

Analysis of the Chair-Rapporteur's proposed reformulations of selected provisions (Articles 4 to 11) of the Updated Draft Legally Binding Instrument

OEIGWG – January 2026

The International Federation for Human Rights (FIDH) welcomes the Chair-Rapporteur's reformulated proposals on selected articles of the Legally Binding Instrument (LBI) and thanks the Chair-Rapporteur and his team for the opportunity to provide written comments.

FIDH values this initiative which seeks to enhance the coherence and robustness of the treaty text, with the broader aim of improving access to justice for victims of corporate harms.

FIDH's comments analyse the reformulated proposals in an effort to obtain the most legally sound and protective text for individuals and communities affected by corporate activities. This non-exhaustive submission complements previous analyses of the Updated Draft, available [here](#).

Art 4.2 and 5.1

FIDH supports the reformulation of both articles, with all the text in blue, including the text in brackets. We only suggest a few small amendments to improve the text grammatically, as follows:

Article 4.2 *"Without prejudice to Article 4.1. above, victims, their representatives, their families and witnesses, shall...*

*(e) be protected from any unlawful interference against their human rights and fundamental freedoms, including against their privacy, and from intimidation and reprisals [or from any violence, threats, harassment, retaliation, de facto or de jure adverse discrimination, pressure or any other harm or arbitrary action], [whether online or offline], before, during and after ~~any~~ administrative, judicial or other proceedings ~~have been instituted~~, as well as from re-victimization in the course of proceedings to seek ~~for access to~~ effective, prompt and adequate remedy, including through appropriate protective and support services that take into account their specific needs and **are gender, age and disability-responsive**. ~~including in a manner that is responsive to gender and age responsive and disability inclusive.~~"*

While the use of victims instead of, or alongside, "affected individuals and communities" is a cross-cutting issue that will be discussed as part of discussions on Articles 1 and 3, we wanted to note that Art 4.2 provides an example of a situation where the use of "affected individuals and communities" is more appropriate, as full communities are sometimes subject to intimidation and violence because, or in the context of, legal proceedings, even if these proceedings are only formally pursued by one or a few members of those communities.

Art 4.4 and 5.4

We generally support the reformulation of both articles, although we would like to seek clarification regarding the reference to a "rapid response mechanisms".

A rapid response mechanism was initially proposed by Cameroon in Art 5.4 *bis*, and this was rightly designed to operate as a stand-alone mechanism independent from

any ongoing legal proceedings. Referencing this mechanism, alongside precautionary measures that are meant to operate within the context of ongoing legal proceedings, makes the ambit of application of both types of urgent measure unclear.

We insist that urgent mechanisms to prevent harm or stop ongoing harm should be available, not only in the context of proceedings, or while proceedings are taking place, but in all contexts. This is a natural consequence of the State Duty to Protect and the principle of prevention. Therefore, in addition to the reformulated Art 4.4 and 5.4, the LBI should articulate a stand-alone right of affected individuals and communities to be protected through urgent mechanisms from serious or irreparable harm, or from ongoing human rights abuses and/or violations, regardless of the existence of ongoing legal proceedings.

The suggestion to consider additional mechanisms such as ‘injunctive relief by courts’, ‘dedicated institutional or legal frameworks capable at responding promptly and effectively’ or ‘a rapid response mechanism’ might be pointing in this direction. Palestine has also proposed relevant text under a draft Art 6.1 *bis*. We hope that states will build from these suggestions to articulate a stand-alone right to be provided with urgent protection.

Art 5.3

We support the reformulation of Art 5.3, with three caveats:

1. The reference to human rights abuses should be followed by “and/or violations”. We nevertheless understand that this issue might be subject of further discussions under Art 1 and 3.

