KEY PROPOSAL: The proposed treaty must recognise that corporations have direct legal responsibilities to respect human rights, and outline a framework for ensuring these legal responsibilities are observed in practice.

SUMMARY: Traditionally, the focus of international human rights law has been on the obligations of States in relationship to individuals as rights-holders. Given the multiple examples of corporate activity that have resulted in, and continue to present a threat of, significant and widespread human rights violations globally, it is crucial to recognise that corporate entities themselves have binding responsibilities within the international human rights framework. Hence, corporations must ensure that they do not violate human rights. Further, these legal responsibilities of corporations need to be made operational through robust State and international mechanisms and processes to ensure that they are observed in practice.

Why is this important to address in the proposed treaty?

Civil society organisations (CSOs) have attested in Treaty Initiative regional consultations that the human rights of individuals and groups of individuals across the world are being violated by corporations. The current legal frameworks, far from protecting affected individuals, often actively perpetuates a culture of corporate immunity, privileging the pursuit of profit and other corporate objectives over human rights. It is also clear from many of the testimonies presented that States either actively play a part in these violations, fail to prevent them or make minimal or no effort to address them once they have occurred. An example is testimony from a CSO participant from Burma, who spoke of the fact that many people are being dispossessed from their land by big corporations. When attempting to assert their historical land claims, courts are refusing to recognise them and are instead backing up baseless claims by the corporation.

In such circumstances, States may be in violation of their duty to protect individuals by preventing non-State actors from violating human rights (among other requirements of international human rights law). Any State failure to protect their citizens from the acts of a corporation, thereby failing to uphold its duty to protect, must be addressed. Further, the corporations whose activities gives rise to human rights violations must assume direct responsibility for their actions.

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1 This paper was produced following online and in-person consultations with over one hundred and fifty civil society organisations (CSOs) in Asia, Africa, Latin America. The drafting of this proposal was lead primarily by David Bilchitz and Carlos Lopez, reflecting on CSO inputs, and it attempts to provide ideas for how the forthcoming treaty may address issues raised by CSOs in the aforementioned consultations. As such, the views expressed here are not necessarily the views of the lead authors or the institutional position of either ESCR-Net and FIDH. This proposal, as well as others produced in this Treaty Initiative project, is primarily designed as a resource to support members and partners of ESCR-Net and FIDH, as well as diplomats, INGOs and others, to prepare their own positions on the treaty (either as supporting documentation or to help refine contrasting views).

2 See reports from the ESCR-Net and FIDH Regional CSO Treaty Initiative consultations, here: https://www.escr-net.org/corporate-accountability/treaty-initiative/materials
A recognition that human rights bind all actors within society, including corporations, is important for a variety of reasons:

1. Corporations can then be held responsible for human rights violations that occur as a result of their activities, reflecting the reality that they are capable of, and in certain circumstances do, violate human rights;
2. Arguments that corporations have no international legal responsibility to avoid violating human rights will be invalid in legal or other settings, which would result in increased accountability and access to justice through overcoming legal barriers to holding corporations accountable, which is particularly important in weak governance areas;
3. Rebalancing the current economic discourse that privileges the pursuit of profit and trade considerations over human rights, by a) legally requiring corporations to factor in human rights responsibilities into commercial decision-making, and; b) obliging States and corporations to integrate human rights into trade and investment treaty negotiations and dispute resolution.

The explicit recognition of the direct legal responsibilities of corporations to refrain from violating human rights would set out a clear and universal framework for all corporations, challenge the current worldview that facilitates economic growth on the basis of, or in the absence of regulation regarding, human rights violations, and protect responsible corporations from losing market-share to lesser scrupulous competitors.

**What is the relevant legal context?**

**International law**

It is commonly understood that, in general, the international legal human rights framework requires States to respect, protect and fulfil all human rights. The State duty to protect acknowledges that non-State actors have the capacity to violate the human rights of others. While the State may play an important role in enforcing the overarching objective to prevent human rights violations by non-State actors, this role is predicated on the understanding that non-State actors also have corresponding responsibilities to themselves refrain from violating human rights. In the Universal Declaration of Human Rights, the UN General Assembly proclaimed that “every individual and every organ of society” shall respect human rights. This realisation is reflected in various international instruments. For instance, article 7 of the International Covenant on Economic, Social and Cultural Rights recognises the right of everyone to the enjoyment of just and favourable conditions of work, the components of which suggest direct action by businesses.

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3 Duty to Respect: Refrain from interfering with the enjoyment of human rights
4 Duty to Protect: Prevent others from interfering with the enjoyment of human rights
5 Duty to Fulfil: Adopt appropriate measures towards the full realisation of human rights
7 Universal Declaration of Human Rights, preamble: “The General Assembly, Proclaims this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.” Available at: http://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf
It is important to note that corporations, like individuals and some other entities, have legal personality, which means that they have the ability to take legal action, and be acknowledged as having rights and responsibilities in connection with their legal personality. Various categories of international law recognise the legal personality of corporations including international human rights law, international environmental law and international investment law.

**The UN Guiding Principles**

The UN Guiding Principles (UNGPs) outline the ‘corporate responsibility to respect human rights’ by noting that:

> Business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.

