responsibility.

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<sup>3</sup> For more information about the standard, see [www.iso.org/sr](http://www.iso.org/sr). For further reading, see Henriques, Adrian ed, ‘Understanding ISO 26000 - A Practical Approach to Social Responsibility’, BSI, London, (2011 forthcoming).



*“These rights are primarily the duty of the state to secure in national law and uphold. Contraventions by private persons and organizations of many of these, such as the right to life, normally carry criminal penalties. However, these also concern and point both public and private organizations, any user of this International Standard, in a direction that encompasses, for example below actions.”<sup>4</sup>*

Under Economic, Social and Cultural Rights, similarly vague guidance is given; outlining the primary responsibility of the state, and implicitly portraying non-state actors’ responsibility as secondary. However, here the examples illustrated how organizations should respect human rights. Most examples come from the field of labor rights.

*The primary obligations here again fall on the state, and states are encouraged to aid the development of less developed countries. However, organizations can also contribute to realization of these rights including by refraining from actions that obstruct or impede the realization of such rights. In doing so, they should base their actions on an acknowledgement of the ideals that everyone should enjoy a standard of living adequate for the health and well-being of himself or herself and family, including food, clothing, housing, medical care and necessary social protection, such as the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his or her control. ...<sup>5</sup>*

### **C. References**

The Working Draft 4.1 references the Universal Declaration of Human Rights and to the Bill of Rights. In fact, the Universal Declaration of Human Rights was referenced from the very outset. Working Draft 4.1 does not specifically explain what the Bill of Rights is or what it means. In other sections of the standard, there are references also to the eight core conventions of ILO, other ILO conventions and recommendations, the ILO Declaration on Fundamental Principles and Rights at work, and the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, the International Covenant on Economic, Social and Cultural Rights and the Convention on the Rights of the Child.

Since early on, the ISO standard references the ILO because of its importance of the work to the field of labor rights. The standard does not reference other UN organizations in the text. The ILO has a memorandum of understanding (MOU) with ISO. The UN Global Compact and the OECD later established a similar MoUs with ISO. These organizations also formally participated in the Working Group and greatly contributed to the evolution of the standard.

Importantly, many hundreds of experts globally contributed for years with comments, input, dedication and commitment to the human rights components of the standard in the Working Group, until finally the document was ready.

### **D. Sphere of influence**

The ISO standard references the concept of *sphere of influence* as a way for organizations to define the scope of their responsibility to act responsibly for human rights, quoting the UDHR:

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<sup>4</sup> Working Draft 4.1., section 7.3.5.1., page 34.

<sup>5</sup> Working Draft 4.1.

*“[...] it is also widely recognized that private organizations and individuals can affect human rights and have a responsibility and ability to advance the achievement of human rights, wherever possible and within their sphere of influence. The UDHR itself states that “every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance.”<sup>6</sup>*

According to WD 4.1:

*“The concept of sphere of influence denotes that an organization has the ability to affect human rights both directly and indirectly. An organization’s human rights obligations apply:*

- *In the workplace, such as provision of safe and healthy working conditions, freedom of association, and non-discrimination (an organization’s human rights obligations apply in the workplace, outside the workplace, and in the wider community);*
- *Outside the workplace, such as respect for standards on use of force in relation to individuals and groups, and*
- *In the wider community, such as protection of the livelihood of local communities and contribution to public debate.”<sup>7</sup>*

The WD 4.1 also links sphere of influence to complicity:

*“Avoidance of complicity in human rights abuses means that an organization does not only promote human rights within their sphere of influence.”<sup>8</sup>*

## **E. Complicity**

The issue of complicity is taken up in the same section, and is described in the following way:

*“An organization may be regarded as complicit in human rights abuses if it in some way authorizes, tolerates or knowingly ignores abuses committed by a related organization, or if it knowingly provides practical assistance or encouragement that helps perpetuate the abuse of human rights abuse. Thus complicity can be direct or indirect. This can occur by association or co-operation with state or non-state actors that are violating human rights.”<sup>9</sup>*

The examples on how an organization can avoid being complicit in the human rights abuse of others is limited to security arrangements. Guidance is taken from the Voluntary Principles on Security and Human Rights.

