

## Al-Haq's Additional Textual Suggestions on the Revised Draft Legally Binding Instrument (LBI)

Date: 29 February 2020

### I. Introduction

1. Al-Haq welcomes the revised draft of the legally binding instrument (hereinafter “LBI”) to regulate the activities of transnational and multinational corporations, and other business enterprises in line with international human rights law. Al-Haq underscores the significance of this process, as it represents a critical opportunity to address the gaps in the international framework that have thus far allowed corporations to act with near impunity to the detriment of the human rights of millions of people worldwide.
2. Al-Haq welcomes the integration of various provisions proposed by civil society and relevant stakeholders and anticipates the continued involvement of civil society organisations in the process. It is clear that the revised draft of this LBI attempts to better establish and consolidate rights for affected individuals, communities and groups, including human rights defenders and protected persons and populations. Nevertheless, Al-Haq remains concerned that the LBI, in its current draft, remains insufficient and should be developed further in order to adequately address the “unfair power imbalance between companies and rights holders;”<sup>1</sup> especially in light of increased corporate influence and capture,<sup>2</sup> and the lack of effective and binding regulatory frameworks for corporations implicated in violations of human rights, particularly in situations of conflict and post-conflict settings. In particular, Al-Haq regrets that the revised draft fails to explicitly reaffirm the right to self-determination and permanent sovereignty over natural resources. Moreover, while Al-Haq recognises important steps which have been made, we stress that the draft requires further emphasis regarding the applicability of international humanitarian law to business enterprises operating in territory affected by armed conflict and situations of occupation.<sup>3</sup>
3. Al-Haq maintains its position that the LBI must prioritise the human rights of affected individuals, communities and populations within the context of business activities, at

<sup>1</sup> UN Human Rights Council, Report of the Fourth Session of the Open-Ended Intergovernmental working group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights, 2 January 2019, A/HRC/40/48, para 4.

<sup>2</sup> See ESCR-Net, Corporate Capture: Definition and Characteristics, available at [escr-net.org/corporateaccountability/corporatecapture/manifestations-corporate-capture](http://escr-net.org/corporateaccountability/corporatecapture/manifestations-corporate-capture).

<sup>3</sup> ‘IHL and Human Rights Law - ICRC’ </eng/war-and-law/ihl-other-legal-regmies/ihl-human-rights/overview-ihl-and-human-rights.htm> accessed 14 February 2020.



all times and in all situations, without exception. Particular attention to vulnerable groups and situations where a heightened risk of business-related human rights violations exist is critical in ensuring that the protections afforded by this LBI can be realised for all persons and peoples. The UN Guiding Principles on Business and Human Rights 2011<sup>4</sup> reflect the reality that the “the most egregious business-related human rights abuses take place”<sup>5</sup> in conflict-affected areas and that indigenous peoples are among the groups most severely affected by business enterprises.<sup>6</sup> Therefore, it is imperative that the right to self-determination and permanent sovereignty over natural resources, the specific circumstances and vulnerabilities of indigenous peoples, as well as populations in high-risk settings, namely conflict-affected areas and protected persons in situations of occupation, are at the core of future drafts of this LBI.

4. In pursuit of this aim, Al-Haq recommends that the LBI be developed and strengthened further to reaffirm the protections afforded to protected populations in conflict-affected areas under international law, in order to counter corporate abuses as well as complicity in the commission of international crimes. A conflict-sensitive approach,<sup>7</sup> with due consideration for the complimentary relationship between international human rights and humanitarian law, should be streamlined throughout the text of the LBI.<sup>8</sup>
5. The following submission consists of comments pertaining to the provisions and paragraphs of the revised draft of the LBI issued on 16 July 2019. While Al-Haq’s primary focus is on strengthening the scope of the instrument with respect to conflict-affected areas and situations of occupation, this submission also includes general comments relating to other related issues, such as, *inter alia*, the rights of indigenous peoples, human rights defenders, corporate liability, enhanced human rights-based due diligence and extraterritorial obligations. Al-Haq is committed to continue to read and analyse future drafts and provide further comments and analysis.

