



**FIAN INTERNATIONAL POSITION PAPER ON BUSINESS DUE DILIGENCE
AND RELATED STATES' OBLIGATIONS IN THE CONTEXT OF CORPORATE
ACCOUNTABILITY**

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Introduction

FIAN International's increasing involvement in standard-setting processes and policy discussions on the issue of 'business & human rights' (BHR) or corporate accountability stems from the organization's work on cases of violations and abuses of the right to food and nutrition (RtFN) involving corporate actors. These include cases of water and land grabbing, financialisation of common resources¹, privatization of water and seeds, forced displacements, environmental destruction, criminalization of defenders, digitalisation of resources, and the marketing of unhealthy ultra-processed edible products. FIAN cases such as the Kaweri case², MATOPIBA case³ or the SOCFIN case⁴ are examples of how corporate, financial and philanthropic actors, connected through complex webs, impact and abuse the RtFN. FIAN's approach on 'business & human rights' discussions has therefore been based on its case work, related policy analysis and the lived experiences of affected communities when attempting to access justice and remedies. FIAN International is of the view that such communities need to occupy the front seat in any process towards legal developments in this area.

FIAN's position in discussions on 'business & human rights' also derives from its mandate as a human rights organization, which defends human rights and uses a rights-based approach when referring to other policy areas as development, trade, environment, etc. FIAN has always called for standards to be based on fundamental human rights principles, such as, *inter alia*, legal accountability; the pro-persona⁵ principle; transparency and independence; the universality, primacy, interdependency and interrelatedness of human rights. As such, FIAN has therefore strongly emphasized the role of States, as primary human rights duty-bearers, which must assert their regulatory powers over businesses and prevent corporate harm to people and the environment.

The watering down of human rights standards and corporate capture

As a human rights organization, FIAN is concerned with attempts to water down human rights standards and levels of protection in the area of 'business & human rights' with voluntary standards. Existing international frameworks on this matter, such as the OECD

¹ With common resources, we refer to what is regularly known as natural resources. This is to depart from the mercantile notion of 'resources', typical of the current commodity model.

² See, 'Uganda: Kaffee mit dem Geschmack der Vertreibung', available at <https://www.fian.de/was-wir-machen/fallarbeits/kaweri-uganda/>, 'Human Rights violations in the context of Kaweri coffee Plantation/Neumann Kaffee Gruppe in Mubende/Uganda', November 2019 available at https://www.fian.org/files/files/HR_violations_in_the_context_of_Kaweri_Coffee_Plantation_in_Mubende.pdf

³ See, 'Land speculation is leading to human rights violations and eco-destruction in Brazil', July 4, 2018 available at <https://www.fian.org/en/press-release/article/land-speculation-is-leading-to-human-rights-violations-and-eco-destruction-in-brazil-2105>, 'MATOPIBA: Pensionskassen machen Geschäfte mit Ackerland' available at <https://www.fian.de/was-wir-machen/fallarbeits/matopiba-brasilien/>

⁴ See, 'Landgrabbing by SOCFIN in Sierra Leone – documentation', available at <https://www.fian.be/Landgrabbing-by-SOCFIN-in-Sierra-Leone-documentation?lang=fr>

⁵ And lately a *pro persona-natura* principle, See https://fian.org/files/files/Filling_in_the_Gaps_in_Human_Rights_Protection.pdf



Guidelines for Multinational Enterprises, the ILO Tripartite Declaration, and the UN Guiding Principles on Business & Human Rights (UNGPs) all lack teeth and represent sets of voluntary ‘recommendations’, ‘expectations’ or ‘guidance’ for ‘responsible business conduct’. In sum, they do not provide for any form of legal accountability nor access to effective justice and remedies for affected individuals and communities in accordance with international human rights principles and standards. Often, when asked to ensure respect and protection of human rights, States also equate World Bank/International Finance Corporation (IFC) safeguards with human rights, even though they are not enforceable in the same way human rights are. In the case of the UNGPs, they are a set of voluntary standards, which overemphasize on business-level grievance mechanisms and risk mitigation, which represent a retrogression regarding existing human rights standards from UN Treaty Bodies⁶ on, for example, States’ extraterritorial obligations⁷. Reducing States’ human rights obligations to mere voluntary standards is worrisome from a rights-based approach.

It is necessary to note that companies can be holders of rights contained in treaties binding on States, such as those of the World Trade Organization (WTO). This generates international obligations and is sometimes imposed on States by the current economic model. The rights held by companies also enable them to resort to avenues such as arbitration tribunals to demand their protection. Taking into account the existence of these rights and the possibility of enforcement by companies, it is necessary to have a corresponding regime with binding obligations that States, jointly or separately, impose on companies via international or national law. These obligations must be legally enforceable and must be able to be claimed by individuals, communities as collective subjects and States as subjects of international law.