## **F. Addressing particular human rights issues**

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<sup>6</sup> Working Draft 4.1., paragraph 7.3.1.1., pages 29-30.

<sup>7</sup> Working Draft 4.1., paragraph 7.3.1.1., page 30.

<sup>8</sup> Working Draft 4.1., 7.3.4.1., p 33.

<sup>9</sup> Working Draft 4.1., 7.3.4.1., p 33.

The clause on human rights contained particular human rights issues to be addressed by the user. (Some of them are addressed under principles / considerations.)

- Vulnerable groups: describing vulnerable groups such as children, women, migrants, persons with disabilities.
- Non-discrimination: describing what discrimination is and providing examples of illegitimate grounds for discrimination.
- Civil & Political Rights: describing the category of rights, and illustrates with a list of examples what an organization can do to act responsibly vis-à-vis them.
- Economic, Social and Cultural Rights: describing the category of rights, and illustrates with a list of examples what an organization can do to act responsibly vis-à-vis them.
- Fundamental rights at work: describes what are considered as fundamental, including the elimination of forced and child labor.
- A human rights based approach: recommends that the user to put the rights of individuals in focus, accepting that all people have universal rights.
- Human Rights risk situations: identifies certain contexts where risks to human rights abuse is heightened.
- Sensitive Action: describes that organizations should respond to situations of ongoing abuse through sensitive action so that the intended objective is achieved, and action does not compound the abuse.

## **II. DEVELOPMENT OF ISO 26000 : HUMAN RIGHTS AFTER 2008**

The UN Framework and its companion reports clarifying the concepts sphere of influence and complicity were published in April 2008. The first ISO 26000 draft that was amended to be aligned with the UN Framework, was Working Draft 4.2, published in June 2008.

At that time, the experts decided to align the ISO draft standard with the UN Framework. The publication of the UN Framework Report on the 8<sup>th</sup> April had a significant impact on shaping the consensus relating to the parts of ISO 26000 dealing with human rights.<sup>10</sup>

ISO published its second version of Working Draft 4 on June 2, 2008. This was the last working draft before the document could proceed to the next step on the ladder, which in the ISO-context is called a "committee draft". Thus, support was high enough for the document to leave the stage of "working draft" and move on up to a "committee draft." This decision is taken by Working Group chairs, based on their determination whether there is enough support for the document to do so. Each country also casts a formal vote when comments are submitted.

### **A. Human rights as a separate theme**

There were no changes from the previous version, but this section grew in presence and became better substantiated. References to human rights are present in many parts of the standard: as a principle, a core subject in itself; and by conscious duplication or cross-reference.

### **B. Character of non-state actor responsibility**

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<sup>10</sup> ISO/TMB/WG SR, N143, June 2008, Working Draft 4.2.

After the publication of the UN ‘Protect, Respect and Remedy’ Framework, the draft ISO standard also clarified that the baseline responsibility for non-state actors is to respect human rights. The standard still references other type of responsibilities that a socially responsible organization can undertake towards human rights, but it is overall rooted in, and consistent with the understanding that respecting human rights is the foundation upon which other actions can build—as the UN Framework stipulates.

Rather than describing state responsibility as being primary, implying secondary responsibility for non-state actors, the standard now describes that the state responsibility is to respect, protect and fulfill human rights, whereas an organization has the responsibility to respect human rights.<sup>11</sup> It states that it is widely acknowledged that non-state organizations can and do impact human rights and thus have the responsibility to respect them, even if most human rights law relate to states.<sup>12</sup> It also helped clarify how sphere of influence as a notion can apply (see below).

The standard clarifies that organizations should respect both civil and political rights as well as economic, social and cultural rights. In the case of economic, social and cultural rights, it also explicitly points out that it is through due diligence this is done.

