

# Corporations in the Global Food System and Human Rights

Report of the Oslo conference 11-12 September 2014



UiO : **Leve**

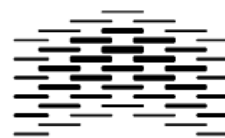
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UNIVERSITY COLLEGE  
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**Redd Barna**



## Introductory note on this report

*The format of this web-based report of the Oslo Conference on corporations in the global food systems and human rights is a combination of information about the background, structure and outcome of the conference, the speakers' own outlines of their talks prior to the conference, and links to their final presentations that can be listened to on podcasts.*

*In addition the report provides highlights in bullet points from the discussions following each session. These are based on detailed minutes from a Rapporteur team and reflect the contributors' personal views without necessarily committing their organisations.*

*In some cases no prior outlines were available (such as for the Commentators on Day 2); in these cases there are summaries of what was presented based on the minutes taken, or in a few cases, transcripts of the presentations from podcast.*

*All presentations and viewpoints are those of the speakers, moderators and commentators and do not represent a collective stand by the organisers nor do they commit other participants. The final conference Statement was distributed in draft form at the end of the conference and comments invited within a limited time. A few of the speakers suggested modest amendments that were by and large taken into account.*

*A report of a scheduled follow-up in the form of a side event at the 3<sup>rd</sup> UN Forum on Business and Human Rights held in Palais des Nations in Geneva on 2<sup>nd</sup> December 2014 is available at (in here: [URL to click at LEVE website](#)).*

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# Conference Concept Note:

## Corporations in the Global Food System and Human Rights: Exploring Problems and Potentials for Governments and Companies

### Purpose

The purpose of this conference is twofold: firstly, to identify and discuss the human rights problems and concerns arising from some of the activities of corporations involved in the production, processing and marketing of foods and drinks. The human rights relevant in this context are the rights to an adequate standard of living/livelihood, food and health. The second purpose is, on this basis, to critically to explore whether and to which extent the 2011 *United Nations Guiding Principles on Business and Human Rights*<sup>1</sup> can serve to improve regulation by states of corporate practices and promote better respect by corporations for these human rights. The conference will also explore whether experiences and shortcomings indicate that it is desirable to move towards an internationally legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises in the field of food.

It will in this connection be taken into account that the United Nations Human Rights Council on June 26<sup>th</sup>, 2014, decided to establish a working group to elaborate a legally binding instrument on this topic; furthermore that the Council in a separate resolution on June 27 entrusted its existing Working Group on the issue of human rights and transnational corporations and other business enterprises, to launch a consultative process with States and other stakeholders, to explore and facilitate the sharing of legal and practical measures to improve access to remedy, judicial and non-judicial, for victims of business-related abuses.

The two day conference on September 11 and 12, 2014, will explore food-related corporate interests in potential conflict with human health and livelihoods on the producer side as well as on the consumer side. The conference will engage different actors in a constructive joint explorative exercise aimed at understanding how human rights in general, and the UN Guiding Principles on Business and Human Rights in particular, can be used as the basis for assessment of corporate accountability and practice and provide a basis for improved human rights realization.

The conference will also engage with existing potential solutions and models proven to work, (recommendations and types of regulation both within and across territorial boundaries). It will discuss how to apply the UN Guiding Principles for research and policy, identifying their gaps and limitations as well as their potentials. Special attention will be given to problems associated with monitoring of corporate practice and their accountability. It will benefit from the increasing attention to and investment in agriculture and food systems, for example through nutrition-sensitive agricultural and marketing initiatives, to promote more equitable, health-friendly and sustainable food systems.

A more long-range aim of the initiative behind the conference is to foster, engage in and further develop research and advocacy networks addressing the roles and the human rights impact of major corporations as globalizing operations/undertakings/actors/agents between producers and consumers of food.

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<sup>1</sup> Developed by the Special Representative of the Secretary-General, John Ruggie, on the issue of human rights and transnational corporations and other business enterprises, and endorsed by the United Nations Human Rights Council in its resolution 17/4 of 16 June 2011

***Underlying concerns: transformation of the global food system - impact of food corporations on livelihood and health***

How and where food is produced, processed, distributed and accessed has implications for the health and livelihood of people, regardless of where they live. Food is necessary to live and is central to health and disease. The food system, or the infrastructure that enables the delivery of food from farm to mouth, can contribute to the health, economic and social well-being of communities, cities and regions.

The important role of the multi/transnational food and beverage industry – often named ‘Big Food’ - in this endeavour cannot be overestimated. Major corporations are increasingly becoming the main determining agents both of agricultural policies and food supplies and are thereby having an increasing impact on the determinants of the livelihood of producers and the health of consumers. Their roles and their human rights impact need to be fully understood and addressed.

The appended note describes some aspects of the enormous transformations of the food system resulting from the accelerating globalisation during recent decades and which have given the corporations the dominant role that they now have.

***Focus: The impact on and possible role of human rights in moderating corporate behaviour***

International efforts to promote human rights for all to health, an adequate standard of living including adequate food and sustainable development face very strong forces promoting international trade and investment across borders. There are rules and regulations concerning investment and protecting investors. Taken together this amounts to a set of contradictory international developments where different interest groups defend different parts of the system.

Food and nutrition constitute a particularly relevant case in this context, and there are strong and heated debates regarding the engagement with businesses that may have conflicting interests with those of public health and with a documented history of undermining certain public nutrition efforts. At the same time, there is increasing participation of private sector actors in the ongoing nutrition efforts internationally. Given their tremendously larger access to resources for influencing and controlling production and retailing patterns and marketing compared to what is typically allocated for public efforts, a new approach is needed to corporate and public interaction towards ending or moderating negative impacts of corporate conduct on the livelihood and health of different groups.

The conference will address both downstream and upstream ends of the food supply chain, from production (and impact on livelihoods) to consumption (and impacts on the most vulnerable population groups and their health), including but not limited to:

- a) Corporations in the agricultural sector often are extending into the food supply chain, and often through vertical investments in agricultural inputs (land, seeds, fertilizers, pesticides etc.) and processing industries through the value chain plus wholesale and marketing entities. Their activities will often affect small farmers and local enterprises and bring them out of competition, without any compensations and remedies thus affecting negatively rural and semi-rural households and their purchasing power.
- b) Corporations in the food supply chain having a strong power over the *products* as regards their design and degree of processing (including ultra-processing) as well as methods of marketing, many of these being documented to cause ill-health if replacing traditional staple and other locally produced foods or affordable foods or being consumed in excess and/or under falsely pretended health claims.

The UN Guiding Principles on Business and Human Rights address both governments ( for the enhancement of their obligations to protect against human rights violations) and corporations

(underlining their responsibility to respect human rights), as well as the expectations to both to ensure that remedies are available in cases of harmful impacts on producers and consumers. They can therefore in principle serve as a set of normative principles for public-private dialogue and partnerships through a new optics, but controversies continue whether they can provide satisfactory protection.

### **Institutional affiliations of the project and conference**

The Conference and future project on food-related corporations and human rights inserts itself in a new activity of the Norwegian Centre of Human Rights (NCHR) at the Faculty of Law of the University of Oslo, to investigate more broadly (i.e. from several thematic angles) the role and potential of the UN Guiding Principles on Business and Human Rights. In this context a small group of experts in Public Nutrition and human rights met in December 2013 to identify particular cases of relevance regarding food-related transnational corporations known for having negative impacts on the livelihood, food security, nutrition and health of specially vulnerable groups (whether socio-economic, gender- or age wise), thus in conflict with the human rights to adequate food and health for all. Thus 'Big Food' was proposed as a significant first candidate to be exposed for special scrutiny under the NCHR endeavours, through a conference in 2014 and for a further development of a project within the NCHR.

The conference planning and project, as institutionally located at NCHR, enjoy the partnership of the interfaculty LEVE Programme (Livelihood in Developing Countries: Health, the Environment and Poverty) to foster interdisciplinary research and other activities within the University of Oslo, coordinated by the Centre for Environment and Development, as well as the Oslo and Akershus University College of Applied Sciences.

### **What are the immediate targets for influence?**

In view of the upcoming Second International Conference on Nutrition (ICN2), organized by FAO and WHO in Rome in mid-November 2014, the seminar is planned in September this year so as to provide inputs for the Conference, including by influencing the Norwegian positions at that event. Furthermore, it is hoped to involve in relevant side events to the Third Forum to follow up on the UN Guiding Principles on Business and Human Rights that will be organised in Geneva by the Office of the UN High Commissioner for Human Rights in December 2014.

### **Public event**

Importantly, the two-day conference will be accompanied by a **public event**, to be held on the evening of the 10<sup>th</sup> of September, open for the general public and with extensive media coverage to raise awareness for these issues with the general public as well.

### **Seminar expected outcomes**

The seminar is expected to have the following outcomes:

- Awareness raised among stakeholders about the UN Guiding Principles on Business and Human Rights and their use to food and nutrition, and of the intended efforts to develop a binding international treaty in this sector;
- Identify priority research gaps and innovative issues identified and future research agenda set;
- Providing inputs for the discussions of the Second International Conference on Nutrition (ICN2) in November 2014;

- Providing background information and inputs to the UN Forum on Business and Human Rights in December 2014.
- Establishing an interdisciplinary project to further the issues in research and advocacy.-

#### **Organizers**

**Norwegian Centre for Human Rights, University of Oslo (UiO)**  
**Centre for Development and the Environment/LEVE, UiO**  
**Oslo and Akershus University College of Applied Sciences, HiOA**

#### **Organising Committee**

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 Arne Oshaug, HiOA;  
 Kristin Kjæret, FIAN Norway;  
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# An additional note on the transformation of the global food system

Almost revolutionary changes have taken place since 1945 in the global food system, changes that with increasing speed penetrate also those developing countries (particularly Africa and large parts of Asia) that until a few decades ago were less affected by them.

One aspect of the transformations are the almost explosive growth of non-communicable diseases (cancer, diabetes, heart diseases) that are associated with changing food consumption patterns, over which the corporations have a decisive influence.

These world-shattering transformation of the food system has been summed up by Professor Tim Lang<sup>2</sup> along twelve dimensions as follows (here somewhat abbreviated and modified from the original): How food is grown (increasing use of agrochemicals, hybrid plant breeding); how animals are reared (in factories); the move from chemistry to biotechnology including genetic modifications; sourcing of food from local to regional and now global; transformation of food processing; intensified use of technology to shape quality; change in the agricultural workforce and their working conditions; vast changes in distribution logistics (airfreight, heavy lorries and satellite tracking); changed methods of supply management (centralisation of ordering, use of computer technology etc.); moulding of consumers tastes and markets through heavy investment in advertising and marketing and placement of products; levels of control of markets; concentration of retailers that have become the dominant gateways to consumers.

Global flows of investment causes changes in the agricultural or fishery workforce by transforming the categories of the producers of food or catchers of fish (from smallholders using bio-diverse plants to mono-cultural plantation types and/or mono-cultural contract farming, from artisanal fisheries to capital-intensive trawlers). There is also a growing division of labour within food production, between the producers of feed (e.g. soy in Latin America) and the producers of meat (animal factories in Europe and North America). Overall, there is a vast transformation from biodiverse food production to monoculture, with serious consequences for sustainability.

These revolutionary changes are facilitated by policies of free trade and investment, drawing on theories or assumptions of comparative advantages for corporations and states, which in practice is concerned less with the comparative advantages of different sections of people than of comparative advantages of profit for corporations or for accumulation of wealth by states.

- **Focus on the producer side** is on the impact of corporations on the **livelihood** of people in rural areas, including forest-living people and artisanal fisheries. They are all in increasing risk of being displaced by corporations, though it cannot be entirely excluded that there can also be win-win outcomes of corporate activities.
- Corporations are involved in buying, processing and marketing food.
- Corporations are increasingly also involved, directly and indirectly, in the production of food, through land purchase for plantation-type economies or for contract farming systems, for provision of seeds and fertilisers (e.g. Monsanto) thereby changing the modes and means of food production, and by determining what should be produced.
- **Focus on the consumer side** is on **health** consequences of corporation-processed and marketed food, addressing the whole chain from corporate food buyers, food processors and food retailers

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<sup>2</sup> Lang, T. (2005) The Global food system and its challenge to food and nutrition policy in Europe. In: Tellnes, G. (ed.) *Urbanization and Health*. Unipub Forlag, Oslo Academic Press.

- Our concerns may need to be related also to the producers of other biomass, which can be in competition with the production of food and can be a major driver in large-scale acquisition of land (land grabbing).
- Regarding biofuel, there are no comparable concerns concerning impacts on the consumers side (on consumers of ethanol or biodiesel, mostly for transport)

# Conference programme overview

## First day: To lay out the issues at stake

Time	Speaker	Topic
08.30 Registration open 09.00 – 09.10	<b>PLEASE BE SEATED BEFORE 09.00!!</b> Inga Bostad, Director of Norwegian Centre for Human Rights (NCHR), University of Oslo	Welcome
09.10 – 09.20	Deputy Minister of Foreign Affairs Morten Høglund	Address to the conference
09.20 - 09.30	Wenche Barth Eide, Department of Nutrition, UiO, on behalf of the Organising Committee	Purpose and overview
<b>Morning session 1<sup>st</sup> part</b> <b>Health issues involving corporate marketing practices and government responsibility – status and current actions taken</b> <b>Moderator: Liv Elin Torheim, Professor in Public Health Nutrition, Oslo and Akershus University College for Applied Sciences, Lillestrøm, Norway</b>		
09.30 – 09.50  09.50 - 11.10	<b>Keynote 1:</b> Tim Lobstein, Chair, World Obesity  <b>Panel I</b> Frances Mason, Save the Children UK  Randi Flesland, Director, Norwegian Consumer Council  Bengt Skotheim, Senior Advisor, Norwegian Directorate of Health  <b>General discussion</b>	Marketing of unhealthy foods, especially to children and youth and consequences for obesity and NCD  <ul style="list-style-type: none"> <li>• The Importance of the International Code of Marketing of Breastmilk substitutes in protecting young children's' nutritional status</li> <li>• Self-regulation or legislation for protecting consumers? The Norwegian experience with reducing marketing of unhealthy food to children</li> <li>• Can the marketing by the food industry be regulated? Some experiences from relevant work in the WHO</li> </ul>

11.10 – 11.35		COFFEE/TEA BREAK
<b>Morning session 2<sup>nd</sup> part:</b> <b>Impact on rural livelihood of the agricultural input industry and corporate land and water acquisition.</b> <b>Moderator: <i>Bård A. Andreassen, Professor, Norwegian Centre for Human Rights</i></b>		
11.35 – 11.50	<b>Introductory address:</b> Olivier De Schutter, former UN Special Representative on the Right to Food; co-Chair of International Panel of Experts on Sustainable Food Systems (IPES-Food) ( <i>on video</i> ).	Sustainable food systems and the role of the private sector
11.50 – 13.30	<b>Keynote:</b> Kjell Havnevik, Senior Researcher, Nordic Africa Institute, Uppsala, Sweden  <b>Panel II</b> Hans Morten Haugen, Associate Professor, Diakonhjemmet University College, Oslo  Aksel Tømte, Programme Coordinator, Indonesia Programme, Norwegian Centre for Human Rights, UiO  Henry Thomas Simarmata, Indonesian Human Rights Committee for Social Justice, and Via Campesina, Indonesia  Anne Hellum, Professor, Faculty of Law, UiO  <b>General discussion</b>	Responsible Agricultural Investments (RAI)  <ul style="list-style-type: none"> <li>• Patterns of power in decision-making over the use of land for food or income by primary and corporate producers</li> <li>• Protection gaps in the palm oil sector – the case of Indonesia</li> <li>• Towards a Declaration of Rights of Peasants and Other People Working in Rural Areas <i>NB: Henry Thomas is probably unable to attend due to visa problems. Asbjørn Eide will convey his outline.</i></li> <li>• Small water for small food: Protection against water grabbing - a gender and human rights issue</li> </ul>
13.30 - 14.15		LUNCH

Afternoon session 1 <sup>st</sup> part: Legal and quasi-legal opportunities to help narrow the protection gap for states and ensure better respect for human rights by companies. Moderator: <i>Michael Windfuhr, Deputy Director, German Institute of Human Rights, Berlin</i>		
14.15 - 14.35	<b>Keynote:</b> Michael Addo, Chair, UN Human Rights Council Working Group on Business and Human Rights	The United Nations Guiding Principles on Business and Human Rights* – background, framework and modalities
14.35 - 15.45	<b>Panel III</b> Asbjørn Eide, Professor em. , Norwegian Centre for Human Rights (NCHR), University of Oslo  Ana Maria Suarez-Franco, Permanent Representative in Geneva of FIAN International, Heidelberg  Allan Lerberg Jørgensen, Director Department of Human Rights and Business, The Danish Institute of Human Rights (DIHR), Copenhagen  <b>General discussion</b>	<ul style="list-style-type: none"><li>• Human rights issues in the transitions of the food and agricultural system</li><li>• Is a binding treaty crucial to end harmful impacts of some food-related corporations in transforming production and consumption patterns?*</li><li>• Working with the private food sector towards a human rights policy and due diligence: the case of Nestlé</li></ul> <i>* Sometimes referred to as “The Ruggie principles”</i> <i>**As related to the UN Human Rights Council ‘s 26<sup>th</sup> session in Geneva in June 2014 and the two resolutions adopted on 26<sup>th</sup> and 27th June regarding a HRC Consultation/Working Group on a possible binding treaty on business and human rights</i>
15.45-16.10	COFFE/TEA BREAK	