<sup>4</sup> Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect, and Remedy’ Framework (2011) (hereinafter “UNGPs”).

<sup>5</sup> UN Human Rights Council, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie – Business and human rights in conflict-affected regions: challenges and options towards State Responses A/HRC/17/32 (27 May 2011), para. 5.

<sup>6</sup> Report of the Special Rapporteur on the rights of indigenous peoples, Note by the Secretariat, A/HRC/39/17, para. 4

<sup>7</sup> International Alert, ‘Why Conflict Sensitivity Matter for Business and Human Rights’ (2016)

<[https://www.international-alert.org/sites/default/files/Economy\\_ConflictSensitivityBusinessHumanRights\\_EN\\_2016.pdf](https://www.international-alert.org/sites/default/files/Economy_ConflictSensitivityBusinessHumanRights_EN_2016.pdf)> accessed 10 February 2020.

<sup>8</sup> ICRC, ‘IHL and Human Rights Law - ICRC’ </eng/war-and-law/ihl-other-legal-regimies/ihl-human-rights/overview-ihl-and-human-rights.htm>.



## II. Self-Determination and Permanent Sovereignty over Natural Resources

6. The instrument, in its current and previous drafts, has neglected the collective right of peoples to permanent sovereignty, access and control over their natural wealth and resources, in a way that respects the land and environment. Businesses, reinforced by or supporting the State, have long unlawfully exploited indigenous lands, leading to detrimental impacts on social, economic, cultural, civil and political rights of communities and peoples around the world. Al-Haq recommends rephrasing the Preamble in order to reaffirm fundamental human rights, precisely including the right to life, liberty and security of person, and the right to self-determination and permanent sovereignty over natural resources, and the dignity and worth of the human person. Moreover, we recommend that the right to self-determination and permanent sovereignty over natural resources are recognised in Article 4 and 5.
7. In order to safeguard the right to self-determination and permanent sovereignty over natural resources, the consent of indigenous peoples should be an explicit requirement. Therefore, it is imperative that the reference to “consultations” in Article 5(3)(b) be replaced by “consent,” in line with international standards.<sup>9</sup>
8. The Preamble and Article 1 should further recognise the disproportionate impact of business-related human rights abuses on populations, communities, vulnerable groups and human rights defenders in high-risk settings, including situations of conflict and occupation. In such settings, systemic human rights abuses, often facilitated by State actors or those in position of authority, combined with a prevailing culture of impunity, allow for, among others, business-related human rights abuses, which may amount to internationally recognised crimes, such as pillage, destruction of the environment, forced displacement and transfer.

## III. Conflict-Affected Areas

9. Al-Haq remains concerned that the revised draft directs most of the obligations towards States to prevent and remedy corporate related violations and abuses of human rights, as opposed to the corporate entities involved in their commission. Future drafts of this LBI should provide more explicit and direct obligations for business enterprises in line with international law and human rights standards. It is important to note that States and the corporations operating in their jurisdictions often have shared interests. In particular, in conflict-affected areas and situations of

<sup>9</sup> Article 10, UNGA, ‘United Nations Declaration on the Rights of Indigenous Peoples (2 October 2007) UN Doc. A/RES/61/295.



occupation, as a result of either weak governance or the inability or unwillingness of States, “the human rights regime cannot possibly function as intended.”<sup>10</sup>

