



OCTOBER 2018

## **A DIVERSIONARY TACTIC**

THE EUROPEAN UNION IN THE UN TREATY NEGOTIATIONS  
ON TRANSNATIONAL CORPORATIONS AND HUMAN RIGHTS





*“So many of us lost limbs or came out of it handicapped. But now everyone has forgotten both us and the disaster. None of us wanted to enter the workshop that day. They forced us to work despite the cracks that had appeared in the pillars the previous day. Five years have passed and no one has been tried or punished”.*

Nilufer Begum, victim of the collapse of the Rana Plaza textile factory in Bangladesh on 24 April 2013

## Multinational corporations and human rights

On 26 June 2014, the United Nations Human Rights Council passed Resolution 26/9 providing for an intergovernmental working group “in order to draw up an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises”.

This resolution is crucial to resolving a major flaw in the international system. Indeed, many companies whose operations have a transnational character (hereinafter “transnational corporations”) are implicated in crimes and in human-rights and environmental violations. Yet, they generally avoid prosecution because of the complexity of their legal structure and the absence of effective legal mechanisms internationally.

Industrial disasters, environmental destruction and the scandals that make newspaper headlines are frequently followed by long legal battles in which the victims often vainly attempt to obtain compensation from the transnational corporations, which refuse any responsibility in the occurrence of this damage and throw the blame on their subsidiaries or subcontractors abroad. Such denials of justice are numerous, from Bhopal to Rana Plaza and the emblematic cases of the Probo Koala or of oil exploration in Nigeria and Ecuador. They shed harsh light on the impunity with which the big transnational corporations operate<sup>1</sup>.

According to a group of experts mandated by the UN,

*“‘Impunity’ means the impossibility, de jure or de facto, of bringing the perpetrators of violations to account – whether in criminal, civil, administrative or disciplinary proceedings – since they are not subject to any inquiry that might lead to their being accused, arrested, tried and, if found guilty, sentenced to appropriate penalties, and to making reparations to their victims”<sup>2</sup>.*

During the 1970s, the UN began a process to put an end to this impunity and to make transnational corporations accountable for their impacts on human rights and on the environment before national or international courts<sup>3</sup>. However, the work carried out by the United Nations Centre on Transnational Corporations between 1974 and 1992, and by the Sub-Commission on the Promotion and Protection of Human Rights between 1998 and 2003 stirred up such an outcry among the OECD Member States and the main international employers’ organisations, that no legally binding international instrument was adopted following their respective efforts.

As a result, many non-governmental organisations and social movements took action around the turn of the millennium to demand that governments agree to a new legal regime capable of making transnational corporations accountable for their acts before national and international courts endowed with effective sanctioning powers<sup>4</sup>.

1 Melik Özden, *Impunité des sociétés transnationales* (Geneva: CETIM, 2016).

2 Diane Orentlicher, *Updated Set of principles for the protection and promotion of human rights through action to combat impunity*. (Geneva: UN Human Rights Council, 8 February 2005), 6.

3 Swann Bommier and Cécile Renouard, *L’entreprise comme commun. Au-delà de la RSE* (Paris: Editions Charles Léopold Mayer, 2018).

4 Peter Utting, “The Struggle for Corporate Accountability”, *Development and Change* 39, No. 6 (2008): 959-75.

Against this backdrop, UN Secretary-General Kofi Annan named Prof. John Ruggie “Special Representative on human rights and transnational corporations and other business enterprises” in 2005. After three years of research and consultations, John Ruggie published *Protect, Respect and Remedy*<sup>5</sup>, a key report that proposed founding regulation of transnational corporations based on three complementary pillars:

1. Duty to protect is the State’s responsibility when third parties, including companies, infringe human rights.
2. Corporations are responsible for respecting human rights.
3. More effective access to compensation measures through judicial and non-judicial mechanisms is necessary.

In 2011, these three principles were unanimously adopted by the Human Rights Council as the United Nations Guiding Principles on Business and Human Rights. They attested to an international consensus on these issues, and in the months that followed revisions were made to the OECD Guidelines for Multinational Enterprises, the European Commission’s definition of corporate social responsibility, and the tripartite declaration of the International Labour Organization, so that they aligned with this new normative framework.