The accompanying commentary confirms that such responsibility “...exists independently of States’ abilities and/or willingness to fulfil their own human rights obligations, and does not diminish those obligations. And it exists over and above compliance with national laws and regulations protecting human rights.”

Further, in explaining corporate responsibility, Professor Ruggie, the author of the UNGPs, noted in a 2006 report to the UN Human Rights Council that:

> while it may be useful to think of corporations as “organs of society” as in the preambular language of the Universal Declaration, they are specialized organs that perform specialized functions...By their very nature, therefore, corporations do not have a general role in relation to human rights as do States; they have a specialized one.

Therefore, the UNGPs support the principle of a direct human rights role for corporations, albeit of limited scope according to their role and function in society. The UNGPs, however, do not explicitly connect the corporate responsibility to respect human rights with a corresponding legal liability to address circumstances where corporations do not fulfil their responsibilities. This is problematic as it renders human rights laws aspirational or merely voluntary standards to guide corporate activity.

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9 International environmental law recognises that corporations have substantive duties in various instances. For example, the 1999 protocol to the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Substances imposes civil liability against corporations for violations of the Convention. Similarly, the International Convention on Civil Liability for Oil Pollution Damage and the Paris Convention on Third Party Liability in the Field of Nuclear Energy both establish direct liability for corporations. For further elaboration on all three conventions see, Ratner, S. in Bodansky, D., Brunnee, J. & Hey, E. (Eds) *The Oxford Handbook on International Environmental Law* (2008).


11 UN Guiding Principles on Business and Human Rights, principle 11.

12 UN Guiding Principles on Business and Human Rights, principle 11 commentary.

leaving no legal basis for taking action against corporations that fail to adhere to human rights, even in the absence of State regulation or intervention. These gaps are compounded by weak enforcement of human rights in the field of corporate human rights violations, in stark contrast to the strong, binding framework established in the trade and investment field.\(^{14}\)

### State implementation

A number of recent constitutions have increasingly recognised that non-State actors such as corporations bear direct responsibility in relation to human rights violations.

For example, the South African Constitution states that “[a] provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right”.\(^{15}\) This provision has been the subject of judicial interpretation which has recognised a number of direct duties upon corporations. These include duties to respect the dignity and reputation of individuals;\(^ {16}\) duties not to harm or impair the access of children to the right to education;\(^ {17}\) and duties to allow unlawful occupiers to remain on their land pending the State finding alternative accommodation.\(^ {18}\) Similarly, the Kenyan Constitution of 2010 confirms that “[t]he Bill of Rights applies to all and binds all State organs and all persons.”\(^ {19}\) Some jurisdictions, such as the United Kingdom, do not expressly recognise legal human rights responsibilities of corporate entities, but places a fiduciary duty on directors to consider the impact of their decisions on the community and the environment\(^ {20}\) and to produce reports which include human rights questions.\(^ {21}\)

### What are the components of the proposal?

In the process of codifying recognition of the corporate legal responsibility to respect human rights the treaty must address the following:

1. **Recognition of direct legal responsibilities, on the part of corporations, in relation to human rights**: the treaty should bring international human rights law into alignment with the recognition within international environmental and investment legal frameworks of corporations as bound by international law. As such the treaty should contain a provision that acknowledges corporations are legally bound to respect human rights and, thereby, can be held directly liable for their involvement in violations of human rights in all countries.

2. **Outline State obligations to give effect to the corporate legal responsibility to respect human rights**: The treaty must outline what State measures are required to give effect to direct corporate legal responsibilities in relation to human rights, including enabling legislation, policies and practice. As a minimum requirement, domestic law should mandate corporate human rights due diligence, facilitate accountability and access to remedy through domestic corporate criminal and civil laws, and take steps domestically and through requests for and provision of international cooperation and assistance to address corporate involvement in extraterritorial human rights violations.

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\(^{15}\) [full reference and link to constitution], Section 8(2).

\(^{16}\) *Khumalo v Holomisa* 2002 (5) SA 401 (CC)


\(^{18}\) *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties* [2011] ZACC 33.

\(^{19}\) [full reference and link to constitution], Section 20(1).

\(^{20}\) See section 172 of the United Kingdom Companies Act 2006.

\(^{21}\) Section 414C of the United Kingdom Companies Act 2006 places an obligation to prepare strategic reports which, in the case of quoted companies, include information about social, community and human rights issues.
3. **Outline a framework for determining corporate legal responsibilities with respect to human rights**: To support development of the nature and extent of these legal responsibilities over time the treaty must include an analytical framework that can be utilised by courts and treaty mechanisms to develop the specific responsibilities for corporations flowing from human rights. The framework should recognise the impact of corporate activities on the rights-holders whilst also providing means of determining the limitations on the legal responsibilities of corporations.

4. **Outline an effective means of implementation, including a complementary recourse mechanism**: The treaty must establish mechanisms to (1) monitor State compliance with the duty to protect against human rights violations by non-State actors; and (2) investigate allegations of corporate involvement in human rights violations and provide binding recommendations on both States and corporations involved.