*“An organization should respect all individual civil and political rights. Examples include, but are not limited to...”<sup>13</sup>*

*“To respect these (referring to economic, social and cultural) rights, an organization should exercise due diligence to ensure that it does not engage in activities that infringe, obstruct or impede the enjoyment of such rights.” ...<sup>14</sup>*

Respecting all rights, and conducting human rights due diligence, are also core elements of the UN Framework.

The standard does proceed to say that a socially responsible organization could also contribute to the realization of economic, social and cultural rights as appropriate; and lists examples. It states that in such case the organization should keep in mind the different role and function that government has, relative to other organizations.<sup>15</sup> To be fully in line with the UN Guiding Principles, perhaps it should also have added that undertakings to support human rights does not compensate for a failure to respect human rights in their operations.

The core subject Community Involvement and Development also refers to the responsibility to respect; under the issue Wealth and Income Creation, where an organization “*engages in economic activity with organizations that, owing to low levels of development, have difficulty in meeting the legal requirements, but only where the purpose is to address poverty*” and “*the activities of these organizations respect human rights (...)*”.<sup>16</sup>

## C. References

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<sup>11</sup> ISO 26000: 2010 (E), section 6.3.1.2., p 24.

<sup>12</sup> ISO 26000:2010 (E), section 6.3.1.1., p 23, also 6.3.2.2, p 24.

<sup>13</sup> ISO 26000:2010, section 6.3.8., p 30.

<sup>14</sup> ISO 26000: 2010, section 6.3.9, p 30-31.

<sup>15</sup> ISO 26000: 2010, section 6.3.9, p 30-31.

<sup>16</sup> ISO 26000:2010, section 6.8.7.2., p 67.

The new draft provided more space than previously to describing the International Bill of Human Rights and the Core Human Rights Instruments. This was done in a help-box that caused lots of discussion amongst experts. To include references to conventions or instruments not ratified by all states, was a contentious issue. Nevertheless, the help-box specifies what the Bill of Human Rights is, and finally lists all the core human rights instruments including some of its optional protocols. Because users are likely to encounter reference to “Bill of Rights”, it would be useful to include a description of it. The UN Framework requires companies to look at a minimum to the Bill of Rights and ILO eight core conventions. The ISO 26000 Working Draft 4.2 went further than that, to also include information about other human rights instruments.

#### **D. Sphere of Influence**

The concept of sphere of influence had been used throughout the document since quite early in the process (2007). Even before the UN Framework was published, the experts were in disagreement as to whether this concept should be included and how it should be used. When the UN Framework and its companion report came in 2008, the discussion became even more heated. It was probably the one component of the UN Framework where there was most disagreement amongst experts in the ISO 26000 Working Group, and where the UN Framework was not fully successful in impacting the content throughout the standard.

The UN Special Representative conveyed his view on sphere of influence and the way it was inconsistently and incoherently dealt with in the draft ISO standard, through a Note submitted to ISO in November 2009.<sup>17</sup> In brief, he argued that in the case of business, its responsibility to respect human rights is triggered when it has an adverse impact on human rights—not because it happens to have influence over other actors. Influence comes into play in determining what the business should do when another actor with which it has a business relationship commits a human rights abuse. However, many Working Group experts were of the perception that responsibility itself should be based on influence.

With regards to human rights, the text includes sphere of influence as a conceptual aid to organizations, helping them to understand the opportunities they might have to support human rights—beyond respect.

#### **E. Complicity**

The publication of the UN Framework and its companion report clarifying the concept of complicity significantly impacted the content of the ISO draft standard. The concept of complicity was already mentioned in the text before the publication of the UN Framework. Notably, the notion was already expressed in the UN Global Compact human rights principles.