<b>Afternoon session 2nd part:</b> <b>Is there a “right to be free from obesity”? Can a human rights framework and instruments serve a purpose in efforts to protect it?</b> <b>Moderator: <i>Tim Lobstein, Chair, World Obesity Federation</i></b>		
16.10 – 16.30	<b>Keynote:</b> Boyd Swinburn, Professor of Population Nutrition and Global Health, University of Auckland, New Zealand, and Head, INFORMAS*	Monitoring and accountability systems for healthier food environments
16.30– 18.00	<b>Panel</b> Brigit Toebes, Rosalind Franklin Fellow, Faculty of Law, the University of Groningen  Fabio Gomes, Senior analyst at the Food, Nutrition and Cancer Division of the National Cancer Institute of Brazil  Graham Dukes, independent expert, Oslo, formerly WHO/EURO,  <b>General discussion</b> (which may take up points from whole day)  <i>* INFORMAS: International Network for Food and Obesity / non-communicable diseases (NCD) Research, Monitoring and Action Support</i>	<ul style="list-style-type: none"> <li>• Corporations and the right to health</li> <li>• Legislative and economic measures to decrease the demand for unhealthy food products: potential and practical impacts of a rights-based approach</li> <li>• What can we learn from experience with medicine policies?</li> </ul>
18.00	Closure of first day	

## Second day:

To summarize and advance the issues to be brought forward through research, advocacy and recommendations

<b>Morning session:</b> <b>Advancing key issues through advocacy, research and negotiations</b> <b>Moderator: Sidsel Roalkvam, Academic Director of LEVE (Livelihood in Developing Countries), Centre for Development and Environment/SUM, UiO</b>		
08.30: Coffee/tea	<b>PLEASE TRY TO BE SEATED AT 09.00!</b>	
09.00 – 09.20	Sidsel Roalkvam, OC	Summing up of the first day and plan for the second
09.20 - 12.15	<p>(Midway stretching legs and grab a coffe or tea!)</p> <p>Michael Windfuhr</p> <p>Boyd Swinburn</p> <p>Commentators:</p> <ul style="list-style-type: none"> <li>• Anna Glayzer, Head of Food Safety, Security and Nutrition Programme at Consumers International, London</li> <li>• Usman Mushtaq, Board Member, EAT Forum</li> </ul> <p>Discussion</p> <p>Malcolm Langford, Research Fellow, Norwegian Centre for Human Rights, Faculty of Law, UiO</p> <p>Commentators:</p> <ul style="list-style-type: none"> <li>• Judith Richter, Senior Research Fellow, Institute of Biomedical Ethics, Univ. of Zürich</li> <li>• Allan Lerberg Jørgensen</li> </ul> <p>Discussion</p>	<p>Livelihood and sustainability requirements on the producer side – which standards to promote? Illustrated by efforts of the Committee on World Food Security.</p> <p>Civil society increasing the demand for action – what responses to mobilize?</p> <p>Towards an empirical theory of human rights and corporate behaviour? Reflections on a future research agenda.</p>
<b>12.15– 13.00</b> <b>Lunch</b>		

<b>Afternoon session:</b> <b>Roundtable and plenary discussion: How to take the issues forward – by whom and to whom? A result-oriented dialogue for the future</b> <b>Moderator: Asbjørn Eide, Professor em., Norwegian Centre for Human Rights, University of Oslo</b>		
13.00-15.00	<p>This last session will be in the form of a <b>Roundtable</b> and a final <b>plenary discussion</b> with ideas for further international steps.</p> <p>Participants in the RT include:</p> <ul style="list-style-type: none"> <li>• Åse Elin Bjerke, Section for Global Initiatives, Norwegian Ministry of Foreign Affairs</li> <li>• Fabio Gomes, the National Cancer Institute, Brazil</li> <li>• Anna Glayzer, Consumers International</li> <li>• David Clark, Nutrition Specialist (Legal), UNICEF, New York</li> <li>• Lina Mahy, UN Standing Committee on Nutrition (SCN), Geneva</li> <li>• Michael Addo, UN Human Rights Council Working Group on Business and Human Rights</li> </ul> <p><b>General Discussion</b></p>	<p><i>Issues related to the protection of the livelihood on the producer side have been discussed in previous sessions.</i></p> <p><i>Due to limited time, this roundtable will focus in particular on issues related to the promotion of healthy diets and ways and measures to guide or regulate corporate behaviour for that purpose.</i></p>
14.50-15.00	<b>Summing up and suggestions for future networking.</b>	
15.00	<b>Farewell coffee and tea.</b>	



## Opening session

### Welcome address from the Norwegian Centre for Human Rights

*Inga Bostad*

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Podcast: <http://www.uio.no/english/research/interfaculty-research-areas/leve/news-events/podcasts/2014/0911-bostad-inga-global-food-systems-and-hr.html>

#### **Key points:**

It is a great pleasure to welcome all of you to the NCHR, which is a research center for multidisciplinary research, international programs and education on human rights.

This conference assesses the role of corporations in determining how food is produced and consumed, distributed and accessed, and how this affects the lives of different people in parts of the world, with particular relevance for their livelihood and health.

As a philosopher, I will start with the basic realization of myself as an individual subject – I am. From this point I ask a rather basic question: I am from what? To which I add: I am from what my food is. But to expand even further: I am from what my food is produced, processed, presented and accessed. Today's topic might not be only considered from a legalistic point of view.

The Centre feels strongly obliged to contribute to this relevant topic. It also has an existential flare to it: it deals with how we consider ourselves and how we see ourselves as part of the world.

We need to consider the role of statehood, urbanization/globalization, exploitation of women, broader socioeconomic consequences, double burden of malnutrition, poverty, overflow of cheap sugar and other substances – and how human rights and the guiding principles can be used as a basis for corporate practice and as necessary tools for understanding and improving human life. We need to critically discuss a joint responsibility for the future of humanity and the globe.

This conference is expected to be one small step in a long journey.

There are a number of instruments that come into play; they are there for us to choose and to improve. This conference is such an instrument.

## Opening address by the representative of the Norwegian Ministry of Foreign Affairs

*Morten Høglund*

*State Secretary, Norwegian Ministry of Foreign Affairs*

Podcast: <http://www.uio.no/english/research/interfaculty-research-areas/leve/news-events/podcasts/2014/0911-hoglund-morten-global-food-systems-and-hr.html>

Thank you very much, distinguished participants, ladies and gentlemen.

It is an honour for me, on behalf of the Norwegian Ministry of Foreign Affairs, to open this important conference on the global food systems and human rights. The Norwegian government attaches great importance to food security as an instrument of poverty reduction. Women's access to food security programs, one of the issues that you will touch upon here, has high priority for our government. We are pleased to note an emerging consensus on the need for efforts by all partners to enhance food and nutrition security.

Ladies and gentlemen, much must however still be done. A key challenge is the need for substantially increased investments in agriculture. According to IFAD, agricultural production would have to increase by 50-70% and in developing countries by almost 100% in order to feed the world population expecting to exceed 9.3 billion in 2050.

We are however also aware that agricultural production, processing and marketing of food is undergoing great transformations. Agriculture is not only a livelihood and a way of life for small holders and other peasants, but pure business as well. The Norwegian government is convinced that the private sector can play an important role, not only for small holders but also in the form of large commercial investments, as long as they operate within internationally agreed standards and norms.

Part of your agenda here is to discuss precisely such standards, their application and their usefulness. Including the evolving guidelines for responsible agricultural investments. We follow the ongoing process in the Committee on World Food Security with great interest. The special focus of this conference is on the role of the food sector corporations in relations to human rights with special attention to the livelihood of the producers and the right to health of the consumers. The Special Rapporteur on the right to adequate food has earlier reminded us that even though high food prices may be temporary, they could have long lasting consequences of physical and mental growth if the coping strategies adopted by households lead to harmful reductions in the quantities or quality of diets at the critical strategies of child growth or during pregnancy.

We are well aware of the fact that the right to food is not only a human right in its own merit, but also important for realizing other rights as well, health being one. Health is important for any individual and a healthy population is important for all societies. Key words are stronger labour force and less expensive health care services. For a number of years Norway has played a leading role in promoting health as part of our foreign policy. The promotion of food security is an integral part of these efforts due to the essential role that food plays for health.

As all of you here will know, the world is struggling with two different burdens of diseases. One is the burdens of under nutrition, which still affects hundreds of millions of people and is one of the major health risks worldwide. Fortunately we have made considerable progress during the last decade in reducing under nutrition and child mortality. Still we must do much more. The other burden is that of malnutrition caused by a diet that contains too much sugar and fat, often associated with poverty. This has led to an explosive growth of NCD, such as heart diseases, diabetes and others all over the world. This is not only a human rights problem, but also a severe

barrier to economic development. We expect this agenda to develop further in the Second International Conference on Nutrition in November in Rome.

Distinguished participants, there is a growing attention within the private sector to guidelines to ensure that corporations can play a fully responsible role in this field. Great headway has been made during the last few years and the United Nations in 2011 adopted the Guiding Principles on Business and Human Rights. Here I am proud that Norway is a driving force internationally. I am pleased to note that among the participants here today is the chairman of the Working Group on Business and Human Rights, Professor Michael Addo. We appreciate that you have taken the time to come here today.

In just a few weeks' time, my government will present the first comprehensive white paper on human rights in 15 years. We are proud of our upcoming white paper where we aim at closing the gap between human rights and development. We will take advantage of human rights principles and mechanisms in strengthening our international development cooperation as well as identifying development areas which could inspire our human rights priorities. I know that Norwegian academics have been and still are leading internationally in the field of right to adequate food as a human right. So you are all in the very best hands during these two days.

Let me end my intervention by wishing you all two productive days here at the Norwegian centre for human rights, also one of the Ministry of Foreign Affairs most important partners.

Thank you.

## On the structure of the Conference

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Good morning, I am a member of the organising committee, which has consisted of 11 individuals from academia and civil society. We a

The overall aims of the Conference appear on the first page of the Conference Programme:

- To identify and discuss the human rights problems and concerns arising from some of the activities of the food related corporations involved in the production, processing and marketing of foods and drinks, and that may be in potential conflict with human health and livelihoods;
- To explore whether and to which extent legal and quasi-legal instruments, for now especially the “United Nations Guiding Principles on Business and Human Rights”, can be used to
  - (i) strengthen government protection against harmful corporate practices and improve regulations where necessary;
  - (ii) promote better respect for human rights by corporations, here especially the right to an adequate standard of living and the rights to adequate food and health;
  - (iii) To prepare some general recommendations that can be used in advocacy in various fora and as support in research.

This conference is a truly innovative venture, because it is the first opportunity to bring together key expertise and networks in nutrition and food security, development, and business & human rights. There have been many encounters between food and nutrition and human rights people more generally, but not with the special niche of *business and human rights* in focus.

Thus contributors here include outstanding nutrition assessment and policy expertise related to commercial marketing of breast-milk substitutes and of junk foods especially to children; furthermore expertise related to the role of business in agricultural development with consequences for poverty and livelihood, and food security. Others have broad human rights expertise related to economic, social and cultural rights and especially including the rights to adequate food and health, and as part of this, the right to nutrition; and last but not least: special expertise regarding business and human rights.

It is therefore an ambitious goal we have set to examine interrelations and opportunities within such a broad field in an overall human rights perspective. It is also an ambitious experiment to bring together people from two broad camps who normally not meet in the same place and seldom not speak to each other: not because they do not want to see each other, but they simply do not meet in the same circles and there is very little interface.

The specific conference objectives we have put up are, first of all, to raise awareness in food and nutrition circles about the *UN Guiding Principles on Business and Human Rights* which were adopted by the UN Human Rights Council in 2011, as well as recent efforts in June 2014 to explore the development of an international *legally binding* convention for the corporate sector; furthermore

to spark a discussion on how such instruments can serve strategic and policy purposes including strengthening accountability in food security and nutrition

We also wish to identify priority research gaps and innovative issues for a future research, advocacy and negotiations agenda.

Specifically we want to propose inputs for the discussions of the Second International Conference on Nutrition (ICN2) in November 2014 in Rome; and also provide background information and inputs to the UN Forum on Business and Human Rights in December 2014 in Geneva, preferably in the form of a special side event.

Last, but not least, we hope the conference will inspire the development of an *interdisciplinary project* to further the issues in research and advocacy, to be anchored at the University of Oslo in an interdisciplinary frame.

Finally, a few words on the format and running of the Conference. It must be noted that this is not a paper conference with pre-prepared contributions, apart from outlines by the speakers that you will find in your folders, reflecting what they see as most important to bring up in the respective sessions.

Please note that time is limited and moderators as well as speakers/panelists and commentators have been instructed to keep strictly to the time! We have organized the programme so that on the first day, the issues at stake will be laid out in four blocks. On the second day the intention is to summarize and advance the issues to be brought forward through research, advocacy and in negotiating fora. We end the Conference with a round table oriented towards points of influence for policies and action.

Throughout the sessions we should join in *collecting recommendations for post-conference activities and networking*.

*Happy conference!*

## **Session 1: Health issues involving corporate marketing practices and government responsibility – status and current actions taken**

Moderator: Liv Elin Torheim

Speakers: Tim Lobstein, Frances Mason, Randi Flesland, Bengt Skotheim

Outlines of panellist's talks<sup>3</sup>

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<sup>3</sup> All presentations can be heard live on podcasts as indicated for each of them.

## Marketing of unhealthy foods, especially to children and youth

*Tim Lobstein*

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Podcast: <http://www.uio.no/english/research/interfaculty-research-areas/leve/news-events/podcasts/2014/0911-lobstein-tim-global-food-systems-and-hr.html>

There are many factors which have driven the increase in child obesity worldwide over the last thirty years, but one in particular is very clear and, I believe, very deliberate. The producers of cheap processed foods have spent considerable amounts of money promoting their products directly to children. They use a number of strategies – the design of the food itself, the sweetness and flavourings, the shape and textures and especially the colours; the design of the packet and the attractive characters and animals they put on the packets. Above all, the companies spend huge amounts of money encouraging children to recognise and recall the brand name, using TV, cinema and now online, digital and social media to promote the brand and associate the brand with cartoons, film characters, gifts and good feelings.

Companies spend hundreds of millions of dollars advertising foods and beverages. Thousands of millions of dollars, indeed over one hundred, billion dollars globally. The foods they promote are not the healthiest, not the fresh fruits and vegetables, not the fresh fish, lean meat or wholegrain breads. The amount they spend vastly outweighs the amount available for health promotion – one UK government report estimated that the amount spent on promoting healthy eating was barely one percent of that spent by food companies promoting their branded, processed products.

In response, consumer and public health groups have campaigned to control marketing to children for many years. I can recall a campaign being run in the USA in the mid-1970s against excess sugar in children's breakfast cereals and the advertising of the cereals on TV. Gradually, with the obesity epidemic becoming so obvious, governments have started to act.

Two regulatory approaches are possible: a 'rights-based' approach which argues that children have a right to be protected from commercial influences, and a 'risk-based' approach which specifies which products or which advertising methods should be restricted. This is a theme which may come up again during the conference. The rights-based approach will protect children from inducements to consume a wide range of products and services. A risk-based approach allows most marketing methods to continue unless there is evidence of its harm – and for this we need to specify the types of food and beverage, the nutrition profiles of products, and the types of marketing methods – not just TV and internet, but for example free toys with fast food meals, which several cities in the US are trying to restrict.

There is also the question of undermining parental authority. Advertisers often claim that the responsibility for children's health depends on the parents. Of course this is nonsense. Parents cannot control the advertising that children see on TV, unless they switch the TV off completely – which of course has many benefits. But we know this is not really what the advertisers are recommending. Also, advertisers are getting through to children directly now. They use text messaging, with location-based promotional marketing: e.g. "You are

passing McDonald's, so take this voucher for 20 cents off your next purchase". And they promote their products on social media, with Coca-Cola among the top ten 'liked' sites in the world. How do parents protect children here? And in case you believe that social media sites are only for older children, then there is plenty of evidence of children aged 8 and 9 registering on Facebook.

I want to make two more points before stopping. The first is that what we do in Europe can help others. The new markets being exploited in low-income countries are not so well regulated and the big food companies are moving in. We see Nestle moving up the Amazon with a floating supermarket of their sweet and tasty processed foods. Nestlé also promotes its unhealthy products with product placement on children's TV, which is not permitted under European law. We see Coca-Cola developing small-scale distribution chains in Africa, in the name of supporting Millennium Development goals. McDonald's has opened hundreds of new stores in the Middle East. And sales are all boosted by advertising – here's the soft drink advertising expenditure by PepsiCo and Coca-Cola in the Middle East in the last decade. And children in these countries are rapidly gaining weight.

The other point I want to make is to justify the comment I made at the start. I suggested that the promotion of branded, processed foods was a *deliberate* driver of obesity. Perhaps I exaggerate, but it is important to recognise that increasing weight means increasing food consumption, which means more food purchases. We can do some calculations, and suggest that in the USA the rise in average weight among children over the last three or four decades – about 6 kg for the average child aged 10 years old – means that these children are now typically eating about 220kcal per day more than they did, so that they can move the extra weight around, keep the extra weight warm, nourish the extra body-mass. Using average daily expenditure on food we can show that this extra 220kcal is worth about US\$1.20 per day in food purchases, which is over \$400 per year. For the 50m school children in the USA that is some \$20bn in extra food purchases, and extended over a lifetime at least \$60bn in food purchases. This is the value of child obesity to the food industry. Is it surprising that they want to encourage the same patterns across the globe? Whatever they say, we must judge them by what they do.



