

## Third Revised Draft of Binding Treaty

### Reflections on the text in preparation of the 7th Session of the IGWG

On 17 August 2021, the Chair of the UN Open-ended intergovernmental working group (IGWG) in charge of elaborating a Legally Binding Instrument (LBI) to regulate the activities of transnational corporations and other business enterprises published the Third Revised Draft of the LBI. The elaboration of this instrument, mandated in 2014 by Resolution 26/9 of the UN Human Rights Council, aims to complement and go beyond the UN Guiding Principles on Business on Human Rights (UNGPs) which were adopted in 2011.

A decade following the adoption of the UNGPs, despite growing efforts to tackle the problem, access to justice for victims of corporate abuse remains largely an illusion and, all too often, impunity stubbornly prevails. On every continent, victims of human rights violations and serious environmental damage still struggle to obtain justice and reparations. The LBI constitutes the strongest and most tangible avenue available to eliminate the major accountability gaps that remain in the international framework.

The process has come a long way since the adoption of resolution 26/9 of the UN Human Rights Council. Six sessions of negotiations of the LBI have already taken place in Geneva; they witnessed the participation and engagement of over a hundred states, experts and hundreds civil society organisations from around the world, including FIDH and its members.

Overall, the third revised draft – *ie* already the fourth version of the text – provides limited changes compared to the previous version, which indicates that the text is stabilizing. Although important issues remain unaddressed by the drafters, the text has gradually taken into account some of the comments made by civil society organisations during previous negotiation session. FIDH considers that the time has come to hold substantive negotiations and that the text represents a good basis for doing so. Only a substantive, precise and constructive engagement during the 7<sup>th</sup> session and beyond will be able to consolidate the strengths and overcome the remaining issues in the draft.

This publication summarises FIDH's main reflections on the Third Revised Draft, outlining some of the improvements and main remaining challenges in the text. The full record of written and oral statements and publications can be found on a dedicated website page. In addition to this comment, FIDH contributed or co-signed analyses of the Revised Draft published by two coalitions, ESCR-net and the Feminists for a Binding Treaty, which usefully complement the present text.

#### **Transversal concerns : clarify the place and scope of prevention and mitigation**

Throughout the text, the LBI continues to carry an important level of confusion when referring to the objective of “mitigation” (not just prevention). It is paramount to clarify that companies should “prevent and mitigate risks” and “prevent abuses”, not “mitigate abuses”.

As FIDH had pointed regarding the Second revised draft, close **attention to the alternate use of mitigation and prevention** is key. Not only have the issues pointed out in the past regarding articles 6.2 and 6.3(b) not been addressed, but the addition of “mitigation” in articles 2.1(c) and (e) deepens this confusion, as these articles refer to the objective to mitigate abuses which an enterprise causes or contributes to through its own activities (when prevention should be used in this context).

The **use of the term “mitigation”** is also particularly misplaced in **Art 6.3(b)** as it specifically refers to the objective to mitigate abuses that an enterprise causes or contributes to through its own activities. Only “prevention” should be used in this context. We thus encourage States to clarify the use of the terms prevention and mitigation throughout the text ensuring that prevention is always used with regard to an entity’s own activities and business relations where a considerable control or influence exists, while mitigation is used in cases where the entity has a very limited to no leverage.

While mitigation has a place, it should be clear that this concerns abuses by business relationships (where a business may have no or limited leverage). In relation to own activities or the activities of business under their control, abuses should be *prevented*. The use of mitigation in these contexts detracts from language in the 1st revised draft that had made clear that prevention was the main goal of legislation and human rights due diligence, and contradicts current PP11 which adopts a more appropriate formulation: prevent abuses in context of own activities and prevent/mitigate abuses by business relationships.

### **Preamble**

We welcome the reference to business obligation to respect internationally recognized human rights (PP 11).

The express addition of the “Gender Guidance” document of the UNWGBHR as well as addition of ILO Declaration on Fundamental Principles and Rights at Work (PP14), is useful as this is a very progressive document.

### **Article 1 Definitions**

The changes in the definitions incorporated in the 3rd revised draft include both positive and detrimental changes as we explain below:

#### **Definition of “Victim” (art 1.1):**

The elimination of the redundant and potentially detrimental lists of types of harm is a positive step that will allow the treaty to cover any type of harm that would constitute human rights abuse.