The second pillar was the basis for the adoption of the Modern Slavery Act in the United Kingdom in 2015, and the Law on Duty of Vigilance in France in 2017. The third pillar, and especially John Ruggie’s observation of difficulties in which “claimants face a denial of justice in a host State and cannot access home State courts regardless of the merits of the claim”<sup>6</sup>, was the basis for the 2014 proposal by Ecuador and South Africa to the UN Human Rights Council for a draft resolution calling for the drawing up of a legally binding instrument on transnational corporations and human rights.

The intergovernmental working group established by the adoption of this resolution thus became part of decades-long UN process, in which many States, backed up by thousands of civil-society organisations and movements, have been seeking to make corporations whose operations are transnational in nature accountable for their acts and for their inaction in preventing and repairing violations to human rights and the environment throughout their value chain.

However, it must be recognised that, since the creation of this intergovernmental working group, the Member States of the European Union and the European Union itself, via its European External Action Service (EEAS) have – despite their declarations in favour of human rights – failed in supporting this historic negotiation process.

## **The European Union in the negotiations of the intergovernmental working group**

First of all, on 26 June 2014, all the European countries with seats on the Council voted – along with the United States, Japan and Korea – against the draft resolution of Ecuador and South Africa. The ambassador of Italy, speaking on behalf of the European Union Member States, justified their opposition by describing the resolution as an attack against the United Nations Guiding Principles, stating that “If the resolution was adopted, it would divide the Council in the years to come”<sup>7</sup>. The European Union thus refused to consider that an international treaty can constrain the operations of transnational corporations in the name of human rights.

Even though the resolution was finally adopted thanks to 20 favourable votes by developing

<sup>5</sup> John Ruggie, “Protect, Respect and Remedy”: a Framework for Business and Human Rights (Geneva: UN Human Rights Council, 7 April 2008).

<sup>6</sup> John Ruggie, Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework. (Geneva: Human Rights Council, 21 March 2011), para. 26.

<sup>7</sup> UN Human Rights Council, Action on the Resolution on the Elaboration of an International Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights (Geneva: UN Human Rights Council, 26 June 2014), <https://bit.ly/2P4Mj15>

countries and 13 abstentions, the European Union has not given its support to this working group since then. On the contrary, during the three working sessions of 2015, 2016 and 2017, and during the five informal consultations held between 17 May and 17 July 2018, the European Union constantly put into question the mandate of the intergovernmental working group and set it against the United Nations Guiding Principles. It did so even though John Ruggie stated from 2008 that the national and international judiciary initiatives must be jointly studied:

*“Judicial mechanisms are often under-equipped to provide effective remedies for victims of corporate abuse [...] States should address obstacles to access to justice, including for foreign plaintiffs—especially where alleged abuses reach the level of widespread and systematic human rights violations [...] [The foregoing] also reflects intended and unintended limitations in the competence and coverage of existing mechanisms. Consequently, some actors have proposed the creation of a global ombudsman function that could receive and handle complaints”<sup>8</sup>.*

Despite the fact that the United Nations Guiding Principles and the intergovernmental working group are complementary to each other, the European Union does not recognise the legitimacy and relevance of the latter, and it boycotted the group’s first session held in October 2015. Only France attended, as an “observer”. In 2016, the European Union and its Member States finally attended the sessions, but participated only marginally. The following year, in October 2017, the European Union finally spoke up during the substantive discussions. Nonetheless, with more than 100 country delegations participating in the discussions, and with debates that take shape and that would make the publication of an initial draft treaty plausible, the European Union attempted to put an end to the working group during the closing session. Indeed, even though the mandate given by Resolution 26/9 of 26 June 2014 was for an “open-ended intergovernmental working group” with the set objective of drafting a legally binding instrument, the European Union claimed that a new resolution was required to engage in substantive negotiations. In a very tense atmosphere, the working group concluded its third working session of October 2017 by calling for a series of informal consultations in order to help the Ecuadorian chair make headway in publishing an initial version of the treaty:

*“the Chair-Rapporteur should present a draft legally binding instrument on transnational corporations and other business enterprises with respect to human rights, on the basis of the contributions from States and other relevant stakeholders, at least four months before the fourth session of the Working Group, for substantive negotiations during its fourth and upcoming annual sessions until the fulfilment of its mandate [...] The Working Group requested the Chair-Rapporteur to undertake informal consultations with States and other relevant stakeholders on the way forward on the elaboration of a legally binding instrument pursuant to the mandate of resolution 26/9”<sup>9</sup>.*