Previous drafts of the standard contained references only to legal forms of complicity. There were long debates over the legal meaning of complicity, and they were effectively used as a barrier against reaching a conclusion on complicity as a whole, since there is no one size fit all definition of complicity in law. The UN Framework stated that complicity could be legal but also carries non-legal meanings, shaped by social expectations. This largely resolved the challenge; it became less relevant and important to get an accurate legal meaning that was valid for all circumstances in most or even some jurisdictions.

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<sup>17</sup> Note on ISO 26000 Guidance Draft Document, by John Ruggie, Nov 2009.

The UN Global Compact's division of complicity into direct, beneficial and silent complicity was also adopted and inserted into the standard, although there was much discussion around the categories.

#### **F. Addressing particular human rights issues**

Major changes were made to approximately half of the human rights issues addressed after the publication of the UN Framework.

Reference to vulnerable groups had already been included but was expanded in content. Eventually it was merged with the issue on non-discrimination. These changes were not a result of the UN Framework. On the contrary, experts were motivated to increase the guidance on the vulnerable groups even though the UN Framework does not particularly emphasize vulnerable groups.

Civil & Political Rights as well as the issue Economic, Social and Cultural Rights was impacted, as described above.

Fundamental rights at work remained the way it had originally been formulated and thus was not impacted.

Human Rights risk situations remains largely the same, but the guidance expressed to organizations on how to deal with such situations refers to the responsibility to respect, and proposes an enhanced due diligence as a solution.<sup>18</sup>

Two completely new issues were added as a clear impact of the UN Framework publication after efforts to align the clause with the UN Framework. The two new sections added, were titled due diligence and resolving grievances.

Two issues disappeared at the same time: the "human rights-based approach" and "sensitive action."

Due diligence is at the very core of the UN Framework, responding to the question of what respecting rights requires of a company. The guidance standard revision on this subject takes its text directly from the UN Framework. Moreover, while the revision initially was limited to due diligence for human rights purposes, at the last Working Group meeting experts decided that due diligence was relevant for all social responsibility subjects. Therefore, they expanded the human rights due diligence construct to comprise a broader social responsibility due diligence process. At the same time, because of how central due diligence is to the responsibility to respect human rights, the guidance standard text also kept it in the human rights section of the standard, with a cross reference.

The UN Framework states that an effective grievance mechanism is part of the responsibility to respect human rights. Resolving Grievances was thus inserted as a consequence of what is requested by the UN Framework. The guidance in the standard corresponds to the criteria outlined for non-judicial grievance mechanism.

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<sup>18</sup> ISO 26000:2010 (E), section 6.3.4.2., p 26

### III. TABLE (SEE ATTACHED)

### IV. CONCLUSIONS

In summary, the UN SRSG process and the publication of the UN Framework Report (including the companion report clarifying the concepts of sphere of influence and complicity and subsequent reports) had two types of impact on the ISO 26000 process in relation to the human rights components. It affected the content of the standard, and it increased the support for the text amongst experts. These two are obviously related because as the text improves, the consensus around it increases. They also stand separate from each other since the “UN Framework alignment” created trust because the UN guidance was largely perceived as a neutral, authoritative and legitimate source.

#### Impact on the content

##### **A baseline responsibility to respect human rights**

Already from the outset of the ISO process, there was broad agreement that non-state organizations should respect human rights. However, there was also mention of other types of responsibility throughout the development of the ISO discussions (as the attached table indicates). When the UN Framework Report suggested that the responsibility for all organizations to respect human rights was a baseline responsibility, it was a way of legitimizing something most experts already agreed to. It also became a point of departure among many experts that other types of non-state responsibilities were secondary, or supplementary. As can be read from the table, upon the publication of the UN Framework Report (April 2008), there was a “cleaning up” of the ISO standard draft from most other type of responsibilities apart from e.g. where there is mention that organizations are called upon, to contribute to securing the rights contained in the UDHR. It is thus fair to say that WD4.2 published in 2008 consolidated and affirmed the idea that respecting human rights is a baseline responsibility for all organizations in all situations.

