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**STATEMENT BY MR. SURYA DEVA  
CHAIRPERSON OF THE WORKING GROUP ON THE ISSUE OF  
HUMAN RIGHTS AND TRANSNATIONAL CORPORATIONS AND  
OTHER BUSINESS ENTERPRISES**

3<sup>rd</sup> Session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights

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Mr Chair, Excellences, distinguished delegates, ladies and gentlemen,

Let me begin by thanking the Chairperson-Rapporteur for inviting the UN Working Group on Business and Human Rights (Working Group) to participate in the third session of the open-ended intergovernmental working group.

The Working Group welcomes the publication of the Elements for the Draft Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with respect to Human Rights (Elements). This publication provides some necessary guidance for the Working Group to appreciate the relationship and synergies between its work related to the UN Guiding Principles on Business and Human Rights (Guiding Principles) and the proposed legally binding instrument. We also welcome the open and largely non-prescriptive character of the Elements as a basis for further discussion.

In these brief remarks today, I first make a few general observations and then provide some reflections specific to the theme of this panel, that is, access to justice and effective remedy.

As the Working Group has previously stated, any further development that enhances effective protection against business-related human rights abuses is welcome. However, it is critical that such an instrument builds on and complements the existing standards such as the Guiding Principles and their elaboration by the Working Group through various reports, guidance and statements. We note that the Elements draw on several (though not all) aspects of the Guiding Principles.

Based on experiences gained from the drafting and implementation of the Guiding Principles, the Working Group would like to stress the importance of adopting an inclusive and transparent process of consultation with all relevant stakeholders. Such a process contributes to the legitimacy of the final product.

The Working Group believes that the Elements contains certain concepts and ideas that are unclear. What is an “activity of a transnational character”, the rationale behind the exclusion of certain types of business activities from the scope of the proposed treaty, implications of labelling the responsibility of states to be “primary”, the correlation between access to remedy and access to justice, and the modus operandi of achieving the primacy of human

rights obligations over trade and investment agreements, are some illustrative examples of such an ambiguity. Further elaboration or clarification of such concepts and ideas will be most welcome.

Mr Chair,

Let me now turn to some specific observations regarding access to effective remedy.

Access to effective remedy for business-related human rights abuses is a core component of the Guiding Principles, and national action plans have a critical role in this respect. However, lack of such access in practice is a matter of concern for the Working Group, and the value-added of the treaty could be to galvanize states to take both individual and collective actions. The Elements propose that states take a range of measures to remove multiple barriers in access to effective remedy. The Working Group hopes that the proposed binding instrument builds on the guidance provided by the Office of the United Nations High Commissioner for Human Rights to improve accountability and access to remedy for victims of business-related human rights abuses (see [A/HRC/32/19](#)) as well as on the recommendations made by the European Union Agency for Fundamental Rights to lower barriers for access to remedy.

Mutual cooperation and assistance among states will be another vital pre-condition to provide access to effective remedy, especially because of the focus of the proposed instrument on business activities of a “transnational character”. On this point, I would encourage states to draw inspiration from the Working Group’s June 2017 report, which makes a series of recommendations on how to improve the effectiveness of cross-border cooperation between states with respect to law enforcement on the issue of business and human rights (see [A/HRC/35/33](#)).

Last but not least, the Working Group’s recent report to the UN General Assembly, which unpacks what an effective remedy means under the Guiding Principles (see [A/72/162](#)), should be directly relevant to the proposed instrument’s goal to provide effective remedies to the victims of corporate human rights abuses. This report stresses that rights holders and their sufferings should be central to the entire remedy process. It outlines several elements flowing from this centrality of rights holders. I will elaborate three of these elements.

First of all, the remedy process should be sensitive to the diverse experiences of rights holders. Rights holders are not a homogenous group. Different groups of rights holders, especially those living in vulnerable or marginalized situations, experience the impacts of business-related human rights abuses differently and may have varied expectations about remedying the harm suffered. Some groups also face additional barriers in seeking access to effective remedies. Unless states and business enterprises are sensitive to this diversity among rights holders, they may not be able to provide effective remedies to all individuals. With this in mind, the Working Group has recently launched a thematic project to unpack the gender dimension of the Guiding Principles, an issue that the proposed legally binding instrument should also keep in mind.

Second, rights holders seeking remedies should not fear victimization. If rights holders or human rights defenders fear victimization in the process of seeking remedies for a human rights abuse, they may not avail such remedies in practice, even if those remedies appear to be effective on paper. That is why freedom from fear of victimization in seeking remedies is an integral component of access to effective remedies. The Working Group welcomes a specific provision in the Elements proposing that states “adopt measures to guarantee the life, security and integrity of victims, their representatives, witnesses, human rights defenders or whistle blowers”. We think that businesses should also play their part in cooperating with such efforts by States, including by ensuring that their actions to defend corporate interests do not have a chilling effect on the legitimate exercise of seeking an effective remedy. In fact, the Working Group is developing guidance to enable businesses to respect and support human rights defenders and preserving civic space in line with the Guiding Principles.

Third, rights holders should be able to seek, obtain and enforce a “bouquet of remedies”. To address a harm suffered by certain rights holders, multiple forms of remedies would be required. Instead of highlighting merely “guarantees of non-repetition”, the proposed instrument should focus on all five components of reparation: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. Moreover, available remedies should combine preventive, redressive and deterrent elements. If any one of these three elements is missing, it will undermine the overall effectiveness of remedies.

An issue that the Elements mention under “principles” and “objectives” of the proposed legally binding instrument, but do not consider under Section 6 is the impact of international

trade and investment agreements on access to effective remedy. As the Working Group noted in its report, the “all roads to remedy” approach entails that mechanisms are in place to avoid negative impacts of other parallel regimes, such as dispute settlement under trade or investment agreements.

In closing, may I draw your attention to the 6<sup>th</sup> Annual Forum on Business and Human Rights, which will take place in Geneva from 27 to 29 November under the theme “Realizing Access to Effective Remedy”. It will be an opportunity for all stakeholders to discuss collectively challenges and solutions in realizing access to effective remedies for individuals and communities affected by business-related human rights abuses.

Thank you very much Mr Chair. We look forward to engaging further in discussion during this session and beyond.