# The Importance of the International Code of Marketing of Breastmilk substitutes in protecting young children's' nutritional status

Frances Mason

Title

Save the Children, UK

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Podcast: <http://www.uio.no/english/research/interfaculty-research-areas/leve/news-events/podcasts/2014/0911-mason-frances-global-food-systems-and-hr.html>

The global baby food industry is predicted to be worth approximately \$47 billion by 2015<sup>4</sup>. The lion's share of this is the sale of milk formula<sup>5 6</sup>. While there is a recognised need for some infants to be formula-fed in certain cases, there has long been concern that the marketing and promotion activities of some manufacturers has led to examples of breast-milk substitutes being used unnecessarily and improperly, ultimately putting children at risk. For this reason, in 1981, the World Health Assembly (WHA) adopted a set of minimum standards to promote and protect breastfeeding and ensure breast-milk substitutes (BMS) are used safely if needed and to regulate "inappropriate sales promotion" of BMS. The standards are known as The International Code of Marketing of Breast-milk Substitutes or, more simply, 'the Code'. Since then the WHA has adopted a number of subsequent resolutions that update and develop the provisions of the Code. The Code instructs signatory governments to ensure the implementation of its aims through legislation<sup>7</sup>.

## Human Rights instruments available to support breastfeeding

The Code is not legally binding unless it has been enshrined into a country's national law but, independent of this, Article 11.3 states that relevant companies should abide by it and regard themselves responsible for monitoring their marketing practices according to the principles and aim of the Code. Furthermore, the Ruggie Principles state that corporate responsibility to protect human rights goes beyond national law. Sadly, in several countries where regulation concerning the Code is being considered or has recently been passed, the reverse is happening and it appears that some BMS companies have been lobbying to weaken it.

Only 37 countries to date have adopted the Code in its entirety into national law. However, human rights instruments, legally binding for all countries which have ratified them, can serve as an additional foundation for Code implementation. Of particular relevance are the Convention of the Rights of the Child (CRC, 1989) (Article 24) which aims to protect breastfeeding, and the Covenant on Economic, Social and Cultural Rights (Articles 11 & 12) which address the rights to food and health. which recognise the right to food and health.

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<sup>4</sup> In 2011, Euromonitor estimated that the global food industry was worth more than \$36 billion with a predicted rise of 31% by 2015.

<sup>5</sup> The sale of milk formula accounted for \$25 billion in 2011.

<sup>6</sup> Euromonitor, *Safety First: Global baby food opportunities and challenges to 2015*, February 2011

<sup>7</sup> WHO, The International Code on Marketing Breast-milk Substitutes 1981, <http://apps.who.int/iris/bitstream/10665/40382/1/9241541601.pdf>

## **Save the Children's evidence of Violations of the Code**

In recent years (2012-14), Save the Children has undertaken surveys in Pakistan, China and Nigeria to assess the extent of reported violations of the Code. Some of the findings include the following (the article allegedly violated is given in brackets):

*Free Samples:* Forty percent of the mothers interviewed in China said they had received free formula samples (Article 5.2). One in ten health professionals surveyed in Pakistan said that their health facility had received free samples of breast-milk substitutes, teats or bottles in the previous six months (Article 7.4). Free samples can start a vicious cycle that undermines a mother's own ability to breastfeed.

*Targeting Mothers:* To protect mothers from being provided with information that comes from a source with an inherent conflict of interest, the Code precludes BMS companies from having direct contact with pregnant women or mothers. However, forty percent of mothers in China interviewed said that they had been contacted directly by purported baby food companies' representatives (Article 5.5). Ten percent of mothers interviewed in Jigawa State, Nigeria said they had been contacted by apparent BMS company representatives.

The companies mentioned by mothers and health workers in relation to the above reported examples of Code violations included Nestlé, Danone, Abbott, Mead Johnson and Wyeth as well as various domestic companies.

It should be noted that in Pakistan, since Save the Children's publication of the findings and continued advocacy, each province now has plans to implement the law on the protection of breastfeeding and strengthen monitoring and enforcement measures.

## **Differing views on Human Rights records**

In December 2013, Nestlé published their human rights white paper<sup>8</sup> stating that "as the first and only infant formula manufacturer to achieve inclusion in FTSE4Good.... Nestlé has committed to meet specific inclusion criteria covering areas such as breast-milk substitutes".

FTSE4Good seeks to encourage companies to improve their policies, practices and accountability. In 2003 it brought in a new policy whereby to qualify for inclusion on the index for BMS marketing, a company must demonstrate that it has put in place management systems that will eventually lead to Code compliance, rather than having to demonstrate actual compliance. As no companies were successful, FTSE4Good produced an apparently weaker set of criteria, in 2010. This led to Nestlé securing a place on the index in 2011. It is Save the Children's view that, in light of the evidence of alleged Code violations reported in Pakistan, China and Nigeria, Nestlé's commitment to 'meet specific inclusion criteria covering areas such as breast-milk substitutes', is left still wanting.

## **Challenges and Recommendations**

*Governments* can and must make a significant impact on the number of reported Code violations by strengthening their national laws and prosecuting any Code violations.

*FTSE4Good* should, by 2015, extend its criteria for the inclusion of a BMS company on its index to include the company's activities in *all* countries, and bring its criteria into line with the International

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<sup>8</sup> *Talking the Human Rights Walk Nestlé's Experience Assessing Human Rights Impacts in its Business Activities*

Code and resolutions. It should also assess company practices in selected countries against the Code and resolutions as well as the company's own policies.

*Investors in BMS companies* should consider the impact of the work of the companies in which they invest. For example, The Norwegian Pension Fund, invests in 8000 companies. As of 31<sup>st</sup> December 2013, the largest investment in any one company was Nestlé. The fund's 2.7 percent stake had a market value of 39 billion NOK<sup>9</sup> (6.2 billion USD<sup>10</sup>).

*BMS companies* should acknowledge Article 11.3 and adhere to the Code in full irrespective of the Code's legal status in any particular country and should adopt and implement a business code of conduct regarding their engagement with governments in relation to breast-milk substitutes legislation.

The Ruggie Principles call for businesses to know and show they respect human rights. Transparency therefore sits at the heart of the UN Guiding Principles. It would be a great show of faith on the part of the BMS industry if they would publish any information they have on the impact of marketing practices on breastfeeding rates, and therefore the impact of marketing on access to nutritious food.

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<sup>9</sup> 2013 Government Pension Fund Global Annual report Norges Bank Investment Management.

<sup>10</sup> According to Currency Exchange rate 8<sup>th</sup> September 2014.

# **Self-regulation or legislation for protecting consumers? The Norwegian experience with reducing marketing of unhealthy food to children**

*Randi Flesland*

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For more than fifty years, consumer rights have been on the political agenda. The US President John F. Kennedy was the first politician to address the protection of consumers. In an historic address to the US Congress in March 1962 he outlined his vision of consumer rights.

As late as 1985, UN adopted The United Nations Guidelines for Consumer Protection. They give important legitimacy to the principles of the rights that consumers are entitled – and should act as practical support and guidance for developing consumer protection legislation.

Consumer rights must be seen as part of the range of social rights that individuals are entitled to claim in a modern society. Several of outlined guidelines are related to food and health, such as: The right to satisfaction of basic needs; The right to safety; The right to information.

Food is a commodity that differs from all other kinds of consumer products. We eat every single day and are dependent of food to live and survive. There are a range of personal, social and cultural factors involved in the food choices we make. We are totally reliant on the food system around us, no matter where we live. Our health and wellbeing is depending on the quality of the food we eat, and the amount of food we consume.

Consumer protection is crucial throughout the value chain – from primary production to the point where we actually eat and drink. The complexity in the production chain, but also the range of functions that food have in society, put consumers in a vulnerable position. The consumer rights related to food are challenged every single day.

Protection of children is well established as an important norm in multiple laws and conventions, because children are entitled an even better protection than other individuals. In terms of marketing of food, both international bodies like UN, WHO and a range of NGO's globally and in Norway have stated that the protection standards are not good enough. There is a worldwide agreement that marketing of unhealthy food should not be directed towards children.

This is based on the fact that overweight is one of the biggest public health challenges of the 21st century, both among children and adults. Overconsumption of unhealthy foods and drinks among children and adolescents is a major health and societal problem.

Norwegian Consumer Council's engagement in marketing to children dates back to 2005. Since 2005 we have experienced three different approaches to how marketing of unhealthy food to children should be stopped in Norway.

1. Self-regulation with no involvement by authorities, 2005 - 2011
2. Policy process in order to implement enforced legislation, 2011 - 2013
3. Industry initiated self-regulation in partnership with authorities, 2013 -

In August 2013 the Food and Drink Industry launched a Professional Practices Committee (MFU) and a new set of guiding principles to be applied by the food business operators in Norway. The Guidelines for marketing of food and beverages aimed at children was fully implemented from January 1<sup>st</sup> 2014.

Until today the MFU Committee has treated four complaints. The decisions are posted on the committee's website. One of the four complaints was judged to be a violation of the guidelines.

Norwegian Consumer Council has for many years argued for a legislative approach to the marketing of food high in sugar, salt and fat to children from commercial operators. Even though the new self-regulation pledge has some points of improvements as compared to the previous one, we argue that MFU is not effective enough.

In the following, we discuss weaknesses with the MFU complaint system and the guidelines. A main concern is the age group that the guidelines has defined to protect. Children is defined as aged up to 12 years. Another big concern is the definition of marketing, which rules out important marketing practices such as packaging, product placement and sponsorship of events.

The conclusion is that there are still plenty of loopholes for the industry to take advantage of in their marketing practices. This means that the commercial pressure on children for consuming unhealthy food still is considerable.

Stronger regulation of marketing of unhealthy food and drink to children is one of several tools that can help to counteract unhealthy diets in children. We have to keep up the work in order to convince political leaders of the need for a legislative approach. The experiences from Norway show how difficult it is to get a law regulation on national level in place. Hence, supernational initiatives may be crucial in order to move the agenda forward and reach the goal of improved protection of children against obesity and future risk for disease.

## Can marketing by the food industry be regulated? Some experiences from relevant work in the WHO

*Bengt Skotheim*

*Senior Advisor (check!)*

*Health Directorate*

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*Podcast: (to come)*

There are excellent examples of efforts to regulate industry marketing of products that negatively affect public health. In 1981 the Code of marketing of breastmilk substitutes was adopted at the 34<sup>th</sup> World Health Assembly (WHA). In 2010, at the 63<sup>rd</sup> World Health Assembly, the WHO Member States endorsed a Set of recommendations on the marketing of foods and non-alcoholic beverages to children.

The code is an important tool for WHO and its Member States to regulate marketing of breastmilk substitutes. And some Member States have utilized the code and set up national legal instruments on its basis. The code is a significant development for the global health community, but has caveats as it is typically difficult to enforce – as is often the case with so-called soft law instruments.

WHO recommendations, such as the one on marketing to children, are developed as guidelines that member states can make use of. This could be in shaping national debates and policies, and possibly setting up national regulatory systems.

The Norwegian government was involved in development of the set of recommendations on marketing in WHO. After its adoption by WHA in 2010, Norway set up national hearings to determine whether it was possible to set up national legislation on marketing of unhealthy foods and non-alcoholic beverages. The outcome was that it would not set up legislation, but rather have a close dialogue and collaboration with industry.

An example of this working relationship is The Norwegian Directorate of Health and the Norwegian Food Safety Authority's keyhole symbol that is a food labelling scheme to help consumers identify the healthier options when buying food. Food industries are an important part of this scheme.

In WHO, which is a member state organization; there are many entities that attend governing body meetings - representatives of civil society organizations, unions, and food and beverage industries. All have an interest in shaping the development of resolutions and guidelines that are developed by WHO. However, WHO have a difficult time of developing good working relationships with the so-called non-state actors.

There are only two industries that the Member States have decided that WHO should have no contact with. These are the weapons and tobacco industries. This is due to the fact that what they produce is profoundly detrimental to our health.

The relationship with food industries is very different to this. We need food. Some might have too much, some might have too little, and yet again some might have the wrong foods – lack of proper nutrition and physical activity is a key in the global obesity epidemic, in which marketing plays a role.

However, WHO needs to have space for having discussions on important matters with non-state actors – that are a part of shaping world trends, discussions and not least what is marketed to the consumer – and thus shaping what our dinner plates are filled with.

Currently WHO, and its Member States, have not been able to set up a process that allows for engagement with non-state actors in a good way. And, one of the aspects precluding this process is lack of trust between the parties.

Regulation of industries and its marketing practices will be very hard to do if there is no viable way for the global health community to engage and discuss in WHO.

## Discussion following the 1st Session

David Clark, Nutrition Adviser, UNICEF, New York said that it is possible to regulate inappropriate marketing practices and that UNICEF has been able to promote such regulation in the case of breastmilk substitutes in countries where there is political commitment and involvement of civil society. It is the only way to successfully change corporate behavior in this arena. Companies are well aware of our ability to do it, and *The Euromonitor*<sup>11</sup> shows that they are seeing this as a real barrier to their expansion. As soon as we start working with the government on the implementation of the Code they start receiving threats that they will be reported to the WTO and suffer adverse consequences. We have been advised by legal experts that there is no legal basis for this, when Governments are seeking to implement the International Code of Marketing of Breastmilk Substitutes, but when that seed of doubt is placed in the minds of Government, it is very difficult to move forward. We and our governments should be well prepared in advance so that when we propose the regulation of inappropriate and harmful marketing practices, we can be confident that it is in line with international trade agreements.

Our purpose is to encourage the general public to make healthier choices. It would be helpful if this conference can come up with suggestions on how to overcome the tactics that are used to undermine efforts to bring about constructive regulations.

Tim Lobstein reported from the meeting in London on 10 September 2014 on the drafting of a framework convention on healthy diets similar to the convention regulating the marketing of tobacco products. Can this be a first step to strengthen progress?

Bengt Skotheim argued that it will be difficult to obtain the necessary acceptance of a convention on healthy diets, although it would be the right way to go. Discussing a convention within the WHO and its member states is very complex. Non-communicable diseases (NCDs) has reached the agenda of the UN General Assembly and that has been a starting point for the way forward

Francis Mason: We try to make the surveys as widely known as possible, including traditional media including newspapers, tabloids -and this is quite expensive. She felt there are many potential entry points, e.g. Nestlé has a strong role in the WEF, can we change that?

Randi Flesland emphasized the need to inform consumers to make better choices. But the nudging is now going on the opposite direction; we need to influence the consumers on the positive messages. Labels with traffic light symbols have proved useful in the UK, where consumers see the information right in front. The key hole symbol has been used in Norway to indicate the healthy choices, and it is a good start but not good enough because each food company can choose if they want to use it or not. One of the food industries in a way destroyed the keyhole because they used the label on cheap and unhealthy products, which made other food industries to drop the use of that label on their products. The Consumer Council therefore wants the traffic light symbol to be implemented in Norway.

Boyd Swinburn: we are coming from reasonably democratic governments, but in 20 years we have seen no real change. Where the progress is really made is with the code on the marketing of breastmilk substitutes, but even here the response from the population has been insufficient. Is it too difficult to regulate marketing of healthy food? It works in other areas: Multilateral trade negotiations are really difficult but they have managed to convert that into law; so it is possible, if

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<sup>11</sup> the Euromonitor International Report Global Packaged Food: Market Opportunities for Baby Food to 2013



there is political will. Who is doing the monitoring of the self-regulation scheme in Norway? The arrangement does not seem very viable. Civil society should be doing it.

Malcolm Langford: there seems to be different forms of strategies, for example boycott campaigns and the code on breastmilk substitutes. There are questions about to what extent these have been successful. Is there a place for a boycott again given the level of noncompliance? Or should there be space for other strategies? On the global convention for healthy diets: maybe a new global framework is the way forward, would be very interesting in relation to trade and investment law (has been seen as successful regarding marketing of tobacco), but it should be tailored to specific contexts. Doubtful if this could be achieved in the short term. Scandinavian countries can set example with regulation. Behavioral economics have shown that consumers are irrational in their choices, so to what extent do consumer approaches really help?

Brigit Toebes: we should start focusing on the adoption of a convention along the lines of the tobacco one. Last week there was a case in the Netherlands that an anti-tobacco group being sued for having too strong ties with the tobacco industry, and the case is based on the framework convention. Therefore, this proposition has a very strong potential. There is an initiative of a framework convention on global health, but it is very broad – is that suitable for this specific topic? What you see in the tobacco convention is very precise and concrete, focusing on sales and marketing of specific products and is an interesting example for the food industry.

Tim Lobstein: The draft global convention on protecting and implementing healthy diets is at least something on the table, it is not ideal but it is a start. We are trying to define what we want, these are early steps but they are beginning to take off at least in the civil society arena.

Bengt Skotheim: the debates in WHO in 2005 and onwards have come a long way in the sense of country attitudes and there appears to be some willingness to discuss regulation on marketing of food. The framework convention on tobacco control is a very important legal instrument for WHO and also ratified by many countries. There are two industries that WHO has no relationship with – tobacco and weapons industry, because they are so detrimental to our health. Having a debate of using similar mechanisms on the food industry is much more difficult. From a health perspective we can do without the tobacco and the weapons industry, but food we need.

Randi Flesland: heavy lobbying from the industry that made the Minister of health to change his mind concerning legal regulation of food marketing. He was persuaded that internal disciplining among the food industries would be stronger than having the regulation from the outside. But the draft law itself is there in some drawer. The health minister (of the previous government) stated that if self-regulation does not work the draft law will be submitted later.

The year that has passed has shown that self-regulation is not working, because of the loopholes in the scheme (for example prohibition of marketing up to 12 years, when it should be 18 years, etc). It should not be self-regulation; too much money is involved.

Tim Lobstein: I am sure that at the time the Norwegian minister of health changed his mind there were a number of newspaper articles saying like “your local shop keeper will go to jail for selling crisps”, absurd products of corporate lobbying, but effective enough to create commotion and a difficult political environment.

Frances Mason: there is a lot of awareness raising that needs to happen, not sure if boycott is the tool, but could be that campaigns could work. Monitoring the number of violations would also help too. It would be a powerful sign if the Norwegian Pension Fund withdrew its investments from Nestlé.