10. As noted above, the risk of business-related human rights violations is heightened in conflict-affected areas, including situations of occupation. What is unique about these contexts, however, is that business-related human rights violations are not only enabled by State inaction or the failure of States to regulate business activities. Rather, the development and expansion of business enterprises can be intrinsic to a State’s policy of belligerence and domination. For example, under the principle of *usufruct*, enshrined in Article 55 of the Hague Regulations, the Occupying Power is prohibited from excessively exploiting the occupied population’s natural resources, beyond the accepted use of the property prior to belligerent occupation. This would rule out, for example, the development of new mines and quarried resources in occupied territory by companies under licence from the belligerent occupant.
11. Under Article 55 of the Hague Regulations (1907) the belligerent occupant has a duty to administer the property according to the rules of usufruct and safeguard the capital of the property for the returning sovereign. Therefore, business enterprises involved in the extraction of natural resources benefiting the Occupying Power’s economy and national interests, in excess of the rules of usufruct may be involved in the crime of pillage<sup>11</sup>, which is prohibited under international humanitarian law (Article 47 of the Hague Regulations and Article 33 of the Fourth Geneva Convention) and amounts to a war crime under the jurisdiction of the International Criminal Court, as enshrined in Article 8(b)(xv) of the Rome Statute.<sup>12</sup>
12. The development of infrastructure, including the construction and servicing of illegal settlements in occupied territory, for the benefit of business enterprises is facilitated by the forced displacement of protected populations and the transfer of civilians into occupied territory, in contravention of international humanitarian law, constituting internationally recognized crimes. Corporations operating in these contexts may be directly or indirectly responsible for incentivising or exacerbating infringements of international human rights and humanitarian law and may be complicit in aiding and abetting the commission of international crimes.

<sup>10</sup> UN Human Rights Council, ‘Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie – Business and human rights in conflict-affected regions: challenges and options towards State Responses’ A/HRC/17/32 (27 May 2011), Summary.

<sup>11</sup> SOMO and Al-Haq, Violations Set in Stone: Heidelbergcement in the Occupied Palestinian Territory, (February 2020), P 31.

<sup>12</sup> Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land (Hague Regulations) (adopted 18 October 1907), entry into force 26 January 1910); UNGA, The Rome Statute of the International Criminal Court (adopted 17 July 1998, entry into force 1 July 2002) 2187 UNTS 3.



13. Therefore, Al-Haq stresses that in order to prevent undermining the protections in this legally binding instrument, it is important that its provisions are more aligned with the provisions in international humanitarian law, including the Hague Regulations of 1907, the Four Geneva Conventions of 1949, and the Additional Protocol I of 1977. Further, the UN Guiding Principles on Business and Human Rights, namely principles 7 and 12, which recall a set of existing obligations under international humanitarian law, applicable to situations of conflict, should be operationalized in this legally binding instrument in full. In doing so, Al-Haq recommends including mention of ‘protected persons’ during belligerent occupation as per Article 4(1) of the Fourth Geneva Convention, as one of the categories of persons “facing heightened risks of violations of human rights within the context of business activities” in Article 14(4).<sup>13</sup>

14. In relation to Article 9 and including Article 5(3) of the LBI, we recommend the consideration of Articles 7, 8 and 47 of the Fourth Geneva Convention which prohibit protected persons under the Geneva Conventions and their political representatives from concluding agreements resulting in the renunciation of rights guaranteed under the Convention. Moreover, and pursuant to Article 55 of the Hague Regulations, there are strict protections afforded to public immovable property in occupied territory, compounded by the requirement that resources be administered for the benefit of the occupied population in line with Article 43 of same. In this regard, Al-Haq seeks to highlight the necessity of replacing the language of ‘consultation’ with ‘consent’ in Article 5(3) of the proposed LBI, as mentioned above, to more adequately reflect the aforementioned preemptory norms of permanent sovereignty over natural resources.

#### (a) Prevention: Mandatory Enhanced Due Diligence

15. Article 5 should be presented more closely in line with the UN Guiding Principles on Business and Human Rights and with relevant obligations and responsibilities set forth in international law. Therefore, it is critical that the LBI require business enterprises to adopt policy commitments to meet their responsibility to respect human rights.<sup>14</sup> Human rights due diligence provided by Article 5(2) should be mandatory and should be coupled with clearly defined obligations regarding the facilitation or provision of remediation.<sup>15</sup> As such, Al-Haq suggests the following amendments:

16. In Article 5 paragraph 2 (b) “appropriate actions” should be replaced with the term “immediate and effective actions,”<sup>16</sup> and should be clearly defined and exemplified.