Despite these conclusions by the Chair-Rapporteur and the working group, the European Union re-entered the fray one month later during the budgetary discussions held in New York with regard to the 2018-2019 programme. On 2 November 2017, it put into question, in writing, the holding of the fourth work session planned for October 2018, explaining that

*“it is our understanding that resolution 26/9 of the HRC only foresees the servicing of three sessions of the open-ended intergovernmental working group”<sup>10</sup>.*

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8 Ruggie, “Protect, Respect and Remedy”: a Framework for Business and Human Rights”, para. 88-91.

9 UN Human Rights Council, Report on the third session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights. (Geneva: UN Human Rights Council, 27 October 2017).

10 UN General Assembly, Agenda item 136 Proposed programme budget for the biennium 2018-2019 (New York: UNGA, 2 November 2017), para. 8.

The UN services then gave an explicit reminder that the resolution sought “to establish an open-ended intergovernmental working group” and that “no further action is required in respect of the working group’s resources, given the perennial nature of the mandate”<sup>11</sup>.

Against this backdrop, and in order to implement the resolutions made by the intergovernmental working group in late October 2017, the Ecuadorian chair convened all the stakeholders to the intergovernmental working group (States, UN specialised agencies, international organisations and non-governmental organisations with consultative status with the UN Economic and Social Council) to a series of informal consultations in order to better identify the points of convergence and tension among the stakeholders in the negotiation on various legal points. This was done with a view of publishing an initial version of the legally binding instrument prior to the work session scheduled to be held in October 2018.

However, during the first informal consultation held on 17 May 2018 at the Palais des Nations in Geneva, the European Union, through the mouthpiece of one of its diplomats from the European External Action Service, again attacked the legitimacy of the process and unabashedly adopted a diversionary tactic. While the chair of the intergovernmental working group wished to gather opinions on the legal stipulations of the treaty being drafted, the European Union representative questioned the working group’s mandate and gave an outline of the criticisms that would come up in the following informal consultations, by simultaneously questioning the legitimacy of:

1. the Ecuadorian chair of the working group
2. the working group in relation to the United Nations Guiding Principles
3. the binding nature of the treaty, and
4. its method of operating through intergovernmental negotiation.

Following this virulent attack against the intergovernmental working group, its chair, its mandate and its way of operating, the European Union boycotted the second informal consultation of 25 May 2018, considering that, by continuing the legal consultations on the content of the treaty in the process of being drafted, the Ecuadorian chair did not respond to its questions about the very mandate of the working group.

Three weeks later, during the third informal consultation on 14 June 2018, the European Union returned to the discussions and, after having remained silent during the whole session, took the floor during the final minutes to repeat its criticisms. The solution advocated by the European Union was to go back to the Human Rights Council in order to have a new resolution on a new mandate adopted, and to recognise the primacy of the work having to do with the United Nations Guiding Principles, which, as the “authoritative framework in this field”, should be given priority.

In response, the representative from Namibia, before the closing of the session, stated that it was no longer the time for prevarications or for putting issues dealt with four years ago back on the table, but rather for substantive legal discussions with a view towards publishing a first draft of the treaty.

Following this meeting, in a memo written on 6 July 2018, the European Union requested that the Ecuadorian chair organise an additional informal consultation devoted specifically to defining the negotiation process.

As a sign of good faith, the Ecuadorian chair thus announced, during the fourth informal consultation on 11 July 2018, that, at the request of the European Union, an extra informal consultation would be held the following week so that the States could exchange their points of view on how to hold the fourth work session planned for 15–19 October 2018 in Geneva.

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11 Emphasised in the text of the official document, UN General Assembly, para. 8.1.

Ecuador also announced that an initial version of the treaty should be published in the coming days, in order to give the various States and stakeholders in the negotiation time to prepare the upcoming session in October.