Fabio Gomes: regardless of the food labelling system you would like in place, countries should focus on removing license characters from food labels. This will be much more effective in changing the consumption than any other system with information about the content of the product. Anti-tobacco activists say that health is not negotiable, and they stress that. In our field we say the opposite, that we should negotiate, we should talk. If what the food industry produces is superfluous and harmful for my country, why should I talk to them? These companies produce anything else but food, they do not produce food. Why should we talk to them?

Desmond McNeill: The Norwegian Pension Fund has been influential for blocking investments in Wal-Mart and in the weapons industry. This was due to big pressure. The new strategy of the fund is to invest also in so called “bad” companies as a way of trying change them from inside.

Judith Richter: which efforts make the code on marketing of breastmilk substitutes more effective? The UN was able to pass a reasonably good code of marketing practices, which came out of the political climate of the time. After that, we also have an international network, IBFAN, that monitors puts pressure, names and shames, and supports countries to withstand the resistance of industry when countries want to implement legally binding measures. There is enough evidence to show that reliance on Corporate Social Responsibility does not give strong protection to consumers. How to give WHO and UN agencies back the political clout to work on international legally binding instruments? Conflicts of interests must be discussed in the open. And we must work on international binding instruments as companies are global.

Tim Lobstein: to say those companies do not produce food is a bit tricky. But having national food-based guidelines, and ask what people should eat more of or less of, and then if companies are producing foods that we need to eat more of they could be included, but the ones who produce what we do not need (junk food) they would not be invited. The problem is the companies involved are those producing the foods that we do not need. At the WHO stakeholder meetings, Mars, Kellogs, Coca Cola etc. are all there, but these are not the companies that produce the food that we need.

Francis Mason: concerning the strategy of the Norwegian Pension Fund: at the end of the day it is quite possible that what we propose might not be financially beneficial to the company and any investor would not be keen to push for such measures.

Randi Flesland: it is important with global initiatives, but also national ones. Labelling is important as consumers in Norway say they want to know more about what they eat, they want it to be easy and they are against marketing of unhealthy food to children.

Bengt Skotheim: we should remember that if a company is generating revenues to the country how do you not talk to them? What should you say to countries that produce sugar? Political clout: it is very difficult at WHO because it is set up as a technical agency, not political. That is tricky. What is the right venue to have that debate? How do non-state actors have a possibility to engage with member states and the secretariat in the right way?

## **Session 2: Impact on rural livelihood of the agricultural input industry and corporate land and water acquisition**

Moderator: Bård Anders Andreassen

Speakers: Olivier de Schutter, Kjell Havnevik, Hans Morten Haugen,  
Aksel Tømte, Anne Hellum

Outlines of panellist's talks

# Sustainable food(/agricultural?) systems and the role of the private sector

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*Video:*

<https://www.dropbox.com/s/fbrof72s0igctdz/Oslo11.9.2014-rev%20%281%29.mp4?dl=0>

Please note: Being unable to attend the Oslo conference Professor De Schutter sent a video presentation to the conference, based on his experience and insights obtained during his six years as United Nations Special Rapporteur, available here on podcast.

No written outline was provided by the speaker, but Asbjørn Eide has summarized his presentation below.

## **Abstract:**

The main message is that investment in agriculture in developing countries, particularly in Africa, had been neglected for thirty-four years but that this changed substantially during the last decade, particularly after the food crisis of 2008-2010. De Schutter reviewed three main initiatives promoting agricultural investments in developing countries. He then pointed out three problematic aspects of the direction that this investment had taken, and concluded with four recommendations which can improve the role and responsibility of the private sector and of the government in agricultural development.

## **1. Past neglect of agricultural investment, and new initiatives during the last decade.**

There was for 30-40 years little interest by governments, the private sector, donors and the World Bank in agricultural investment, particularly in Africa. Agriculture in low income countries was seen as a sector that had no future, in large part because the international trading system was not favouring investment therein.

Much has changed during the last ten years, particularly in the wake of the global food crisis in 2008-2010. Governments and donors have realized that many years of agricultural development have been lost. The private sector, encouraged by governments and foundations, is now taking a strong interest. Some of the main initiatives are these:

- **AGRA** – Alliance for a Green Revolution in Africa, was established in 2006 and supported by major foundations such as the Melinda and Bill Gates foundation, the Rockefeller Foundation and the development agencies of several donor countries. In essence it seeks to develop a network of agro-dealers that could facilitate access to inputs for farmers, particularly small farmers, to make them to become more competitive and productive by moving to more highly capitalized agriculture production. AGRA is active in several bread-basket regions of Africa.
- **Scaling Up Nutrition (SUN)**, an initiative started in 2009, is now active in approximately 40 countries. It seeks to stimulate interest for and support of investment in agriculture, by establishing multi-stakeholder platforms involving governments and major corporations. Its

main purpose is to improve access to good nutrition, with a special emphasis on nutrition for pregnant women and infants. SUN is based on the awareness that child health can be much improved by ensuring sufficient and nutritious food for mother and child during what has been called the “thousand days window of opportunity” from conception to the child’s second birthday, thereby laying the nutritious ground for a healthy development of the child. In practice, this encouragement of investment in agriculture for purposes of food and nutrition has been supported in particular by major enterprises engaging in fertilizers and seeds, including SYNGENTA and YARA.

- **New Alliance for Food Security and Nutrition** was launched by President Obama on the eve of the G8 meeting in 2012. (G8 refers to the informal network of the 8 main industrial countries). In practical terms, the New Alliance for Food Security and Nutrition operates as a consortium involving major corporations in the area of food, fertilizers and feed. It can be seen as a follow-up of an initiative first taken by the G8 countries during their meeting in L’Aquila in 2009, where they committed themselves to invest 20 billion dollars during 2009-2012. The governments failed to deliver the pledged assistance, and the private sector was therefore called in to deliver on the financing gap. The New Alliance for Food Security and nutrition was formally established in 2012. The private sector participants in the consortium of agrochemical corporations and agro-food corporations, such as Syngenta and Yara, are committed to investment in agriculture in order to produce as much food as possible in the shortest possible time.

## 2. Problematic aspects of the direction that these initiatives had taken.

The initiatives described above are important and undoubtedly well intended. They seek to redress the previous lack of investment in agriculture, and they also respond to fact that local food processing facilities in Africa are weak or non-existent. Through these initiatives, they seek not only to increase the amount of food produced but also to enhance the nutritional value of food.

But from the perspective of an inclusive approach to food security, there are problems with the way these initiatives are implemented in practice. To illustrate the mindset governing the approaches taken by these initiatives, a quote from a report in 2013 by the World Bank might be illustrative:

*“Africa represents the ‘last frontier’ in global food and agricultural markets. It has more than half of the world’s uncultivated but agriculturally suitable land and has scarcely utilized its extensive water resources. As Africa’s population, incomes, and cities grow and spur the development of domestic markets, the prospects for agriculture and agribusiness will be better than ever.”<sup>12</sup>*

In other terms, today the current tendency is to see the needs of agricultural and food systems as business opportunities for private actors. But opportunities are not the same as solutions to the situation faced by the rural inhabitants in developing countries. Only when certain safeguards are put in place can it help to solve the problem.

De Schutter identified two main problems with today’s agricultural investments: Targeting the wrong beneficiaries, and lack of consultation with those affected.

**Inadequate targeting:** In Africa and Asia, the majority of the population consists of rural inhabitants. Poverty is widespread in the rural areas. The large majority of peasants, many of whom are women,

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<sup>12</sup> “Growing Africa: Unlocking the Potential of Agribusiness”. World Bank, 2013, p. 2. <http://siteresources.worldbank.org/INTAFRICA/Resources/africa-agribusiness-report-2013.pdf>.

cultivate small plots of land with uncertain tenure. In practice, the initiatives towards agricultural invest tend to favor commercial farmers to the detriment of the many smallholders and other traditional users of land. This can aggravate rather than improve the livelihood in rural areas and increase the migratory pressure towards cities with the formation of slums as a likely outcome.

Investments affect the scale and method of production and of the kind of products that are promoted. Investments tend to promote mono-cultural production of raw material for processing, not food crops for small farmers to feed themselves and their families. Investments will not favour local livelihood but promote commercial farming for national and international trade.

The initiatives towards increased investments rely in practice on high-cost agricultural inputs (seeds, fertilizers), with agricultural products for export or distant markets. This can be suitable for commercial farmers but not for smallholders. The objective to increase capital-intensive cash-crop production as fast as possible does not correspond to the needs of the small-scale farmers. They traditionally seek to produce for their families and the local communities, contributing to rural development and thereby reducing the pressure of migration to cities. But they do not have access to credit partly due to their insecure tenure of land. They have little political influence and are unable to obtain the kind of support that could improve their livelihood in the rural areas. These smallholders are of little interest for the agro-dealers selling seeds and fertilizers.

For these reasons it is doubtful that smallholders and other peasants can benefit from the investment initiatives mentioned above. The smallholders fail in competition with large-scale commercial farmers that have reliable and substantial access to capital. The lack of focus on small-scale, poor farmers and their specific needs has resulted in situations in which commercial farmers have been prioritized. This has increased pressure on land on water, where smallholders face competition with the commercial farmers.

De Schutter referred to an example from Malawi which in his capacity as Special rapporteur he visited in 2013. Malawi had joined the New Alliance for Food Security and Nutrition, and the government had in its Cooperation Framework Agreement committed itself to release 200 000 hectares of high-quality agricultural land, located near lake Malawi. Small local farmers, who often cultivate marginal and low-quality land and who are without access to credit, would in practice have no access to this high-quality land now released for investments. The decision to commit this huge amount of land was done without any consultation with the local rural inhabitants.

**Lack of consultation:** Most projects are carried out without consultation with those that are likely to be affected by them. There has been little or no bottom-up flow of information about the needs of the local population. Rather there have been many top-down decisions made by bureaucrats that may be well intended but not well informed of the local needs. In his contact with the AGRA executives on one hand, the representatives of the smallholders on the other, de Schutter found that they did not understand each other, they had quite different concepts and language. The AGRA executives were speaking a different language, which was commercially oriented. There was what he calls “A dialogue between the deaf”: The supporters of large-scale investment did not understand or even listen to the smallholders and peasants.

One example: When SUN was launched, there was much talk about the introduction of “plumpy nuts”, ready-to-use therapeutic food and marketed to compensate for the sometimes low nutrient content of some traditional diets. There was a serious risk that this could displace the local production in favour of external, mass produced products, instead of promoting appropriately modified compositions of the locally available foods.

### **3. Four recommendations for a human rights-focused investment in agriculture in developing countries**

#### *Recommendation 1:*

Important to understand the differences between the role of the private sector (corporations and other business enterprises) and the priorities of governments. Business enterprises of any kind, including corporations have as their primary purpose to obtain profit for their shareholders, otherwise they would not exist. This is their function and they cannot be reproached for that. Governments, on the other hand, should be concerned with the wellbeing of the whole population, ensuring adequate livelihood and income for all members of society. Very often the private investors pay no attention to the public strategy that the government had laid out for itself. Unless the private investments are channelled to poverty-reducing aims, if the private sector is left to decide on its own where and for what it will invest, that will not suffice. It will not compensate for the failure of the governments to ensure adequate training, improvement of infrastructure and of storing capacities. Unless governments recognize their responsibility towards the small farmers and use public funds to adopt the necessary measures, the involvement of the private sector will not help to re-boost and re-launch agriculture in low income countries. The involvement of the private sector is not a substitute for the public policies. *Recommendation 2:*

Obtain a better understanding of the two different worlds of farmers, between the large commercial farmers and the small farmers, who have no or little access to capital and no mortgage because their tenure is uncertain. These two worlds of farmers are very different from each other and they speak almost two different languages so that it resembles a dialogue between the deaf.

#### *Recommendation 3:*

Ensure that investment policies are better aligned with country-led strategies. Very often the private sectors make decision that takes no account of the policies that governments have set for themselves. The 2005 Paris Declaration on Aid Effectiveness, where donors underlined the importance of alignment with policies set by the partner governments, could be a good guide for this.

#### *Recommendation 4:*

Promote compliance by the private sector with the UN Guiding Principles on Business and Human Rights, which require corporations to respect peoples' right to food and adequate standard of living. This includes a human rights due diligence duty to seek information about the impacts of the activities, and to act on the basis of the information received. This should ensure that if there are negative impacts on human rights of corporate activities, action should be taken in order to prevent harm and to promote positive human rights impacts of business activities. This is true in particular for the right to food. There is a need for private investors to ensure they will not deprive small farmers from access to land and water, that they will not impose standards that will make it difficult for small farmers to enter into rural supply chains, and that they will not encourage farmers to buy expensive inputs that will lead these farmers to fall into unsustainable levels of debt. There are many areas in which this due diligence obligation imposed on the private sector can play an important role in the context of the right to food.

Governments must also do their part. Their duty is to protect the right to food by regulating adequately agro-food companies and investors in agriculture, and corporations must do their, applying due diligence to respect the rights also of smallholders and avoid encouraging them to engage in expensive agricultural inputs that make them overstretched and indebted. Ensure also that there is a genuine consultation with those that are likely to be affected.

## Responsible agricultural investments – need to face reality

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1. Current situation and trends, the drivers of large scale investments
2. Surge in large scale transnational and cross-cultural large scale investments in land; volumes, crops, target regions etc.
3. Who are the investors; large scale corporations, state and state companies, pension-, state- and sovereign funds, church institutions. Norway a major player (Statoil, Green Resources, Norfund, Church/OVF )
4. Brazilian agricultural context; large scale versus small scale agriculture, crops, direct and indirect changes in land use, environmental impacts, gross annual incomes, labour and land needs, displacements and conflict.
5. African agricultural context
6. Case studies of large scale agricultural investments (large corporations, church organization and pension funds).
7. Investment outcomes; investors claim win-win outcomes, rural smallholders experience win-lose outcomes, while many outcomes turn out to be lose-lose (Matondi et al. 2011, Neville and Dauvergne 2012:279, FAO 2013, Swedish FAO Committee 2014. Ch. 8)
8. Properties of large scale investments; mono-cropping undermining biological diversity, land and water needs which conflicts with rural smallholders, mechanization and limited labour needs, high level of inputs leading to long term reduction in soil fertility, negative environmental and climatic effects. Regime yet to prove its sustainability.
9. Properties of smallholder agriculture; family based, labour intensive, focus on food production, often mixed production crops and livestock, weak land rights, gender inequalities. Support to smallholder regimes has declined since early 1980 both at national and international levels. This fact and more recent displacement processes are important reasons for their “claimed failure.” Smallholder regimes have potential to absorb increasing populations (Africa to increase from present 1 to 2 billion by 2050) and to produce efficiently and sustainably given continuous support based on tenure security, research, experiences and knowledge.
10. Challenges; need for RAI principles to be the basis for more concrete guidelines that can be the foundation for strategies, policies and support activities that **prioritise the production regime** with best potential to attain economic, social, cultural, economic and environmental sustainability. The need to start from the focus on the production regime is, in my judgment, the only way to attain the long term objectives of the RAI principles, which are similar to those of many other principles, guidelines, certification schemes etc., i.e. food security, nutrition, increased productivity and production with potential not to harm ecological systems. Ruggie principles (UN Guiding Principles on Business and Human Rights), UN Global Compact, CSR and adherence to human rights are important for safe-guarding and qualifying large scale



international, cross-spatial and cross-cultural investments so that they do not undermine or obstruct more sustainable production regimes. This will at the same time protect the land and water rights of more sustainable production regimes which can ensure to the right to food.

11. Can CFS/RAI process meet the challenges? Briefly about CFS/RAI process.
12. Reflections and critique of RAI principles; although some improvements and clarifications in the August 8 draft as compared to that of August 1 2013 (Zero draft) too general in character, do not face real challenges and conflicts on the ground that have emerged in the wake of rapid increases in large scale transnational agricultural investments, weak on prioritization and linking principles to responsibilities (although improvements compared to Zero draft). Need to base RAI principles more clearly on experiences and knowledge and to transform them into guidelines that can be the foundation for policies and strategies that can make a difference, i.e. make the principles more effective.
13. Proposal for modified principles and a new set of guidelines for responsible agricultural investments which attempts to link principles and guidelines to the real challenges is presented in the Discussion paper of the Swedish FAO Committee (March 2014, ch. 11).
14. Conclusions and the future.

# Land and resources acquisitions in Sub-Saharan Africa: How do states and corporations act?

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In this brief *land acquisition* will be used as a general term for land transfers, land sales and land leases, acknowledging that the term 'land grabbing' is more frequently applied in the media. The problem is captured in this quote from a World Bank study: "lower recognition of land rights increases a country's attractiveness for land acquisition..."<sup>13</sup>

The amount of such transfers are documented elsewhere.<sup>14</sup> This brief has two functions:

- 1 Present and assess the recent initiatives and how they specify conditions on participating states;
- 2 Present and assess human rights-embedded tools to direct how land transfers are to be conducted.

## Recent initiatives

- African Union (AU): Comprehensive African Agricultural Development Programme (2003); with four pillars: Land & water management; Market access; Food supply and hunger; Agricultural research; Each state should invest 10% of their national budgets in agricultural development; 8 of them have done so.
- G8: New Alliance for Food Security and Nutrition (2012): encompasses Benin, Burkina Faso, Cote D'Ivoire, Ethiopia, Ghana, Malawi, Mozambique, Nigeria, Senegal, Tanzania; endorsed by IFAD, FAO, WFP, World Bank, ADB.
- World Economic Forum (WEF): New Vision for Agriculture (2009): encompasses Burkina Faso, Ethiopia, Ghana, Kenya, Mozambique, Rwanda and Tanzania: emphasizes "collaboration, investment and innovation"; says that "large-scale initiatives is therefore key to success"
- WEF/NEPAD/AU: Grow Africa (2011): Same 7 countries: "accelerate investments and transformative change"; among operating principles: (extract) "...facilitates sustainable large-scale investments"
- Rockefeller, Bill & Melinda Gates: Alliance for a Green Revolution in Africa (2006): encompasses Ghana, Mali, Mozambique and Tanzania; Partners: IDRC, DFID, NEPAD; says that "strategy focuses on smallholder farmers".