<sup>13</sup> Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect, and Remedy’ Framework (2011).

<sup>14</sup> Ibid, Principle 16.

<sup>15</sup> UN Guiding Principles, Principle 17.

<sup>16</sup> Al-Haq, Oral Intervention Article 5 (Prevention), Item 4, Tuesday 15 October 2019; (According to the UNGPs, business enterprises should take adequate measures to prevent, mitigate and remediate adverse human





These actions should mirror the UNGPs and should include explicit obligations for businesses to address adverse human rights impacts through prevention, mitigation; where businesses enterprises identify that they have caused or contributed to adverse impacts, they should provide for or cooperate in their remediation through legitimate processes.<sup>17</sup>

17. Paragraph 2(c) of Article 5 should stress that the monitoring of the human rights impacts of business activities and relationships must be a continuous process, before, during and after, to guarantee effective and genuine results.
18. Al-Haq welcomes the inclusion of protected populations under occupation or conflict areas to the categories requiring special attention in Article 5(3)(b). Nevertheless, it remains insufficient and in practice unrealistic considering the situation of armed conflict, hostilities, and/or the presence of foreign domination and authority – all of which often strives for advancing territorial appropriation and annexation, including the natural resources within, and where corporations are often involved. Therefore, more stringent human rights due diligence, such as that outlined in 5(3)(e) as well as additional mechanisms and methods of prevention and remediation are needed.
19. Additionally, Al-Haq underscores the importance of Article 5(3)(e) which requires the adoption and implementation of enhanced human rights due diligence to prevent human rights violations or abuses in occupied or conflict-affected areas, arising from business activities or contractual relationships, including with respect to products and services. However, the language should be clearer and should explicitly require the integration of a conflict-sensitive approach to enhanced human rights due diligence in relevant contexts. In future drafts, enhanced human rights due diligence should be expanded with additional obligations, including further preventative measures, divestment and disengagement policies, in order to avoid corporate involvement in or contribution to human right violations or abuses and grave breaches of the Geneva Conventions in their activities and relationships.<sup>18</sup>
20. Where businesses fail or are unable to conduct enhanced human rights due diligence and risk being involved in human rights abuses and internationally recognised crimes in situations of conflict and occupation, Article 5 should provide for the possibility of explicitly prohibiting businesses, through domestic legislation, from pursuing their relevant operations and relationships. Additional language should be included for State Parties to ensure adequate sanctions when failing to comply with obligations in

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rights impacts associated with their activities and relationships<sup>16</sup>. *In addition, “the business responsibility may encompass ‘additional standards’ with regards to respecting the rights of specific groups and populations in certain contexts, including situations of armed conflict.”*

<sup>17</sup> UN Guiding Principles, Principle 11.

<sup>18</sup> *See generally*, Andreas Graf and Andrea Iff, ‘Enhanced Human Rights Due Diligence in Conflict Affected and High-Risk Areas’ (2016), Essential.



Article 5, both on the part of home and host States. Al-Haq advises that the French Corporate Duty of Vigilance Law provides a recommended template to follow in terms of providing for mandatory enhanced due diligence.<sup>19</sup> Al-Haq considers that enhanced due diligence should include the identification of risks of serious human rights violation of subsidiaries, subcontractors and suppliers with whom an established business relationship is maintained.

#### (b) The rights of victims

21. While the revised draft of the legally binding instrument attempts to be “victim-centric” by including provisions on the protection of victims and human rights defenders, paragraph 1 of Article 1 should also include human rights defenders, vulnerable groups and populations and those in high-risk settings, in the definition of victims proposed.
22. Special attention should be given to protect the rights of employees in businesses operating in high-risk settings such as conflict-affected areas, especially employees from the protected population in situations of occupation working in business enterprises that fall within the jurisdiction of the Occupying Power.

