

Affiliate , International Commission of Jurists - Geneva فرع لجنة الحقوقيين الدولية ، جنيف
تتمتع الحق بصفة استشارية لدى المجلس الاقتصادي والاجتماعي في الأمم المتحدة
NGO in Consultative Status with the Economic and Social Council of the United Nations



Call for inputs: Views and proposals on a draft legally binding instrument on the right to development

Due: 26 July 2019

Submitted by: Al-Haq, Law in the Service of Man

**Consultative Status to the United Nations Economic and Social Council
(ECOSOC)**



Al-Haq

Al-Haq is an independent Palestinian non-governmental human rights organisation based in Ramallah, West Bank. Established in 1979 to protect and promote human rights and the rule of law in the Occupied Palestinian Territory (OPT), the organisation has special consultative status with the United Nations Economic and Social Council.

Al-Haq documents violations of the individual and collective rights of Palestinians in the OPT, irrespective of the identity of the perpetrator, and seeks to end such breaches by way of advocacy before national and international mechanisms and by holding the violators accountable. The organisation conducts research; prepares reports, studies and interventions on breaches of international human rights and humanitarian law in the OPT; and undertakes advocacy before local, regional and international bodies. Al-Haq also cooperates with Palestinian civil society organisations and governmental institutions in order to ensure that international human rights standards are reflected in Palestinian law and policies. The organisation has a specialised international law library for the use of its staff and the local community.

Al-Haq is the West Bank affiliate of the International Commission of Jurists - Geneva, and is a member of the Euro-Mediterranean Human Rights Network (EMHRN), the World Organisation Against Torture (OMCT), the International Federation for Human Rights (FIDH), Habitat International Coalition (HIC), and the Palestinian NGO Network (PNGO).

Drawing on Al-Haq's particular experience in monitoring documenting violations of international human rights and international humanitarian law during armed conflict and belligerent occupation, this paper addresses issues pertaining to the right to development mostly through the lens of the collective rights of protected persons during situations of prolonged belligerent occupation, such as Israel's occupation of the Palestinian territory.

A. Type of the instrument:

Should the instrument be principally:

- a framework convention,
- a treaty focusing on inter-state relations defining rights and obligations of States,
- a treaty modelled on existing human rights treaties, defining the rights of individuals and peoples and corresponding obligations of States and non-state actors;
- an instrument combining existing models of human rights treaties with inter-State rights and obligations; or
- another instrument or agreed outcome?

1. Al-Haq recommends that the proposed draft legally binding mechanism should be a multilateral treaty that focuses on inter-state relations and defines the rights and obligations of States, as well as clear consequences for States who fail to uphold their rights and obligations.
2. Nonetheless, it should also complement already-existing and developing human rights treaties, providing for the protection of individual and collective human rights, corresponding to the obligations of State and non-state actors under international law. This framework would increase the likelihood of the right to development being enforced by and on individual states that are parties to the mechanism. Similar, to the UN Human Rights Treaty System, a legally binding instrument on the right to development should include an individual complaints mechanism. Further, Al-Haq recommends that any draft legally binding mechanism include responsibility and liability of corporations for impeding the right to development.

B. Content of the instrument

Which previous instruments and provisions should be referenced in the preamble?

3. The right to development should be linked to rights and obligations under international law such as those mentioned for inclusion in the preamble and shown as a right that is outlined and insinuated in previous international laws and treaties. As a starting point the Charter of the United Nations, Common Article 1 of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, the Declaration on the Right to Development (UNGA 41/128), General Comment No 3 (1990) of the Committee on Economic, Social and Cultural Rights, Declaration on the Granting of Independence to Colonial Countries and Peoples (General Assembly resolution 1514 (XV) of 14 December 1960), Article 2(c) of the International Convention on the Suppression and Punishment of the Crime of



Apartheid (30 November 1973), the Rome Statute of the International Criminal Court, the United Nations Declaration on the Rights of Indigenous Peoples, the United Nations Convention on the Law of the Sea (in relation to the special requirements of developing States). Provisions referenced in the preamble should also include the Universal Declaration of Human Rights, Convention on the Elimination of All Forms of Discrimination Against Women, as well as provisions of international humanitarian law, relevant to situations of conflict, notably the Hague Regulations (Articles 43, 46, 52, 53, 55), and the Fourth Geneva Convention (Articles 1, 33).

Which considerations should be incorporated in the preamble?