However, as one can see when reading the attached table, some drafts later the guidance text elaborates on further type of responsibilities in relation to human rights. However, when this happens it builds on the idea that the primary organizational responsibility is *respecting*; and that where and when possible, organizations can support, promote, contribute towards the fulfillment of or advance other rights as appropriate. The frequency of: (x) and x\* also increase in the table, indicating a larger nuance in the formulation of the text. Yet, not every part of the guidance makes a clear differentiation between the responsibility to respect and other type of responsibilities. One example is the difference between guidance given on civil and political rights vis-à-vis economic, social and cultural rights. Under the section on civil and political rights, the emphasis and examples are on how companies should respect human rights mostly through refraining from different type of actions. Under the section on economic, social and cultural rights, the guidance refers to both respecting but also to supporting. Whereas it clearly states initially that the baseline responsibility is to respect rights, it provides more detailed explanation on how an organization also can support human rights. It does not discuss whether the rights that an organization chooses to contribute to should somehow be linked to impact on that right.

## All rights in the Bill of HR

Since the earlier drafts (from 2006 and onwards) there was always reference in the drafts to the International Bill of Human Rights, and civil and political as well as economic, social and cultural rights were presented in two distinct headings (issues) under the human rights clause. Fundamental rights at work were always a core part of the human rights clause. The issue of vulnerable groups was the one issue that probably changed most frequently. The purpose of listing particular groups was not to create an exhaustive list of groups that are particularly vulnerable to human rights violations, but rather an attempt to describe aspects of vulnerability that could inform organizations to understand different type of vulnerability better. Yet, in the end it did become a list of many examples, sometimes reflecting particular agendas, and expert comments continued as the work evolved, to propose numerous groups to include as vulnerable. There was never an attempt to distinguish any rights as more important than others. Initially, and fundamentally there was indeed a discussion as to whether and how certain rights were more important than others, but there was never an agreement on how to give guidance to organizations on such a contested matter.

## Due Diligence

Due diligence was not present as a sub-clause in the standard previous to the publication of the 2008 UN Framework Report. The content was taken straight from the UN Framework Report, and throughout the process thereafter it was relatively uncontroversial. The more controversial debate was on the definition of due diligence; and whether to define it as what is commonly understood as due diligence (which is how the SRSG defines it), whether to define it in the context of human rights or social responsibility more broadly. The final definition of due diligence is entirely compatible with how it is used in the UN Framework. The final definition of due diligence reads (definition 2.4):

*“comprehensive, proactive process to identify the actual and potential negative social, environmental and economic impacts of an organization’s decisions and activities over the entire life cycle of a project or organizational activity, with the aim of avoiding and mitigating negative impacts” (ISO 26000:2010 E, para 2.4)*

Towards the end of the drafting of the standard, experts wanted to broaden the scope of a “human rights due diligence” to a “social responsibility due diligence”. In consequence, the standard now guides readers to a SRDD – generic for all issues that relate to SR, but it also retains guidance on a HRDD because it is so central to the concept of non-state actor responsibility for human rights.

When asked what experts thought was the most important impact that the UN (Ruggie) Framework had on ISO 26000, Dutch expert *Mr Hans Kröder*, from the stakeholder group *Service, Support, Research & Others* replied the following:

*"Another result [of the “Ruggie framework”] is that due diligence has become not only an issue within the Human Rights core subject, but also a process step in the process of integrating social responsibility into an organization. After the discussions at the 7th conference in Quebec we realized the value of exercising due diligence regarding all core subjects. So a new sub clause (7.3.1) was accepted at the 8th and final Conference in Copenhagen on due diligence as process step".*



## **Resolving grievances**

The section on resolving grievances came about only after the publication of the UN Framework Report, in which grievance mechanisms play a significant role. The content was relatively uncontroversial.

