

Towards a legally binding instrument on Business and Human Rights

*Intervention from Jerome Chaplier, ECCJ Coordinator,
at the European Parliament Event on the UN Treaty on Business and Human Rights,
organised by the S&D Group, 2 September 2015*

Today, a large, and constantly growing, coalition of civil society organisations from around the globe is calling for an internationally binding instrument. Over 400 organisations worldwide have signed on to the second statement of The Treaty Alliance; many of them were present in Geneva during the July UN meeting.

Why are we witnessing such a strong global call for a Treaty? And why is the Treaty important for victims of corporate abuse?

The global debate on Business and Human Rights has become very lively over the last decade, together with a proliferation of initiatives, progress has been made on the collective understanding of key issues.

But, unfortunately, governments still largely rely on voluntary, non-binding approaches, while very little has been achieved in regards to state protection against human rights violations by businesses. Some major accountability gaps have not been addressed, neither in domestic, regional or international law. Victims of human rights abuses have no more access to judicial remedies today than they did 5 years ago, particularly in a transnational context.

All over the world human rights abuses are still taking place at an alarming scale. Let's look at the record of big companies from three major European countries. A study released last year by our organisation, ECCJ, together with IPIS, collected allegations from 2005 to 2013 about adverse human rights impacts of 170 listed companies from the UK, France and Germany stock market indexes (FSTE100, CAC40 and DAX30). The findings speak for themselves: in the last decade around half the companies listed on these indexes have been named in human rights concerns, expressed by the media or non-governmental groups. The study again shows the ineffectiveness of companies' adherence to voluntary, non-enforceable standards: of the 90 listed companies identified in human rights-related concerns or allegations, 63 are members of the UN Global Compact.

Sadly, all over the world, environmental and human rights defenders are still paying the price for their activism: they are victims of intimidation, persecution, violence and crime. In many countries their situation has yet to improve, while in others it has actually worsened.

Some of the main driving factors in the adoption of the resolution establishing the treaty process were the governments' admittance that the international system remains blind to

the lack of accountability of unscrupulous companies, the lack of progress in access to justice, the contrast between rights of investors and rights of affected people, and the imbalances of power between corporations on the one hand, and communities, as well as several States, on the other.

A question is often raised: we have the United Nations Guiding Principles (UNGPs) do we really need a new global instrument?

It is widely recognized that the adoption of the UNGPs in 2011 was an important step forward. It helped to move the debate from *why* we are placing human rights responsibilities on companies to *how* these responsibilities should be installed and by which means will States ensure this happens. The UNGPs offer unique opportunities for States to address existing issues and develop action plans, and civil society has been calling for their robust implementation – but they have their inherent limits. Although they contain principles and duties rooted in international human rights law, the UNGPs remain a voluntary instrument, not binding on either States or companies. Affected individuals or communities seeking to defend their rights against a company cannot rely on the UNGPs for protection or for remedy. And today we can clearly see that the UNGPs do not seem to trigger effective state action in order to close these accountability gaps.

The most serious human rights violations relate to companies' activities outside European borders, where victims are too often powerless and not able to defend their rights. How many of them managed to have their problems adequately addressed via the available weak, non-judicial grievance mechanisms? How many victims have made it to a court room? The answers to these questions are both worrying and shameful.

Currently, for a victim to access judicial remedy in transnational cases they have to face a major jurisdictional challenge, take on the added impediment of living in states with weak governance and lack of independent justice, go against the complex corporate structures of multinational corporations separated in multiple legal entities with limited liability, and finally overcome great practical and financial barriers.

Some say the time has come for a robust, legally binding instrument which addresses some of the problems these victims still face – well, this instrument is actually long overdue.

As Prof Ruggie, the person behind the UNGPs, stated: “The UNGPs are a floor, not a ceiling”. The UN Human Rights Council adopted them without prejudice to any future initiatives, such as a relevant, comprehensive international framework. The European Union also stated that the UNGPs don't exclude further legal developments.

Therefore, a binding instrument is complementary with the much-needed governmental and corporate efforts to implement the UNGPs. Further Treaty discussions should build on the progress made possible by the UNGPs, while seeking to overcome their inherent shortcomings and protection gaps and without being a substitute to their implementation in national and regional frameworks.

How is the EU engaging in this process?

The EU and its Member States must be the frontrunners in the Business & Human Rights debate they claim to be – and on some occasions have even proved to be. Over the last years, Europe has shown leadership in enhancing corporate transparency (EU directive on Non-Financial Reporting, UK Modern Slavery Bill), in embedding Human Rights Due Diligence principles in a few policies and legislations (Non-Financial Reporting, EU conflict minerals regulation or the French duty of vigilance Bill), in renewing its approach to CSR in line with the UNGPs, in encouraging the development of National Action Plans for UNGPs implementation (though only a disappointing seven have been released so far), in issuing guidance for specific economic sectors and for SMEs.

The EU has made many public commitments to advancing human rights protection in the context of business activities and across its policies – recently in the EU Action Plan on Human Rights and Democracy – but does the EU really walk the talk? Do the EU and Member States really deliver meaningful change to make business accountable to society?