Hence, we see that only the latter explicitly says that it primarily seeks to serve smallholders.

Of the four others, the strongest conditions are found in New Alliance for Food Security and Nutrition. Three examples are illustrative:<sup>15</sup> Ghana: Pilot model lease agreements for 5,000 ha of land in database established. Mozambique: Adopt procedures for obtaining rural land use rights (DUATs) that decrease processing time and cost. Tanzania: Instruments developed that clarifies role of land implementing agencies in order to responsibly and transparently allocate land for investors in SAGCOT (Southern Agricultural Growth Corridor of Tanzania) region.

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<sup>13</sup> Deininger and Byerlee 2010, *Rising Global Interest in Farmland. Can It Yield Sustainable and Equitable Benefits?*, 55.

<sup>14</sup> Anseeuw, W. et al. 2012, *Land Rights and the Rush for Land, Findings of the Global Commercial Pressures on Land Research Project*.

<sup>15</sup> GRAIN 2013, *The G8 and Land Grabs in Africa*; [grain.org/article/entries/4663-the-g8-and-land-grabs-in-africa](http://grain.org/article/entries/4663-the-g8-and-land-grabs-in-africa).

## Human rights-embedded tools

There are several tools to direct business conduct, and public actors' regulating and facilitating role. One example is the revised Performance Standards by the International Finance Corporation (IFC). The listing below include only those that are explicitly embedded in human rights.

- UN Guiding Principles on business and human rights (A/HRC/17/31, Annex) (2011);
- UN Special Rapporteur on the right to food: Large-scale land acquisitions and leases: a set of minimum principles and measures to address the human rights challenge (A/HRC/13/33/Add.2, Annex) (2009);
- UN Special Rapporteur on the right to food: Guiding Principles on Human Rights Impact Assessments of Trade and Investment Agreements (A/HRC/19/59/Add.5, Annex) 2012) Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (2012);
- Draft Revised Principles for Responsible Agricultural Investments in the Context of Food Security and Nutrition [likely to be adopted at Committee on World Food Security 2014 session; first version of these Principles (without explicit human rights terminology) was launched in 2010, by the World Bank, IFAD, FAO and UNCTAD].

Are these non-binding guidelines applied? Three examples, two from the USA and one from OECD are illustrative:

The USAID states: "partners have expressed a strong desire to ensure that activities and investments are consistent with the Voluntary Guidelines."<sup>16</sup> Moreover, the White House "welcome the successful conclusion of the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the context of National Food Security and support the broad-based consultation process and pilot use of the Principles of Responsible Agricultural Investment."<sup>17</sup> The OECD lists "multilateral instruments dealing with RBC [Responsible business conduct] in agriculture", which include the FAO Voluntary Guidelines, but also the 2009 "Large-scale land acquisitions and leases - A set of core principles and measures to address the human rights challenge", by the UN Special rapporteur on the right to food.<sup>18</sup>

It must be noted that these are all non-binding instruments, rather than binding human rights treaties, but they do of course represent important specification of the provisions of the treaties. While the adoption of these tools must be noted, their actual influence is difficult to assess.

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<sup>16</sup> <http://blog.usaid.gov/2012/09/5-more-questions-about-the-new-alliance-for-food-security-and-nutrition>.

<sup>17</sup> [www.whitehouse.gov/the-press-office/2012/05/18/fact-sheet-g-8-action-food-security-and-nutrition](http://www.whitehouse.gov/the-press-office/2012/05/18/fact-sheet-g-8-action-food-security-and-nutrition).

<sup>18</sup> OECD 2013, *Policy Framework for Investment in Agriculture*, 42.

# The protection gap in the palm oil sector in Indonesia

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**Outline:** My presentation will focus on the how legal norms affects realities on the ground in the palm oil sector in Indonesia; and how this impacts on protection of human rights – historically and today. I will then ask the question of what implications these experiences have for an international regime that aims to regulate the human rights impacts of businesses.

**I will start by looking at the big lines in forest management.** Indonesia's Forestry Law defined all forest land as state land (much like the colonial laws). This covered 70% of Indonesia's total land area, and has been the basis for Indonesian forest management until today<sup>19</sup>. Under Suharto's New Order regime, forest management was top-down. In order to implement large-scale projects, investors needed good relations with the President. Under the following democratic reform period, management of natural resources was de-centralised, and local authorities gained a much larger say in decision-making. However, this has not yet lead to any significant improvement in 'democratic representation' or accountability concerning natural resource management – local authorities tend to side with commercial interests, interests they often depended on in order to be elected in the first place. Corruption at regional level has increased, and so has the number of operating permits issued.

**My first point is that in spite of weak law enforcement and a gap between laws and policies on natural resource management on the one hand, and realities on the ground on the other, laws and policies does to a considerable extent affect power relationships and define the space wherein local realities are shaped.**

The stipulation that all forest land belongs to the state did not fully remove the various normative systems that land management previously were based on, but it put local communities in a very weak position whenever there was a conflict of interest between the communities and commercial interests backed by the state.

Similarly, the fact that a plantation permit is issued for a given area does not necessarily mean that any plantation will be established, or that its size and location will be as outlined in the permit. But when a permit is issued, it puts those living within the concession area in a weak negotiating position; especially when (as is often the case) these communities don't possess any formal acknowledgement of ownership over the lands they traditionally have been living off. Such land takeover 'on paper' has been fittingly described as 'virtual land-grabbing'.

If a permit already is issued then communities would often settle for what they can get, such as compensation (which technically speaking often would be considered 'charity', if their ownership is not formally recognized), or promises of jobs at the plantations or participation in smallholder schemes. This is a pragmatic approach that leaves out any question of FPIC.

(However, companies seeking to get palm oil plantation permits do not necessarily have any clear intention of establishing a plantation<sup>20</sup>. Motivations for seeking permits could be 1- that the permit

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<sup>19</sup> A 2012 decision by the Indonesian Constitutional Court has declared that *adat* (customary/indigenous) forest cannot be claimed as state land – the presentation will not go into this.

<sup>20</sup> As pointed out by McCarthy

would enable them to clear-cut a forest and take the timber in it (clear-cutting would otherwise be illegal) 2 – that the permit could give them access to bank loans or subsidy schemes 3 – possibilities of ‘selling out’, waiting for a possibility for giving up their licence to a different company in the palm oil or extractive industry sector. Perhaps they could even hope to ‘sell out’ to an environmental/climate project.)

**Law enforcement is agenda-driven.** Powerful actors, such as business enterprises with close links to state and local governments, media and the police, have much influence on which laws are enforced, and how they are enforced. It is well documented that both the police and the judiciary are perceived to be among the country’s most corrupt institutions, and the police is often accused of one-sidedly protecting the interests of palm oil companies. Law implementation is selective. Almost any law that has an operational aspect can potentially be used for extracting bribes.

A particular challenge in this regard is inconsistent legislation, overlapping mandates of various institutions and unclear responsibilities, allowing for selective interpretation. In our fieldwork we have found many examples of companies violating the law, apparently without suffering any legal consequences. At the same time, these companies were able to use law to its advantage.<sup>21</sup>

**Consequently, having the law on your side’ can be perceived more as a sign of privilege than any indication of ethical behaviour (or even legal/procedural compliance). The ‘underprivileged’ in this context, will be those with the least protection.**

In the palm oil sector, those that lack formal land ownership would have weak protection of their rights. Gaining acknowledgement of ownership can be seen as an investment, and may require considerable financial resources, even when no bribing is involved. (And plantation workers who lack work contracts are in a particularly vulnerable position).

There are also examples from other sectors:

- Hundreds of thousand illegal artisan miners that operate every day throughout the country. The fact that their operations are ‘illegal’ does not necessarily hinder them from working but it puts them in an extremely vulnerable legal position. (Compared with, for example, the companies they sell their minerals to)
- Or logging; sustainable small-scale logging for personal consumption in traditionally managed forest may be technically illegal whereas large-scale commercial logging which much more significant social and environmental impact may be legal.

Today, civil and political rights are much better protected in Indonesia than they were under New Order. Even so, our findings from Kalimantan show that there is still widespread coercion and silencing of protesters.

**There are laws intended to include local communities in decision-making processes, or that obliges companies to seek their consent, or respect their traditional land arrangements, but in practice these are often not enforced as intended. A main challenge is to ensure genuine representation, and avoid ‘elite capture’.**

In Central Kalimantan, we have encountered many examples of how village heads or traditional leaders have been bribed to make statements about the traditional customary land, getting rich by giving up common village land. Case studies elsewhere have similar findings.

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<sup>21</sup> Examples of the first could be ‘cooperation on with local population on maintaining security’, which is encouraged by the mining law and in effect allowing for use of hired thugs to protect company interest. Examples of the latter could be

‘Elite capture’ is also perceived to threaten the ‘indigenous’ movement in Central Kalimantan in a different way. The ‘indigenous institution’<sup>22</sup> is acknowledged and given certain authorities through a province law, but this law also gives provincial authorities a great deal of influence over who that are appointed as indigenous leaders. The governor is himself the head of the national Dayak council (Dayaks are the main group of indigenous people in Kalimantan). At the same time, ‘indigenous rights’ are probably the human rights that are most often invoked for social mobilization purposes in land conflicts. Thus there is a risk that the ‘counterforces’ will be co-opted, and the indigenous leaders will end up representing elite interests. (Avoiding ‘elite capture’ and ensuring genuine democratic representation also constitutes one of the most fundamental challenges for democracy in Indonesia as a whole, at both local and national level)

**Ethical industry initiatives have failed to guarantee FPIC (free, prior, informed consent)**

The Roundtable for Sustainable Palm Oil (RSPO) constitutes the most prominent ethical industry initiative. RSPO’s own criteria oblige companies to apply FPIC, but case-studies find that compliance with these criteria is low even among RSPO-members.<sup>23</sup>

One important reason for this is that in most areas, traditional land ownership is not acknowledged by the state, and companies tend to base themselves on state law in questions of land ownership.

**Implications for the GP, sector-focused ethical initiatives or the intention to create a binding instrument:**

In the Indonesian domestic sphere, any attempt to establish a regulatory scheme that guarantees FPIC will risk being undermined by the same forces that make law enforcement so partial and rights protection so weak in the first place, i.e. ‘elite capture’, leading to partial enforcement, where the elite can benefit from the law being enforced in its favour, and at the same time operate outside it.

This risk is high due to the asymmetry between companies and local communities, with regards to legal understanding, information, ability to negotiate or further their cause (via media, access to decision-makers, law-enforcers, or other means) power and economic resources. Given this asymmetry, the social conditions for accountability are weak. Safeguards should be in place to ensure that representation of affected groups is genuine and without pressure. This constitutes a main challenge.

Some NGOs have campaigned successfully against palm oil companies, affected the power balance in the specific cases they have been involved in, and consequently managed to change corporate behaviour, leading to improvements on the ground. (The Indonesia programme is also seeking to address this imbalance in power by strengthening civil society’s capacity to hold government and businesses accountable). However, much of the pressure on companies has been based on consumers and investors outside Indonesia, in particular Europe and the US. Most of the palm oil is consumed either domestically or in other Asian countries such as India or China, where the consumer demand for ‘ethical’ corporate behaviour is weak.

Due to the already weak lines of responsibility between different state institutions (and companies), it is important to ensure that initiatives to regulate the sector increase, rather than replace, the demand for the state to fulfil its obligation to protect.

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<sup>22</sup> *lembaga adat*, could also be translated as customary institution

<sup>23</sup> See for example ‘Conflict or Consent? The oil palm sector at a crossroads’ edited by Marcus Colchester and Sophie Chao

## A note on peasant rights<sup>24</sup>

Henry Thomas Simarmata had been invited to present and discuss the ongoing efforts within the United Nations Human Rights Council on the drafting of a declaration on peasant rights. Unfortunately, Mr. Simarmata was unable to attend the Oslo conference due to problems with over-extension of his Schengen visa. This note is therefore prepared by Asbjørn Eide, intended to provide the relevance of the work on peasant rights for the discussion of the livelihood of the rural population in developing countries.

During its 21st session, on 11 October 2012, the Human Rights Council decided to establish an open-ended intergovernmental working group with the mandate of negotiating, finalizing and submitting a draft United Nations declaration on the rights of peasants and other people working in rural areas.

A draft declaration had already been submitted by the Advisory Committee of the Human Rights Council. The background to this initiative is that peasants and other people working in rural areas suffer disproportionately from poverty and malnutrition and from the burdens caused by environmental degradation and climate change, and that an increasing number of peasants and other people working in rural areas are forcibly evicted or displaced every year to make way for large-scale development projects, and that it is increasingly difficult for small-scale fishers and fish workers to make their voices heard, defend their human rights and tenure rights, and secure the sustainable use of the fishery resources on which they depend.

It has also been shown that access to land, water, seeds and other natural resources has become an increasingly difficult challenge for rural people. For all these reasons the importance of improving access to productive resources and investment in appropriate rural development, including agro-ecological approaches, have been broadly recognised.

In the provisional draft of a future declaration, the term “peasant” means women or men who engage in—or who seeks to engage in—small-scale agricultural production for subsistence and/or for the market and who relies significantly, though not necessarily exclusively, on family or household labour and other non-monetized ways of organizing labour. The Declaration is intended to apply also to persons engaged in artisanal or small-scale agriculture, livestock raising, pastoralism, fishing, forestry, hunting and gathering, and handicrafts related to agriculture or a related occupation in a rural area, and to indigenous peoples working on the land, transhumant and nomadic communities and the landless, as well as to salaried workers, regardless of their legal status, on plantations and large farms and in agro-industrial enterprises.

It was therefore obvious that this intended declaration will be of great interest in the efforts to safeguard the livelihood of food producers and harvesters in developing countries. In the absence of Henry Simarmata, however, we did not have a discussion of this issue during the Oslo conference.

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<sup>24</sup> Henry Thomas Simarmata has been a guest researcher at the Norwegian Centre for Human Rights. He is a member of the Indonesian Human Rights Committee for Social Justice and represents also Via Campesina, Indonesia

## Small water for small food: Protection against water grabbing - a gender and human rights issue

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Transnational land deals reflect the process whereby agro-food-energy systems are becoming globalized under the control of multinational companies. These deals may bring benefits at the national and local level in terms of national and local investments, technology transfer and jobs for women and men. The downside of these deals is that they often result in uncompensated loss of livelihood resources for poor and marginalized groups, so-called “land grabbing”. These negative effects have given rise to a series of human rights initiatives seeking to strengthen the obligations of the host state to ensure protection of human rights under its jurisdiction as well as addressing the extraterritorial human rights obligations of multinational companies. The Special Rapporteur on the Right to Food has in a number of recent reports addressed the obligation to ensure the affected local population’s right to an adequate standard of living, particularly access to land to produce food.<sup>25</sup> Water as both a target and a driver of this changing mode of agricultural production has so far been given little if any attention, in spite of the interconnectedness of the right to an adequate standard of living and the right to land, water and food. The fluid nature of water and its hydrological complexity often obscures how water is appropriated as a result of transnational land deals and the associated impacts on local livelihoods and food security.<sup>26</sup>

This paper, which is located in Sub-Saharan Africa where 35% of transnational land deals take place, focuses on agriculture driven appropriation of water as a gender and human rights issue.<sup>27</sup> In this context transnational land deals are, as pointed out by the UN Human Rights Council Advisory Committee on Rural Women and the Special Rapporteur on the Right to Food, endangering rural women’s access to and control over productive resources, particularly land and water. African rural women play a crucial role in the food security of households, producing between 60 and 80 per cent of food crops. As producers of food for livelihood most rural women rely on naturally available common pool land and water sources that are governed by local community based norms and institutions.

In Sub-Saharan Africa 90 per cent of land is regulated by local customary arrangements for land tenure and related natural resources, such as water. Rural people’s access, use and control of common pool water sources has for centuries been regulated by unwritten local norms and institutions. These local community based water governance regimes, which have co-existed with the received western water laws since the colonial period, often recognize a right to clean drinking water and a broad right to livelihood in terms of access to land and water which is necessary for livelihood.<sup>28</sup> These local practices and norms constitute a dynamic and responsive form of law, often

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<sup>25</sup> See A/HRC/13/33 and A/HRC/22/72

<sup>26</sup> Lyla Mehta, «Introduction to the Special Issue: Water grabbing? Focus on the (Re) appropriation of Finite Water Resources” Water Alternatives 2012, Volume 5, Issue 2

<sup>27</sup> This paper is based on the research project Gender, Human Rights and Water Governance. See A.Hellum and P. Kameri-Mbote et.al Water is Life. Women’s Human Rights in National and Local Water Governance in Southern and Eastern Africa. Weaver Press 2015.

<sup>28</sup> B.Derman and A.Hellum “Livelihood rights perspective on water reform: Reflections on rural Zimbabwe.” Land Use Policy 24 (2007)



referred to as 'living customary law'. These community based norms and institutions often lack formal legal recognition and are not integrated and protected by the laws and policies that frame the national water governance systems.<sup>29</sup>

Large scale land and water deals between international companies and national governments are framed by state law based on permitting systems. They are framed by water laws that don't fully respect and protect local community based water rights. Permits to use water for commercial agriculture, are often granted by national water governance systems without sufficient consideration of the existing uses of small scale users who lack the resources to fulfill the formal requirements for obtaining a water permit. These micro-scale users, most of them women producing food and other items for livelihood, are easy victims for "water grabbing" in a situation where government tend to side with large scale users who are powerfully connected and will pay for water. One example is the Jatropha and sugar cane enterprise in Chisumbanje and Mwenezi districts in Zimbabwe.<sup>30</sup> This enterprise constitutes a complex set of deals between the parastatal Agriculture and Rural Development Authority agricultural production company that owns land in the area, new indigenous companies owned by ZANU PF politicians and an international company controlled by the Zimbabwean national Billy Rautenbach. It illustrates a process where the water permits given to the company by the Zimbabwe National Water Authority (ZINWA) did not consider how the right to primary water (embedded in the Water Act) of the nearby community would be affected by the company's use of land and water. Because of fencing local communities and women within them have lost access to water for drinking, washing and food production.

