Briefing for Member State and European Union representatives in the Council, Commission, and External Action Service on content for the UN treaty, June 7 and 8, 2018

Dear representative of Member State and the European Union,

This briefing was prepared by CIDSE, CAFOD, FoEE, ActionAid and SOMO to provide useful input to your discussions on June 7th and 8th regarding the EU position on the content for the international legally binding instrument on transnational corporations, other business enterprises and human rights.
We would like to draw your attention to developments in Europe that we believe can be seen in the same spirit as the UN treaty in that they are also addressing the current regulatory gap between companies operating at an international scale and laws which are implemented nationally:

- In France, the *duty of vigilance law* (adopted in 2017) requires large French companies to establish and publish a vigilance plan with measures to adequately identify the risks and prevent serious harms to human rights, human health and safety, and to the environment linked to their own activities and to the activities carried out by subsidiaries, subcontractors and suppliers. The law also establishes civil liability for harms resulting from a company's failure to observe its duty of vigilance. The French law applies to a company's activities and that of its business relationships. The elements for a draft legally binding instrument that were published in October 2017 elaborate further on this in section 2(scope of application): *'In this regard, based on the deliberations of the first two sessions, this proposal considers that the objective scope of the future legally binding instrument should cover all human rights violations or abuses resulting from the activities of TNCs and OBEs that have a transnational character, regardless of the mode of creation, control, ownership, size or structure.'* Given the fact that the issue of scope is one of the most important subjects of the UN treaty for the EU, we think it would be helpful if the EU adopts the approach of the French law for the UN treaty negotiations.

- In Switzerland, the citizens' Responsible Business Initiative (RBI) proposes introducing into the Constitution the companies' obligation to respect human rights and environmental standards. In order to fulfil this obligation, companies would be required to carry out appropriate due diligence with respect to risks linked to their activities and to their business relationships. The initiative also includes the civil liability of the parent company. In May 2018 the Parliament's Legal Affairs Committee approved a counter-proposal which includes mandatory human rights due diligence (HRDD) and civil liability for parent companies.

- In the Netherlands, a proposed Child Labour Due Diligence law awaits a vote in the Senate. This law would create HRDD requirements for all companies that deliver products and services to the Dutch market two or more times a year, wherever they are incorporated. These companies will have to

submit a statement to the regulatory authority declaring that they have carried out due diligence to identify risks related to child labour throughout their full supply chain.

- The Action Plans to implement the UNGPs in countries such as Germany or Italy have introduced the commitment by these Governments to consider binding legislation on HRDD.

- Civil society in Luxembourg has launched a campaign asking for a duty of vigilance legislation imposing HRDD obligations for companies headquartered in Luxembourg.

We understand that part of your upcoming discussions will be focused on due diligence. In that regard we want to draw your attention to the OECD general due diligence guidance which were recently adopted. These are intended for use in all sectors of the economy and by all companies, regardless of geographical location or value chain stage.

We understand that you will also be discussing access to remedy. This is a very important thematic area in which EU Member States have not made progress at an individual level and can all benefit from collective action in the context of the Treaty process. In this briefing, we would like to share some relevant resources and recommendations that indicate the importance and potential of an international legally binding instrument for improving access to remedy for victims of business-related human rights abuses.

Last year, the UN Working Group on the issue of human rights and transnational corporations and other business enterprises in its report to the UN General Assembly further unpacked the concept of access to effective remedies. Also last year, the European Fundamental Rights Agency published a report outlining ways in which access to remedies can be improved, including by lowering barriers to judicial remedies. Amnesty International and the Business and Human Rights Resource Centre have also formulated legal solutions aimed at improving access to justice for victims. In their report "The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business" International Corporate Accountability Roundtable (ICAR), CORE, and the European Coalition for Corporate Justice (ECCJ)conclude that States are failing to implement their obligations in relation to ensuring access to remedy, analyze the main barriers to remedy, and set out recommendations for how States should address these issues.

Furthermore, we would like to put forward recommendations drawing largely on our report: 'Removing barriers to justice', which we presented in Cohom in september 2017. For the full report please see here.

In order to ensure that the future instrument will provide access to remedy, we believe that the following steps need to be taken during the drafting process:

1. **Use the Treaty to make it easier to overcome jurisdiction barriers**; by creating a framework for jurisdiction and choice of law by domestic courts for human rights violations by their companies overseas, the Treaty could decrease the likelihood of lengthy jurisdictional battles, ensuring that cases will proceed to trial of substantive matters more quickly.