However, the use of “may” instead of “shall” in relation to the inclusion of family members/relatives as victims narrowing the scope of the article is regrettable. In line with international and regional jurisprudence, this definition should in all cases include family members and relatives.

Furthermore, the definition of victim, should include not only people that have suffered harm but also those who suffer or have suffered from threats. Similarly, the scope of family members and relatives should also include “caregivers” that are not directly related as a family but are considered as part of them.

“Victim” shall mean any person or group of persons or group of persons , irrespective of nationality or place of domicile, who individually or collectively have suffered harm or threats of

harm, that constitute human rights abuse, through acts or omissions in the context of business activities.

The term “victim” shall also include the immediate family members or dependents of the direct victim as well as caregivers, and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.

### **Definition of “human rights abuse” (art. 1.2):**

The inclusion of “direct and indirect harm” is a positive development.

Similarly, the elimination of the previous reference to “businesses” only, meaning that violations by States/State-actors can now be interpreted to be included in the definition fill an important gap.

The replacement of the reference to “environmental rights” with “the right to a safe, clean, healthy and sustainable environment”, which has a much clearer scope and grounding in international human rights law, resolves the concerns raised by many States.

### **Article 2. Statement of Purpose**

The reference to **mechanism of monitoring and enforceability** in **Art 2.1(c)**, seeks to reinforce the (usually weak) implementation by States of their obligations in the context of business activities. However this purpose should be operationalized by adding a specific article on ‘Monitoring and Enforcement’ with an aim to reaffirm the role of the State as a guarantor and enforcer of rights, rather than leaving enforcement almost fully to victims through private complaint procedures.

### **Article 4 Rights of Victims**

This article refers to a broad range of rights and protections which already exist in international law and should be guaranteed not only to victims of corporate abuses but to all individuals. A change in title to Article 4 to ‘**Right to Effective Remedy**’ and use of the term “rights-holders” instead of “victims” would clarify this point.

We welcome the changes in Article 4.2. (c) which illustrate a **broad understanding of the right to access to justice and to reparation**, in line with the Inter-American Human Rights system’s case law. It is worth noting that the listed forms of remedy in the article are not limitative. To fully align with this wording the article should also include “covering of expenses for relocation of victims, replacement of community facilities, comprehensive emergency assistance and long-term health monitoring.”

Furthermore, to overcome specific barriers to access to justice, this article should strengthen the **provisions on access to information** in line with international human rights instruments, ensure differentiated impacts are taken into account in reparation processes, guarantee participation and alleviate the burden of proof. The latter could be done by including the principle on the dynamic burden of proof as suggested under article 7 below.

### **Article 5 Protection of Victims**

This article should better take in account the **role of the State** vis à vis human rights violations and its duties to investigate, sanction and remedy its own failures (which operate

alongside its duty to ensure remedy against corporate actors). In this respect, Article 5 should require States to adopt provisions to investigate wrongdoings by public servants tasked with overseeing corporate activity and to take measures to ensure that individuals and communities whose human rights are at risk from business activities have access to effective precautionary measures to prevent imminent or irreversible harm.

## Article 6 Prevention

On one hand, a number of positive developments can be underlined, including:

- the elimination of the reference to “severe” human rights abuses which considerably restricted the scope of due diligence (**Art 6.3**);
- the specific reference to the obligation to **undertake and publish** human rights, labour rights, environmental and climate change impact assessments **Art. 6.4 (a)**, and the obligation to report publicly and periodically on environmental and climate change standards (**Art 6.4 (e)**);
- the addition, in **Art 6.8**, of the term “legislation” when referring to what needs to be protected from vested interests, and the need for states to act in a “transparent manner”.

