

Shortcomings of the Proposal of a Simplified Framework Convention on Business and Human Rights:

A DIVERSION FROM MEANINGFUL AND COLLECTIVE PROGRESS TOWARDS ACCESS TO REMEDY, JUSTICE, AND ENDING CORPORATE IMPUNITY

1. Background: What is being proposed under the idea of a Framework Convention?

The idea of a [Framework Convention](#) developed primarily by an [academic effort](#) is being [presented as a potential alternative to the draft legally binding](#) instrument to regulate in international human rights law the activities of transnational corporations and other business enterprises (LBI) that has been under [intergovernmental discussion and negotiations for over six years](#).

A vital dimension of this proposal is the source of its emergence—Global North legal and academic space, with its most vocal proponents enjoying positions with institutions resourced by Global North States, such as Denmark. It is noteworthy also that the States thus far known to have presented interest in exploring this alternative approach, which risks and undermines the work of a vast global coalition over more than six years and decades of organizing prior to that, are nations with histories of being [colonizers and where many transnational corporations are headquartered](#). The positionality of the emergence of a simplified Framework Convention discourse thus begs attention for the seemingly Global North- and Euro-centered objectives embedded in its proposition. This effort and analysis are undertaken by a few legal researchers from the limited scope of Global North institutions. They are attempting to circumvent, if not strategically discount, the work of multitude of experts, activists, policy professionals, representatives of social movements and grass roots communities, diplomats through not only legal or business and human rights spaces, but also from varied spheres of academia, activism, and policy from across the world.

The main elements of the proposed simplified Framework Convention are a statement of overall objectives (see Article 2); a list of states' general obligations that merely repeats what currently exists under international human rights law and the UNGPs (see Article 3); a provision of guiding principles to the proposed Framework Convention, which recall the UN Guiding principles on Businesses and Human Rights (UNGP) and enshrine a multistakeholder approach to achieving its objectives that puts business and business associations on par with civil society organizations, workers, rights-holders and their representatives, and human rights defenders, and movements for justice (see Article 4); some paragraphs on the relationship between the Convention and other agreements and legal documents, which do not oblige States to implement but only send an encouragement message, and protect bilateral and multilateral agreements(Art.5); an article on jurisdiction excluding strategic application of extraterritorial human obligations of States and the judicial competence of the judiciary in countries where controlling companies are domiciled to judge cases of violations of these companies beyond their borders (Art.6); the Conference of Parties, excluding adoption of decisions by democratic majorities and imposing consensus instead (Art 7). The proposition recognizes the need to work on further details to meet what the draft LBI seeks to achieve, especially in order to enhance access to remedy by victims, but fails to provide those details.

According to information obtained by civil society organizations during informal meetings with states' representatives, recently, a few States that have either boycotted the LBI related process, or have

generally refrained from constructive participation, including the United States, Japan, and some states members of the European Union, have been organizing meetings to discuss the idea of the simplified Framework Convention. Others have expressed their openness to the proposal.

[The LBI process has also been described by one Global North legal researcher strongly promoting the Framework Convention concept as “...cleaving along the lines of conventional binaries. To caricature this Manichean view... the treaty pits emerging against industrialized economies, and is buoyed by activists, while businesses are irreconcilably opposed.](#) To overcome these stated “conventional binaries” and the “Manichean view,” the alternative proposed seems no less than Machiavellian. The States interested in supporting such an approach are treading along the ‘end justifies the mean’ tactic. The *end* that may satiate the views of Global North nations related to their business and human rights issues, while protecting a legal status quo they strongly defend, while involuntarily, if not deliberately, stemming the progress made thus far with the investment of resources, time, effort, and commitment by an expansive, global, and inclusive coalition advancing a collective vision.

If these States and their legal experts are concerned about the future and effectiveness of this discourse, then their meaningful participation in the collectively established and agreed upon process must remain the appropriate forum for navigating their trepidations and expressing their opinions.