"Water grabbing" as a human rights and gender issue underscores the need of mechanisms to hold states and international companies accountable in assuring that the basic human right to an adequate standard of living, involving water for personal, domestic and livelihood uses under article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and article 14 of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) is respected, protected and fulfilled. It is argued that the human right to water is broader than UN General Assembly Resolution 64/292 that included water for domestic uses but excludes water to grow food that is necessary to make a living. Seeing the right to life, food, health and water as indivisible the Right to Food guidelines section 8 includes access to water resources as one of its central obligations to improve secure access to produce food for livelihood. In striking a balance between conflicting land and water uses the right to adequate food requires that both states and companies, involved in transnational land deals, consider the situation of vulnerable groups in order to ensure that they are secured access to productive resources, most importantly land and water, to grow food for consumption.<sup>31</sup> Transnational land deals, often resulting in enclosure, eviction or displacement, calls for an approach that addresses the intersecting disadvantages of women belonging to vulnerable groups, most importantly poor peasant women. Thus the legal pluralities that have a bearing on poor rural women's access to resources as part of a community that hold land and water together as well as their individual right to access resources on an equal basis with men within the community must be addressed. Such an approach is taken by the Draft Declaration on the Rights of Peasants and Other People Working in Rural Areas.

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<sup>29</sup> B. Van Koppen, J. Butterworth, and I. Juma (eds.), *Community-Based Water Law And Water Resource Management Reform In Developing Countries* (Oxford: CABI publishers, 2008)

<sup>30</sup> P. Mutopo & M. Chiweshe "Water resources and biofuel production after the fast-track land reform in Zimbabwe", *African Identities*, 2014

<sup>31</sup> M. Windfuhr «Water for Food: a Human Rights Obligation. How States can Manage Conflicts Between the Human Right to Water and the Human Rights to Adequate Food. German Institute for Human Rights 2013.

## Discussion following the second session (minutes)

Bård A. Andreassen: There are number of gaps in existing guidelines. One issue is that of gender imbalance, with reference to water grabbing.

Michael Windfuhr: On the voluntary guidelines: 1) We have two documents on the rights for smallholders. There has been a battle between some states and civil society in the UN/FAO /CFS about what we need to develop, and it was the CFS who decided that we will make the voluntary guidelines. 2) We have made fast progress on the issue of land grabbing, and it was possible because they are voluntary. We should not underestimate the relevance and scope of the existing voluntary guidelines. It is better than another document developed by the industry.

Hans Morten Haugen: I agree that the WFS 2008 is a good document, but it is too long to be accessible for the companies.

Kjell Havnevik: There are some important issues there, but it is not enough. That is our role. The attitude is often that improvements of the condition for smallholder agriculture is good for the smallholders themselves, but we need to change the perspective to acknowledge that smallholder agriculture is good for the environment, for sustainable production, and therefore good for all of us.

Anne Hellum: What we need to do now, is to discuss how to disseminate the guidelines so they will be more used in the human rights system itself, at national level (no appearances at all), and in dealing with and giving responsibilities to the industry. The guidelines now have no impact at all.

Malcolm Langford: Agree that small is good, but we can also see that we can have very good high-level labor intensity in large scale farming, e.g. with horticulture production or flowers using Dutch technology. What is the role of the large-scale agriculture in these terms? Is there a role for it, or is small always beautiful?

Kjell Havnevik: I do think that there is a large-scale agriculture that can be sustainable that we should not disregard for some crops. We must find out under which conditions large-scale agriculture can be good for sustainable food security at the local, national and international level.

Aksel Tømte: Jobs that are created is very often the argument for investments. In palm oil, employment is created in the starting phase, but the need for employment decreases by time, and thereby the initial justification for large-scale investments turn out not to be tenable in the long run,

Hans Morten Haugen: De Schutter's report on contract farming discussed pros and cons and gave advice on how it could function and what are the traps.

Anne Hellum: regarding the example of horticulture, e.g. flowers in Kenya: a study on farmworkers found that farmworkers did not live on their farm and did not have access to water, they were cut off, partly because the national governments are not involved or in control of what happens after the investment.

Ana Maria Suarez: It is necessary to highlight that all these investments are not based on a human rights approach. We need tools to ensure that human rights are met and we need them to work preventively, because the damages are not reversible. Also, should we have voluntary or binding? Depends upon the context. Civil society has been brought in – critical to the Ruggie principles.

Fabio Gomes: By focusing on smallholders you also focus on diversity and equity, which is an important addition to why smallholding is "good".

Kjell Havnevik: Yes, this is why I mentioned the cows in Norway feeding on Brazilian soy. We must look at the system, we need to ask whether this or that is the right crop or the right way to grow or produce food.

Lilla Engstrøm: More than 50 guidelines already exist. Do we need another document or do we need something else? What must happen now, for the guidelines to be implemented?

Hans Morten Haugen: It should be an objective to work for a more concise human rights based approach. In biofuel, documents are not human rights based at all, but industry focused. They do not take social human rights concerns at all, but are approved by the EU.

Kjell Havnevik: There is a need for more action research and more information. Testing out these instruments where actions are tested. This is a challenge for human rights research.

Aksel Tømte: In countries where law enforcement itself is weak, voluntary guidelines will also be weak. But still it creates a discourse and a way of engaging with industry for civil society.

Kjell Havnevik: We see that things on the ground are not working, guidelines are not followed. We need to think about how we organize our whole culture around production and consumption of food, water and labor. Are smallholder farmers the future?

### ***Conclusions (summarized by the moderator BAA)***

- Unequal power balance.
- Hold corporations to account by complaining when harm is alleged.
- Important issue to understand the implications of it being more profitable for the Norwegian farmers to have the feed from the Brazilian forest. Is this sustainable?
- We must learn more about Brazil and how this can be related to Africa. Not aware how the growing population in Africa will get food, will it be sustainable?
- There are a number of gaps in existing guidelines, but can this be remedied by another guideline?
- There are limits of the small scale sector.
- Voluntarily versus binding tools –what are their relative merits?
- New models for developments of smallholders positions.
- We have identified here some research gaps, but there is a lot of action and research to come.

### **Session 3: Legal and quasi-legal opportunities to help narrow the protection gap for states and ensure better respect for human rights by companies**

Moderator: Michael Windfuhr

Speakers: Michael Addo, Asbjørn Eide, Ana Maria Suarez-Franco,  
Allan Lerberg Jørgensen

Speakers' outlines

# The United Nations Guiding Principles on Business and Human Rights: background, framework, modalities and added value

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## I. Introduction

The search for a credible and effective strategy for responding to the challenges posed by adverse corporate human rights impacts.

## II. The UN Guiding Principles on Business and Human Rights.

The year 2005 marked an important turning point in the search by the United Nations for an effective policy direction on the significance of human rights in the conduct of business. In that year, the United Nations Commission on Human Rights (replaced in 2006 by the Human Rights Council (the Council or HRC))<sup>32</sup> requested the UN Secretary General to appoint a Special Representative (SRSG) to “identify and clarify standards of corporate responsibility and accountability with regard to human rights”.<sup>33</sup> This task, which fell on Professor John Ruggie, led in 2008 to the policy framework known as the Protect, Respect, and Remedy Framework.<sup>34</sup>

This policy framework was based on three structural pillars, firstly, the State duty to protect against human rights abuses by third parties including business enterprises; secondly, the responsibility of business enterprises to respect human rights which entails business to avoid infringing on the human rights of others and thirdly, access to effective remedy for anyone whose rights are violated or adversely affected.<sup>35</sup> The three pillars are at once independent and complementary and according to Ruggie, “[E]ach principle is an essential component of the framework: the State duty to protect because it lies at the core of the international human rights regime; the corporate responsibility to respect because it is the basic expectation society has of business; and access to remedy, because even the most concerted efforts cannot prevent all abuse”.<sup>36</sup> The policy framework was warmly received by the Human Rights Council in 2008 and on account of that Ruggie’s mandate was renewed in order for him to propose ways of operationalizing the policy framework.<sup>37</sup>

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\* The views expressed here are made by the author in his personal capacity and do not represent those of the UN Working Group.

<sup>32</sup> See, <http://www.ohchr.org/EN/HRBodies/HRC/Pages/HRCIndex.aspx>

<sup>33</sup> See CHR Resolution 2005/69 (2005)

<sup>34</sup> United Nations, *Protect, Respect and Remedy: A Framework for Business and Human Rights*. Report of the Special representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises (John Ruggie) (UN Framework on Business and Human Rights) UN Doc. A/HRC/8/5 (2008)

<sup>35</sup> *Ibid.*, UN Doc. A/HRC/8/5, *loc. cit.*

<sup>36</sup> *Ibid.*, para. 9

<sup>37</sup> Human Rights Council resolution 8/7 (2008)

In 2011 Ruggie submitted his final report<sup>38</sup> in which he presented the Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework (Guiding Principles or UNGPs or GPs).<sup>39</sup> That document contains 31 principles with commentaries that elaborate on ways of operationalizing the three pillars proposed in the Protect, Respect, Remedy framework.<sup>40</sup>

The Guiding Principles emphasise a number of important features aimed at the avoidance, mitigation and ultimate elimination of corporate adverse human rights impacts. Firstly, they aim to reflect common understandings of existing standards between stakeholders as distilled from many multi-stakeholder consultations over many years. During his mandate as the SRSG on Business and Human Rights, John Ruggie was at pains to assure all stakeholders that the Framework and the Guiding Principles do not create new normative standards but rather that they elaborate “the implications of existing standards and practices that are integrated within a single, logically coherent and comprehensive template; and identifying where the current regime falls short and how it should be improved”.<sup>41</sup> Secondly, the Guiding Principles propose a co-operative and integrative approach to the reconciliation of competing stakeholder claims. In this respect, the Guiding Principles recognize the contribution of every stakeholder to the effective avoidance and remediation of adverse human rights impacts.

The UN Protect, Respect and Remedy (PRR) policy framework and its operational Guiding Principles respond to a challenging environment for the conduct of business in which there are diverse governance regimes with varying levels of effectiveness. There are numerous voluntary initiatives (corporate codes,<sup>42</sup> civil society guidelines,<sup>43</sup> industry and multi-stakeholder initiatives<sup>44</sup> and some intergovernmental regimes such as the OECD Guidelines (2011 Rev),<sup>45</sup> the ILO Tripartite Declaration<sup>46</sup> and the UN Global Compact<sup>47</sup>) **that** have been invaluable in different ways, but overall, they represent a rather broad and imprecise brush that has not had a sufficiently fine enough impact on the call for change.<sup>48</sup> These voluntary initiatives complement the regulatory and compliance standards set out in corporate and commercial law<sup>49</sup> as well as in criminal,<sup>50</sup> environmental, health and safety,<sup>51</sup> and consumer protection<sup>52</sup> laws. Some of the documented shortcomings of legal

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<sup>38</sup> See, United Nations, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy Framework*, Report of the Special representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises (John Ruggie). UN Doc. A/HRC/17/31 (2011).

<sup>39</sup> *Ibid.*

<sup>40</sup> For an initial review of the UN Guiding Principles, see, Radu Mares (ed.), *The UN Guiding Principles on Business and Human Rights* (Nijhoff) 2011. See also, Wesley, Cragg, “Corporate Responsibility to Respect Human Rights: A Critical Look at the Justificatory Foundations of the UN Framework”, vol. 22 (2012) *Corporate Ethics Quarterly*, p9

<sup>41</sup> United Nations, *Guiding Principles on Business and Human Rights*, *loc. cit.*, para. 14

<sup>42</sup> see, [http://www.business-](http://www.business-humanrights.org/Categories/Companypolicysteps/Policies/Codesofconductcorporate)

[humanrights.org/Categories/Companypolicysteps/Policies/Codesofconductcorporate](http://www.business-humanrights.org/Categories/Companypolicysteps/Policies/Codesofconductcorporate)

<sup>43</sup> On this, see, <http://www.business-humanrights.org/Categories/Principles/GuidelinespreparedbyNGOs>

<sup>44</sup> see, for example, The Extractive Industry Transparency Initiative (EITI) at <http://eiti.org/eiti/principles>

<sup>45</sup> see, <http://www.oecd.org/daf/inv/mne/oecdguidelinesformultinationalenterprises.htm>

<sup>46</sup> see, [http://www.ilo.org/empent/Publications/WCMS\\_094386/lang--en/index.htm](http://www.ilo.org/empent/Publications/WCMS_094386/lang--en/index.htm)

<sup>47</sup> see, <http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/>

<sup>48</sup> see John Ruggie, *Just Business. Multinational Corporations and Human Rights* (W.W. Norton 2013) pxxviii.

<sup>49</sup> See, in the UK, the Companies Act 2006

<sup>50</sup> See, Jennifer Ross, *Corporate Criminal Liability: One Form or Many Forms*, (1999) *Juridical review*, p49. See also, Celia Wells, *Corporations and Criminal Liability* (OUP) 2002

<sup>51</sup> see, Health and Safety at Work Act 1974

<sup>52</sup> see, for example, the Consumer Credit Act 1974

standards, in terms of their inflexibility, gaps around which companies can develop strategic avoidance and the slow response to change can indeed be addressed by voluntary initiatives.

In the field of corporate governance, it is not the lack or shortage of opportunities or initiatives that is the main handicap. If anything, there are rather too many initiatives. The question then arises as to why the United Nations has chosen to propose another layer of governance in its Protect, Respect and Remedy Framework and Guiding Principles? In other words, what is so special about the PRR Framework and its Guiding Principles as a corporate governance regime?

### **III. Uniqueness as the Basis of Added Value**

In this part I propose to assess four broad themes:

1. The provenance and legitimacy of the PRR Framework and Guiding principles.
2. Nature and significance of the concept of 'smart mix'.
3. The flexible application of the Framework and the Guiding Principles.
4. The role and contribution of the UN Working Group on Business and Human Rights.

# Corporations and human rights responsibilities during transitions

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We agree that states have the primary obligation to respect, protect, facilitate and provide human rights. If states fully implemented their human rights obligations through appropriate and effective regulation and control, providing social security when required, re-education and alternative sources of livelihood to compensate for negative externalities of corporate activity, the problems would be much less. *But:* Governments are often unwilling or unable to shoulder their responsibility. Many corporations are reluctant to accept constraints that reduce their profit. Corporate managers might be persuaded to try to avoid harmful impact of their activities even if profits declined, but stockholders would simply move their money to other and more profitable enterprises.

In June 2013, Dr. Margaret Chan, Director-General of WHO, gave expression to years of frustration facing corporate strategies to prevent public health regulations (see the Bellagio statement included in the documentation here). She said:

*Research has documented these tactics well. They include front groups, lobbies, promises of self-regulation, lawsuits, and industry-funded research that confuses the evidence and keeps the public in doubt. Tactics also include gifts, grants, and contributions to worthy causes that cast these industries as respectable corporate citizens in the eyes of politicians and the public. They include arguments that place the responsibility for harm to health on individuals, and portray government actions as interference in personal liberties and free choice.*

## Understanding the components of the global food system and their transformations

The focus here: Human rights in the food sector. Vast transformations are taking place in the global food system. The concept paper submitted for this conference has described some of the main transitions, addressing both downstream and upstream ends of the food supply chain, from production (and its impact on livelihoods) to consumption and its impacts, particularly on vulnerable population groups, to their health.

Food corporations are heavily involved in these processes. They are among the main drivers of the transitions. Transitions include an accelerating process of slum-type urbanization with high crime- and drug rates, and also impoverishment of rural areas. Women are particularly strongly affected. Inequality is growing both in urban and rural areas. Land is taken over by absentee landowners and corporations, engaging in industrialized agriculture characterized by mono-culture for urban markets and export. Land is partly diverted to biofuel production. Local markets disappear or are weakened. Numerous human rights problems arise in the process of transitions.

There is no point in discussing whether these transformations are good or bad. They are good for some. For others, they are bad both in the short and the long run unless appropriate measures are taken. Some transformations are unavoidable, others may and should be slowed down or negative consequences better managed through appropriate action.

Welfare economists tend to calculate overall utility of projects and policies. In contrast, a human rights approach seeks to identify the consequences for groups or individuals that are negatively affected: rural women, indigenous peoples, smallholders and peasants, slum dwellers in urban areas.



We are in this conference particularly concerned *how to build on human rights to counteract* (a) undermining of livelihoods in the rural areas, violating their right to an adequate standard of living, and (b) the explosive growth, mostly in urban areas, of non-communicable diseases (cancer, diabetes, heart diseases) harming the right to health for many people.

We are preoccupied with the need to ensure responsible agricultural investments, ensure the rights of women also in rural areas, the rights of indigenous peoples, local smallholders and peasants. But I assume that we are not favouring the maintenance of outdated and unproductive ways of life. Transitions to newer forms of healthy livelihood can be welcomed if everyone can have their share and if no one is left destitute or marginalised.

How can transitions be better managed with human rights perspective? It would require both responsible governments, and corporations that fully recognize their social responsibilities. Many initiatives exist and need our support. New ones should be taken.

### **Some examples of guidelines and initiatives that need to be strengthened and supported:**

We should make sure that the efforts by the Committee on World Food Security, here addressed by Kjell Havnevik and Michael Windfuhr, are supported and applied in practice.