On the other, many substantial shortcomings flagged with regards to the second revised draft persist in this version:

- Despite the explicit mention of State owned enterprises, the new text falls short of **addressing the role of the State as an economic actor** with a heightened duty to respect human rights. It is key that the LBI better addresses the obligation for a State to conduct due diligence when it engages in economic activities or when it offers financial or other support to businesses, such as granting export licenses, conducting commercial transactions with businesses, including procurement and privatisation of services, etc. to address compliance with due diligence obligations for companies that provide goods and services to States or receive subsidies from States;
- Drafters must **align the language used in Article 6 with the steps of human rights due diligence** ‘codified’ by existing international standards such as the UNGPs and OECD Guidelines. It is essential for the future legally binding instrument to take stock of the existing standards when they are more protective of human rights and to improve them when they are not sufficient.
- To better include **protection of human rights defenders** as a key element for an effective prevention of human rights abuses and violations in the context of business activities, and explicitly clarify that human rights defenders and affected community members, including members of the LGBTIQ+ community, peasants and other rural people and ethnic and linguistic minorities should be consulted throughout the planning, implementation and follow-up of a given economic project.

## Article 7 Access to Remedy

**Access to information** remains very weak and poorly addressed in **Art 7.2** and it does not address discovery.

Regarding **the burden of proof**, the use of “shall” instead of “may” in **Art 7.5** is a stronger and clearer formulation, that no longer leaves its application to the discretion of State

authorities. However, the option of reversing would still be left to judges' discretion and subject to states' constitutional laws. The formulation could be revised as follows :

*States Parties shall enact or amend laws ~~allowing judges~~ to reverse the burden of proof in appropriate cases to fulfill the victims' right to access to remedy  ~~, where consistent with international law and its domestic constitutional law.~~*

*And the principle of dynamic burden of proof should be added in line with the wording suggested below:*

*They shall include the power for judges, on a case by case basis, ex officio or at the request of a party, when ordering evidence, during its practice or at any time of the process before ruling, to require proof of a certain fact to the party that is in a more favorable position to provide evidence or clarify the disputed facts. The party will be considered in a better position to prove by virtue of its proximity to or possession of the evidentiary material, of its technical knowledge of the circumstances, because it has directly intervened in the facts that gave rise to the litigation, or due to the state of defenselessness or incapacity in which the opposing party finds itself, among other similar circumstances.*

This article should also include mechanisms of collective redress; access to independent scientific advice and other technical expertise as well as access to evidence (discovery).

## Article 8 Legal Liability

Many of the shortfalls previously raised remain unaddressed. Article 8 on legal liability should better clarify between provisions addressing

- liability in cases of harm a company caused or contributed to through its own activities or operations (8.1), and
- liability in cases of harm caused or contributed by the activities or operations of a company that it controls, or for failure to prevent harm linked to its business activities (8.6).

In that spirit, **article 8.1.** wording should be adjusted as follows :

*States Parties shall ensure that their domestic law provides for a comprehensive and adequate system of legal liability of legal and natural persons conducting business activities, within their territory or jurisdiction, or otherwise under their control, for causing or contributing to human rights abuses ~~that may arise from~~ through their own business activities, including those of transnational character, or from their business relationships.*

In **Article 8.3** the reference to "other regulatory breaches" which had been a welcome addition in the previous version of the draft was removed. **We suggest this reference to "other regulatory breaches" be reincorporated.**

To clarify the conditions for liability under **Art 8.6** it should clearly distinguish the 3 following scenarios:

- 1) Liability of business enterprises for the human rights abuses to which the entities they control, manage or supervise cause or contribute to.
- 2) Liability of business enterprises for failing to take adequate measures to prevent foreseeable human rights abuses to which they are linked through a direct or indirect business relationship.

### 3) Strict liability for activities that are inherently dangerous.

Furthermore, the deletion of the phrase “legally or factually” when referring to “control, management or supervision” could be detrimental if only legal or formal control is considered. **We recommend the reference to “legal or factual control” to be integrated back in the text.**

**Adding a definition of cases where control could be presumed**, without it being definitive or exclusive in the LBI can be useful. Such definition could read :

*Control shall be presumed where*

- a company holds over 50 percent of voting rights in another company or where a company fails to disclose conclusive evidence about its lack of control.
- a company had sufficient leverage or could have created sufficient leverage on a third party.
- the lead business enterprise holds a direct commercial relationship with the entity that caused the harm.
- a business enterprise fails to disclose conclusive evidence about its lack of control

Furthermore, provisions on liability for failure to prevent (art 8.6) are still convoluted and confusing. **Due diligence shall never act as a shield** from liability. However in the current formulation, it is not clear whether due diligence as a defence is being suggested for “own activities”. Clarifying that this defence is not available when companies cause or contribute to human rights abuses through their own operations is paramount. We suggest thus by removing the last sentence of article 8.7. :