2. The latest attempt to derail genuine progress on corporate accountability

It is important to note, however, that the proposed simplified Framework Convention represents only the latest attempt to derail genuine progress on corporate accountability in the last 50 years. Attempts to regulate multinational enterprises in international law date back to the early 1970s in connection with the broader process of decolonization. Throughout this evolution, there have been constant efforts in resistance to this progress by industrialized countries and business associations.

From the UN Commission on Transnational Corporations proposing a [“Code of Conduct on Transnational Corporations”](#) to the [“Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights”](#) proposed by the Sub-commission on the Promotion and Protection of Human Rights in the early 2000s, attempts to create binding obligations have been repeatedly watered down and challenged. The UNGPs adopted in 2011 continues to follow the flawed logic of non-binding international responsibilities of corporations, allowing them to continue to benefit from the veil of impunity offered by States. Thus, the LBI initiative aims to challenge this logic while the proposed simplified Framework Convention aims only to reinforce the status-quo.

3. Why is this idea coming to the forefront now?

The chair of the negotiations has announced that during the 7th session, the text will be negotiated in the screen of the negotiation room and a group of friends of the chair will be created to advance the negotiation towards the 8th session. Evidently, some States will attempt to stymie these substantive negotiations from advancing, and instead propose new alternatives, such as the simplified Framework Convention, presented to create a possible exit from or an end to the LBI process.

However, this proposal ignores that during the 2nd and 3rd sessions of the open-ended intergovernmental working group (OEIGWG) that discussed an LBI, there were in-depth discussions on the format of the discourse, including on a framework convention idea. And, the current states supporting the simplified Framework Convention did not propose it at that time.

All options discussed back then were set aside by the intergovernmental process and the current model was adopted, based on which the draft text of the LBI has been developed and revised.

4. Why will the simplified Framework Convention be an unacceptable diversion?

The proposed simplified framework Convention should not be accepted because it is:

a. Introducing an empty proposal

The proposed Convention adopts a reductionist approach that is repetitive of what already exists under the international human rights law and in the UNGPs, as well as related resolutions following the UNGPs. It provides broad international guidance that will be very hard to translate into implementable steps at the level of national legislations.

b. Evading an international intergovernmental democratic debate on how to eliminate barriers to accessing justice and remedy for affected people and communities

The proposed Convention does not attempt to tackle any of the barriers facing victims and their representatives, including jurisdictional barriers, access to information, high costs of cases, challenges associated with the burden of proof, implementation of judgements, among several other elements.

c. Undermining a democratically adopted resolution of the UNHRC

The proposed simplified Framework Convention fundamentally undermines the entire purpose embodied in Resolution 26/9, which aims at moving the business and human rights framework from the realm of voluntary guidance to enforceable obligations that allow a functioning accountability and remedy regime to be set in place.

d. Arguing on the law of industrialized countries to delay an international urgent response for affected people and communities

The proposed simplified Framework Convention is suggested inter alia on the argument of the incompatibility of the LBI drafts with the laws of industrialized countries. In this way, their laws are suggested as a blockage to the urgent changes required to stop patterns of human rights harming conducts by transnational corporations and other business enterprises. Such conducts mostly have adverse impacts on marginalized and disadvantaged communities in former colonies. Thus, the proposed Framework Convention in a sense denies that the laws of industrialized or transitioning countries also require changes to make them compatible with sincere and effective human rights protections, changes that require that those legal frameworks move away from the protection of powerful economic endeavors toward the protection of human dignity and nature worldwide.

e. Wasting an opportunity for justice and remedy

The proposed simplified Framework Convention will not add much, but instead waste the opportunity to meaningfully advance the international framework pertaining to business and human rights that can, after decades of pursuit, result in offering a tangible process to advance justice and access remedy.