## **Defining and avoiding complicity**

The idea and mention of complicity was already in the standard in the early drafts (2006 and onwards) as discussed above. The support for the notion in the draft was initially weak and numerous comments and interventions made by experts tried to remove it, especially a number of business / industry experts. The UN Framework Report had a significant impact on establishing a baseline expectation of organizations that avoiding complicity is a central part of respecting human rights, which is part of social responsibility. The UN Framework Report helped clarify the content of what complicity meant. The UN Framework Report clarified that complicity can be legal and non-legal, which was a great added value and strongly impacted the consensus of the experts to allow for a description of both, as discussed above.

## **Human rights risk**

Already from 2007, the ISO draft contained description of particular situations where there may be a heightened risk to impact human rights negatively. The UN Framework emphasized that organizations should consider risks to human rights. Later ISO drafts (after the publication of the UN Framework) recommend organizations to respond to such contexts through an enhanced due diligence.

## **The principle of human rights (4.8)**

The ISO 26000 principle on respect for human rights states the baseline responsibility to respect human rights, and in particular the rights as set out in the International Bill of Rights. The formulation of this was clearly impacted by the UN Framework Report and its emphasis on *responsibility to respect* as well as the obligation to respect *all rights* as set out in the Bill of Rights. Compare with the formulation of the principle, the first time it appeared (2006) was:

*“Organizations should ensure that their activities respect, promote and advance internationally recognized human rights. For example, they should: ensure that they are not complicit in human rights abuses; and ensure that all relevant staff, including security personnel, are provided with appropriate cultural and human rights training and guidance”.*<sup>19</sup>

## **Impact on process: experts and consensus**

### **The support for the content increased among experts**

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<sup>19</sup> WD2, Oct 2006, para 5.3.2. p 12.

Firstly, the arrival of the UN Framework Report clarified what is reasonable to expect from business in relation to human rights (which translated into “organizations” in the ISO 26000). Secondly, industry support for the UN Framework Report led many who had been hesitant even to have a clause on human rights to accept the idea. Thirdly, because of the SRSG’s regular reports to the UN Human Rights Council, and the positive reception there for his work, there was an elaborate authoritative intergovernmental position to rely on, removing the mists of suspicions of stakeholder biases. Suspicion of other stakeholders and ideas about the others’ hidden agendas sometimes prevented a discussion where arguments could be debated on their merits. Once the UN Framework Report had been published, it became the obvious and natural reference point. It was perceived as an independent authoritative institution that had reached foundational conclusions. It was truly beneficial for the discussions and it increased the consensus.

### **UN Framework - / “Ruggie”-arguments**

In ISO discussions, a typical argument to promote or defend any particular position became “align with Ruggie” or “the UN Framework says x”. A discussion on a particular substantive issue could be resolved or killed by using this kind of argument. If something was in contrast to a statement contained in the UN Framework, there would be a strong preference in the group to go with what those reports held or said (or was claimed to hold or say). There were however, a couple of points where the UN Framework or “Ruggie” argument could not dictate the outcome of the work, because of strong stakeholder positions. The best example of this was probably to retain the concept of sphere of influence in some fashion. Sphere of influence is an established term in the field of CSR and expressed in the UN Global Compact principles.

### **Sphere of Influence**

The concept of sphere of influence is retained in the document but the content of it in fact changed in the human rights clause, mostly due to the alignment with the UN Framework . In one of the earlier drafts, a paragraph in the human rights section reads the following way:

*“While states have the primary responsibility to promote and protect civil and political rights, all other organizations should support and respect the protection of internationally proclaimed civil and political rights within their sphere of influence and make sure that they are not complicit in abuses of these rights.”<sup>20</sup>*

Later drafts (2007) connect sphere of influence to the notion of complicity in the human rights clause, sometimes confusingly without really explaining how or why:

*“Promotion of the observance of human rights within an organization’s own activities should always be encouraged. An organization should also consider its sphere of control and influence. An organizations responsibility for human rights also pertains to the activities of connected organizations, such as subsidiaries, joint venture partners and suppliers. An organization may be regarded as responsible for, or complicit in, the activities of such organizations.”<sup>21</sup>*

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<sup>20</sup> ISO/TMB/WG SR, Working Draft 2, N80, Oct, 2006, p 23..

