

Oral Statement of FIAN International to the First Session of the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights - Panel VII - Geneva, July 9, 2015

Ana María Suárez Franco

Madame Chairperson-Rapporteur

The most challenging aspect for FIAN International is the allocation of liability to TNCs harming the enjoyment of the human right to adequate food in the context of their activities as groups of enterprises. This includes the determination of liability of companies indirectly harming human rights, while being linked by contractual relationships or other kinds of controlling positions to the legal entities directly creating the harm.

Under their obligation to protect human rights territorially and extraterritorially, states have to provide criminal, administrative and civil liability mechanisms for enterprises involved in human rights offenses. The treaty should stipulate a legal framework prescribing the conduct to be considered as harming the enjoyment of human rights. For such conduct both companies and individuals in such companies shall be liable. FIAN wants to highlight the following aspects:

- 1) Groups of enterprises should be obliged to declare their existence and the enterprises forming the group and contractual relationships or the specific supply chain, in order to facilitate determination of liability.
- 2) To define situations in which the corporate veil has to be lifted to determine liability including of shareholders. Mechanisms used in other fields of law as for example in competition, taxes or labor law should be explored and if appropriate included.
- 3) The working group should explore theories and models existing in diverse legal systems to determine criminal liability, including the theories of "directing mind", the "responsible superior" or the "corporate culture". The norms included in this respect in the treaty should be developed in the light of the bona fides and effectiveness principles, allowing to tackle the mentioned challenges in the cooperation of diverse legal cultures.
- 4) In order to ensure equality of arms and due process for the victims, the burden of proof regarding due diligence of parent or controlling companies should be reverted. Clear rules for this reversion should be incorporated in the treaty, including elements such as: the size of the company, whether the company was informed about the offense, foreseeable character of the offense, common means of the involved companies and the related permissive or impulsive corporate culture.
- 5) Clear norms should be included regarding the definition of complicity to determine criminal liability, in the cases of parent or controlling companies harming the enjoyment of human rights via subsidiaries or via contractual related legal entities.