According to the academic proposing the initiative, it is based on the “impressive development” of the NAPs under the UNGPs, ignoring voices from civil society that have criticized among others aspects:

- The ambiguous character of the UNGPs.
- The focus on due diligence and grievance mechanisms in which the businesses have the opportunity to determine their own prevention duties, and be the judge and the party in the resolution of conflicts.
- The misuse of due diligence to reduce broader debates on corporate accountability.
- The lower standards achieved by the NAPs due to its multistakeholder constituency.
- The overall lack of effectiveness of NAPs (See for example the evaluation of the German NAP).

f. Letting affected people, communities, and their advocates behind in the debate

The initiative neglects the fact that affected people and communities from diverse regions have contributed to the LBI process and have brought their realities as an input for the LBI.

In fact, the contributions by the affected people, communities, their advocates, human rights and environmental defenders, scholars, and others have made clear, inter alia, the real obstacles that affect communities while accessing prevention and remedy. Furthermore, these affected people and communities have also presented clear proposals regarding existing liability gaps and ways to overcome them, which are wholly ignored in the simplified Framework Convention proposal. And in addition to seemingly excluding these inputs, the affected have not been in fact invited to the debates around the proposed simplified Framework Convention.

g. Domesticating human rights and denying justice beyond borders

While the aim of the UN Charter was to guarantee human rights worldwide, including beyond the borders of the States, the simplified Framework Convention proposal attacks the great advances achieved in the field of [extraterritorial obligations of States](#). This protection beyond borders is more urgent than ever in the current globalized context, including in new policy fields in which human rights are under threat-- such as financialization of nature, public services, housing, education, water, food systems ; as well as environment and ecology, migration, digitalization, expansion of agro industrial food systems, transnational privatization of education, healthcare, etc.

h. Departing from unfounded fears on “cases flood gates”

In this line, the alert from the simplified Framework Convention proponents on “[cases flood gates](#)” opening up by the recognition of claims in home countries is based more on a myth than on any reality. The practice shows that the opening of new judicial avenues does not automatically lead to “floods of cases,” because the affected communities need time, resources, and capacity to prepare their cases before they can venture into a legal process of any kind.

i. Inappropriately comparing with the Framework Convention on Tobacco Control (FCTC)

While the proponent of the simplified Framework Convention uses the example of the FCTC, they ignore that the simplified Framework Convention proposal and the FCTC are not comparable. In fact, the FCTC is not based on the UNGPs or the NAPs, neither based on the model of multistakeholder initiatives. On the contrary, the FCTC contains strong safeguards against corporate capture by industries and businesses with vested commercial interests and to advance industry liability, through protections such as Article-5.3 and Article-19 respectively.

j. Considering international law as a collection of States' practices and rejecting its power to change States' behavior for human rights protection

In the rationale of the simplified Framework Convention, the proponent alleges that to be effective, international law shall just follow the developments at national level, especially those derived from the UNGPs implementation through the NAPs. This rationale ignores that the aim of human rights law is to correct insufficient or ineffective national policy and legal developments, as well as to create a leveled playing field to close gaps in protection.

While the experiences of States are a key source to the evolution of an international law, they cannot solely be based on good practices, but must also take into account lessons learned from the challenges and shortcomings of the States' practice of the law. There are more than sufficient experiences and resultant understanding gleaned from the practice by the States under voluntary norms since the 70s to inform the LBI process

On the issue of due diligence laws the experience is fresh, but there is already evidence that this is insufficient, as shown by the [cases litigated under the French "Loi de Vigilance."](#) The first cases in France show that the debates in court are mainly focusing on the companies' vigilance plans on the paper, instead of defining if companies have complied with their duty of care focusing on the harm suffered by the affected communities.

k. Negotiating human rights law with those to be held accountable – a formula for corporate capture of governance at the cost of human rights

The simplified Framework Convention proposal is based on the multistakeholder approach. The rationale alleges that businesses' commitment is needed and useful to change abusive trends. Nonetheless, the current impunity makes evident that the will of the companies only goes until where their profits begin to be under threat. This happens because their statutory mandate is to obtain profit. It belongs to their DNA; therefore, recommending to rely on the will of the perpetrators to change their abusive behaviour can serve in some cases, but will not do so in the hardest cases in which human rights abuses produce profit.