<sup>21</sup> ISO/TMB/WG SR, Working Draft 3, N113, July 2007, p 19.

*“Avoidance of complicity in human rights abuses means that an organization does not only promote human rights within their sphere of influence.”*<sup>22</sup>

The current wording of the published standard takes the following approach:

*“The baseline responsibility of non-state organizations is to respect human rights. However, an organization may face stakeholder expectation that it go beyond respect, or it may want to contribute to the fulfillment of human rights. The concept of sphere of influence helps an organization to comprehend the extent of its opportunities to support human rights among different rights holders. Thus it may help an organization to analyze its ability to influence or encourage other parties, the human rights issues on which it can have the greatest impact and the rights holders that would be concerned.*

*An organization’s opportunity to support human rights will often be greatest among its own operations and employees. Additionally, an organization will have opportunities to work with its suppliers, peers or other organizations and the broader society. In some cases, organizations may wish to increase their influence through collaboration with other organizations and individuals. Assessment of the opportunities for action and for greater influence will depend on the particular circumstances, some specific to the organization and some specific to the context in which it is operating. However, organizations should always consider the potential for negative or unintended consequences when seeking to influence other organizations.”*<sup>23</sup>

As the UN SRSG pointed out in a Note to the ISO 26000 Working Group (dated November 2009), there were inconsistencies in the use of the term of sphere of influence in the ISO document. The text was modified to some extent. The use of the term in the human rights section is entirely aligned with the UN Framework but not all other inconsistent uses were fully removed from the standard.

## **Complicity**

The notion of complicity, as stated above, was already in the drafts before the companion report came out. However, the content and scope was clarified through the UN Framework Report and its companion report on complicity.

Before the companion report came out, the section on complicity stated (also see below, on sphere of influence):

*“An organization may be regarded as complicit in human rights abuses if it in some way authorizes, tolerates or knowingly ignores abuses committed by a connected organization. In some cases, complicity may give rise to criminal or other legal liability. [...] While case law is developing that is clarifying the legal liability of private organizations or businesses for complicity in international crimes, most of what society, business and human rights advocates understand as complicity goes beyond its present legal definition and application.”*<sup>24</sup>

The final published standard contains the following text:

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<sup>22</sup> ISO/TMB/WG SR Working Draft 4.1, N137, March 2008, p 33.

<sup>23</sup> ISO 26000:2010 E, p 24-25.

<sup>24</sup> WD3, July, 2007, p 19.

*“Complicity has both legal and non-legal meanings. In the legal context, complicity has been defined in some jurisdictions as an act or omission having a substantial effect on the commission of an illegal act such as a crime, while having knowledge of, or intent to contribute to, that illegal act. Complicity is associated with the concept of aiding and abetting an illegal act or omission. In the non-legal context, complicity derives from broad societal expectations of behavior. In this context, an organization may be considered complicit when it assists in the commission of wrongful acts of others that are inconsistent with, or disrespectful of, international norms of behavior that the organization, through exercising due diligence, knew or should have known would lead to substantial negative impacts on society, the economy or the environment. An organization may also be considered complicit where it stays silent about or benefits from such wrongful acts.*

*While their boundaries are imprecise and evolving, three forms of complicity can be described.*

*Direct complicity: this occurs when an organization knowingly assists in a violation of human rights.*

*Beneficial complicity: this involves an organization or subsidiaries benefiting directly from human rights abuses committed by someone else. Examples include an organization tolerating action by security forces to suppress a peaceful protest against its decisions and activities or use of repressive measures while guarding its facilities, or an organization benefiting economically from suppliers’ abuse of fundamental rights at work.*

*Silent complicity: this can involve the failure by an organization to raise with the appropriate authorities the question of systematic or continuous human rights violations, such as not speaking out against systematic discrimination in employment law against particular groups.”<sup>25</sup>*

## **Conclusion**

To conclude, there is no doubt that the SRSG process and the UN Framework Report and subsequent reports strongly impacted both the content of the ISO 26000 Guidance Standard as well as the overall consensus with regards to the human rights parts of the standard. Mostly stakeholders but also some states increased their trust in the process once the UN Framework provided a common understanding and baseline expectation to respect human rights that most actually agreed with.