2. The phrase “in the context of business activities” should ideally be added to maintain specificity and clarity as to the ambit of operation of this duty, recognising that the duty to investigate does indeed arise in all cases of human rights violations.
3. The reference to the State’s domestic and legal frameworks does not add any value, and does not assist in implementation as the Chair-Rapporteur’s proposal suggests. This is true of Art 5.3 as it is of any other part of the LBI. States parties will naturally make use of their existing, amended, or new legal frameworks to implement the LBI. In this sense, the phrase is redundant and unnecessary. The only tangible effect this reference can have is to undermine implementation of the LBI, by restricting or blocking its implementation if a State’s domestic and legal frameworks fall short or are not in line with the LBI provisions. The reference to consistency with the State’s international human rights law can help, but this adds unnecessary complexity when the reference to a State’s domestic and legal frameworks is not necessary in the first place.

We suggest the following reformulation:

Article 5.3 *“States Parties shall investigate human rights abuses ~~and/or violations~~ in the context of business activities effectively, promptly, thoroughly, ~~and~~ impartially and within a reasonable time, and, where appropriate, take action against those responsible, whether natural or legal persons ~~Such investigations and actions shall be carried out in accordance with the State’s domestic and legal framework,~~ in a manner consistent with the State’s international human rights law obligations.”*

Art 6.1

We cautiously support the reformulation of Art 6, but would like to understand the reason for referring to international human rights law in the context of the Duty to Regulate, and not also, and mainly, the LBI itself. Once approved and ratified, the LBI will become part of international human rights law, and will be the main instrument to refer to for purposes of understanding, interpreting, and implementing the duties articulated in it. The duty to regulate will need to be implemented first and foremost in line with the LBI, which establishes a set of rules, principles, and duties of international human rights law designed to operate within the particular context of business activities.

We suggest the following reformulation:

Article 6.1 "States Parties shall regulate, in accordance with [this LBI](#) and international human rights law, the activities of all transnational corporations and other business enterprises within their territory, jurisdiction, or otherwise under their control, whether those activities are carried out domestically or abroad."

Art 6.2

We support the reformulated Art 6.2(a), (b), (c), and (d), and appreciate the attempt to clarify the scope of the phrase "internationally recognised human rights" under Art 6.2(b). However, in this regard, we are concerned that the proposed delimitation of the human rights scope might exclude certain human rights articulated in UN Declarations and Resolutions, such as the UNDRIP, UNDROP, the UN Declaration on Human Rights Defenders, and Resolutions 48/13 of the Human Rights Council and 76/300 of the UN General Assembly on the Right to a Clean, Healthy, and Sustainable Environment. The LBI does address the rights and protections owed to

human rights defenders, and to some extent Indigenous Peoples, but is silent on the rights of peasants and other people living in rural areas, and does not mention the right to a Clean, Healthy, and Sustainable Environment expressly, so these gaps are only partially rectified in the text of the LBI.

Art 6 in general

More broadly, we continue to regret the failure to adequately address the rights of access to information, consultation, and FPIC, the right to be protected from serious or irreparable harm or ongoing harm through urgent measures, and the protection of environmental and human rights defenders (EHRD) in the context of Prevention.

Two clarifying notes are necessary. Firstly, the right to access information, and the State duty to protect EHRDs and provide precautionary measures are addressed in Art 4, 5, and 7 in the context of access to remedy. This is very important. However, it is also critical that these rights and protections are also addressed under Art 6, to avoid leaving an important gap in State duties when it comes to Prevention.

Secondly, consultation, FPIC, and protection of EHRDs are also currently addressed in Art 6, but as “supporting or ancillary measures” alongside corporate Human Rights Due Diligence (HRDD) obligations (art 6.4d, e, and f). There are two problems with this approach: 1. It is not clear whether these measures are meant to be obligatory or not. Companies must be legally required to respect these rights in the context of their HRDD; 2. These rights should not be addressed only within the context of corporate HRDD (as if they only entailed corporate duties). It is the State that must guarantee them, and therefore they should be addressed as part of State duties outside and independent from corporate HRDD duties.

