Strategic Reflections on the Treaty Process in 2015:
Where are we after July, and what should we do next?

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Reflecting on the first year of the coming into force of the UN Open-ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises (IGWG), and as we now look to the fourth UN Forum on Business and Human Rights, it is an opportune moment for civil society organisations (CSOs) to take stock of where we now stand, and what we should be considerate of as we plan for 2016.

It’s alive!

Perhaps the most remarkable take-away from the first year in the life of the IGWG is that the process is still alive!

There were moments during the IGWG’s first meeting in Geneva in early July, particularly at lunch on the first day, when many thought we would all be going home very early, with the process stalled at the start gate. That didn’t happen, as the objections to the IGWG’s meeting agenda raised by the delegation of the European Union were eventually overcome by the newly appointed and determined IGWG Chairperson, who is also the Ambassador of Ecuador to the UN in Geneva. So after the high-drama of a diplomatic stand-off spanning three hours, the substantive phase of the IGWG’s programme of work for the meeting began in earnest.

As the debates finally began on the first day many were relieved that the process would at least have the chance to finally discuss the substantive legal and procedural issues facing the operation of a binding international instrument to address corporate human rights violations. With the first meeting of the IGWG completed and the date for the second meeting set for 24-28 October next year, CSOs can draw much from what happened in 2015 as we plan for the important year ahead.

The force of a footnote

The first obvious observation is that States remain divided in their opinion of what the scope of a future binding international instrument should be. In a broader sense, the so-called ‘north-south’ divide that plays out in many debates at the UN Human Rights Council is seemingly alive and well in the IGWG process. The main opposition to the advance of the IGWG comes from the EU, with support from other ‘northern’ states such as the US.

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The EU’s stated objection to the programme of work for the first IGWG meeting was that the meeting did not focus on all business enterprises, but instead prioritized focus on the activities of transnational corporations. This directly echoes opposition shown a year earlier to the footnote that was included into the resolution which established the IGWG, Human Rights Council Resolution 26/9, from June 2014. This now famous 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”.

From a political perspective, and leaving aside the legal ramifications, many argue that with this limited scope for the treaty, which will likely result in EU and other states remaining disengaged from the process, will not produce a useful addition to the international normative standards in this area.

While this is debatable for several reasons there are some relevant things to say specific to this phase of reflection and planning. Firstly, this is only the first year of the IGWG’s activities, and it is expected this process will take many more, so we cannot yet know whether States from within the EU, or even the US, may yet engage. Representatives of the French, Swiss and US missions to the UN in Geneva were noticed at the Council, albeit seemingly as observers at this stage. There were nearly fifty other states present throughout the IGWG meetings, but more substantive contributions will be required from all states from all regions – notwithstanding the various inputs of Mexico, Ghana, China, and handful of others that came well prepared to this meeting – if the IGWG is able to make consistent progress over the coming years.

As with other initiatives at the Human Rights Council that have come before the IGWG, it is possible that states that are currently inactive in the IGWG process will become more actively engaged in the years to come. Shifting domestic political dynamics have the potential to alter the international priorities of states, and we’ll see whether if this factor changes the position of states toward the IGWG in the future.

How contentious the footnote remains is another important consideration. At present it certainly seems like the supporters of the footnote are resolute. In particular, Pakistan and Russia, supported by India, China and others, seem unmoved by suggestions to modify the footnote in Resolution 26/9. While they presently appear united in their desire to maintain the focus on transnational corporations, it is less clear whether those states all agree with each other’s interpretation of how any treaty would operate in accordance with the footnote.

So, while the political debates surrounding the footnote dominate at the moment, as the negotiations progress time will tell whether the legal ramifications of the footnote, beyond the present diplomatic

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dynamics, render the treaty unworkable or not. After all, there is also no certainty at all of what constitutes ‘transnationality’ in a legal sense. There are therefore many questions and scenarios for the footnote to contend with in practice. For example, will the treaty cover companies in the supply chain of transnational corporations? Will financiers of corporate operations be considered implicit in the activities of their corporate clients, for the purposes of establishing liability under the treaty? Etc.

At a more conceptual level there is also a question of how a footnote can be applied to a concept (i.e. a transnational corporation) that does not exist clearly in law. After all, corporations are not registered internationally. Transnational corporations are groups of national corporations, with component parts registered in different legal jurisdictions. In this sense, what actually is ‘transnational’? A principle question for civil society is whether or not a treaty focused on ‘transnationality’ can ensure that corporate entities are not able to restructure themselves so as to effectively avoid the treaty provisions once the it lays out what corporate structures it applies to and what it does not.

Everything old is new again

One promising sign from the discussions in Geneva was the beginning of a discourse about how traditional principles of international human rights law can influence directly the discussions about business impacts on human rights. In the years between 2005 and 2011 the debates in this area at the UN so often did not explicitly embrace an analysis of how the human rights principles of the tripartite obligations of states to respect, protect and fulfill human rights could be a framework for analyzing their duties in the context of business activities. In Geneva in July, in the first meeting of the IGWG, there were already mentions of the state duty to respect and protect in this context, as well as discussions of how the primacy of human rights can interplay with states’ priorities in other areas, particularly the implementation of trade and investment systems.

Many contributions in Geneva also reaffirmed the universality and interdependence of human rights, clearly indicating a preference for any future treaty to fully embrace economic, social and cultural rights, and not be restricted to dealing with so-called ‘gross’ human rights violations. Lastly, another important contribution to the debate in Geneva was the discussion about the potential application of extraterritorial obligations, and some important mentions of the value of the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights.