The European Union representative then took the floor, repeated his criticisms, and, unexpectedly, protested in the strongest manner against the fact that the chair of the working group had announced the imminent publication of a first draft of a legally binding instrument – in accordance with the mandate set by the working group following the previous negotiation session of October 2017 – and the holding of the negotiation session of October 2018, even though the States had not yet been heard regarding the programme of work. The diplomat of the European External Action Service put forward the following questions:

*“On the 6th of July, towards the end of the last session of the Human Rights Council, we had the permanent mission of Ecuador announcing that the 4th session of the IGWG could be, would be convened on the 15th or the 19th of October, and we heard that this was announced again today, in introduction for this consultation. And here we have two questions. Isn't there a risk that announcing dates could prejudice the outcome of the consultations on process? Isn't it more logical to first find agreement on the way forward on process before announcing dates for the 4th session of the IGWG? I have some more remarks, but I'll leave that for later stage, thank you”.*

The stakeholders at the consultation interpreted these as rhetorical questions seeking not only to discredit the approach of transparency and good faith shown by the working group's chair, who had undertaken to hold a fifth informal consultation, but also to directly attack his work and his mandate, as defined by the Human Rights Council and the United Nations High Commissioner for Human Rights – these two UN bodies that had included the holding of this fourth work session in the agenda for months. In an electric atmosphere, the Ecuadorian ambassador chairing the session replied:

*“The mandate of the resolution 26/9 has not foreseen only three meetings, it foresees a mandate clearly stated that we have a substantive negotiation beginning in the fourth session. My understanding after the approval of the report by the Council of HR is that we have a very clear guideline to proceed with it. [...] On a procedural basis, I would like to hear everyone, but I don't like to be bullied either”.*

The consultation continued in a tense atmosphere, with the OECD Member States present and Russia openly supporting the European Union's diversionary tactic, while many developing countries flew to the rescue of the chair in order to reiterate their support to this intergovernmental working group and to the drawing up of a legally binding treaty on transnational corporations and human rights.

Having observed over the previous month and a half the obstructive attitude of the European Union during these various consultations, and with the desire to mobilise European civil society in order to publicly show the disagreement among European non-governmental organisations with this diversionary tactic, CCFD-Terre Solidaire, which had written an open letter, took the floor on behalf of 36 associations and European trade unions “to examine these aspects and to study the initial version of the treaty that will be published by Ecuador, and to do so with a constructive approach that prevails over the unproductive debates seeking to attack the legitimacy of this historic process”<sup>12</sup>.

In this respect, the diversionary tactic adopted by the European Union for nearly two months was successful: the discussions on matters supposedly resolved since the adoption, four years ago, of Resolution 26/9 became polarised and prevented the States from developing their points of view on substantive legal aspects in a spirit of collective deliberation.

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<sup>12</sup> Regarding this, see the CCFD-Terre Solidaire web page “Que font les Etats membres de l'Union européenne à l'Onu pour mettre fin à l'impunité des multinationales ?” (Paris: CCFD-Terre Solidaire, 12 July 2018), <https://bit.ly/2NhwNx1>

During the extra informal consultation held at its request on 17 July 2018, the European Union released a final round of criticisms before the October 2018 negotiations. In addition to the recurring criticisms put forward during the previous consultations, the European External Action Service diplomat requested, in the name of the 28 Member States of the European Union, that a new process of negotiation be established through a new Human Rights Council resolution:

*“We could envisage a resolution of the Human Rights Council mandating a group of eminent legal experts to consult States and all stakeholders (including civil society, trade unions and business) with a view of producing draft options for a legally binding instrument to be presented at the Council after one year. It could build on the discussions held and documents produced during the three sessions of the Intergovernmental Working Group. Once the report of the group of eminent legal experts is presented to the Council, the Human Rights Council would then decide on the best format to continue the discussion - resuming an Intergovernmental Working Group or deciding on another format to pursue the agenda. We hope that one of these two proposals can be considered favourably as a way to allow for meaningful progress towards a possible legally binding instrument”.*

Hence, the European Union, after two months of meetings among the various stakeholders in this intergovernmental working group, did not budge from its fundamental opposition voiced from the time of the vote on Resolution 26/9 in the summer of 2014. It requested a new resolution from the Human Rights Council and a negotiation process steered in a supposedly apolitical way by “experts”, thereby indefinitely postponing the holding of the intergovernmental negotiations required for the adoption of any new UN treaty.