Art 7.2

We support the reformulation of Art 7.2, with the exception of the need for consistency with domestic legal principles. While this phrase may be justified in certain scenarios – for example, in relation to states that do not recognize the concept of corporate criminal liability within their legal systems - it is difficult to see what purposes it would serve in this context. The reference to “domestic legal principles” is preferred over “domestic legal and administrative systems”, but it is still difficult to see its added value. On the contrary, it could have detrimental effects if domestic legal principles were relied on to justify restricting or blocking provisions to remove barriers to justice. This in turn would defeat the purpose of the LBI to improve access to justice for victims. For this reason, we recommend removing the phrase “*consistent with its domestic legal principles*” while maintaining the rest of the reformulated text.

Additionally, we recommend that the phrase “non-judicial mechanisms” in this article (and whenever the LBI addresses the State duty to ensure access to justice and remedy) is preceded by the qualifier “State-based”. This is to make sure that the mechanisms of justice the LBI refers to are the “competent authorities provided for by the legal system of the State”, that States are already required to put in place under International Human Rights Law (ICCPR).

Art 7.3

The reformulated Art 7.3 represents an improvement over the previous text, but we continue to have many concerns, as follows:

1. The reference should be to “legislative or other measures” in Art 7.2(a), not policies.

2. Legal aid is essential and we welcome the reformulated text. However, there are other common means for States to alleviate the cost of legal advice and procedures that are currently not mentioned by the LBI. These include the waiving of court fees, granting exemptions from the obligation to pay the legal costs of the other party, and promoting or allowing access to less costly professional advice in the form of pro-bono assistance, “no win – no fee” arrangements, and others. These could be listed in an illustrative and non-exhaustive manner.
3. Art 7.3(b) is unnecessarily long and convoluted, and is attempting to address in one line very different access to information issues which should be addressed separately and clearly:
 - (i) One of these issues concerns measures to ensure that affected individuals and communities have access to information about their human rights, means of protecting them, and available support.
 - (ii) Another one concerns the right of victims to participate in proceedings and be kept informed, including about the status of ongoing claims.
 - (iii) The third concerns measures to ensure that affected individuals and communities have access to evidence (which can be from state agencies, companies, or both) necessary to substantiate claims of human rights abuses and/or violations in the context of business activities. Access to evidence in these contexts can be facilitated by legal and/or procedural measures such as mandatory corporate disclosure laws, discovery rules, the establishment of legal presumptions, and

the shifting of the burden of proof to the party most capable of producing the relevant evidence. Most of these are yet to be adequately addressed by the LBI.

4. We support the elimination of Art 7.3 (c) and (d), which were either badly formulated or redundant. However, with the elimination of Art 7.3(c), there no longer is a provision establishing a general duty of States to address the imbalance of power between the parties in judicial and non-judicial mechanisms. While the LBI does contain several provisions aimed at addressing specific imbalances, this is not equivalent to, nor does it substitute for, a general, ongoing and overarching duty to redress inequality of arms in legal proceedings. For this reason, we suggest to add a line at the beginning of Art 7.2(b) in the following terms:

Article 7.2 *"State Parties shall ...*

(b) take proactive measures to ensure material equality between the parties in all judicial and State-based non-judicial mechanisms, and progressively remove the legal, practical, and other relevant obstacles that, individually or in combination, hinder the ability of a victim from accessing such judicial and non-judicial mechanisms for the purposes of seeking an effective remedy;

Art 8.1

While some of the suggested changes to this article help improve and clarify its scope, some could have the effect of restricting the bases of liability in a way that is detrimental to the objectives of the LBI to enhance accountability and remedy. In particular, the direct connection now being made between "may arise" and "own actions or omissions" can be read as suggesting direct causation, eliminating

liability for contribution and potentially also for due diligence failures. This would also contradict the proposed new text of Art 8.3. Since Art 8.1 is meant to be a foundational article that sets the scene for the more specific liability provisions that come later in the text, we suggest reverting back to a more general and comprehensive formulation. Specifically, instead of referring to “*abuses and violations that may arise from their own actions or omissions*”, we suggest referring to abuses and violations “*in connection with*”, or “*in the context of*” their business activities or **business** relationships, including those of transnational character.

