Statement at the 8th 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,

I would like to thank the Chairperson-Rapporteur for inviting me to share my views at the 8th session of the open-ended intergovernmental working group negotiating an international legally binding instrument (LBI) on transnational corporations and other business enterprises with respect to human rights.

At the outset, I would like to acknowledge that no woman speaker is part of this expert panel and I normally do not join such panels. I would urge the Chair to have better gender diversity in such panels in future.

My intervention today will focus on two aspects. I will first provide an overview of where we stand in terms of the LBI in the context of the evolving regulatory landscape in the business and human rights field. I will then offer some suggestions as to how we should proceed to build consensus and facilitate greater engagement of States.

I have been involved with the LBI process from the very beginning, in fact even prior to the Human Rights Council adopting Resolution 26/9 in June 2014. I also had the honour to serve on the UN Working Group on Business and Human Rights for six years to push for the implementation of the UN Guiding Principles on Business and Human Rights. My reflections today will draw on my experiences as an active participant in both these processes.

At least six conclusions can be drawn about the current state of play. First, there is a growing consensus that businesses should respect all human rights in all situations. In practice however, most businesses have not yet adopted the idea of earning "profit with principles".

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Second, it is increasingly becoming clear that binding rules are required at national, regional and international levels to create incentives and disincentives for responsible business conduct. Voluntary or soft standards would still have a role to play. However, a global level playing field can be created only by rules that are binding both on paper and in practice. We should see the current LBI process in this context.

Third, whether it is the UN Guiding Principles or the proposed the EU Directive on Corporate Sustainability Due Diligence or this LBI, States have a critical role in ensuring that businesses respect human rights. Businesses can outsource their operations, but States cannot outsource their human rights obligations to market forces.

Fourth, the strong "demand" for the treaty has not yet been matched by "supply" on the part of States. Most States are not doing enough to promote business respect for human rights. Policy incoherence, corporate capture of regulatory institutions, and myopic vision of pursuing economic development at the cost of human rights and the environment are hampering States' efforts. This also explains why the LBI process is limping forward and requires a booster dosage.

Fifth, corporate impunity for human rights abuses is still the norm, as not much progress has been made in strengthening access to remedy pathways. Equally concerning is the shrinking civic space that is so vital to promote corporate accountability and respect for human rights generally in both public and private spheres.

Sixth, the current international soft standards may not be fit for the purpose. The "do no harm" approach, for example, only provides a starting point. More ambitious standards may be required to deal with the challenges that we face – from inequality to climate change, conflicts and new technologies.

Mr Chair

Let me now turn to suggestions to move forward the LBI process to the next level.

We should remind ourselves the reasons for this LBI. In my view, the real value of the LBI would be to fill regulatory gaps left by international soft standards and national laws related to human rights due diligence or modern slavery. Creating a global level field for responsible business conduct and strengthening access to remedy for affected rightsholders are a case in point. The needs of rightsholders should shape political feasibility, rather than the other way round. At the same time, as this LBI cannot overcome all existing barriers to regulate effectively corporate human rights abuses, expectations need to be managed.

The LBI should strike a balance between specificity and flexibility. Stakeholders may have different views, but I think the Chair's informal proposals are trying to do this, albeit in an imperfect way. Instead of micro-managing precise details, the LBI text should stipulate "broad but specific" provisions for implementation at the domestic level. Constructive ambiguity in the LBI provisions could be used later by the treaty body to develop specific guidance incrementally. For example, while the term "progressively" in Article 7(1)(b) of Chair Proposals may appear ambiguous, this may give State Parties necessary flexibility to reduce barriers to access to remedy in short, medium and long terms.

In this context, let me also address briefly to the recent proposals that a less prescriptive framework agreement may be the better way forward. Instead of focusing on the label or form of the LBI, we should pay attention to the substance: why is a treaty needed and what type of the treaty is most suitable to respond to this need? The form question should not be used to divert attention from substantive provisions that the proposed LBI should include to add some value. An empty or hollow framework agreement will not add much value.

It would be prudent to build on core elements of the UN Guiding Principles to build consensus. At the same time, as Pillar II of the UNGPs was not meant to be legally binding, its entire language may not be suitable for legalisation. For example, as compared to "abuse" or "violation", "adverse impact" is a much broader concept, and it may not be appropriate to impose legal liability for each and every adverse human rights impact linked to a business activity. On the other hand, the LBI should try to fill gaps in the UN Guiding Principles, for example, in relation to environmental pollution, climate change and FPIC (free, prior and informed consent).

In my view, the LBI provisions should acknowledge that all business enterprises have an obligation to respect human rights, requires States to take effective law and policy steps to prevent business-related human rights abuses, strengthen access to remedy for corporate human rights abuses, promote policy coherence in the areas of trade and investment, and facilitate mutual legal assistance and international cooperation among States.

Mr Chair

It will be critical to resolve differences among States and other stakeholders around the scope of the LBI. Although the treaty should promote business respect for human rights by all business enterprises, it should not ignore the unique regulatory challenges posed by multinationals or the limited capacity of small and medium enterprises. Therefore, the LBI may require States to "encourage all" but "require certain" business enterprises to conduct human rights due diligence. State Parties should be given some leeway in identifying the size and/or type of corporations for mandatory human rights due diligence.

In terms of the process, significant efforts should be made in between annual sessions to build consensus around the LBI text. The "friends of the Chair" should proactively lead this process. It will be critical to include an African State to this Group, or perhaps have two States from each region. Moreover, a group of scholars, lawyers, trade unions leaders and civil society representatives with expertise, integrity and commitment to the treaty process should be engaged to advise "the friends the Chair".

Regional consensus-building processes should be consultative and transparent to secure buy in from different stakeholders. Moreover, as conducting regional consultations with all stakeholders would require resources, States and philanthropic foundations should contribute to a fund to support the LBI negotiations both in Geneva and in different world regions.

Finally, we need to show some urgency in taking decisive steps to end the continued corporate impunity for human rights abuses. It will be desirable to set a timeframe to conclude the LBI negotiations. In my view, it should be possible to conclude negotiations by 2025 if States show the required political will and engage with process in good faith.

Let me conclude by saying that States listen to corporate leaders in creating an investment-friendly environment. They should now listen – with the same seriousness – to their own citizens as to what they want the LBI to look like.

Thank you very much Mr Chair.