We’ll see in later years how this discourse evolves further, but the signs are promising from this first gathering of the IGWG that traditional human rights principles may have room in the operation of this IGWG to be creatively applied. The potential is present then for the development of new understandings of how human rights law principles can interact in the future negotiations in order to address corporate related human rights impacts. In this sense, it is a promising time for civil society organisations that apply strong human rights law analysis in their international advocacy.
What about the corporate sector?

In Geneva in July there were only a handful of corporate representatives at the IGWG meeting. The inputs that did come from the corporate sector stressed the role of states in the application of international human rights law, deflecting analysis from the role of corporations in the realization of human rights.

Coming into the meeting it might have been simplistically assumed that all in the corporate sector would be against the creation of a treaty. However, an Economist Intelligence Unit survey has introduced a welcome texture to this discussion. The survey was funded in part by the governments of Norway and the UK, as well as the International Chamber of Commerce and the International Organisation of Employers, and was undertaken by Mazars and the Global Business Initiative on Human Rights, among others. Eight hundred and fifty three senior executives, half of which are responsible for the human rights oversight in their company, took part in the survey.

Fifty seven percent of respondents indicated that a new legally-binding international treaty would be either slightly useful (32%) or very useful (25%) in helping them respect human rights. Only one percent more of respondents indicated the same for the UN Guiding Principles on Business and Human Rights.

One CEO was quoted as saying, “we need to move from voluntary compliance to something harder. I have a lot of respect for the Guiding Principles. They were no easy task [to achieve], but it is all a bit too voluntary”.

Eighty four percent of respondents disagreed with the statement that “respecting human rights is a matter for governments, not for business”, and seventy one percent disagreed with the statement that “the corporate responsibility to respect for human rights means only complying with relevant local laws”.3 There is obviously a danger in reading too much into surveys and statistics, but at the very least it is clear that the positions of corporations are not homogenous, and there may be corporate executives that have their own reasons for considering the creation of a treaty as beneficial to their operations. It would be interesting to further examine this discussion in 2016.

Civil society organisations have a key role to play and 2016 is a key year to continue showing it

Another key take-away from the IGWG meeting in Geneva is the significant influence of civil society organisations (CSOs) in this process. CSOs have been well coordinated in their support for the creation of a treaty for several years, and this was evident again in July. In the lead up to the IGWG meeting the Treaty Alliance again illustrated the measure of CSO support for the creation of a treaty when over one thousand signatories joined their

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second joint statement, after the first 2014 joint statement also garnered over a thousand signatories, from over ninety countries.

In Geneva over a hundred organisations were present at different points in the week, making their presence known inside the Palais, as well as outside with #OccupyUNSquare – a week of activities and mobilization in the square out the front of the main gates to the UN.

During the negotiations, at the key moment on the first morning of proceedings, reference was made several times to the ‘world watching’ the actions of the states inside the meeting, and the significant support from civil society for development of a binding international instrument. Beyond the moral force of CSOs strong presence, the substantive contributions from CSOs to the debate provided significant texture to the issues being debated, often complementing well the panel contributions and adding detail where states often lacked specificity in their statements.

CSOs will continue to play in integral role to the success of the IGWG, particularly when there is unity and coordination in the broad objective of creating an international instrument that provides effective means of remedy for affected people, and stronger means of preventing corporate-related human rights abuses.

On the evidence of the first IGWG meeting, with the lack of detail and specificity in many of the contributions of States, it will likely also to fall to CSOs and legal academics to provide leadership in illustrating how the treaty may innovatively overcome the many challenges facing an effective design for a treaty. The strong and coordinated civil society presence will be crucial also in generating the requisite political momentum to pass important provisions into the text of the treaty.

**Opportunities abound for CSOs**

2016 is a crucial year. It is widely anticipated that it is in 2016 that the leaders of the IGWG will look to formulate the basis for the outline of a draft text, before developing a more substantive draft to provide to the Human Rights Council in 2017.

It is in this context that the Treaty Initiative of the International Network on Economic, Social and Cultural Rights (ESCR-Net) and the International Federation for Human Rights (FIDH) will continue to facilitate the engagement of CSOs in all regions in the process towards advocating for a meaningful treaty that responds to the needs of those who understand first-hand the challenges of holding
corporations accountable. The Initiative brings together CSOs with legal academics to exchange perspectives on how a treaty could be designed to meet the needs of those affected, as well as providing the information required for CSOs everywhere to generate their own advocacy positions in Geneva, and in their national arenas.

Opportunities abound for CSOs at this critical stage. While 2016 provides a key chance for CSOs to influence the process of developing this treaty, there is also the opportunity in every region and country to leverage any attention that the treaty discussion receives to point the spotlight once again on the everyday struggles of communities facing corporate related human rights abuses. This ‘piggy back’ advocacy was undertaken effectively in Geneva by a community representative of people impacted by Brazilian company, Vale.

There are ample other opportunities as well to continue using the treaty advocacy spaces in Geneva, but also at regional and national level to continue putting pressure on companies for their local violations of human rights.

It is in this context that the treaty debates provides significant opportunities in all aspects of CSOs work in this area, and it’s a chance that must not be wasted after generations of activists and advocates have fought so hard to get this far.