

## **Submission to the United Nations open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights**

### **Concerning possible principles, scope and elements of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights**

**June 2015**

#### **Overview**

The Institute for Human Rights and Business (IHRB) appreciates the opportunity to provide input to the open-ended intergovernmental working group mandated to “elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises.”<sup>1</sup>

IHRB shares the views stated in UN Human Rights Council resolution 26/9 that, “States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including transnational corporations,” that, “transnational corporations and other business enterprises have a responsibility to respect human rights,” that, “civil society actors have an important and legitimate role in promoting corporate social responsibility, and in preventing, mitigating and seeking remedy for the adverse human rights impacts of transnational corporations and other business enterprises” and that, “transnational corporations and other business enterprises have the capacity to foster economic well-being, development, technological improvement and wealth” but also have the capacity to cause “adverse impacts on human rights.”<sup>2</sup>

IHRB believes greater accountability is needed for communities impacted negatively by activities of all companies and welcomes international efforts to fight impunity. This can and will likely be achieved through a variety of avenues. A new international legal framework could help protect victims as well as better ensure a level playing field for all businesses: transnational and local; large and small; publicly listed, state-owned or privately owned. This submission is intended to provide initial general views and recommendations for consideration by the intergovernmental working group in advance of its first session in July 2015. IHRB looks forward to learning more about the working group’s plans and would be pleased to respond to any questions and be involved in further dialogue on this important subject.

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<sup>1</sup> UN Human Rights Council resolution A/HRC/RES/26/9, 14 July 2014, paragraph 1.

<sup>2</sup> Ibid, preambular paragraphs.



## 1. Build on past successes and encourage ongoing efforts

IHRB believes that as the intergovernmental working group begins its activities, every effort must be made to learn from and build on the considerable progress of recent years by the Human Rights Council and the wider UN human rights system with respect to the subject of business and human rights. That progress is most notable in the context of the unanimous endorsement by the Council in 2011 of Guiding Principles to implement the UN “Protect, Respect and Remedy” framework on business and human rights developed by then Special Representative, Professor John Ruggie.<sup>3</sup> The UN Guiding Principles (UNGPs) affirm state duties concerning human rights abuses caused by or involving corporate actors and establish the responsibility of all business enterprises to respect human rights, setting out the clear expectation that this responsibility should be carried out through ongoing human rights due diligence processes. Equally important, the UNGPs stress the vital importance of access to effective remedies for victims of corporate related human rights abuses.

As member states will be aware, since their endorsement by the Council in 2011, significant efforts have been made to implement the UNGPs at all levels. The results of this ongoing work have been reported by the expert working group mandated to advance implementation of the UNGPs as well as the UN Office of High Commissioner for Human Rights (OHCHR).<sup>4</sup> A number of ongoing implementation efforts are noteworthy in this context, including the expert working group’s strong calls for and guidance concerning the development of national action plans to advance UNGPs implementation<sup>5</sup> as well as the OHCHR accountability and remedy project intended to make domestic judicial mechanisms more effective and accessible for victims of business related human rights abuses.<sup>6</sup>

While ongoing commitment to implementing the UNGPs by a wide range of actors is generally encouraging, progress remains far too slow and uneven, and capacity constraints make it difficult for some actors to take necessary measures to ensure implementation. IHRB encourages the intergovernmental working group to actively seek the views of the expert working group and OHCHR as well as other actors such as UN human rights treaty monitoring bodies, UN special procedures mechanisms as well as other actors with experience of the UNGPs, including in the context of the annual UN forum on business and human rights, in order to fully assess lessons and shortcomings in implementation efforts to date. Such consultations should reflect both on matters of substance, including any ongoing questions with respect to specific provisions of the UNGPs, as well as obstacles to effective implementation and how existing mechanisms such as the Council’s Universal Periodic Review process might more effectively address business related issues.

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<sup>3</sup> UN Human Rights Council resolution A/HRC/RES/17/4, 6 July 2011.

<sup>4</sup> See for example, report of the working group on the issue of human rights and transnational corporations and other business enterprises, A/HRC/26/25, 5 May 2014.