Despite this setback, the Ecuadorian chair stood firm and on 20 July 2018 uploaded a first draft of a legally binding instrument<sup>13</sup>. This represented a historic step, as it was the first time, since the founding of the United Nations Centre on Transnational Corporations in 1974, that the States found themselves faced, within the framework of intergovernmental negotiations, with a draft binding treaty on transnational corporations and human rights.

In order to support the Ecuadorian chair at this historic moment, various UN and non-governmental organisations publicly declared their support for the intergovernmental working group in the face of pressure and criticisms from the European Union and the OECD Member Countries. During the autumn session of the Human Rights Council on 18 September 2018, the European Union made a new attack against how the intergovernmental working group operates. Following this, the non-governmental organisations and social movements that are members of the Treaty Alliance published a press release to “call on the EU and its allied States to cease with this action and instead engage constructively in the process to develop a powerful binding instrument that protects affected people everywhere”<sup>14</sup>. On 20 September 2018, at an event held by Ecuador during the Human Rights Council session, the United Nations Deputy High Commissioner for Human Rights, Kate Gilmore, officially reiterated that

*“As the office of the High Commissioner for Human Rights we welcome this work and the prospects of such a treaty as a tangible and authoritative bolstering of and complement to the UN Guiding Principles on Business and Human Rights. [...] These are companion efforts – not mutually exclusive but mutually reinforcing. Both the letter and spirit of the UN Guiding Principles anticipates relevant, meaningful legal developments at the international, regional and national levels so that protection against business related human rights abuses is better assured”<sup>15</sup>.*

<sup>13</sup> Consult this document on the website of the Office of the UN High Commissioner for Human Rights: <https://bit.ly/2Ly1nT0>

<sup>14</sup> Treaty Alliance, Treaty Alliance calls on EU states not to frustrate binding treaty on business & human rights process, 18 September 2018.

<sup>15</sup> Kate Gilmore, UN Deputy High Commissioner for Human Rights, side event on the “Update on the progress towards the effective fulfilment of the mandate of resolution 26/9 through the preparation for the 4th session of the OEIGWG” (Geneva: UN Human Rights Council, 20 September 2018).

All the while recognising the incongruity of the situation, Kate Gilmore directly attacked the opponents of this negotiation process, hoping to put a conclusive end to the repeated attacks made by the OECD Member States, and the European Union in particular:

*“given the mutuality of these efforts, and to preserve the integrity of the streams of work to challenge business to step up to rights, we have to guard against detractors [...] It is just a little odd for me to speak on this so please forgive me if you find my expression in any way out of keeping with your expectations. However, we would like to convey respectfully our deep appreciation for the leadership of Ecuador and of others involved in this complex process, and urge all stakeholders to engage as constructively and collaboratively as possible specifically in the lead-up to and during the forthcoming session where we hope procedural and substantive challenges may be resolved”<sup>16</sup>.*

While this document is being published, and despite this unequivocal support from the highest UN bodies in charge of human rights for the drafting of a legally binding instrument, our allies in Brussels and in various European capitals inform us that the European Union and its European External Action Service, which operates by consensus, has not yet officially agreed on its participation in the negotiation session which will start in a few days at the Palais des Nations in Geneva.

Given these circumstances, it is necessary to step outside the UN and European diplomacy framework. We can indeed see that while the diplomats of the European External Action Service are focusing their efforts on obstructive diversionary tactics, European Parliament has already adopted nine resolutions in favour of the UN treaty<sup>17</sup>. And, most importantly, while the European Member States are taking cover behind the actions of the European External Action Service within the UN framework, they still have full sovereignty and authority to engage in negotiations in their own name. In fact, the European Union has received no official mandate from its 28 Member States to negotiate and ratify this treaty in their name.

In that case, what can we expect from France? Does the French government accept that the European External Action Service take such positions, in its name, with regards to the efforts made since 2014 to put an end to the impunity of transnational corporations and to bring about a legally binding instrument on transnational corporations and human rights?

### **The moment of truth for France?**

These questions are all the more relevant because of France’s special status and responsibility in the discussions on regulating transnational corporations, ever since its National Assembly adopted the Law on Duty of Vigilance on 27 March 2017.