Art. 8.2

We do not support the reformulation replacing “shall” with “may” in the chapeau, because the expression “subject to the legal principles of the State Party” is sufficient to provide States with the right amount of leeway, especially on subject-matters such as the criminal liability of legal persons. Indeed, this provision is about ensuring that States hold natural and legal persons liable for human rights abuses and violations, which is not completely in line with Art. 26(1) and 26(2) of UNCAC referred to in the Annex. Art. 26(1) and 26(2) specifically relate to the liability of legal persons, as opposed to Art. 15 and following, obliging State Parties to criminalize different forms of corruption. Replacing “or” with “and/or” in the list of forms of liability can also ensure more leeway to States, while also highlighting that civil liability does not exclude criminal liability and the other way around for instance (or that administrative liability can be a good alternative to criminal liability, especially for legal persons). In addition, the notion of “domestic legal and administrative systems” is confusing and should be replaced with “domestic legal systems”.

Art 8.3

We support this reformulation which narrows down on specific forms of liability, in line with international business and human rights standards, while remaining sufficiently broad and flexible to accommodate different legal principles. We would only question whether there is a need to have the lines following the phrase “(b) *contributing to human rights abuses or violations*”. While the stated objective of the proposed new text is to preserve flexibility for domestic translation, this line may have the opposite effect of restricting the various modes of participation or secondary liability envisaged under different legal systems. However, explicitly mentioning actions or omissions in the context of contribution is important, and therefore we suggest the following reformulation:

Article 8.3 *“Subject to the legal principles of the State Party, the liability of legal and natural persons referred to in Article 8.1 above, shall be established for:*

- a. *acts or omissions causing human rights abuses or violations; or*
- b. *acts or omissions contributing to human rights abuses or violations”*

Art 8 - General

Due diligence failures: There remains a need to ensure liability for failing to undertake environmental and human rights due diligence, regardless of harm. This form of liability is preventive in nature, as its purpose is to sanction and correct procedural failures that could result in human rights abuses or violations. The liability would be established for “failing to undertake human rights due diligence in line with Art 6.4”.

Criminal liability: The LBI is also still failing to adequately address questions of criminal liability, beyond simply indicating that there should be one. The LBI should

explicitly require States to establish the criminal (or functionally equivalent) liability of legal persons, as well as the criminal liability of natural persons, for serious human rights abuses or violations that amount to crimes under international and domestic law.

Crimes under international law encompass:

- So-called “core” international crimes, *i.e.*, war crimes, crimes against humanity, genocide, and aggression; and
- Other serious human rights violations and abuses that are directly criminalised under international law and/or that States are required by international or regional instruments and case-law to penalise, such as slavery and the slave trade, torture, enforced disappearance, extrajudicial, summary or arbitrary executions, arbitrary detention, trafficking in persons, and sexual and gender-based violence.¹

The LBI should also ensure that the modes of criminal liability are not limited to conspiracy and aiding, abetting, facilitating and counselling, but include all forms of perpetration or participation, *i.e.*: commission, ordering, soliciting, inducing, or otherwise assisting in, or contributing to, the commission or attempted commission of crimes (see, e.g. Art 6.2 and 3 of the Draft Articles on Prevention and Punishment of Crimes Against Humanity).