4. The preamble to this treaty should mention the consideration of international cooperation and healthy, non-exploitative, and sustainable economic growth. In addition, the preamble should refer to the right to self-determination and permanent sovereignty over natural and national resources.
5. In particular, the right to development of peoples during armed conflict, with special mention of the collective rights of peoples under foreign occupation to development. In addition, all measures necessary should be taken to end situations of prolonged occupation, colonization, apartheid, and annexation as situations which by their nature impede the collective right to self-determination and the right to development.
6. It would be useful to mention the right to rebuild, after armed conflict, in terms of the third prong of the R2P doctrine.
7. Consideration should be had for the United Nations sanctioning regime, with a preference for targeted economic sanctions, where umbrella sanctions may unduly impede the right to development.
8. Some reference may be useful to warn against austerity policies in macroeconomic models, which lead to mass unemployment, as breaching State obligations on the right to work under the ICESCR. Notably in General Comment No. 18, the Committee on Economic, Social and Cultural Rights stated “the right to work requires formulation and implementation by States parties of an employment policy with a view to stimulating economic growth and development, raising levels of living, meeting labour requirements and overcoming unemployment and underemployment”.

How should the object and purpose of the instrument be formulated?

9. The instrument’s object and purpose should be drafted to highlight the rights of all peoples and individuals to economic, social, cultural and political development that is



people-centered, including the right to self-determination, whereby people may determine their political status and pursue their development with sovereignty over all their natural wealth and resources. It should highlight the need for an enforcement mechanism to ensure that these values are upheld. This would be with the objective that supporting such development might lead to the enforcement of all human rights for people everywhere.

Which elements should be included in the instrument and how should it be structured?

10. The instrument should include the nature of the right, the application of the right in contexts of peace and armed conflict, special mention of rights of persons in non-self-governing territory, under colonization, apartheid, occupation. There should be section on responsibility and liability, with either an included article or additional Protocol providing for a complaints mechanism. The instrument should include the elements of economic, social, cultural, and political development, addressing economic development foremost.
11. Economic development should include local sovereignty over all natural wealth and resources. In the special context of armed conflict and belligerent occupation, this is affirmed by obtaining consent from political and civil society representatives of occupied populations for any development of land and natural resources whereby the occupied population maintains the right of self-determination and permanent sovereignty over all resources. The obstruction of development in agriculture, mineral extraction, stone mining and quarrying, construction, tourism, and communication should be forbidden. Furthermore, the exploitation of water resources in occupied territory should be expressly forbidden as a war crime under international law. The mechanism should also address the issue of populations obtaining access to infrastructure necessary for development, such as electricity for personal use and for economic development, as well as the right to build homes and own land without threat of confiscation or demolition by foreign companies or belligerent occupiers. Development should also be supported in offshore endeavors such as fishing industries within a state/territory's waters.
12. Economic development should also address the degree to which a territory or state has been made dependent upon external donors and international organizations, as a result of prolonged conflict or occupation for example, and strive to provide methods to genuinely develop and/or strengthen the local economy so that dependence on external funds decreases. This can be done by addressing the root causes and nature of the issues that have led a state or territory to become dependent on foreign and humanitarian aid.

13. More specifically, the economic element should affirm the right of any economic development in the case of occupation to be done solely for the benefit of the occupied population and place obligations on Third-State parties, banks, corporations, and investors involved in both passive and active investments to uphold this right. Those entities who infringe upon a territory or state's right to economic development should face economic penalties and prosecution.
14. The element of social development should include the protection of social rights such as the right for all genders to be able to work in safe conditions, maintain an adequate standard of living, obtain public education at minimum through the age of 18, vote, and be represented in their governments. Curriculum for public education should be created and regulated by each State, without intervention from foreign powers. In addition, the right to cultural development should ensure that local populations have the right to maintain all their traditional cultural practices, so long as they are not inherently life-threatening, without intervention or appropriation by an Occupying Power, or other State/s. Cultural practices include but are not limited to language, local clothing, food, music, and dance.
15. Political development should be upheld by ensuring self-governance with free and fair elections. The elected government should have dominion over the State's economic development without foreign interference. Additionally, such governments will have the ability and duty to regulate state education, infrastructure, welfare, and security. In the case of occupation, the occupied population should not be held to the standards of a separate legal system that prosecutes them differently than citizens of the Occupying Power's state.

Which duty bearers, in particular non-state actors, should be included?

16. Duty bearers, besides state actors, should include corporations engaged in contributing to the de-development of territories. State parties should ensure that parent companies within their jurisdiction may be held accountable for their subsidiaries' actions in other states that infringe upon the right to development. Obligations should include the requirement of withdrawing from the area that is being exploited or de-developed within a time period that is both concrete and reasonable.
17. In some cases, individuals may be criminally responsible for de-developing a country held under belligerent occupation. For example, at Nuremberg, the industrialists in the I.G.Farben trial were prosecuted for the systematic economic exploitation of occupied territory, as a part of the war crime of pillage. This was a more widespread and



systematic type of pillaging, whereby the economy of the occupied territory was systematically dismantled and the economic substance of the occupied territory taken over. In this vein, the treaty could reference the International Criminal Court's jurisdiction over the war crime of pillage, including systematic economic exploitation, which by its nature directly infringes the right to development and for which there is individual criminal liability.

