

**Submission to the Open-Ended Intergovernmental Working Group on  
Transnational Corporations and Other Business Enterprises with Respect to  
Human Rights**

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**In Response to the Call for Comments and Proposals on the Draft Legally Binding  
Instrument**

**Submitted by:**

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Council**



**Date: 28 February 2019**

## Introduction

1. Al-Haq presents the following submission in response to the call for comments and proposals issued by the Office of the United Nations (UN) High Commissioner for Human Rights, with regards to the zero draft legally binding instrument to regulate under international human rights law the activities of transnational corporations and other business enterprises (hereinafter Zero Draft Treaty or Treaty), released by the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights.
2. Al-Haq welcomes the release of the Zero Draft Treaty, as a crucial step towards ensuring corporate accountability and addressing the international legal framework's shortcomings in this regard. Nonetheless, as noted in the Fourth Session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, there remains an “unfair power imbalance between companies and right holders”,<sup>1</sup> especially in light of increased corporate presence, influence and leverage, and the lack of effective regulatory frameworks for corporations in situations of conflict and post-conflict settings.
3. Accordingly, Al-Haq presents its recommendations throughout this submission on the various issues relevant to the Zero Draft Treaty, primarily focusing on conflict-affected areas, including situations of occupation, and the importance of including further specific provisions referencing international humanitarian law, as well as issues pertaining to liability, human rights defenders and victims, the environment and gender.
4. Al-Haq adopts the position that the Treaty must prioritise affected communities and populations in their pursuit to realising human rights, equally and indivisibly, at all times and in all contexts, in the face of corporate abuses and complicity in crimes.

## Right to Self-Determination and Permanent Sovereignty over Natural Resources

5. The Treaty must address the ramifications of corporate activities on the fundamental rights of communities and peoples, particularly the fundamental right to self-determination and permanent sovereignty over natural resources, including in situations of conflict and occupation. Explicit reference should be made throughout the Treaty in this regard, something which should be highlighted in **Article 1** of the preamble of the Treaty to start with.
6. In **Article 3(2)**, it is important that the provision is expanded to cover all international human rights and fundamental rights, including the right to self-determination and

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<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.



those rights recognised under domestic law, in addition to international humanitarian law. Fundamental human rights must cover the right to self-determination which many peoples across the world are struggling to achieve, as perpetrated by State and non-state actors, including business enterprises, most commonly seen in situations of conflict and occupation.

### **Conflict-Affected Areas, Applicable Legal Framework, and Jurisdiction**

7. The Treaty, in its current format, fails to shed light on the importance of requiring stringent human rights due diligence by both States and corporate actors in situations of conflict and occupation.
8. The current draft of the Treaty references conflict-affected areas only once in Article 15(4). **Article 15(4)** requires that “special attention shall be undertaken in the cases of business activities in conflict-affected areas,” to “identify, prevent and mitigate” human rights abuses incurred by the activities or the relationships of business enterprises within this context. This implementing article should be reinforced and echo the UN Guiding Principles on Business and Human Rights (UNGPs) which recall a set of existing obligations under international humanitarian law, applicable to situations of conflict, as illustrated in Principle 7 and 12.<sup>2</sup>
9. Should a reference specific to international human rights law be kept in the preamble, **Article 1**, as opposed to a reference to international law more generally, then it is necessary to also reference international humanitarian law as a legal framework governing situations of conflict.
10. **Article 9** on prevention does not include any measures regarding human rights due diligence for business activities in conflict areas, constituting a major gap. **Article 9** should have an additional provision, requiring enhanced human rights due diligence, specific to conflict-affected areas to avoid corporate adverse human rights impacts and involvement in gross violations of international law, considering the environment businesses operate in, which lacks consistent and effective regulatory frameworks. The Treaty should also require States to impose mandatory and enhanced human rights due diligence for businesses, operating or planning to operate in conflict areas, including more urgent and immediate preventive measures, divestment and disengagement policies, to avoid corporate involvement in or contribution to human rights abuses in their activities and relationships.
11. The aforementioned is echoed in Principle 1 of the UNGPs which provides that States must protect against human rights abuse within their territory and/or jurisdiction and “should consider the full range of permissible preventative and remedial measures,

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<sup>2</sup> See also: OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High Risk Areas, 2016.



including policies, legislation, regulations and adjudication. States also have the duty to protect and promote the rule of law, including by taking measures to ensure equality before the law, fairness in its application, and by providing for adequate accountability, legal certainty, and procedural and legal transparency”.<sup>3</sup>

12. Furthermore, **Article 9** should also require an independent mechanism for environmental and gender impact assessments, governed by State regulations.
13. As for the applicable legal framework for conflict settings, the Treaty mentions international humanitarian law once in Article 15(6) thus not adequately emphasising the protections afforded to people, nor the obligations and responsibilities set for State and non-state actors within this context. This could be addressed by adding reference to international humanitarian law, where applicable, such as in **Article 7** on applicable law, as well as in **Articles 2 and 3**.
14. In addition, in **Article 10** on legal applicability, more focus on conflict-affected areas is required, where international humanitarian law is applicable and allows for additional specialized protections for persons and civilians within this context. In this Article, a reference should be made to liability, particularly with regards to aiding and abetting international crimes perpetrated by State actors, especially in situations of occupation and conflict. Meanwhile, **Article 10(11)** regarding criminal liability and universal jurisdiction should read as: Where applicable under international law, States shall incorporate or otherwise implement within their domestic law appropriate provisions for universal jurisdiction over human rights violations that amount to war crimes, crimes against humanity and genocide. **Article 5** on jurisdiction should be amended accordingly, to provide for universal jurisdiction.
15. Furthermore, in **Article 6(1)** on statute limitations, specific reference should be made in the first sentence to international humanitarian law. Al-Haq proposes the following amendment: Statutes of limitations shall not apply to violations of international human rights and humanitarian law which may constitute gross human rights violations, grave breaches and internationally recognised crimes under international law. Such amendment would provide a clearer basis and definition for the crimes, which would be in line with international criminal law and the Rome Statute of the International Criminal Court.
16. In Article 4 on the definition of business activities of a transnational character, and in **Article 4(2)** more specifically, “two or more national jurisdictions” should be interpreted to include non-self-governing territory and territory under military occupation.