We should promote the application of the *Voluntary Guidelines to support the progressive realization of the right to adequate food in the context of national food security*, FAO 2004.

We should promote the application of *the Voluntary Guidelines on the Responsible Governance of Tenure in Land, Fisheries and Forests in the Context of National Food Security*, CFS 2012

We should promote the *Voluntary Guidelines for Securing Sustainable Small-Scale Fisheries in the Context of Food Security and Poverty Eradication*, adopted by the FAO's Committee on Fisheries on 10 June 2014.

We should encourage the adoption of the *Draft Principles for Responsible Investments in Agriculture and Food Systems*, launched by a CFS Intergovernmental Working Group on PRAI, 11 August 2014.

We should strengthen and ensure the full implementation of codes and other instruments regarding harmful marketing of breast milk substitutes and unhealthy foods and beverages, especially to children.

Priority must be given to the full implementation both by states and corporations of the *International Code of Marketing of Breast-milk Substitutes* and relevant subsequent World Health Assembly resolutions.

We should encourage the UN *Committee on World Food Security* (CFS), the newly established WHO *Commission on Ending Childhood Obesity*, and the *World Health Organisation*, to make progress towards the adoption of a Framework Convention to Promote and Protect Healthy Diets

These important initiatives can form part of a building bloc to ensure *accountability, monitoring and reporting in the food sector*, embracing both the production and the consumer side. But we should go one step further:

***Proposal: A legally binding framework treaty detailing state's own obligations to respect, protect and fulfil, with reciprocal monitoring, supplemented by protocols that are sector-specific?***

## Is a binding treaty crucial to ending harmful impacts of some food-related corporations?

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Following a 40-year struggle to make transnational corporations and other businesses accountable for human rights violations, in August 2014 the UN Human Rights Council (HRC) has started working towards the adoption of a treaty on the topic. In August 2013 Civil society presented its demands for this in the first meeting of the working group of the HRC in charge of promoting the Guiding Principles on Business and Human Rights held in Medellin, and in the Peoples Forum held in Bangkok in September. During the HRC's September session, Ecuador brought this demand to the attention of states in a statement supported by the African and Asian Groups, and some GRULAC countries.

Throughout the discussions, a group of civil society organizations, networks and social movements called the *Treaty Alliance*, based in their experience with communities affected by violations of their human rights, agreed (supported later by over 610 civil society organizations and social movements and 250 individuals around the world), that an eventual binding instrument should:

a) Affirm the applicability of human rights obligations to the operations of transnational corporations and other business enterprises; b) require States Parties to monitor and regulate the operations of business enterprises under their jurisdiction, including when acting outside their national territory, with a view to prevent the occurrence of abuses of human rights in the course of those operations; c) require States Parties to provide for legal liability for business enterprises for acts or omissions that infringe human rights (Territorially or extraterritorially); d) require States Parties to provide for access to an effective remedy by any State concerned, including access to justice for foreign victims that suffered harm from acts or omissions of a business enterprise in situations where there are bases for the States involved to exercise their territorial or extraterritorial protect-obligations. e) Provide for an international monitoring and accountability mechanism, f) Provide for protection of victims, whistle-blowers and human rights defenders that seek to prevent, expose or ensure accountability in cases of corporate abuse and guarantee their right to access to information relevant in this context .

In June 2014, the HRC then adopted a resolution creating an open-ended intergovernmental working (OEIGWG) group to draft such a treaty.

The “core group” that sponsors the resolution on business and human rights was divided on this issue<sup>53</sup>. While Ecuador and South Africa on one side, and the other members of the “core group” on the other side” tried hard to reach a consensual single draft resolution, finally two different resolutions were adopted by the Human Rights Council.

The resolution officially entitled “*Elaboration of an international legally binding instrument on Transnational Corporations and other Business Enterprises with respect to Human Rights*”

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<sup>53</sup> Within the core group, Norway opposed the draft resolution presented by Ecuador and South Africa. The other four members of the core group, while not opposing in principle the need for a treaty, had various views on ways to get to that objective. In the end Argentina abstained, Russia and India voted in favour, and Ghana did not vote because it is not a member of the Council.

(A/HRC/26/L.22)<sup>54</sup>, answers the demands of the treaty Alliance by providing for the establishment of an open-ended intergovernmental working group (OEIWG) mandated with the elaboration of an international legally binding instrument to regulate, under international human rights law, the activities of transnational corporations and other business enterprises. It stipulates that the OEIWG shall hold its first session for five working days in 2015, before the HRC's 30th session with the first two sessions dedicated to conducting constructive deliberations on the content, scope, nature and form of the future international instrument.

FIAN welcomes fact that the discussion on human rights and TNCs will be finally in the hands of states. Even if experts will play a relevant role in the debate, it is essential that the main subjects of international law, the states, take charge of the process and cooperate to generate regulations protecting the human rights regarding the activities of business enterprises.

The inter-governmental process has the potential to increase the legitimacy of the discussion, promote the democratic deliberation and development of regulations at the regional and national levels, complementing what has been achieved in existing diverse standards. Furthermore it should give visibility to the victims of threats and violations. Not just the result but the process will create useful spaces to develop the regulation of corporation activities, including in the field of health, food and nutrition.

Following the evolutionary nature of international law, the treaty is the logical next standard setting step. It shall close the remaining gaps in protection, including the elimination of ambiguous formulations on states' obligations to regulate enterprises, clarifying its scope, as well as the obligations of companies.

The treaty should ensure international monitoring, accountability and liability mechanisms for both states and business enterprises, to ensure access to remedy and reparation for victims of threats and/or violations. The treaty should also cover the extraterritorial dimension of human rights relating corporate activities and provide measures for states' cooperation in the regulation, monitoring and eventual sanction of transnational business activities.

Furthermore the treaty could correct the existing asymmetries between the state and corporate power, and between the access to justice for companies and for affected individuals and communities. Moreover, the binding instrument should provide mechanisms to ensure coherent enforcement of judicial decisions in cases of contradiction among diverse jurisdictions (i.e. Chevron Texaco case in Ecuador).

The treaty should include international monitoring and adjudication mechanisms, ensuring that where the national legal systems are not enough or effective for the victims, impartial international institutions guarantee adequate supervision and access to justice on the basis of human rights law.

It is proven that international conventions are effective tools for prompting domestic legal reform and creating a clear framework for adjudication. Any support to these and other binding regulatory efforts, including those in the field of health food and diets, is critical, so long as they are framed by human rights law, and recognize the primacy of human rights.

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<sup>54</sup>Co-sponsored by Ecuador, South Africa, Bolivia, Cuba and Venezuela, which was voted with 20 votes in favour, 13 abstentions and 14 votes against (Mainly US, EU states, Korea and Japan), and second, a resolution especially referred to promotion of the Guiding Principles, adopted by consensus.

# Corporations in the Global Food System and Human Rights

## Working with the private food sector towards a human rights policy and due diligence: the case of Nestlé

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The Danish Institute for Human Rights (DIHR) is Denmark's National Human Rights Institution. As part of its legal mandate, DIHR is mandated to engage directly with companies in order to protect and promote human rights. In the late 1990s, we became one of the first human rights institutions to work in partnership with business.

Human life is inextricably linked with business, and human rights questions are piling up on the corporate agenda as never before. Companies have a responsibility to respect human rights. At the same time they play a major role in society by generating jobs, revenue, innovation and services, which are all prerequisites for the realisation of human rights.

For the vast majority of companies, human rights and human rights due diligence are still unfamiliar territory. Some estimates show that there are about 80.000 multinationals in the world, and according to one survey, fewer than 400 of them have a human rights policy statement. We have a long way to go.

DIHR engages with the private sector in order to develop innovative approaches, allowing companies to improve their human rights impact. The knowledge and experience we get from working with individual companies has the potential to benefit thousands of other companies. We seek to make this knowledge publicly available through tools and publications that combine cutting-edge human rights expertise with hands-on experience from the world's leading companies<sup>55</sup>.

In 2010 DIHR and Nestlé SA entered in a partnership, following a human rights gap analysis of Nestlé's management procedures and policies. Since then DIHR has supported Nestlé at various levels; through review of policies and guidance to assess if human rights issues are adequately reflected in management procedures and policies, enterprise human rights risk assessments and last but not least through human rights impact assessments (HRIAs) in the form of facilitated assessments coordinated by a DIHR and Nestlé HQ team (HRIA team). To date DIHR has facilitated 9 HRIAs<sup>56</sup> and 3 more HRIAs will be carried out by end of 2015<sup>57</sup>.

DIHR and Nestlé co-developed the methodology for the HRIAs using various tools including a set of self-assessment questionnaires based on the DIHR Compliance Assessment Tool, a tool that covers all human rights issues based on the UDHR, ICCPR and ICESCR and ILO Conventions. The HRIAs cover eight issue areas including human resources, health and safety, security arrangements, business integrity, community impacts, procurement, sourcing of raw materials and product quality and marketing practices. Lastly, the HRIAs have also looked at how Nestlé has positively contributed to human rights in the countries it operates.

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<sup>55</sup> <http://www.humanrights.dk/business-human-rights>

<sup>56</sup> HRIAs have been conducted in Colombia, Nigeria, Angola, Sri Lanka, Russia, Kazakhstan, Uzbekistan, Vietnam, Pakistan

<sup>57</sup> Egypt, Saudi-Arabia and China

In 2013, DIHR and Nestlé jointly published the White Paper *Talking the Human Rights Walk* in December 2013, a publication discussing the methodology and the outcomes of the HRIAs<sup>58</sup>. The White Paper was subsequently discussed in an expert consultation in order to share experiences and inform the further development of HRIA methodology<sup>59</sup>.

Besides the aforementioned corporate level HRIAs, DIHR and Nestlé have also collaborated at a broader level. The outcomes of the first HRIAs demonstrated that while overall Nestlé has had a positive impact on farmers' livelihoods through the delivery of training on good agricultural practices and by making access to international markets easier, a number of human rights challenges in Nestlé's rural supply chain remain. To respond to some of these challenges, Nestlé has undertaken a number of actions. Nestlé developed its Responsible Sourcing Traceability programme and aims for 40% of its 12 key commodities to be traceable by 2015. Responsible Sourcing Guidelines for all its high-risk commodities have been developed, which include explicit human rights and labour requirements. Findings from the HRIAs, for example related to the sourcing of coffee, have been fed into these Responsible Sourcing Guidelines. And as the first food and beverage company, Nestlé entered into a partnership with the Fair Labor Association (FLA) to address the issue of child labour in the cocoa supply chain in Cote D'Ivoire and hazelnuts in Turkey. It also collaborates with the International Cocoa Initiative to address child labour. Nestlé has been involved in multi-stakeholder platforms such as the SAI Platform to promote sustainable agricultural practices together with companies like Danone and Unilever.

Nestlé's Rural Development Framework assesses where Nestlé's business operations can be aligned to the social needs of the country and communities in which it operates. DIHR has supported Nestlé in the initial stages of the development of the framework, for example in the development of human rights country baseline studies and developing human rights indicators to assess its impacts in the rural communities where it operates.

DIHR and Nestlé have also collaborated on a number of other issues, including the issue of the human right to water which started with a discussion paper on Nestlé's role with regard to the human right to water. Based on a wide range of advice from international experts, Nestlé has made commitments on its water use and stewardship to ensure efficiency in using water, cleansing of discharged water, water stewardship, and improved water management in agriculture. Through the HRIAs and Nestlé Water Resource Reviews, Nestlé has been assessing its impacts on access to water on local communities.

While large food and beverage companies like Nestlé are undertaking various steps to address collective impacts on human rights, there are limitations of what one company can achieve. In some cases the responsibility lies with the company in question, but in many cases the responsibility lies with multiple actors. Water is a case in point, where adverse business impacts on access to water is due to a combination of actors operating without overall coordination. This includes industrial use by companies in multiple sectors, agricultural use by farmers. A human rights approach to the issue can help us understand the role and responsibilities better, including ultimately how business, civil society and government can work together to improve water governance.

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<sup>58</sup> <http://www.humanrights.dk/publications/talking-human-rights-walk-nestles-experience-assessing-human-rights-impacts-its>

<sup>59</sup> <http://www.nestle.com/asset-library/documents/creating-shared-value/human-rights-compliance/nestle-human-rights-rural-development-stakeholder-summary.pdf>

## Discussion following Session 3 (minutes)

Boyd Swinburn: We as public health people consider big junk food companies together with tobacco companies as vectors of disease. Junk food, like tobacco, is not necessary for human life. We frame the issues different from human rights people.

Judith Richter: We must pay attention to discourse and politics of CSR: corporations greatly influence the both HR agenda of the UN and the post MDG agenda. (See e.g. the analysis of ICC and IOC statements in the publications by the Global Policy Forum ). If we go back 40 years in time, the biggest difference in terms of corporate influence over UN processes was before and after introduction of multi-stakeholder processes. One cannot expect anything other from companies than to go against HR regulations. The UN Global Compact was brought forward as an argument of why it is not necessary to have international legally binding HR measures. Both the Guiding Principles and the Global Compact in fact helped to get rid of the HR Norms. The GP were still used in June 2014 as an argument for not starting work on a legally binding international HR treaty. We have to start looking critically at all the actors in the room - at the discourse of all actors in negotiations, at the "consensus-centred" decision-making processes when argumentation would be more appropriate and productive.

Desmond McNeill: To Allan: concerning the paper on Nestlé: could you please reflect on whether people were critical about your engagement with Nestle? What reactions have you gotten?

Researcher at NCHR: Can you comment on the transnational element of due diligence, related to Nestle? Policy mix? Nestle is a large company in one sector – what effect does it have on the sectorial level?

Malcolm Langford: the MDGs were critiqued for being non-inclusive, the new process may be overly inclusive, but it sure is better from a HR perspective. Concerning the GP – how do we practically go forward? Learned enough to think about legal drafting and effectiveness? Is the Code of Marketing of Breast-Milk Substitutes not a HR standard? It is a prototype of Ruggie. How do you engage with Nestlé on that issue?

Allan L. Jørgensen: I will remember to use term "junk food" next time. From an institutional perspective: how do we manage reputational risk of engaging with many "bad" MNC? We have done it as a national sport for the past 50 years. So far we have gotten away with it, even if getting our hands dirty when working with Schell, Total etc. Why? I think we can push sector standards. Companies are driven by their peers. They are interested in setting high barriers of entries for other companies. For example, Nestlé constantly feel behind Unilever – competition of being "best". We exploit their concerns. Turn private goods into public goods. They have the GP and due diligence on paper, but they don't document it. Glass is half empty – we help to produce tools that companies can use and share.

Ana Maria Suarez Franco: It is necessary to bring health and HR people together. We should not confuse CSR with human rights responsibilities. A binding human rights treaty would focus more on human rights obligations: obligations of states to regulate their companies and how they can do it. The process in the Human Rights Council is intergovernmental, the Member states decide if they want to invite companies or not. The biggest challenge is to ensure that the voices of those whose HR are violated by companies are heard in negotiation processes.

Malcolm Langford to Addo: are you a victim of corporate lobby? Or of civil society?

Michael Addo: I am nobody's victim, neither of the corporate lobby, nor of the civil society. I put across what I believe is correct. Swinburn's intervention captures the beauty of this conference. HR

is an interdisciplinary subject. We must harmonize our languages. Everybody out there, including business, are doing things with and for HR. We should capture the complexity. What is the scope of corporate responsibilities? The scope of HR? The understandings are evolving. Can all terms evolve around HR as a core? Do we speak about the same subject, using different languages? How do we go forward? Normally I am an academic, but at work I represent a group. If I reply as a working group member: we want any mechanism that can help us go forward. We don't know what it is. It is critical for us to know what you want. Concerning the comment about using the Guiding Principles as a reason for not having a binding treaty: I have not heard that argument before. The GP must be developed further, we should not stop at this point.

Anna Glayzer: Food companies often argue they have the right to freedom of expression in terms of marketing. Does this argument hold?

Liv Elin Torheim: Concerning the need for a common language and norms - what should we develop? What would be the best way forward? To develop Guidelines, frameworks or principles? What do you recommend?

Asbjørn Eide: I was a member of the UN Sub-Commission when adopting the human rights norms to be applied by enterprises in 2003. Our error was that they were formulated as norms directly binding on transnational corporations and other business enterprises. International law is generally binding only on states, not on non-state actors, except in special circumstances (international criminal law, piracy etc.) The new initiative by Ecuador is an opportunity for states to make a treaty between themselves, binding on the state parties, on how they will regulate corporations. They can use inputs from the norms adopted by the Sub-Commission, from the Guiding Principles on Business and Human Rights, from academic and other research. On those sources they can agree between themselves to which extent they will regulate corporations in order to prevent harm attributable to the corporations. While there are controversies whether states can regulate corporations directly, there is no doubt that they can agree between themselves on the extent of protection against human rights violations by corporations. Companies may want to limit such efforts, but states have a general obligation to protect HR and that can be specified in one or more treaties. It might be preferable to make several, sector-oriented treaties because there are different needs for different types of corporations. The food sector can be one, the mining sector can be another, and so on.

Michael Addo: From an academic point of view: we must revisit how international law is made. We must include non-state actors in the making. There are enough standards in international HR law to cope with the argument of freedom of expression.

Ana Maria Suarez-Franco: The premise of HR overrides other rights. We have enough criteria. What is acceptable? It is unacceptable to go below HR law.

Fabio Gomes to Allan Jørgensen: does Nestlé pay for your work? Nestlé is very powerful, but does it make a positive contribution to human rights? The damages that companies may cause are substantial. Strong financial power drives the world; do we need a war to redirect the financially powerful? Allan Jørgensen: Nestlé pays. If not, no one else would. Financial power – we should harness it for public good. We should build the business case for HR for companies as we have done for states.