2. **Use the Treaty to remove legal barriers to corporate liability and to place upon corporations a broad duty of care**; in almost all situations relevant to transnational human rights cases, parent companies do not, under present legal regimes, bear the liabilities of their subsidiaries. This constitutes a profound legal blockage causing denial of effective access to remedy in transnational human rights cases. The Treaty could create a mechanism for making a parent company liable for its subsidiary's conduct, enabling victims to pursue compensation from the parent if the local company was unable to meet its liabilities. A duty of care could be limited to the company's own subsidiaries or applied more generally throughout its supply chain. This aspect would require careful thought from a women's rights perspective, as women tend to be over-represented at the bottom of global supply chains; in insecure and casual work.

3. **Use the Treaty to promote convergence of criminal law around basic modern approaches to corporate liability**; the criminal law in many countries is insufficiently structured to deal with corporations as offenders, but examples of modern approaches do exist. The Treaty could help move all legal systems towards a basic criminal law position for corporate offenders. Criminal conviction and sentencing of offenders can provide moral satisfaction for the victims of serious business related human rights abuses and also public recognition that a harm has been inflicted. Furthermore penalties, if set at an appropriate level, can serve as an effective deterrent.

4. **Use the Treaty to improve corporate responsibility by giving binding legal force to the due diligence framework from the UNGPs**; there are problems around corporate management and the integration of social and human rights objectives, varying in severity depending on countries' company law approaches. But there are signs of significant change as due diligence concepts become more entrenched. There is scope to support and progress these existing developments, and to build on them. Due diligence would appear to have the potential to radically improve corporate planning, to avoid problems, and to encourage transparency. Significantly, it would also, in principle, establish a broad direct parent company duty of care that would help to ensure a cause of action for private claims for redress by victims.

5. **Use the Treaty to affirm and extend protection for human rights defenders**; in 2017, the UN Working Group on Business and Human noted that *'There are increasing records of killings, attacks, threats and harassment against human rights defenders who speak up against business-related human rights issues, including the particular challenges faced by women human rights defenders'*. The Treaty could help address this alarming trend by introducing libel law reform; introducing a model of judicial protection for whistle-blowers and human rights defenders; and by strengthening the commitment to consult with women and men in affected communities and recognise and protect the rights and interests of indigenous peoples in relation to business projects. Such measures should take into account the gender-specific risks entailed by specific groups of human rights defenders, such as women human rights defenders. The measures described above to address corporate impunity could also have a significant preventative effect in relation to future threats and attacks.

6. **Use the Treaty to improve access to courts**; there are multiple problems for plaintiffs in accessing courts and receiving a hearing in cases against TNCs, including funding provision, locus standi (the right to appear before, or to make submissions to, the court), access to information, the disclosure

of documents and the burden of proof. The strategies for reform that the Treaty could adopt include reversing the burden of proof, requiring disclosure of information by transnational businesses and making adequate provisions for plaintiffs and their representatives to secure a hearing and to finance their cases.

7. **Use the Treaty to improve the effectiveness of State enforcement**; at both the domestic and international levels, States face shortcomings and lack adequate processes to enforce human rights law against TNCs. Domestically these problems correspond to uncertainty over mandate, and adequate competence and resources. Internationally there is simply no current machinery dealing with corporate transnational human rights cases. The Treaty could address these shortcomings by creating international agreement on judicial cooperation and mutual recognition and enforcement of judicial decisions; affirming the role of domestic agencies in responding to transnational cases; establishing effective sanctions to be imposed by domestic administrative and criminal processes; and establishing a global oversight body on business and human rights.

In addition, given the concerns of Member States regarding tackling discrimination, we want to highlight the positive opportunity to use the Treaty to ensure progress; for example, instead of being framed as vulnerable groups, the Treaty could contain a clear recognition of the heightened risk of discrimination against certain groups, including women, and of the additional barriers they face in accessing remedies. The Treaty should commit States to take positive measures to ensure effective access to remedies, without discrimination, to women. This will require meaningful consultation of on the basis of the principle of equality, and special attention to groups victims of discriminationwhen creating, designing, reforming and operating remedial mechanisms.

In conclusion, as civil society organisations we have participated in recent national level processes on legally enforceable requirements for businesses to respect human rights. These are helpful steps but to date represent a piecemeal response compared to the scale of influence which private sector actors have globally and the range of rights which they can impact. Here the current UN treaty process offers clear opportunities to make significant international progress on both human rights due diligence and access to justice which should not be wasted. We will be looking to Member State governments and the EU joined position to take a constructive and proactive role both in the informal sessions which they requested from the Working Group and to build on this in the 4th session of the Working Group in Geneva in October 2018 and beyond so as to work towards fulfillment of the Resolution 26/9 mandate.

We will be very happy to share further information and ideas on any of these points and look forward to hearing from you.

With best regards,

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