

What happened in Geneva? Reflections on the first session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights

By Katharine Valencia

In 2011, after six years of studies and consultations, Professor John Ruggie presented the *Guiding Principles on Business and Human Rights* to the international community. These principles are basically a compilation of relevant international law that conceptualizes human rights obligations in relation to business activities in the following terms: 1) the State duty to **protect** human rights; 2) the corporate responsibility to **respect** human rights; and 3) the responsibility of States and businesses to provide effective **access to remedies**. The UN Human Rights Council adopted the Guiding Principles, and established a Working Group composed of 5 independent experts mandated to monitor and promote their implementation.

Many companies have made progress in adopting human rights policies, strengthening due diligence processes, and in other aspects of applying the Guiding Principles.¹ However, those who believe that the implementation of the Guiding Principles has been too slow or even ineffective have argued that it is necessary to develop a “hard law” mechanism to hold businesses accountable for human rights violations.

Last year, Human Rights Council members engaged in an intense deliberation regarding the next steps in the field of business and human rights. The delegations of Ecuador and South Africa led an initiative to create a **legally binding instrument to address human rights violations by businesses**. Opposing this effort were the United States and the European Union, among others, who argued *inter alia* that this “competing initiative” would undermine the implementation of the Guiding Principles. After much debate, a plurality of the Council approved Resolution 26/9, creating an **open-ended intergovernmental working group** to “elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises.”²

DPLF attended the [first period of sessions](#) of this intergovernmental working group (IGWG), which took place from July 6-10, 2015 at the United Nations in Geneva. The purpose of this meeting was to discuss the broad themes of a potential treaty, with oral and written interventions by States and civil society (without yet beginning to draft the treaty text itself).

This IGWG session revolved around the relationship between the Guiding Principles and a potential binding treaty, as well as the scope of such a treaty. **There was a general consensus that the Guiding Principles remain an important source of law and should continue to be implemented by states**. On the first day, the IGWG approved a proposal by the European Union representative to add a panel to the

¹ Douglass Cassel and Anita Ramasastry, *White Paper: Options for a Treaty on Business and Human Rights* (American Bar Association and The Law Society of England & Wales), May 2015.

² Human Rights Council, Resolution 26/9, *Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights*, A/HRC/RES/26/9, July 14, 2014.

agenda specifically regarding implementation of the Guiding Principles. **A more contentious issue was the scope of the treaty.** The EU, noting that it spoke on behalf of another unnamed entity, proposed making any potential treaty applicable to “all” business enterprises. However, most states present, including Cuba, Ecuador, and Bolivia, argued that this was contrary to the IGWG’s mandate, considering Resolution 26/9’s controversial footnote that seems to limit the scope of the discussion to transnational businesses.³ Although the EU’s proposal was in line with the position of many civil society organizations, others argued that it was merely an attempt to derail the negotiations.

Even after the IGWG decided not to move forward with the EU proposal, the scope of the potential business and human rights treaty remained heavily debated throughout the week. Disagreement remained over the issue of **whether to expand the treaty’s focus beyond transnational corporations (TNCs) to encompass other businesses such as state-owned and local enterprises.** Some civil society actors urged the IGWG to include all business enterprises, so that victims of corporate abuse could turn to a legal mechanism for redress regardless of the corporate form. One panelist, Professor Chip Pitts, highlighted that TNCs are very adept at creating subsidiaries and structuring their operations to avoid legal liability; thus if the treaty is to be applied only to TNCs instead of all businesses, it will be easy for the former to avoid accountability. However, **most states present argued in favor of only focusing on TNCs** because their nature often allows them to evade the jurisdiction of domestic courts. Meanwhile, there was general consensus on the question of which human rights should be encompassed by the treaty. **Both civil society actors and state representatives agreed that the treaty should cover all human rights,** including economic, social and cultural rights, rather than solely grave human rights abuses or crimes under international law.

[DPLF had the opportunity to give an oral presentation](#) on the extraterritorial obligations of states in the context of human rights violations committed by businesses. On July 8, during the session entitled *Obligations of states to guarantee the respect of human rights by TNCs and other business enterprises, including extraterritorial obligations*, we discussed the findings from our report on the [impact of Canadian mining in Latin America](#). DPLF noted that **patterns in home states which are conducive to the violation of human rights by corporations will continue without concrete action by the international community to ensure that states meet their extraterritorial obligations.** DPLF urged the IGWG to build upon the international standards already developed by various thematic rapporteurs and UN Committees with regard to these important state responsibilities in the context of transnational corporations and human rights.

Towards the end of the week there was a discussion on the appropriate standard for corporate legal liability. Panelists discussed the **variety of options available to treaty drafters, including the imposition of criminal, civil, and/or administrative responsibility for human rights violations by corporations, as well as whether the treaty should impose responsibility on natural persons and/or legal entities.** Several labor and human rights treaties, as well as national legislation from specific countries, were raised as points of references and possible models.

³ The text of the footnote reads: “‘Other business enterprises’ denotes all business enterprises that have a transnational character in their operational activities, and does not apply to local businesses registered in terms of relevant domestic law.”

The first session of the IGWG closed with the presentation and adoption of the report by the President-Chair of the session, Ecuadorean Ambassador María Fernanda Espinosa Garcés. The report recommends that the second session of the IGWG take place in 2016 and encourages governments, intergovernmental organizations, civil society, and other interested parties to participate in consultations with the President-Chair in the interim.

The real impact of civil society on this process remains to be seen. Despite the advances of the week, the controversy regarding the scope of the treaty remains, and this could hinder further progress. In the development of the agenda for the second session and in the intervening consultations it is **fundamental that states take into account the comments of civil society, including their concerns about access to remedy and other rights of victims**. DPLF will continue to report on this process as it unfolds.