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<sup>25</sup> ISO 26000:2010, E, p 26.

## Development of content of ISO 26000 with regards to human rights, over t

Content of ISO 26000	Name (abr.) of ISO draft, month and year of publication			
	Issues Paper (June, 2005)	WD1 (March, 2006)	WD2 (Oct, 2006)	WD3 (July, 2007)
<b>General</b>				
Mention of human rights	x	x	x	x
A separate clause on human rights		x	x	x
A separate principle on human rights			x	x
Mention of labor / employee issues	x	x	x	x
References to UDHR	x	x	x	x
References to ILO Core or other Conventions	x (core)	x	x	x
References to Bill of Rights (UDHR, ICCPR, ICESCR)			x	x
Mention of ILO	x	x	x	x
Mention of Sphere of influence				x
Sphere of influence is related to complicity and /or attributes responsibility in the field of human rights				x
Mention of complicity			x	x
Mention of ius cogens or criminal liability			x	
<b>How should non-state actors relate to human rights?</b>				
<i>Protect</i>			x	(x)
<i>Support</i>			x	
<i>Respect</i>			x	x
<i>Promote</i>			x	x
<i>Advance</i>			x	
<i>Contribute to the (full) realisation / to securing</i>			x	x
<i>Duty to implement practices that reflect aspirations</i>				x
<i>Safeguarding (within its Sol)</i>				x
<i>Refrain from obstructing, infringing or impeding</i>				x
<i>Foster the rights (in the IBoR)</i>				
<b>Issues</b>				
Issue: Vulnerable groups				x

Issue: Non-discrimination				x
Issue: Civil & political rights			x	x
Issue: Economic, cultural and social rights			x	x
Issue: Fundamental labor rights /rights at work			x	x
Issue: Community rights			x	
Clause 6.4: Labor rights / practices			x	x
Issue: Due Diligence				
Issue: Resolving grievances				
Issue: A human rights-based approach				x
Issue: Human rights risk situations				x
Issue: Sensitive Action				x
	x - Yes (x) - mention in some places, in regard			
	** This (WD 4.2) was the first draft that was amended to be aligned			

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WD4.1 (March, 2008)	WD 4.2 (June, 2008)**	CD1 (Dec, 2008)	DIS (Sept, 2009)	FDIS (July, 2010)	Publ standard (Nov, 2010)
x	x	x	x	x	x
x	x	x	x	x	x
x	x	x	x	x	x
x	x	x	x	x	x
x	x	x	x	x	x
x	x	x	x	x	x
x	x	x	x	x	x
x	x	x	x	x	x
x	x	x	x	x	x
x	x	x	x	x	x
x	x	x	x	x	x
x	x	x	x	x	x
x	x	x	x	x	x
x	x	x	x	x	x
x	x	x	x	x	x
x	x	x	x	x	x
(x)		(x)	(x)	(x)	(x)
(x)	(x)	(x)	(x)	(x)	(x)
x	x	x	x	x	x
x	(x)	(x)	(x)	x*	x*
x			(x)	(x)	(x)
x	x	x	x	x	x
x	x	x	x	x	x
		x	x		
x	x	x	x	x	x

x	x	x	x	x	x
x	x	x	x	x	x
x	x	x	x	x	x
x	x	x	x	x	x
x	x	x	x	x	x
	x	x	x	x	x
	x	x	x	x	x
x					
x	x	x	x	x	x
x					

*ds to certain issues*                      *x\** - Referenced with the words: "where possible"  
ned with the UN Framework Report



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