



Business and human rights

## Treaty road not travelled

**John Ruggie explains why, at this time, a global treaty forcing companies to follow binding rules on human rights would not work and should not happen, despite calls from campaigners**

Since July 2005, I have served as the United Nations secretary-general's special representative for business and human rights. My third report to the Human Rights Council has just been released. Drawing on 14 multi-stakeholder consultations and extensive research, it lays out a strategic policy framework for better managing business and human rights challenges.

The framework rests on three foundational principles: the state duty to protect against human rights abuses by business; the corporate responsibility to respect human rights; and the need for better access by victims to effective remedies.

The "protect, respect and remedy" framework itself is offered as the major recommendation to the Human Rights Council. It is intended to establish greater coherence and generate cumulative progress in the business and human rights domain. Under each of the framework's three principles, the report also addresses a broad range of specific measures, including changes in national laws and regulatory policies, international mechanisms and voluntary initiatives.

But there is one thing the report does not do: recommend that states negotiate an overarching treaty imposing binding standards on companies under international law.

Treaties form the bedrock of the international human rights system. Specific elements of the business and human rights agenda may become candidates for successful international legal instruments. But it is my carefully considered view that negotiations on an overarching treaty now would be unlikely to get off the ground, and even if they did the outcome could well leave us worse off than we are today.

This view may disappoint some stakeholders. Therefore, I am grateful for the opportunity to explain it.

### Reservations

I have three main reservations about recommending to states that they launch a treaty process at this time. First, treaty-making can be painfully slow, while the challenges of business and human rights are immediate and urgent. Second, and worse, a treaty-making process now risks undermining effective shorter-term measures to raise business standards on human rights. And third, even if treaty obligations were imposed on companies, serious questions remain about how they would be enforced.

Human rights treaties can take a long time to negotiate, and still longer to come into force. Even soft law declarations that are not legally binding can take a generation to negotiate. For example, the Declaration on the Rights of Indigenous Peoples, adopted by the General Assembly last year, was 22 years in the making.

We cannot simply tell victims of human rights abuses that rescue will be on the way in the year 2030 – if all goes well. Even if we were to go down the treaty route, we still need immediate solutions to the escalating challenge of corporate human rights abuses. UN high commissioner for human rights Louise Arbour has put this well, saying: "It would be frankly very ambitious to promote only binding norms considering how long this would take and how much damage could be done in the meantime."

*A treaty-making process now risks undermining effective shorter-term measures to raise business standards on human rights*

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So, why not start the treaty-making process now, while simultaneously taking shorter-term practical steps? The challenges of business and human rights remain highly complex and the current consensus among states – which would have to negotiate, sign, and ratify any treaty – does not go far beyond “we need to do something about this problem”. This poses at least four serious risks to achieving meaningful outcomes.

First, the strategic interplay between treaty negotiations and gaining state support for short-to-medium term solutions does not always work in favour of the latter. Where states are reluctant to do very much in the first place, as is the case for quite a few states in the business and human rights area, they may invoke the fact of treaty negotiation as a pretext for not taking other significant steps, including changing national laws – arguing that they would not want to “pre-empt” the ultimate outcome.

A second risk is posed by governments, non-governmental organisations and companies having limited capacity in this area. A treaty-making process, precisely because it could create legally binding standards, would demand greater attention and resources, to the probable detriment of practical and urgently needed innovations in the interim.

A third risk concerns the level of standards that would be incorporated into such a treaty. They would not match the highest voluntary standards today, but most likely reflect the lowest common denominator. Given the vast disparity that currently exists, this could be so low as to be counterproductive. In the wake of a treaty with low standards, pressure on all companies to perform at the highest voluntary levels – from NGO campaigns, socially responsible investments funds, consumer groups, and so on – would become less effective because companies could, and many would, respond that they were following newly pronounced international law.

Such a loss of social leverage would be even more probable, with worse effects, if a treaty with low standards were not ratified by enough states to become law.

#### Hard to enforce

Quite apart from these risks is the concern that treaties that are not or cannot be enforced rapidly lose legitimacy. I see four options for business and human rights.

One would be an international court for companies. But not even the most wishful of wishful thinkers believes that this is realistic for the foreseeable future.

Another is enforcement by host states – that is, where companies operate. But states that have ratified the existing human rights treaties already have the obligation to protect individuals within their territory or jurisdiction from corporate-related human rights abuses. If they are unwilling to discharge it, an additional treaty is unlikely to help. Moreover, while there may be a need to further clarify what legal obligations the state duty to protect vis-à-vis business entails, this isn't the sort of

instrument treaty advocates have in mind. As for host states that have not ratified the existing treaties, it isn't self-evident why they would sign on to a new treaty imposing such obligations on companies. In short, the host state option might end up being either redundant or irrelevant.

A third option is enforcement by home states – where companies are incorporated or headquartered. But many if not most states are unlikely to embrace extraterritorial enforcement by others, claiming that it would constitute interference in their domestic affairs. Besides, home states are already legally permitted, if not necessarily willing, to take more extensive action to regulate overseas human rights harm by corporations based in them without arousing host state ire – as indicated in both my 2007 and 2008 reports. Pushing for new treaty obligations on extraterritorial enforcement, therefore, could backfire and reduce the scope of existing possibilities.

A final option would be to establish a new treaty body, as is the case for all other human rights treaties. If states agreed, companies would have to report on their human rights performance and the committee would express its views on compliance – which is what the “enforcement” powers of treaty bodies consist of.

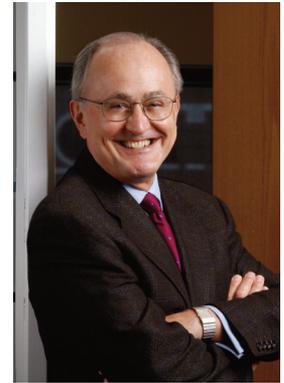
#### Do the math

If this is the preferred approach, then the arithmetic needs to be explained. There are 77,000 transnational corporations, with about 800,000 subsidiaries and millions of suppliers – Wal-Mart alone has 62,000. Then there are millions of other national companies. The existing treaty bodies have difficulty keeping up with 192 member states, and each deals with only a specific set of rights or affected group. How would one such committee handle millions of companies, while addressing all rights of all persons?

Clearly some “sampling” procedure would have to be adopted, and that would become the object of political contestation. But even leaving politics aside, the sheer policy challenge of designing selection criteria for the universe of all businesses, only a tiny fraction of which is visible to the international community, is staggering.

None of these issues has been systematically addressed by advocates of an overarching treaty imposing binding international standards on companies; it is assumed that this must be the answer because the current system does not function well enough. I also believe that it is essential to strengthen the international human rights regime to bridge protection gaps in relation to business. But more readily achievable alternatives to the status quo exist, involving both mandatory and voluntary measures, which could be undermined by the risks described above.

In contrast, the proposed framework of “protect, respect and remedy” offers a platform for generating cumulative and sustainable progress without foreclosing further development of international law. ■



Ruggie: protect, respect and remedy

*It is essential to strengthen the international human rights regime to bridge protection gaps in relation to business*

#### Next month in Ethical Corporation

For more business and human rights analysis, read next month's Ethical Corporation for a **special report on the future for business and human rights** after John Ruggie's third report to the UN.

Plus: **Sir Geoffrey Chandler**, founder-chair, Amnesty International UK Business Group, 1991-2001, and formerly of Shell, on the strengths and weaknesses of Ruggie's proposed framework.