Our assessment is that the EU's track record is, unfortunately, poor and its approach fragmented and lacking in ambition. There is a need for leadership from and within the Commission. The issue of Access to Remedies has received very little consideration from the EU and Member States. National Action Plans have little substance when it comes to accountability and remedy. The recent initiatives on conflict minerals or textiles show how the Commission still relies on old voluntary recipes instead of binding rules. And we are afraid that the forthcoming new CSR strategy might follow the same path.

Not only are the EU and Member States currently failing to turn their business and human rights commitments into action, they also refused to engage constructively in the UN Treaty process at the IGWG meeting last July. In Geneva, only 9 out of 28 Member States joined the EU delegation on the first day. They created broad discontent when they delayed the debate process by putting two new conditions on the table while discussing the work plan. The first condition was to place greater emphasis on the UNGPs, and the Chair accepted to have it reflected in the work plan. The second was that the future instrument should apply to local businesses as well and not only transnational corporations or other businesses with a transnational character. This demand was highly political and predictably going to cause strong divisions between the states present. It has to be said that many civil society organisations and experts actually support the validity of EU's comment on enlarging the Treaty's scope. But the fact that the EU raised this concern as a pre-condition rather than in the session specially dedicated to the issue of scope, made it look like a manoeuvre to derail the process. To make matters worse, the EU remained silent during the following discussions on the Treaty's substance, and finally left the room on day two. This choice of action was considered by many present in Geneva as outrageously deconstructive.

It is difficult not to interpret the July chain of events as a negative signal from the EU, spelling out that economic interests prevail over human rights, when a week after leaving

the room in Geneva, the EU repeated its eagerness to conclude negotiations on the TTIP and its mechanisms aimed at protecting companies and investors.

We believe that those whose rights are violated by European companies deserve more than an EU 'empty chair policy'. The EU has been a strong advocate of human rights defenders in the past at the UN HRC. The world needs the EU to show leadership once again and push for progress rather than obstruct the process.

Members of the Treaty Alliance from India and Colombia highlighted the contradiction between the EU always talking about human rights and human rights defenders in their countries, and then giving the impression of not being interested in the Treaty. This proves that the EU's external credibility on human rights issues is also at stake here.

Conclusions and next steps

The next steps which we believe need to be taken towards a binding UN instrument on Business and Human Rights require global action and involve the EU, its institutions and Member States working together with national governments all around the world, and an open and democratic Treaty process that includes and consults with civil society organisations and victims of irresponsible business behaviour.

Firstly, when it comes to protecting companies' rights and their interests, states do not shy away from instating new law, signing free trade agreements and investment treaties, recognising arbitration tribunals and adopting strong enforcement mechanisms – it is time to be bold and set up a robust international legal instrument that protects people's rights as well.

Secondly, if the EU is serious about its commitment to protecting human rights, they must show they are engaging in the process in good faith. They must demonstrate political will. There are pending issues regarding the content of the Treaty and they will be defined by those who decide to engage constructively in the process. Concurrently, the EU and Member States must not use the global Treaty process to deprioritize the agenda setting process at home towards ambitious legislative and regulatory action at national and EU levels.

Thirdly, civil society organisations should be seen as a key partner in the process, as they have a crucial role in speaking for those affected and bringing forth first-hand experiences and an in-depth analysis of the shortcomings of existing mechanisms and of ways to overcome them. The relevance and quality of the contributions they made to the Geneva debate has been acknowledged by many state delegations present.

ECCJ would like to make a call to action to the European Parliament, to the Members of Parliament present at the S&D seminar on the UN Treaty on 2 September 2015, and to the Members of DROI and other relevant EP Committees:

1. We suggest you continue to monitor the debate in Geneva and the position of the EEAS and the EU permanent mission at the UN, as well as the position of the European

Commission. We encourage you to engage in the UN HRC session in March, where the Treaty will surely be discussed, and join the second IGWG session in 2016. You could also encourage your colleagues in national Parliaments to be aware of this process and the opportunities it offers.

2. Please ensure that there is a formal support of the Treaty from the European Parliament. In 2015, the European Parliament adopted a resolution, calling on EU and Member States to engage in a constructive way in the IGWG. This resolution was referenced in several interventions during the IGWG session. A similar action now would send the warning that the EU has ignored the Parliament's call and decided to disengage from the Treaty process, and show that there are a multitude of voices within the Union.

3. The European Parliament could also organise a Parliamentary hearing, involving all MEPs, on the question of the current international legislative gaps and on how the Treaty could help overcome them. At the same time, the European Parliament could also commission a report on this subject.

As stated many times in Geneva, without the EU it will be very challenging to adopt a strong Treaty that would have a broad impact and bring real systemic change. The global civil society needs to have the European Parliament, Commission and Member States on its side.

Our European coalition and the members the Treaty Alliance are looking forward to working together with the European Parliament on these issues.

The European Coalition for Corporate Justice gathers members from 15 European countries, and is a member of the Treaty Alliance, a global movement campaigning for the adoption of a UN legally binding instrument on Business and Human Rights.