Which obligations should the instrument concretize

18. In the case of occupied territories, the instrument should outline the obligation of the Occupying Power to only develop the occupied territory for the benefit of the protected population and to quickly halt any ways in which the occupier financially benefits from the occupied territory's resources. The occupied population's best interests should be prioritized over broader war objectives. The mechanism should outline a plan that quickly and efficiently transitions entities violating the right to development out of an area, provides financial compensation for those whose right was infringed upon, and imposes penalties for failing to respect the right to development as outlined in the mechanism.
19. In this respect, State parties have obligations to implement national legislation to hold individuals, corporate actors and corporations responsible for breaching the right to development, either nationally or extraterritorially.
20. State parties should have obligations to search for, prosecute or extradite individuals and corporate agents, breaching the right to development, where this amounts to the war crime of pillage including by systematic economic exploitation of occupied territory.
21. Corporations that directly infringe upon the local population's sovereignty over land and natural resources and/or contribute to it through their subsidiaries should face corporate liability while allowing for individual and collective remedies for those affected. Control of access points for the export and import of services and products by land and sea should be maintained by the local population to encourage steady labor and trade flow.
22. The instrument should reference the obligations of States, third States and the international community to ensure the right to development of peoples under siege or sanctions regimes. In relation to the former, is the imposition of a siege, especially a prolonged siege, compatible with the right to development?

How should the relationship with other rights and obligations under international law be determined?

23. In relation to the realization of the right to development during belligerent occupation, the laws of armed conflict operate as the *lex specialis*. That being said, the issue of acting for the “benefit of the occupied population” or the “bests interests” test should be teased out here, especially in relation to developing natural resources during a prolonged occupation, in the interests of the occupied population and what that means in relation to Article 55 of the Hague Regulations. What do we mean by the interests of the occupied population? It must be clarified that this is limited to the best interest of the protected population under Article 4 of the Fourth Geneva Convention and does not extend to the interests of settlers unlawfully transferred into the occupied territory.
24. But even so, who determines what represents the best interests of persons under occupation, colonization or apartheid – civil society, the political representatives, the international community? It is not clear, and the consideration, while laudable, needs more clarification.

C. Institutional arrangements

What type of institutional arrangements should be foreseen?

- a. A conference of State Parties with subsidiary bodies?
 - b. An expert body with the mandate to submit reports on its work to the General Assembly, adopt recommendations, views and general comments?
25. An expert body should have the mandate to submit reports to the General Assembly, adopt recommendations and general comments and views. The expert body should be composed of impartial members who can objectively document violations of the right to development.

Which entity should serve as the Secretariat?

26. The UN Department of Economic and Social Affairs should serve as the Secretariat for this mechanism.

Should there be a funding mechanism for covering the costs of the institutional arrangements and implementing recommendations?



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27. The costs of arrangements and the implementation of recommendations should be funded through mandatory annual payments of each UN Member State, regardless of whether they sign on to the proposed mechanism for the right to development. Funding should not be reliant upon voluntary contributions that may wane with disapproval of the application of the right to development mechanism against violating states.

D. Compliance, monitoring and enforcement arrangements

What type of compliance, monitoring and enforcement procedures should be envisaged?

- a. A compliance committee with a facilitation and enforcement branch?
- b. A reporting procedure with periodic reports, reviewed by an expert body?
- c. A self-assessment combined with a peer review mechanism?
- d. A communications procedure?
- e. An inquiry procedure?
- f. An inter-State complaints procedure?
- g. An advisory opinion procedure?
- h. Should some procedures be optional and if, should the procedures be included in the text of the instrument in the form of an opting in or opting out clause or in an optional protocol?
- i. How should the relationship with other relevant procedures and mechanisms be determined?

28. The Right to Development as enshrined in this mechanism should be monitored and enforced with a facilitation and enforcement branch. This could be accomplished by active UN presence on the ground or frequent visits where violations of the right to development occur. This should include a UN representative residing on the ground, when possible, so that violations can be rapidly brought to their attention, documented, and brought to the UN General Assembly. The procedures for monitoring, enforcement, and compliance should not be optional and must be adhered to by all states bound to this treaty.

E. Final provisions

What elements should be specified in the final provisions?

- a. Who can become a party to the LBI?
- b. What is the desired number of ratifications for entry into force?
- c. Should reservations be possible?
- d. Should there be a clause on dispute resolution with respect to the interpretation or application of the instrument with jurisdiction of the International Court of Justice?
- e. Should there be a clause concerning the possibility to denounce the agreement?

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29. Any UN Member State may, and is encouraged to, become a party to this legally binding instrument, which should be entered into force once it has been ratified by at least 20 States. Reservations from any provisions of this legally binding instrument should not be permissible, nor should the possibility to denounce the agreement be allowed. A clause should be added that grants jurisdiction in case of violations to the International Court of Justice. The final provisions should also include a possibility to propose amendments to the agreement, which would require a conference to consider such amendments that would be adopted if a majority of state parties vote in favor of the agreement.