¹ Legal instruments imposing this obligation include: League of Nations, Convention to Suppress the Slave Trade and Slavery (1926), art. 6; U.N. Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (1949), art. 1-4; U.N. Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (1984), art. 4; U.N. Convention against Enforced Disappearance (2006), art. 7 and 25; Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (1994), art. 7(c); Council of Europe, Convention on preventing and combating violence against women and domestic violence (2011), art; 33-41. This obligation has also been confirmed by U.N. charter and treaty human rights bodies as well as regional courts and commissions.

Art 9.1

We appreciate the attempt to clarify the bases of Jurisdiction under Art 9.1(a) to ensure that not only the forum of the place where the acts or omissions *that resulted in* a human rights abuse is included (this will generally be the forum of the direct perpetrator of the abuse), but also the forum of the place where the acts or omissions that *contributed to* a human rights abuse, and the forum of the place where *failures to prevent* or to *conduct adequate human rights due diligence* took place (if this is understood as different from contribution). However, the proposed new text does not fix the problem, because it continues to anchor jurisdiction to the place “where the human rights abuse took place”. Since Art 1.3 defines a “human rights abuse” as an act or omission that *results* in an adverse human rights impact, the reformulated text continues to establish jurisdiction only in the place of the direct perpetrator. This continues to leave out the places where acts or omissions amounting to *contribution* took place, and where the relevant *failures to prevent* or to carry out adequate due diligence took place. Adding the phrase “arising from acts or omissions” in the chapeau to Art 9.1 does not fix the problem.

This can be addressed by a change in the definition of “human rights abuse” under Art 1.3, or a new Art 9.1(a) that explicitly establishes jurisdiction in all the relevant places, as follows:

1. the acts or omissions that *resulted in* an adverse human rights impact took place;
2. the acts or omissions that *contributed to* an adverse human rights impact took place; and,

3. the *failure* to prevent an adverse human rights impact or to carry out human rights due diligence to prevent an adverse human rights impact took place.

We support the preservation in Art.9.1(c) of the distinction between natural and legal persons potentially involved in the harm, and the jurisdictional basis to bring claims against one or the other, as it remains necessary.

We continue to stress the need for the LBI to establish grounds for criminal jurisdiction, in addition to civil jurisdiction. This could be articulated in a new subparagraph e), which should provide for the criminal jurisdiction of a State when the alleged offender is a national of that State; domiciled within that State; and, in cases of universal jurisdiction under international law, is present in the territory of that State. The latter would bring the LBI in line with the well-established principle of universal jurisdiction in international law including in e.g., the Convention against Torture, the Convention for the Protection of All Persons from Enforced Disappearance, and the Geneva Conventions.

Proposed new Art 9.4 *bis* or 9.1 *ter*

We generally support the proposed new language for a Forum of Necessity article. However, we would like to note that jurisdiction in these cases should be provided not just when no other court is available, but when no other court guaranteeing a fair trial is available (as has been suggested by Palestine and Mexico). This is to take into account the fact that a court may be available, but it may not provide guarantees of an effective remedy.

We strongly encourage the States to complete Article 9 with a provision enshrining the obligation of *aut dedere aut judicare*/prosecute or extradite.

Art 10.1

We support this reformulation, which accommodates what the Chair-Rapporteur indicates as a “growing tendency to extend the exclusion [of statutes of limitation] to other gross violations of human rights and serious violations of humanitarian law”. However, we would suggest using the phrase “human rights abuses or violations that amount to crimes under international law”, instead of “human rights abuses that constitute the most serious crimes of concern under international law”.

In addition, the LBI should clearly indicate that statutes of limitation for civil or administrative claims linked to human rights abuses or violations amounting to crimes under international law should equally not apply. This is consistent with instruments such as the Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity (Principle 23), which the Chair-Rapporteur’s proposals also quote.

Art 10.2

We recommend the removal of “legal proceedings” as this implies that a case has already commenced and the provision should cover cases that have not yet started, and/or where the impact is not immediate.

We thank the Chair-Rapporteur for his consideration and reiterate our full commitment and availability to engaging constructively throughout the negotiations process.