This special status of France in the intergovernmental working group becomes clear when we note that it’s the same person who brought the legislative draft for the Law on Duty of Vigilance before the French National Assembly between 2013 and 2017 – the MP Dominique Potier – who, at the invitation of the chair of the working group, opened the third session of the intergovernmental working group on 23 October 2017 as main speaker alongside the Ecuadorian Minister of Foreign Affairs, Maria Fernanda Espinosa.

We have seen, with the 20 July 2018 publication of a first draft of a legally binding treaty, that the efforts of the working group have entered into a historic phase. This first treaty draft was hailed with enthusiasm and relief by the non-governmental organisations and social movements that have been mobilised for years on these issues within the Treaty Alliance and the Global Campaign<sup>18</sup>.

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16 Kate Gilmore, UN Deputy High Commissioner for Human Rights.

17 See, for example, EU Parliament Resolution on the EU’s input to a UN Binding Instrument on transnational corporations and other business enterprises with transnational characteristics with respect to human rights (Brussels: European Parliament, 2 October 2018), <http://bit.ly/2Rochhw>

18 Global Campaign, Open letter to the Member States of the United Nations regarding the publication of the “zero draft” text for negotiation (Global Campaign to dismantle corporate power, August 2018), <https://bit.ly/201pbEs>

However, the Ecuadorian chair of the working group has distanced himself from a certain number of demands made by civil society in recent years and has accepted a certain number of criticisms made by his opponents in order to propose an initial version acceptable to all the stakeholders in the negotiations.

While a long road still lies ahead for the non-governmental organisations and social movements in order to clarify various aspects of this first treaty draft and to improve it as much as possible, this draft version does show the European Union and its Member States that the Ecuadorian chair is trying – in good faith and in accordance with his mandate – to enable the negotiations to move forward while taking into account different points of view, so that the negotiations lead to a legal instrument that can be ratified with broad agreement.

Given the indications for compromise made to the States by the chair of the working group, and given France's special position in the group since its Law on Duty of Vigilance was adopted in 2017, France must assume its responsibilities and commit itself constructively to the substantive negotiations. The public statements made by cabinet members and various speeches by the French president corroborate this.

Indeed, during the parliamentary debates on 17 October 2017, and in response to a question by the MP Dominique Potier, the Minister of Foreign Affairs Jean-Yves Le Drian confirmed France's determination to see this draft treaty come to a successful conclusion:

*"In these discussions, France will contribute a constructive and pragmatic approach. It will look for solutions that guarantee a fair and universal implementation of norms at the international level in order to avoid that our businesses alone assume extra obligations. But we have things to say because, and you just mentioned it, our law of 27 March 2017, of which you are the originator, made it possible to extend the legal responsibility of multinationals to human rights violations in the entire sphere of influence and in particular in the subcontracting chains of multinationals, be it on national territory or not. It's a benchmark, and because of this France will be very determined to make sure this treaty proposal can be activated and considered by the United Nations"<sup>19</sup>.*

A few days later, in an open letter addressed to the French president, 245 French MPs from the majority and the opposition parties called on the president to commit the French government to "a treaty proposal and to assume leadership of this fight within the European Community"<sup>20</sup>.

More recently, during the Conference of Ambassadors held in Paris on 27 August 2018, President Emmanuel Macron made a strong appeal in favour of adopting new international rules to correct the "social aberrations" of contemporary globalisation:

*"I believe that our world order can be significantly better regulated with respect to social affairs. And I think that the 100th anniversary of the ILO in 2019 should allow us to go further and to set ourselves a new goal. Wherever globalisation is criticised, it is these social aberrations that are attacked. The working classes and the middle classes, in the United Kingdom, and in the United States, as well as in our country, are criticising the fact that they are being left behind, that this order has led to the inequalities that I just mentioned, which are no longer tenable. We should therefore think not in terms of one group pitted against another, but develop, as we have in other areas, opportunities for international cooperation, that can help us define common standards; we should therefore think in terms of bringing together the willing, encouraging cooperation among everyone?"<sup>21</sup>.*

19 See the full video at: <https://bit.ly/2FlfM1Z>

20 See the article and open letter "Responsabilité sociale des entreprises: 245 parlementaires veulent voir Macron faire bouger l'Europe" on the Libération website, 26 October 2017, <https://bit.ly/2NiZFFv>

21 See the speech by the French president to the Conference of Ambassadors on 27 August 2018, at <http://bit.ly/2D-VIABL>