The [multistakeholder format](#) is the direct way toward further [corporate capture](#). It puts democracy in danger. In fact, multistakeholder initiatives are apparently participative. However, the imbalances of power that they embody put corporate interests over the people and the nature, and in many cases subjugate States' power to the corporations' will.

5. Why should states continue to pave the way forward with the LBI instead of resetting the process?

The draft LBI incorporates even less of what civil society has considered the minimum for meaningful access to remedy and justice, while the proposed simplified Framework Convention discards even those elements, thus, the States should continue to negotiate the content that advances international human rights law.

Adopting an approach based on the proposed simplified Framework Convention will jeopardize the most crucial elements that would achieve an advancement for access to remedy and justice, and ending corporate impunity. These include broader prevention measures, beyond mandatory human rights due diligence throughout the value chain and global operations; legal liability, which is intrinsically linked to

access to justice and effective remedies; gender-responsive remedies and reparations; judicial mechanisms operating extraterritorially, cooperation, inter alia.

On the other hand, the proposed draft LBI:

- Is already well-aligned with the approach and language of the UNGPs including in matters pertaining to scope and approach to human rights due diligence. This alignment has been acknowledged by the High Commissioner for Human Rights, members of the Working Group on Business and Human Rights and experts in the field.
- Gives discretion to the implementing States in several important areas, including in implementing prevention obligations, setting in place a legal liability regime especially in regard to criminal liability, addressing burden of proof and access to information, international cooperation, enforcement, prohibition of the *forum non-convenience*, *forum necessitatis*, among other areas.
- Reaffirms international law principles of sovereign equality and territorial integrity of States.
- Proposes a Conference of Parties, supported by a committee of experts that could advance and supplement the LBI by any further developments to fulfil its purposes. As any international agreement, the LBI can be expanded through protocols.
- Is still in the negotiations phase, thus further revisions, coherence, and strengthening of the text are work in progress, which is open to any State or other interested stakeholders to contribute to.

Additionally, if the issue vis-à-vis proposal of the simplified Framework Convention is also related to its modality, then it is critical to note that there are no legally adopted definitions or prescribed [models for framework conventions, although they represent certain common characteristics](#). Some of these are: “the formulation of the objectives of the regime, the establishment of broad commitments for its parties and a general system of governance, and more detailed rules and the setting of specific targets are left to either parallel or subsequent agreements between the parties.” These characteristics are prevalent in the LBI process and in its latest draft.

Furthermore, due to the general character of the current draft, it includes a Conference of States Parties, which will allow further States’ negotiation to ensure that the LBI continues to evolve according to the developments of the society and regulatory challenges, as well as is responsive to the developments both nationally and internationally.

In view of these common parameters, the LBI process is inherently not disparate from the prominent modality of a framework convention. Thus, the proposition of the simplified Framework Convention even from the view of an alternative form to the LBI process is fundamentally a redundant argument.

6. What should civil society active in the process demand from the States?

Counter arguments to the LBI process may emerge more profusely as the LBI negotiations enter into final stages. In informal meetings, the United States has announced that it will read a statement asking to go a step back and consider other alternatives. This would be a blatant attempt to weaken an international multilateral mechanism, which for the first time in modern history can emerge as an effective instrument to hold abusive businesses accountable and secure justice and remedy for victims. Such counter and distractive narratives must be carefully evaluated through the critical lenses of legal implementation and efficacy, the spirit of collectivism being challenged by the voices of a few, and the power inherent in geopolitical dynamics as the industrialized nations continue to exert domination in international multilateral processes (e.g. [Global North States attempting to stymie or hijack other FC efforts like the UNFCCC COPs](#)).

The LBI process must continue in the frame of Res. 26/9. The States shall continue negotiating the content of the LBI in this context and spirit, as well as discard divertive and empty alternatives, such as the proposed simplified framework Convention, once and for all.

[This document is the fruit of collective work of diverse members of the Treaty Alliance (TA), including Corporate Accountability and FIAN International. The writers have based their analysis on discussions within the TA facilitation group and contributions by TA members in public debates on the topic.]