Thank you Chair

1. My focus is on discriminatory laws and policies.
2. Much of the discussion of Goal 10 has focused on *economic* growth and development. We talk about technological progress or labour share of GDP.
3. Inequality is not simply about lack of economic opportunity or markets. Social forces and legal barriers create and impede greater equality, too.
4. This Goal 10 recognises. It acknowledges that there are deep structural inequalities and barriers that leave individuals and communities behind – not just economically, but socially, politically and culturally.
5. Economic growth on its own will not fix this. (In fact, single-minded pursuit of economic prosperity may blur or remove the focus from remedying social disparities and barriers.)
6. For this reason, Goal thus calls for removal of discriminatory laws, policies and practices.
7. Laws discriminate against groups in a variety of ways – but no form is more acute, more devastating, than that of criminalisation.
8. As a lawyer under apartheid, I saw the devastating effect of applying criminal penalties to ordinary human activities – for instance, the pass laws, miscegenation laws, laws enforcing whites-only neighbourhoods. Under apartheid, white South Africa criminalised ordinary black people for trying to go about their ordinary daily lives.
9. As a proudly gay man in homophobic pre-democracy South Africa, I saw and experienced what the constant threat of arrest,

detention, arraignment, trial and conviction have on LGBTI persons.

10. Over the last twenty-five years, also as a judge, I have seen the effect that criminal law can have on communities.

11. It takes people outside systems of protection, declares their actions or identity illegitimate, creates *and magnifies* stigma, and excludes them from protections our judicial, social and economic systems may provide.

12. Despite calls for reform, 69 countries still criminalise same-sex sexual activity – almost half of them on my own continent of Africa.

13. Over 100 criminalise drug use or personal possession.

14. And almost all countries have some form of criminal limitation on sex work.

15. One in five people who are in prison are there because of drug related crimes – and, of those, 80% of those are there for personal possession or use.

16. You may think this only affects a small group, but, in 2017, 271 million people used drugs in 2017.

17. In South Africa, the Court in which I am privileged to sit on 18 September 2018 ruled unanimously that criminalising the use or possession in private or cultivation in a private place of cannabis by an adult for his or her own personal consumption in private violates the privacy guarantee in our Bill of Rights. The impact of the criminal law was a significant aspect of this decision.[1]

18. Some estimates suggest that around 5% of the population in all societies and cultures identifies as sexually or gender diverse

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[1] *Minister of Justice v Prince* [2018] ZACC 30 (18 September 2018), available at http://www.saflii.org/za/cases/ZACC/2018/30.html. The Constitutional Court quoted with apparent endorsement (in para 34) the conclusion of the High Court that "The evidence, holistically read together with the arguments presented to this court, suggests that the blunt instrument of the criminal law as employed in the impugned legislation is disproportionate to the harms that the legislation seeks to curb insofar as the personal use and consumption of cannabis is concerned" (High Court judgment para 108 – available at http://www.saflii.org/za/cases/ZAWCHC/2017/30.html).

(with perhaps double that proportion being in some measure orientationally or gender-diverse, but not identifying so).

19. Criminalisation has far-reachingly adverse consequences.

20. Take the HIV epidemic, of which I know as someone living with HIV. Criminalisation of same-sex sexual behaviour, sex-work or drug use prevents people from accessing health care services, including prevention, testing and treatment.

21. It inhibits their willingness to test and to receive treatment and counselling. And, most severely, it marks them with a badge of stigma – of contempt, of societal and *legal* disapproval and rejection.

22. Current data shows that gay men and other men who have sex with men are *28 times more at risk of HIV* than the general population.

23. People who inject drugs are 22 times more at risk – while sex workers and transgender women are 13 times more likely to fall vulnerable to infection.

24. All this is sadly, soberingly bad news.

25. But there is good news.

26. Decriminalisation works.

27. Countries that decriminalise drug use and provide harm reduction see a drop in HIV infections.

28. Decriminalising sex work could avert between 33 and 46% of new HIV infections among sex workers and clients over 10 years.

29. These reductions in infections are also a proxy indicator for improvements in wellbeing, capacity to trust law enforcement, reductions in violence, and ability to access health-care and support services.

30. We must urgently incorporate action against criminal laws within Goal 10 and also Goal 16.

31. Until we do, we will not reach those Goals.

32. Nor will we reach goals on eradicating poverty and hunger, on health, education, gender equality, employment.

33. Yet, until now, we have seen very little discussion on discriminatory laws at all, let along criminal laws.
34. We have 11 more years to go and it is imperative to see these principles, based on practical experience, gain greater attention and action. Otherwise we will not succeed in our noble aim of "not leaving people behind".

During additional questions, I tried to underscore these points:

1. In September 2019, the Sustainable Development Agenda will be discussed in a high-level meeting at the General Assembly. Recently the Draft Political Declaration for the meeting was released. <u>Discrimination is not mentioned once</u>. This is a sad but correctible mistake. It can be changed. We must have greater focus on discrimination and in particular the removal of discriminatory laws.

2. Target 10.3, on discriminatory laws, is one of the few that has an indicator directly linked to international human rights law – it calls on us *to measure discrimination which occurs on the basis of characteristics protected under international human rights law*. It has been 25 years since the UN Human Rights Committee held that criminalising same-sex sexual activity amounts to discrimination and breaches human rights.[2] Since then, many UN human rights bodies and mandate-holders have called for laws that criminalise drug use, sex workers, adolescent consensual sex[3] or reproductive health services to

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[2] *Toonen v Australia* (31 March 1994), Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994), available at http://hrlibrary.umn.edu/undocs/html/vws488.htm.
[3] The Court in which I sit struck down a prohibition that criminally penalised under-16s engaging in sexual conduct. See *Teddy Bear Clinic for Abused Children v Minister of Justice* [2013] ZACC 35, available at http://www.saflii.org/za/cases/ZACC/2013/35.html.

be removed. UNDP and UNAIDS along with Essex University recently released guidelines on human rights and drug policy.

3. We need clearly principled commitments to when and how the criminal law should be used, and when it should not. International Human Rights Law helps us along the way to this. A few years ago, UNAIDS and OHCHR started a process of evaluating the role of criminal law. The International Commission of Jurists (ICJ) this year will be holding a series of consultations across the world on the development of a set of principles on the use and misuse of the criminal law. Situations studied include drug use, sexual and reproductive health, consensual sexual conduct (as in sex work or same-sex sexual activity or among consenting adolescents) and laws on HIV transmission, exposure and non-disclosure.

4. I would urge all in this room to reach out to the ICJ to strengthen the consultations and empower the process forward.