~~8.7. Human rights due diligence shall not automatically absolve a legal or natural person conducting business activities from liability for causing or contributing to human rights abuses or failing to prevent such abuses by a natural or legal person as laid down in Article 8.6. The court or other competent authority will decide the liability of such entities legal or natural persons after an examination of compliance with applicable human rights due diligence standards.~~

**Article 8.7** continues to evoke “applicable human rights due diligence standards” as a normative reference for courts or competent authorities which can be potentially very detrimental. To clarify the link between due diligence and liability, article 8 should clearly state that it rests on the defendant business enterprise to demonstrate that it took every reasonable step to prevent the entities it controls or over which it exercises sufficient leverage from causing or contributing to a human rights violation or abuse (however such defense would not be available when the violation arises from its own actions or omissions or those of the entities they control manage or supervise, see above article 8.6). This type of provision is well established in different national and international legal instruments and case law, and is here suggested for civil claims. It thus does not conflict with the ‘presumption of innocence’ principle which is a criminal law principle.

Regarding corporate criminal liability, **Article 8.8** we regret the elimination of the reference to the duty of states to continue working towards recognising crimes under international law in their national legal systems and to making legal persons criminally liable for them.

### Article 9 Adjudicative Jurisdiction

The changes incorporated on article 9 are welcome as they clarify the grounds for jurisdiction and definition of domicile. Yet some changes are still necessary to ensure accountability gaps are properly closed.

**Article 9.1.(a)** positively adds the place where the human rights abuse “produced effects” which can be equated with the place where the harm/damage occurred, an obvious



ground for the jurisdiction that had so far been missed.

**Article 9.1 (b)** makes a reference to “contributing” which can be potentially limiting, in that it would leave out instances of direct causation. “Causing” should be added, to use the same language as Article 9.1(c) which correctly uses “causing or contributing”.

**Article 9.5.** the elimination in the new draft of the phrase “sufficiently close connection” and use, instead, of a close list of grounds for proceeding with a *forum necessitatis* claim, can have both advantages and disadvantages.

- On the one hand, the express enumeration of grounds makes sure that claimants found in any of those situations will not have to argue and litigate that their situation amounts to a “connection”. For jurisdictions that use a very narrow interpretation of “sufficiently close”, this could be advantageous.
- On the other hand, the close list of grounds risks excluding other grounds that could, in a given jurisdiction or case, be interpreted as amounting to a “connection”. By maintaining the reference to “connection to the State Party concerned”, followed by “including where [adding the list of three grounds]” the LBI retains a general basis that can capture new or unanticipated situations, while making sure that the three listed grounds are always interpreted as amounting to a sufficient connection. Moreover, the reference to a “substantial” activity under 9.5.c is too restrictive.

*Courts shall have jurisdiction over claims against legal or natural persons not domiciled in the territory of the forum State if no other effective forum guaranteeing a fair trial judicial process is available and there is a connection to the State Party concerned, such as:*

- a. the presence of the claimant on the territory of the forum;*
- b. the presence of assets of the defendant; or*
- c. some activity of the defendant*

## **Article 10 Statute of Limitations**

A major positive step is the change from criminal proceedings to “all legal proceedings” (i.e. also including civil action) in **Article 10.1**. This is particularly significant for States where statutes of limitation do not apply to criminal action for certain crimes under international law, but do apply to a civil action for damages attached to them, which significantly reduces their chances of success or achieving full reparations.

**FIDH will address these concerns during the 7th IGWG session and in its conversations with other involved organisations and delegations. Further details on the suggested wording to address these concerns can be provided upon request.**

**We also encourage FIDH members who share these concerns to include them in their analysis of the Treaty, in their communication with State delegations and partners and to outline them in their interventions on this topic.**

**We call upon negotiating States—especially those who have repeatedly called for substantive discussions to take place, those who declare being committed to achieve a more sustainable globalisation, as well as those who are contemplating the adoption of domestic and/or regional mandatory HRDD measures—to defend the process, prepare and engage with the draft’s content, as well as to make efforts to strengthen the text in view of making the protection of human rights more effective in cases of corporate abuse.**