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<sup>3</sup> Principle 1, the UN Guiding Principles on Business and Human Rights.



17. **Article 5(1)(a)** reaffirms jurisdiction on the basis of territoriality, whereas **Article 5(1)(b)** permits the exercise of extraterritorial jurisdiction, accepted under international law, which allows States to regulate the actions of their nationals abroad. The Treaty should recognise the improper use of *forum non conveniens* and provide for specific provisions, encouraging *forum necessitatis*, especially for cases relating to corporate abuse in conflict settings and occupation where access to remedy and justice are often deliberately hindered and denied.
18. At the same time, **Article 9** on prevention mechanisms should also include measures that emphasize the protection of human rights defenders. In addition, **Article 9(2)(g)** should emphasize that the adverse impacts of corporate activities may affect communities beyond the State where the corporation is domiciled or the State where it is conducting its activities; e.g., in the case of effluent penetrating boundaries and intoxicating a third country.

### Human Rights Defenders and Victims

19. While the Treaty claims to be “victim-centric”, it currently ignores the role of human rights defenders and fails to provide necessary provisions to ensure their protection against increased risks and attacks. Human rights defenders are increasingly faced with systemic attacks, intimidation, threats, and criminalization, including through State laws and by corporate actors.
20. In **Article 4(1)**, concerned with the definition of the victims, additional references should be made to include human rights defenders, vulnerable populations and groups, including protected populations.
21. **Article 8** of the Treaty on the rights of victims to have “fair, effective and prompt access to justice and remedies”, human rights defenders must be included, in line with the UN Declaration on Human Rights Defenders, while ensuring a gender-responsive approach.<sup>4</sup> Other groups that should be included in the definition of victims are those at risk in conflict settings and protected populations.
22. Victims may be understood to mean workers within the corporation, who for example, in the case of conflict affected areas, including situations of belligerent occupation may be coerced to work in corporations active in settlements constructed in violation of international law.

### Scope of the Treaty

<sup>4</sup> For more details on the Gender-Responsive Lens, see: ESCR-Net, ‘Advocating for Binding Treaty on Business and Human Rights – ESCR-Net Advocacy Position Papers’, 19 December 2018, available at: [https://www.escr-net.org/sites/default/files/advocacy\\_position\\_papers\\_igwg2018.pdf](https://www.escr-net.org/sites/default/files/advocacy_position_papers_igwg2018.pdf)



23. The proposed scope of the Treaty, in line with resolution 26/9 (2014) of the Human Rights Council, is limited to transnational corporations and other business enterprises of transnational character in their operational activities. Al-Haq is concerned that the scope disregards the fact that any business enterprise, “regardless of their size, sector, operational context, ownership and structure,”<sup>5</sup> including State-owned companies, could have an adverse impact on human rights and be complicit in grave breaches and internationally recognised crimes. Al-Haq therefore recommends that a new resolution be adopted in this regard, to amend resolution 26/9 (2014) dictating the scope of the Treaty.

For more information, please consult previous statements, advocacy position papers and statements that Al-Haq produced and contributed to since the beginning of the Treaty process:

- Oral Statement on behalf of Al-Haq, ALTSEAN-Burma, AWID, CIHRS, ESCR-Net, FIDH, WILPF, ACCA and SOMO, during the Fourth Session (October 2018), under Item 4 – Final Provisions, available at: <http://www.alhaq.org/images/stories/PDF/FIRST%20JOINT%20ORAL%20STATEMENT%20Conflict%20Affected%20Areas%20OEIGWG%204%20Session%20October%202018.pdf>
- Oral Statement on behalf of Al-Haq, Feminists for Binding Treaty, Franciscans International and ESCR-Net, during the Fourth Session (October 2018), under Optional Protocol – Panel on Rights of Victims, available at: <http://www.alhaq.org/images/stories/PDF/Second%20Joint%20Oral%20Statement%20Gender%20Conflict%20Areas%20IGWG%20October%202018.pdf>
- ESCR-Net Advocacy Position Papers ahead of the Fourth Session (October 2018), highlighting corporate capture, human rights defenders, a gender-responsive lens, indigenous peoples’ rights, and conflict-affected areas, available at: [https://www.escr-net.org/sites/default/files/advocacy\\_position\\_papers\\_igwg2018.pdf](https://www.escr-net.org/sites/default/files/advocacy_position_papers_igwg2018.pdf)
- Other statements and press releases:
  - Al-Haq Participates in the First Negotiations Since the Release of Zero Draft Treaty on Transnational Corporations and Human Rights, 22 October 2018, available at: <http://www.alhaq.org/advocacy/targets/united-nations/1311-al-haq-participates-in-the-first-negotiations-since-the-release-of-zero-draft-treaty-on-transnational-corporations-and-human-rights>
  - Al-Haq takes part in the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, 1 November 2016, available at: <http://www.alhaq.org/advocacy/targets/third-party-states/1082-al-haq->

<sup>5</sup>Principle 14, [https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR\\_EN.pdf](https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf)

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