### IV. Accountability: Legal Liability and Adjudicative Jurisdiction

#### (c) Legal Liability (Article 6)

23. Al-Haq strongly welcomes the inclusion of “liability of legal persons” in Article 6 as a necessary step to ensure corporate accountability. The presence of an enumerated list of offences in Article 6(7) will facilitate ease of incorporation into domestic law, the retention of which is particularly important for the purposes of criminal prosecutions, but the list should not be exhaustive. Article 6(7) should draw from existing provisions already codified in international criminal, humanitarian and human rights law. In the same paragraph, ‘or’ should be replaced with ‘and’.
24. In order to ensure the primacy of human rights in this LBI, the provisions in Article 6 should not be contingent on the State’s domestic law; therefore, “subject to their domestic law” should be removed.<sup>20</sup> Furthermore, Article 6(1) should make explicit reference to the extra-territorial applicability of the State’s human rights obligations therein.

<sup>19</sup> French Corporate Duty of Vigilance Law (English Translation)

European Coalition of Corporate Justice, 2016, available at: <http://www.respect.international/french-corporate-duty-of-vigilance-law-english-translation/>

<sup>20</sup> This reflects the framework envisioned in the OECD Guidelines for Multinational Enterprises 2011, Commentary, paragraphs 37-38.



#### (d) Adjudicative Jurisdiction (Article 7)

25. Article 7 should explicitly state whether it provides for, or recommends, universal jurisdiction over these crimes (also relevant for Article 9). Here, it would be useful to include reference to the grave breaches provisions common to the Four Geneva Conventions, so that legal persons who have commissioned, or are complicit in, the commission of war crimes, can be held to account.
26. It is important to include that States should incorporate or otherwise implement within their domestic law appropriate measures for universal jurisdiction for acts or omissions which amount to grave breaches of international humanitarian law, gross human rights violations, or otherwise violations of *jus cogens* norms which give rise to obligations *erga omnes*.<sup>21</sup>
27. Finally, the LBI should further provide for specific provisions encouraging *forum necessitatis*, such as the International Criminal Court, especially for cases relating to corporate abuse in conflict-affected settings and situations of occupation where access to remedy and justice are often deliberately hindered and denied.

#### V. Definitions

28. Al-Haq echoes the suggestion put forth by ESCR-net to replace “contractual relationship” with “business relationship” in Article 1 to better reflect the UN Guiding Principles on Business and Human Rights, and to include relationships with business partners, entities in its value chain, and any other non-State or State entity directly linked to its business operations, products or services.<sup>22</sup> This is critical in ensuring that parent companies of transnational corporations are held liable, even when no contractual relationship exists between them and their subsidiaries. Following this, “business relationships” should be brought within the scope of the LBI with explicit reference in Article 3.
29. The definition must also include “acts and omissions” of business enterprises and refer to “products and services”—mirroring Principle 13 of the UNGPs.<sup>23</sup> In order to ensure accountability Article 1 paragraph 3 should include “both acts of commission and omission.”

<sup>21</sup> ICJ, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion), 9 July 2004, at paras 88, 156; ICJ, Case Concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain) (Judgement), 24 July 1964.

<sup>22</sup> ESCR-Net, ‘ESCR-Net Position Paper on the Revised Draft of Treaty on Transnational Corporations and Other Business Enterprises with Respect to Human Rights’ (October 2019)

<sup>23</sup> UN Guiding Principles on Business and Human Rights, Principle 13.





30. Article 1 should include additional definitions, including of: “Transnational corporation”; “Supply chain”; and “Extraterritorial obligations” as defined by the Treaty on Transnational Corporations and their Supply Chains with Regard to Human Rights.<sup>24</sup>

## VI. Conclusion

31. The LBI, in its final format, must emphasise the primacy of *human rights* over business relationships and contractual agreements and address the ramifications of corporate activities on the fundamental rights of communities and peoples, particularly the fundamental right to self-determination and sovereignty over natural resources, with specific consideration for conflict-affected areas and situations of foreign occupation and colonisation.

<sup>24</sup> Global Campaign to Reclaim Peoples Sovereignty, Dismantle Corporate Power and Stop Impunity, Treaty on Transnational Corporations and their Supply Chains with Regard to Human Rights, Articles 14-23 Part I.