Yet, despite these public stands in favour of the intergovernmental working group and of a multilateralism concerned with protecting global common goods and with building new international norms<sup>22</sup>, and despite the adoption of the French Law on Duty of Vigilance, many obstacles remain:

- First of all, we can see that France did not exercise its veto with regard to the European Union continuing obstructive and unabashed diversionary tactics during the five informal consultations held between May and July 2018 in Geneva. Nor did the French diplomats making up the permanent French delegation to the UN in Geneva consider it proper to temper the scathing criticisms made by the European External Action Service diplomats during the many consultations.
- Next, the discussions within the Plateforme RSE, the French multi-stakeholders consultative body on CSR issues advising the French prime minister, showed that the French administration is very reluctant about expanding favourable statements on the intergovernmental working group. For example, in early September 2018, CCFD-Terre Solidaire proposed that the working group working on the linkage between CSR and the Sustainable Development Goals issue a proposal indicating that France shall “actively support the UN negotiations on drawing up an international legally binding instrument on transnational corporations and other business enterprises and human rights in order to facilitate access to justice and the creation of inclusive societies, in accordance with SDG 16”<sup>23</sup>. However, it should be noted that, during the following meetings, one ministry strongly opposed to such a recommendation and did not want the Plateforme RSE to explicitly commit the government in this direction, contrary to the public declarations of Minister of Foreign Affairs Le Drian before the members of the National Assembly one year earlier.
- Finally, various French diplomats in charge of the issue with whom CCFD-Terre Solidaire and Coalition française pour un traité ONU met in Paris and Geneva also affirmed that they did not possess “a written mandate [...] or written interministerial instructions”.

Despite the many obstacles that seem to persist within the French administration, the meetings that Coalition française pour un traité ONU is conducting at this time with the presidential office, the Ministry of Foreign Affairs and the Ministry for the Economy and Finance show that interministerial discussions have now been started up and are continuing at a steady pace.

Given this situation, France cannot remain on the sidelines during the negotiations to be held from 15 to 19 October 2018 in Geneva. France must, on the contrary, be actively involved:

- within the European Union, in order to effect changes in the position of its Member States and of the European External Action Service on the issue; and
- within the intergovernmental working group, by taking clear and constructive stands, and this whatever the stands taken by the diplomats of the European Union delegation<sup>24</sup>.

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22 The speech by the French president before the United Nations General Assembly on 26 September 2018 is a new illustration of this. See <https://bit.ly/2lv0euM>

23 Plateforme RSE, Document de travail sur la RSE et les Objectifs du Développement Durable (Paris: Plateforme RSE, France Stratégie, September 2018).

24 On Tuesday, 2 October 2018, the French national consultative commission on human rights (CNCDH) unanimously adopted a declaration along these lines. This is also the position of Coalition française pour un traité ONU, of which CCFD-Terre Solidaire is a founding member and which has been advocating these recommendations for months. In March 2018 it asserted that “France must use its influence so that the European Union participates in a positive way in the negotiations and does not act as an obstacle to drawing up such a treaty, by no longer falling back on procedural arguments or arguments invalid in substance” (Paris: CNCDH, 2 October 2018); Coalition française pour un traité ONU, Traité ONU sur les multinationales et les droits humains: vrais enjeux et faux débats (Paris: Coalition française pour un traité ONU, 2018).

In fact, since the United Nations Guiding Principles were adopted in 2011, the Resolution 26/9 of the Human Rights Council, the Modern Slavery Act and the Law on Duty of Vigilance show that there is now broad consensus about putting an end to the impunity of transnational corporations and of making up for the deficiencies in international law. But, above all, the Law on Duty of Vigilance gives sway to the French position in European and UN bodies, in a way that France cannot ignore.

France must therefore now take into account these various aspects and turn its words into action. It must heed the fact that its highest governmental representatives have publicly taken clear stands on the issue, and it must declare both the primacy of human rights and environmental protection over the conquest of new markets and the primacy of corporate accountability and transparency over the defence of corporate private interests.

The date is set on 15 October in Geneva!

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### **Contact :**

Swann BOMMIER

*Advocacy officer, Corporate regulation*

[s.bommier@ccfd-terresolidaire.org](mailto:s.bommier@ccfd-terresolidaire.org)