Scope of the proposed instrument: What human rights to be covered?

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Excellencies, distinguished delegates, ladies and gentlemen,

It is really an honour and privilege to be here and be part of the process of what I call "humanising business". I would like to thank the resolution sponsoring states to give me an opportunity to share my views as to what human rights should be covered under the proposed legally-binding international instrument.

The open-ended intergovernmental working group (OEIWG) has to grapple with two issues related to the scope of the proposed instrument. The first issue about the "regulatory targets" has already been dealt with in the previous panel. The second issue is about the "subject matter" of the instrument.

Madam chair, I will submit that we should ask three *questions of principle* to determine the subject matter of the treaty. First, what are the human rights that companies could violate? We know that companies could and do violate almost all human rights, a fact which was acknowledged even by Professor John Ruggie during his mandate. Second, what is the objective of putting in place such a treaty in the first place? We need a legally binding international instrument not for the sake of it, but to fill certain governance gaps left by existing regulatory initiatives, the scope of many of which is quite broad. Third, how could the treaty empower victims and states in dealing with powerful corporate actors? It is trite to say that victims are looking for effective remedies to hold companies accountable for all types of human rights violations.

The debate about whether the treaty should be limited to "gross" human rights violation or not is reflective of the historical divide between civil and political rights on the one hand and the social, economic and cultural rights on the other. International human rights discourse has been trying to bridge this divide over the years. Therefore, it will be logical for a treaty in the area of business and human rights to narrow this divide rather than perpetuate it.

While debating options about the subject-matter of the proposed instrument, another evolutionary context should be kept in mind. States have negotiated narrower human rights instruments with special reference to certain rights (like protection against torture) or certain sections of society (like women or children). But in most cases, narrow instruments have followed the broader general instruments, rather than the other way around.

Madam chair, in my view, there are at least three broad options for the OEIWG regarding the subject-matter of the proposed instrument.

The **first option** will be to limit the scope of the treaty to "gross" human rights abuses. However, there is no certainty or consensus yet about the meaning of the term "gross". Under

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international human rights law, a number of factors – such as the character of the right, the magnitude of the violation, the type of victims and the impact of the violation – may determine what violations are regarded "gross" or "serious". Although the term "gross" is susceptible to a broad interpretation, it is really doubtful whether proponents of this option have a broad interpretation in mind while floating this option.

The **second option** will be to extend the scope of the proposed treaty to all "core" international human rights instruments. This list would be wider than the "core" list of internationally recognised human rights that the UN Guiding Principles on Business and Human Rights recommend companies to follow "at a minimum". While this option will superior to the first option, even this option may not fully satisfy the needs of victims, because the "core" international human rights instruments will not include many labour rights, environmental rights or the rights of indigenous people for that matter.

The OEIWG should, therefore, consider the **third option**, under which "all" international human rights instruments (not merely the *existing* ones but also those that might evolve in *future*). This option may be operationalised by stipulating in an Annexure to the treaty all the human rights instruments applicable to companies.

Madam chair and distinguished delegates, I will contend that the third option will offer the most suitable response to the three principled questions that I have alluded to in the beginning. This option will also be superior normatively: we do not need to renegotiate afresh human "rights" for the non-state actors; rather what we need to agree upon is "obligations" with references to whatever rights are recognised in relation to states.

Let me also briefly deal with the practical or political feasibility of the third option. It is pointed out that it would be almost impossible to forge consensus amongst states for such a broad treaty. My response will be that if states could unanimously endorse the second pillar of the Guiding Principles – which is not limited to gross human rights violations – they should not be hesitant now to support such a broad treaty. Any hesitation on their part would only indicate that such states are not really sincere even about the Guiding Principles.

From a practical point of view, it may be advisable that although the proposed treaty applies to all human rights, it takes the character of human rights into account while proposing remedies for violations. For example, there is a stronger case for criminal sanctions for "gross" human rights violations than for all violations.

Madam chair, to conclude, I propose that the treaty should cover the full range of interrelated, interdependent and indivisible human rights – civil, political, social, economic, labour, environmental and cultural. If the treaty is applicable only to "gross" human rights violations, it will only be *symbolic* for victims, as it might not cover a great majority of human rights abuses committed by companies all over the world.

Why should the proposed international treaty exclude access to remedies for victims of the Rana Plaza building collapse, Shell's operations in Nigeria or the Bhopal gas disaster for that matter? The displacement of indigenous people for mining, emission of (and exposure to) hazardous chemicals, compulsory pre-employment pregnancy testing of women and illegal land grabs by companies should not be taken less seriously than slavery or genocide.