This watering down in standards of protection does not take place in a vacuum, but is the consequence of the increasing participation of business actors in multilateralism and the proliferation of ‘multistakeholder’ spaces, which consider businesses as stakeholders in human rights discussions. Including businesses ‘at the table’ or as ‘stakeholders’ to policy spaces or to standard setting processes poses a great risk to dilution of human rights standards, due to power relations and State-corporate collusion seen in many countries. This form of power is structural as it influences inputs to the political process, allowing businesses to gain control in defining the contours, focus and content of the frames that regulate their activities, thereby turning it into a bargaining exercise, steered by commercial interests and making public interest secondary. This was seen clearly at the 2021 United Nations Climate Change Conference (COP 26) where the biggest delegation was a group of

⁶ See UN Committee on Economic, Social and Cultural Rights (CESCR), *General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities* available at <https://www.refworld.org/docid/5beaecba4.html>, UN Committee on the Rights of the Child (CRC) *General comment No. 16 (2013) on State obligations regarding the impact of the business sector on children’s rights* available at <https://www2.ohchr.org/english/bodies/crc/docs/CRC.C.GC.16.pdf>

⁷ See Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, available at <https://www.etoconsortium.org/en/main-navigation/library/maastricht-principles/>, Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights available at https://www.etoconsortium.org/nc/en/main-navigation/library/maastricht-principles/?tx_drblob_pi1%5BdownloadUId%5D=63

500 fossil fuel industry lobbyists while civil society, indigenous peoples, fisher folk and communities from resource-rich nations faced numerous hurdles in participation. The process leading to the UN Food Systems Summit (UNFSS) is another case in point where the private sector was accorded a favoured status, thereby shedding light on the mounting political role of corporations throughout global food governance and the marginalization of peoples' solutions⁸. FIAN will continue to denounce the phenomenon of corporate capture of policy spaces at all governance levels, which undermines standards of human rights protection.

FIAN critiques of business due diligence

It is important to understand FIAN's critical stance to the concept of 'business due diligence' in light of the context presented above (watering down of human rights and context of corporate capture).

Although 'due diligence' has been used in international human rights instruments to describe State's obligations, for instance regarding the prevention of violence against women, the term has become popular essentially in the area of corporate social responsibility (CSR). Business due diligence is an internal process for businesses to ensure they identify, prevent and mitigate risks to their own business operations. The increasing development of CSR has seen the concept expand to include human rights and environmental risks. The UNGPs represent the first attempt to provide an international definition and standard of human rights due diligence practices which businesses are expected to conduct.

A DISTRACTION FROM DELICATE ISSUES

FIAN is concerned with the fact that discussions in human rights fora regarding corporate accountability have overwhelmingly focused on business due diligence as a means to distract from the real issues of legal liability, regulation of activities of transnational corporations (TNCs) (including their parent companies), or of extraterritorial jurisdiction - all of which pertain to States' competence and obligations.

Additionally, due diligence, as an exclusive criteria to define liability, is insufficient to fully hold companies accountable for human rights violations, including those that occur along the global value chain. As long as liability is defined by a list of precautions/measures to be taken by eventual perpetrators, and not based on the actual harm caused to individuals, communities or the environment, it will not ensure real access to justice and remedy.

This focus on due diligence is undeniably linked to corporate capture and States' unwillingness to ensure human rights and implement their obligations.

THE LIMITS OF DUE DILIGENCE

⁸ See, 'Rising up against corporate capture of food and policy making, FIAN International, September 22, 2021 <https://www.fian.org/en/press-release/article/rising-up-against-corporate-capture-of-food-and-policy-making-2852>

Business due diligence can serve businesses to identify risks and prevent human rights abuses. However, it has serious limitations and should not serve to overshadow other fundamental measures for prevention, liability and access to justice:

1. It runs the risk of becoming merely procedural and a tick-boxing exercise for businesses if it becomes a criteria for determining their liability. If framed as an obligation of process rather than result, due diligence will enable corporations to escape liability and restrict affected individuals and communities in their access to justice and remedies⁹.
 - **In sum, due diligence, including mandatory, as an internal exercise for business is ok, but it should not form a basis for determining liability nor be considered as the only process for regulating actions of TNCs. In addition, mandatory due diligence without a regime of legal liability in case of harm, is meaningless for affected individuals and communities.**
2. The limitation of due diligence in serving as a serious tool for preventing human rights abuses lies in its intrinsic problems of dependency and lack of transparency: businesses become both ‘party and judge’ of their own due diligence practices when they produce their own impact assessment studies, define the risks to be corrected or mitigated, conduct consultations themselves with potentially affected communities and provide for remedies through their own grievance mechanisms. Although outsourcing impact assessments to third party or ‘independent’ auditing firms is potentially more transparent, it nevertheless still raises issues of conflicts of interest, as their economic interests tempt auditing firms, to give in to pressure by their clients to understate risks.
 - **In sum, as a form of self-monitoring or self-regulation, business due diligence lacks independence and impartiality to be a serious tool to identify and prevent human rights abuses.**
3. Company-level grievance mechanisms are perhaps one of the most dangerous and anti-human rights components of business due diligence plans, and an example where businesses are literally both judge and parties in a remedial mechanism for affected individuals and communities. Once again, these mechanisms are not independent and their transparency is highly questionable. In some cases, they are also used to impede people’s access to state-based judicial mechanisms, which are likely to be impartial. Non-judicial remedy mechanisms can be useful in providing rapid and effective remedies, however these should be provided by the State (State-based) as an independent authority, as the main human rights duty-bearer and

⁹ See, ‘Ugandans face serious human rights violations amid Total project’, October 26, 2021
<https://www.fian.org/en/press-release/article/ugandans-face-serious-human-rights-violations-amid-total-project-2873>

guided by public interest, general or community (which isn't the case for businesses).

There are also examples pointing at corporate capture seeping into state functioning, thereby jeopardising autonomy of judicial bodies. In these cases, access to remedy and justice through state-based mechanisms can also get difficult for those affected. Solutions could be provided, for example, through the possibility of affected people or communities to make claims where the headquarters of the involved corporations are domiciled or have substantial activities, or also via an international adjudicatory body. Nonetheless, corporate interference in judicial systems remains to be a structural problem, which cannot solely be resolved by an international instrument, but requires other structural changes to stop corporate capture and ensure the separation and independence of state powers.

- **In sum, company-level grievance mechanisms lack independence, impartiality and transparency in order to provide satisfactory, effective and comprehensive remedies for affected individuals and communities and can become hurdles to achieve effective remedy. Businesses are not administrators of justice. They provide the reparation required from them by the State's legal liability mechanisms.**

Due diligence (understood simply as fulfilment of requirements) can be used as an opening clause for systematic human rights violations by companies. This happens as compliance is assessed through requirements that are designed to distract from real harm caused by business activities to human rights and the environment.

4. Reducing discussions and measures to prevent human rights abuses by corporations to due diligence is extremely limiting and ignores the primary and crucial role that States play in prevention. Business due diligence should not serve as a way for States to sub-contract businesses obligations which pertain to them. As part of their obligation to protect human rights, States must conduct (prior and continuous) impact assessments and consultations with communities (including Indigenous Peoples, peasants and other rural local communities) before issuing permits, licences, concessions or grants for businesses to operate. Regarding specifically consultations, and the free, prior and informed consent (FPIC) of Indigenous Peoples, this is strictly a legal obligation of States and not of companies.

For peasants, the United Nations Declaration on the Rights of Peasants (UNDROP) has established peasants' right to free and effective participation. Besides providing robust regulatory and monitoring frameworks over business activities, States also have a preventive role to play in other areas of law, such as trade and foreign trade promotion, investment, commodities, energy, environmental protection, agri-businesses, mining, and development cooperation in ensuring that these do not lead to corporate human rights abuses, both at home and abroad. Procurement contracts have also an important role to play, when we speak of prevention.

- **In sum, prevention is not only about internal business due diligence practices, but mainly about asserting States' individual or joint regulatory power over business operation to ensure via robust regulatory and monitoring mechanisms that businesses do not cause harm at home and abroad.**

Towards a 'corporate accountability' framework

Rather than focusing on due diligence frameworks, FIAN has campaigned at national, regional and international level for legal frameworks for corporate accountability, in accordance with States' obligation to respect, protect and fulfil human rights both within and beyond their borders. As such, FIAN could defend and propose the following:

- 1. Duty of care:** The concept of duty of care¹⁰, as opposed to due diligence, imposes a legal obligation on corporations of reasonable care towards natural persons and the environment, which they could foreseeably harm through their operations. The duty of care, in addition to imposing a legal requirement to prevent harm (and undertaking due diligence), therefore also triggers the civil liability of businesses when harm occurs. The concept of duty of care is therefore particularly useful in order to assert the legal responsibilities that parent companies hold over the activities of their subsidiaries, sub-contractors and other entities throughout their global value chains and business relationships. This concept is more comprehensive and places power with the judge to assess and decide liability. It does not limit itself to a list of predetermined conditions or vigilance plans defined by the company.
- 2. Regime of legal liability:** Concretely for States (in particular 'home States'), to impose a duty of care on corporations domiciled in the State's territory requires the adoption of a comprehensive regime of legal liability of corporations for harm to

¹⁰ In addition to the duty of care, there are other legal mechanisms existing in other legal jurisdictions that may be more suitable than due diligence to establish the responsibility of companies in relation to human rights. These include: strict liability, tort liability, presumption of guilt, reversal of the burden of proof, the pro person principle, liability for hazardous activities. See also, the 2021 ruling of The Hague Civil Court in the case against Royal Dutch Shell PLC at <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2021:5339>. In the ruling, the Court based the obligation of Shell to reduce CO2 emissions on the (unwritten) standard of care laid down in Section 6:162 of the Dutch Civil Code, which meant that acting in conflict with what is generally accepted according to unwritten law is unlawful.

human rights and the environment, both within its territory and abroad. This means a regime of administrative, civil and criminal liability or its equivalent, for harm caused throughout the corporation's business operations, including abroad, and therefore providing and facilitating access to justice and remedies to foreign plaintiffs in its courts.

- 3. International cooperation between States:** As for similar transnational issues, such as money laundering, child trafficking or climate change, the regulation and liability of TNCs requires international cooperation between States and therefore an international treaty. Individual national laws or mere regional laws are not sufficient to create a level playing field in a globalized world. To take actions through international cooperation is a human rights obligation of States under several human rights treaties and the UN Charter, and States should therefore actively engage in discussions towards an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights.

In the absence of an international treaty and in the current context of the development of national laws on corporate due diligence, duty of care or corporate accountability, 'home States' should envisage in their regulations the provision of cooperation and assistance to 'host States' in prevention, monitoring, accountability, prosecution, enforcement and reparation. Such assistance and cooperation of 'home States' should not be understood as an infringement on the sovereignty of 'host States', but rather as part of the obligation for international cooperation and assistance for the universal realization of human rights as envisioned by the UN Charter.

- 4. States' actions to prevent abuses:** In addition to imposing robust corporate accountability frameworks, which include a duty of care on corporations within their territory and jurisdiction, States can also themselves take actions within different policy areas in order to prevent corporate human rights abuses both at home and abroad. State's trade, investment, including promotion of trade and investment, energy, development cooperation, and foreign affairs policies as well as policies in International Financial Institutions should not incentivize corporate human rights abuses nor other States to lower their levels of human rights protection and could include specific provisions on corporate accountability.

Additional FIAN specificities

With a specific mandate on the right to food and nutrition (RtFN), FIAN can also provide additional proposals to tackle specific RtFN abuses:

- The recognition of peasants and other people working in rural areas as a group requiring particular attention and protection from corporate abuses and violations in addition to indigenous peoples and ethnic groups (and in accordance with the UN Declaration on the Rights of Peasants (UNDROP)).

- Special attention and protection is required for the marginalized and disadvantaged populations, especially those who have worked and cared for both the land and the commons and have been most affected by corporate actions. This also implies a real and effective participation of women, youth, girls and boys in decision-making scenarios and in the spaces for mitigation and justice related to corporate actions.
- FIAN's case work, in particular that on the financialization of common resources (e.g. MATOPIBA), suggests that the supply chain model is outdated. This is not to dismiss human rights abuses that do occur in supply chains, but to ensure that any future international regulation also takes into account the complex web of actors, including financial and philanthropic actors (pension funds, International Financial Institutions and foundations such as the Bill & Melinda Gates Foundation), which fund the activities of corporations or other development or investment projects.
- Regulations should not cover only 'gross human rights violations' or violations of civil and political rights, but also economic, social and cultural rights as well as labour and environmental standards.
- The work on agro-toxics, and especially high hazardous pesticides has shown that regimes of strict liability and the reversal of the burden of proof are needed to ensure balance in judicial procedures, what in legal terms is called "equality of arms".
- In order to ensure that any international, regional or national legal framework works, it is essential to put in place mechanisms to check and prevent corporate capture and regulate conflicts of interests. Multistakeholder governance must be dismantled and direct participation of companies in legal/policy making on businesses and human rights must be condemned.
- In cases of omission of legislation by Parliaments, judges should use their capacity to directly apply international standards to the decision of specific cases on abuses by businesses.

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