<sup>5</sup> See overview of state national action plans guidance and progress at:  
<http://www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx>

<sup>6</sup> See overview of OHCHR accountability and remedy project at:  
<http://www.ohchr.org/EN/Issues/Business/Pages/OverviewOfProjects.aspx>

The intergovernmental working group could also play a valuable role in encouraging more countries to adopt rigorous national actions plans on business and human rights and to fully support OHCHR's efforts to address accountability issues at national level, all of which will inform discussions on new legal standards which may be needed internationally. It is noteworthy that of the 47 members of the Human Rights Council, only a handful have taken steps to develop national action plans for implementing the UNGPs, and only a few additional countries not on the Council have done so.

## **2. Clarify aims of the intergovernmental working group's mandate**

Council resolution 26/9 mandates the new 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.”<sup>7</sup> The resolution, does not, however, indicate reasons why such an instrument is necessary, how the broad range of issues of relevance to the business and human rights agenda should be covered in a single or multiple instruments, or whether the proposed instrument would address itself only to actions of states or include specific actions states should take vis-à-vis business and whether the instrument(s) should apply to all business enterprises – transnational or not. These are all matters of critical importance, not only to the success of the current mandate, but also to all actors working to advance business respect for human rights outside the UN system. IHRB therefore recommends that in addition to building on ongoing UN efforts to advance implementation of the UNGPs as noted in point one above, the intergovernmental working group should dedicate its first sessions to clarifying member state views on such key foundational issues before turning to more specific questions of content or scope of any future instrument or instruments in this area.

Such a process would require, for example, further discussion of the UNGPs themselves, including whether any specific provisions would be seen as potentially forming the basis of broad agreement for new international legal standards. It would also require the intergovernmental working group to clarify how its efforts to ensure corporate respect for human rights through legally binding rules might usefully be part of and integrate with wider efforts, including at the ILO, the OECD, in regional forums and in numerous other settings. Such coordination is vital in constructing a more integrated body of international law and related arrangements over time that would most effectively ensure responsible business practices globally.

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<sup>7</sup> HRC Resolution 26/9, paragraph 1.

### **3. Establish a programme of work based on empirical evidence and inclusive consultation**

In order to maximize the chances of success, IHRB recommends that the intergovernmental working group begins its activities by stating clearly its commitment to an evidence-based process, including with respect to lessons learned from UNGPs implementation efforts to date. The working group could play an important initial role by advancing understanding of the range of possible approaches to developing new legal standards in this area. This could be achieved in part by calling for a review of legal options that might be pursued. This might involve commissioning further work by OHCHR to set out the variety of forms new legal instruments could take as well as highlighting existing relevant work in this respect such as a paper by Prof. Douglass Cassel of Notre Dame Law School and Prof. Anita Ramasastry of the University of Washington School of Law (Prof. Ramasastry is also an IHRB Senior Research Fellow). These legal experts have usefully set out some of the options that states should consider, including in the context of national action, international supervision and policy coherence among other issues.<sup>8</sup> The final products from OHCHR's ongoing accountability and remedy project when completed will also provide valuable evidence concerning the most common and pressing problems victims face in seeking access to remedy for corporate related rights abuses.

Another critical aspect of the programme of work ahead is to ensure an ongoing process that is transparent, inclusive and representative of the broad range of perspectives that exist on this issue. In this respect, the annual UN forum on business and human rights, with its policy of open participation and regional outreach is an important marker of good practice established by the Human Rights Council that the intergovernmental working group should follow and fully integrate as part of its work. As part of such efforts, the voices of human rights defenders as well as civil society groups that do not have UN ECOSOC status should be heard directly as part of the working group's sessions. Equally important, business representatives, not necessarily restricted by scale, size, ownership, reach, or membership in an association, as well as trade unionists and academics from all parts of the world, should be involved and adequately represented.

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<sup>8</sup> Cassel, D. / Ramasastry, A. 2015: White Paper: Options for a Treaty on Business and Human Rights, Prepared for the American Bar Association, Center for Human Rights and the Law Society of England and Wales, Human Rights Committee.