

Oral Statement by FIAN International, Franciscans International, CCFD-Terre Solidaire and Society for International Development – Panel V Subtheme II: The relation between the United Nations Guiding Principles and the elaboration of an international legally binding Instrument on TNCs and other business enterprises

Daniel Fyfe

Madame Chair,

I am delivering this statement on behalf of FIAN International, Franciscans International, CCFD, Society for International Development and La Plataforma Internacional contra la Impunidad. All are members of the Treaty Alliance.

Although we were told yesterday to consider the glass half-full rather than half-empty, we owe it to the affected individuals and communities, some of them with us here today, to work towards improving the existing legal framework as to put an end to impunity. We must do everything which is possible to fill the empty half. This is part of the evolving character of international law.

Although the UNGPs on Business and Human Rights and the OHCHR's Accountability and Remedy Project are one of the numerous sources to be taken into account for the elaboration of the binding instrument, we would like to call your attention on some of their shortcomings, which are not a consequence of the lack of experience with their implementation, but which are rooted in the GPs themselves.

First, the UNGPs and the Accountability and Remedy Project are ambiguous and very basic with regard to States' extraterritorial obligations. They do not build on the extensive corpus of jurisprudence on the matter, including from the UN Treaty Bodies, Special rapporteurs, international and regional jurisprudence, among others. Therefore, they do not deal in an integral manner with the particular challenges for States to regulate transnational corporations, individually and through international cooperation. This is one of the reasons why the future binding instrument should have a special focus on the regulation of Transnational Corporations and on extraterritorial obligations of States without, obviously, excluding domestic human rights obligations and reaffirming States' obligation to protect with regard to other business enterprises.

Second, the UNGPs are weak regarding affected individuals' and communities' right to effective remedy and reparation. The third pillar of the Guiding Principles overemphasizes non-judicial grievance mechanisms which have proven in certain cases to create further obstacles in access to justice and legal remedies and which by their very nature are subject to bias and flaws. The binding instrument should therefore focus on remedy mechanisms for the affected individuals and communities, which are in the hands of the states, without leaving the fate of the affected individuals and communities in the sole hands of the companies.

Third, the National Action Plans, in their voluntary character, will ultimately provide different national conditions for corporate liability and thus fail to provide proper regulation of global character creating a common pattern for regulation worldwide. This approach can contribute to creating "liability havens" (similar to tax havens) for businesses, which would be free to go from one jurisdiction to the other in order to avoid legal liability. The binding instrument presents an opportunity to set obligatory international common standards contributing to overcome differences in the regulation of TNCs and OBEs liability.

In order to complement the work done through the UNGPs and the Accountability and Remedy Project, we highlight the importance for the working group to go beyond these GPs and to refer to the extensive range of other international and regional instruments and jurisprudence on the matter, including those developed since 2011, as listed in our written contribution.

Thank you for your attention.