### ***Conclusions (as summarized by the moderator MW)***

- What types of instruments work?
- Smart mixes between soft and hard law.

- Sectoral approaches may be most effective.
- It is not always either – or. We can't end the Working group on the Guiding Principles – we should see how it goes.



**Session 4: Is there a “right to be free from obesity”? Can a human rights framework and instruments serve a purpose in efforts to protect it?**

Moderator: Tim Lobstein

Speakers: Boyd Swinburn, Brigit Toebe, Fabio Gomes, Graham Dukes

Speakers’ outlines

## Monitoring and accountability systems for healthier food environments

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Following the 2011 UN High Level Meeting on non-communicable diseases (NCDs), WHO has developed, and countries have endorsed, a Global Action Plan on NCDs which includes nine targets and 25 monitoring indicators. The accountability systems to ensure that policies and actions are implemented are relatively weak, but can be strengthened by regular monitoring and benchmarking national progress towards targets. The WHO monitoring framework includes few upstream indicators of food policy implementation and the healthiness of food environments. Since these more closely reflect government actions than mortality, morbidity and risk factor prevalence, they are politically sensitive and are best monitored and communicated by independent bodies.

The International Network for Food and Obesity/NCD Research, Monitoring and Action Support (INFORMAS) was formed in November 2012 to monitor and benchmark food environments. The 10 modules developed constitute two process modules (government policy implementation, private sector actions), seven impact modules (food composition, labelling, promotion, price, provision, retail, and trade and investment agreements) and one outcome module (diet quality). Measurement frameworks have been developed and protocols, pilot testing and implementation are underway at various stages for the modules.

The network is primarily of researchers and international NGOs and several countries are implementing aspects of the INFORMAS modules. Since governments and the private food sector are the main players in determining food environments, they carry the greatest responsibility to ensure that they are supportive of healthy food choices. For the private sector, the Access to Nutrition Index (ATNI) is an existing tool for monitoring transnational food corporations. This has been applied once already for the global top 25 food manufacturers. INFORMAS aims to extend the ATNI monitoring indicators to capture, not only their positive actions towards healthier food environments, but also those actions which undermine good food policy for public health.

For the government sector, the Food Environment Policy Index (Food-EPI) is the core tool. It aims to measure progress on specified food policies and related infrastructure support systems. Its 42 indicators were developed from the seven impact modules (above) and the WHO systems building blocks (eg leadership, governance, resources, monitoring systems). It was first applied in New Zealand, where an Expert Panel of over 50 medical and health experts rated the government's level of implementation based on a detailed evidence base and international best practice benchmarks. Over half of the indicators were rated as 'low' or 'very little, if any' implementation, especially in policy areas such as food marketing to children and fiscal policies. The implementation gaps were turned into 34 potential actions which were then prioritised into the top seven recommendations: Develop a comprehensive plan, set targets, increase funding, regulate marketing to children, tax sugar-sweetened beverages, implement the Health Star Rating System, and implement healthy food policies in schools and early childhood settings.

The independent measurement of food policies and environments can provide the evidence of progress towards fulfilling basic human rights at a national level. The value of having this monitoring

done by civil society organisations, principally universities and NGOs, is to engage this sector in holding the other sectors, government and private companies, to account for their actions towards creating healthy food environments. While the INFORMAS monitoring is focusing on environments related to obesity and NCDs, they also have relevance for protecting against undernutrition as well.

## A right to health perspective

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As will be clarified below, there are many dense connections between guaranteeing access to adequate food and the protection of the right to the highest attainable standard of health. An important aspect of this relationship concerns the negative health impacts of unhealthy foods and beverages on consumers. Given the dramatic global increase in non-communicable diseases, particularly among vulnerable population groups, the question arises how the role of the food sector can be tackled through the right to health.

It would be important to identify human rights responsibilities at two levels: a primary human rights responsibility of States to regulate the food and beverage industry, and a secondary moral and/or legal responsibility of corporations to respect, protect and fulfil the right to health. While strictly speaking corporations do not have legal obligations under the human rights treaties, this type of conjecture may help us to move closer to the legal recognition of such obligations. Moreover, the obligations so defined can be used in non-binding international instruments defining the (moral) obligations of such entities. In addition, corporations could use such identifications where they seek to define their commitment to human rights.

An important starting point for this analysis is General Comment 14 on the Right to the Highest Attainable Standard of Health (2000), currently the most authoritative explanation of the right to health.<sup>60</sup> This document explains that the right to health has two dimensions: a right to health care services and a right to a broad set of underlying conditions for health. Food and nutrition are explicitly mentioned as elements of the underlying determinants of health. Furthermore the document contains the so-called 'AAAQ', i.e. the recognition that availability, accessibility, acceptability and quality are essential components of the right to health.<sup>61</sup> The document also defines a set of state obligations to 'respect, protect and fulfill' human rights and also describes potential violations of states in relation to a right to health.<sup>62</sup>

**State obligations** - based on the 'obligation to protect', States are under an obligation to regulate the corporate food sector. General Comment 14 identifies as a violation of the right to health

'(...) the failure of a State to take all necessary measures to safeguard persons within their jurisdiction from infringements of the right to health by third parties. This category includes (...) the failure to protect consumers and workers from practices detrimental to health, e.g. by employers and manufacturers of medicines or food; the failure to discourage production, marketing and consumption of tobacco, narcotics and other harmful substances; (...)".

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<sup>60</sup> Committee on Economic, Social and Cultural Rights (CESCR), *The right to the highest attainable standard of health*, UN General Comment No. 14 (2000), UN Doc. E/C12/200/4, 11 August 2000 (hereinafter referred to as 'General Comment 14').

<sup>61</sup> General Comment 14, paragraph 12. Accessibility has four overlapping dimensions: non-discrimination, physical accessibility, economic accessibility and information accessibility.

<sup>62</sup> General Comment 14, paragraphs 34-37.

**Corporate responsibilities** - when it comes to the obligations of corporations, General Comment 14 clearly recognizes that the right to health in Article 12 ICESCR is directly applicable to the private business sector:

*While only States are parties to the Covenant and thus ultimately accountable for compliance with it, all members of society – individuals, including health professionals, families, local communities, intergovernmental and non-governmental organizations, as well as **the private business sector** – have responsibilities regarding the realization of the right to health (...).*<sup>63</sup>  
[emphasis added]

It could be worthwhile to analyze the obligations of corporations under the obligations to respect, protect and to fulfil. While this typology is primarily designed for States, this typology can also be applied to corporations. A similar position was taken by the UN draft norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (2003):

‘Within their respective spheres of activity and influence, transnational corporations and other business enterprises have the obligation to promote, secure the fulfilment of, respect, ensure respect of, and protect human rights recognized in international as well as national law.’<sup>64</sup>

In his 2008 report UN High Commissioner on Human Rights on the Responsibilities of Transnational Corporations John Ruggie proposed a three-pillar framework for corporate accountability for human rights, which he describes as ‘Protect, Respect and Remedy’. Ruggie does not explain how his proposed framework relates to the above-mentioned generally accepted framework under international human rights law, where state obligations are classified into obligations to *respect*, to *protect* and to *fulfil* human rights.

I would argue that corporations have both negative obligations to respect human rights, as well as positive obligations to protect and to fulfil human rights. By presenting the obligations in this way, it is asserted that corporate human rights obligations are not exclusively in the sphere of ‘doing no harm’ and that we can progressively define positive obligations for corporations. To some extent this approach mirrors the approach under Article 2(1) ICESCR, which stipulates that States can ‘progressively’ realise the rights set forth in the Covenant, to the maximum of their available resources.

Furthermore a distinction could be made between ‘internal’ and ‘external’ obligations. While internal obligations are obligations that a company has within its direct sphere of influence (mostly within the company), external obligations are obligations that a corporation has in relation to the public as a whole or towards the community that lives in the area where it operates. For addressing the harmful effects of unhealthy foods and beverages, one would enter the sphere of external obligations.

I would assert that the obligations so defined represent a sliding scale of obligations, which need to be realised depending on the financial capacity of the company and its location.

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<sup>63</sup> General Comment 14, paragraph 42.

<sup>64</sup> UN Doc. E/CN.4/Sub.2/2003/12, 26 August 2003, available at [http://www.unhcr.ch/huridocda/huridoca.nsf/\(Symbol\)/E.CN.4.Sub.2.2003.12.Rev.2.En](http://www.unhcr.ch/huridocda/huridoca.nsf/(Symbol)/E.CN.4.Sub.2.2003.12.Rev.2.En), accessed August 2014.

## **Legislative and economic measures to decrease the demand for unhealthy food products: potential and practical impacts of a rights-based approach**

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Podcast: <http://www.uio.no/english/research/interfaculty-research-areas/leve/news-events/podcasts/2014/0911-gomes-fabio-global-food-systems-and-hr.html>

There is plenty evidence on the effectiveness and cost-effectiveness of regulations, which by means of economic and legislative measures are able to reduce the demand for harmful products, be them tobacco, baby formulas, alcohol, or ultra-processed products so called foods. However in the case of ultra-processed products very little has been achieved. The problems, causes and solutions are well known, but BIGSNACK transnational corporations have been succeeding on avoiding the successful history of tobacco control to be repeated.

This does not imply that for instance tobacco and food are alike, it means that it should be made clear that these measures are not aiming at regulating foods, but products which are inherently unhealthy for their content, associated eating practices, and their manufacturers policies and practices. The reasons for regulating such products are mostly based on the scientific evidence of their impacts over human health, and increasingly, also over planet's health. That is extremely important, but insufficient as anyone dedicating time to a given subject can become an expert following the scientific knowledge paradigm. As a result, it is possible to find experts serving private interests to counter-argue the need for regulations when they harm their businesses.

The regulation of such products and corporate practices should not be addressed and pursued as a public health matter, and a threaten to the living and physical world only, it must also be recognised as a contribution to the realization of the human right to food. The absence of regulatory measures to impede the advance of these products over traditional foods, meals and ways of eating, should be interpreted as an omission of the state to guarantee the right to adequate food. Additionally, corporations policies and practices aiming at compromising traditional diets and access to vital resources, even if indirectly, through the promotion of their products, should be configured as violations. Furthermore, with the scientific evidence very consistent on the effectiveness of regulations, most barriers to oppose them emerge from juridical decisions, not much from scientific debates anymore.

For these reasons, adding the human rights perspective to the rationale for regulating the demand for these products also favour decisions taking at juridical power level towards regulations. Very often judges feel uneasy about taking a decision on a scientific basis, scientific laws count, but usually are not the ones prevailing at juridical level. On the other hand, it is more unlikely that regulations recognised as an instrument supporting and progressing the realisation of human rights, for instance, get judged by jurists and society as a technocratic measure disputed by scientists. The characterisation of the promotion of inadequate production and eating practices, and/or omissions to impede them, as violations to basic rights sets out a perspective that might result in greater social concern and public support. It also helps to set the social basis to mobilise the fulfillment, monitoring and sanctions for noncompliance of regulatory measures already formally in place but practically inoperative, besides progressing the improvement of the legal framework.

A recent case from Brazil, illustrates how a legal framework that have been persistently ignored or barred by private/corporate interests to become effective, has advanced after setting its basis on the children's right to protection for instance. Characterising more objectively how an abusive, and hence illegal, advertisement to children looks like. This experience adds important lessons, and might strengthen initiatives aimed at regulating marketing/advertising in general or specifically on ultra-processed products in other countries, by setting the rights to childhood, health, adequate and healthy food as their basis.

Further to this achievement in itself, the process of formally establishing democratic forums dedicated to promote social participation on policy-making and decision-taking on all matters especially those intimately linked to health, social security and food and nutrition, characterises an important lesson. Councils established to serve as a formal and direct space to promote the participation of civil society on discussions and decisions to be enacted by the State promote a rebalancing of power vectors, favouring truly democratic debate and decision-taking. Although powerful economic drivers are still able to lobby via informal spaces and even through corruption, there is a formal place for the voice of those affected by problems, which are often kept invisible to the process.

## Pharmaprecedents: What can we learn from the field of medicines?

Graham Dukes

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When we set out to consider the problem of ethical standards in any industrial or trading sector it can be useful to consider whether we can learn something from experience in other sectors. I would like to suggest that where food manufacturing and trading is concerned it is worth considering what has been achieved in the field of pharmaceuticals. In both these fields - foods and medicines - some forms of control have been exercised for hundreds of years, for the simple reason that both play an important role in the health of individual citizens. In our own time, however, steps to set standards and maintain them have generally been stricter and have been adopted earlier where medicines are concerned - primarily because of a series of dramatic tragedies that have hit the headlines.

Standards have been created regarding *quality, safety, efficacy* and *truth*. Let me concentrate here on truth - truth in advertising and labelling.

Now how does one ensure that a firm tells the truth, the whole truth and nothing but the truth about its products? One might venture to suggest that all one needs to do is to pass a law setting this standard, and then impose censorship to enforce it. Well, that has been tried - with only limited success. Admittedly, if one has a system where every product has to be individually assessed before being granted a sales licence one can ensure that the packaging texts are adequate and truthful. But then comes the advertising. If you try to censor that *before* it appears you will soon be told that you are inhibiting free speech, which is unconstitutional. If you wait until an untruthful advertising campaign starts, and then try to stop it, you will probably find that the advertisements have had the desired commercial effect long before you prod the courts into action.

So what about individual company codes of ethical behaviour? Almost every drug company I know has such a code, but few such codes seem to have any effect on day to day practice. What, then, does work?

There is a solution, and one that I can recommend from experience in a range of countries. The starting point here is a code of ethical behaviour in advertising and promotion drawn up, not by an individual company, but a national association of manufacturers and traders, and binding on its members- The second step is for the association to establish a board of control to enforce the standards, with firm penalties for contravention. The third step is to oblige all member companies, not only to respect these standards but - and here is the real clue - to keep an eye on their competitors, ensure that they too are compliant, and to report any contravention to the board. That is the key to success. In a highly competitive sector every firm is more than eager to report to the Board of Control offences committed by its competitors, which constitute unfair competition and therefore threaten one's own business. In the field of medicines, sector-wide codes like this operate in various countries. Britain, Holland and Australia are three examples. The Australian example is particularly worth examining for two reasons:

*a. It has a basis in law.*

Australia's "Competition and Consumer Act",<sup>65</sup> originally passed (under another name) in 1974 and

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<sup>65</sup> Competition and Consumer Act 2010, being an amendment of The Trade Practices Act (No. 51 of 1974).



much expanded in 2010 makes provision for sector-wide codes of business ethics. For a particular sector, such a Code may be set up voluntarily, or the Law may require that it be created.<sup>66</sup>

The Codes set up under the Law deal with a range of unethical practices - they include unethical promotion, cartels, misuse of market power, retail price maintenance and mergers and acquisitions that could lessen competition.

Complaints regarding the functioning of a code can be submitted to the Council created to implement the law, and the Council may take serious cases of contravention to the Courts.

*b. the code for the pharmaceutical sector has proved remarkably successful.* The code commission for the sector regularly hears cases and it imposes substantial fines for breaches of the code, generally without the need to have recourse to the Courts.

The proceedings of the code commission are regularly published and they are impressive. Clearly, this sort of mutual control does work.

I should add that the Competition and Consumer Act does not introduce a similar behavioural Code for the food sector. However the Australian food trade falls under:

- a. the general provisions of the Act (on pricing, cartels, etc.)
- b. very recent Food Standards legislation that is primarily concerned with quality and safety
- c. joint legislation in Australia and New Zealand on food labelling and
- d. a separate code on the advertising and marketing of foods and beverages drawn up by the Australian Association of national Advertisers (AAA).

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<sup>66</sup> Mandatory Codes created under the Act to date relate to Horticulture, the Oil trade, Franchising and Unit pricing. Medicine Australia's Code of Conduct (covering pharmaceuticals) is voluntary; reports on cases are published quarterly and annually.

## Discussion following Session 4

David Clark: Article 24 of the Convention on the rights of the child has been interpreted to mean that parents have the right to be protected against misinformation, of the sort found in promotional materials for breastmilk substitutes. This can be a useful tool. Also, the countries with the best enforcement and impact is where they are imposing criminal responsibility on Code violators.

Fabio Gomes: Many countries could already apply fines, they have the legal backing, but the sizes of the fines are usually relatively small, compared to the financial powers to TNC. Hence, financial sanctions are limited although important and necessary. For this reason, other kinds of sanctions should be considered, such as counter-advertisement, temporary suspension of sales and/or operation.

Graham Dukes: Very difficult to identify people, but take a look at a book by John Brightweight. The law has failed to pick up individuals and hold them responsible. E.g. the pregnancy medicine in the 60s, no one was ever found guilty. But examples do exist. One medical director was held financially responsible, which scared others.

University of Copenhagen (name missing): The trade issue has not been covered, but should be taken more into account. Eg the TTIPS under negotiation, which will increase corporations 'powers and rights. We must recognize that while we work at this, other mechanisms that will be undermining this are coming to place.

Tim Lobstein: Yes, many of us are aware and worried, and this is going on behind closed doors.

Lina Mahy: In the ICN2 Framework for Action the chapter on trade and investments is still there, so please governments, take this message that it need to be kept.

Boyd Swinburn: We want a health and nutrition impact assessment of the trade treaties and of how it is going to affect governance. When it comes to how to measure you are left with impact assessments in evaluating.

Brigit Toebe: We need some instruments in more fields.

Ann Louise Lie: Private-public partnerships - what do you see as the potential to the INFORMAS?

Boyd Swinburn: Public private interactions, do not like to call it a partnership. The concept creates conflicts of interest. Try to develop a sort of flow diagram. It becomes a judgment of risks. What professionals and researchers think and involving the civil society. INFORMAS does not couple up with private companies for money.

Catarina, University of Copenhagen: Most important and what we need is evidence based knowledge, and then legal instruments. Does regulating marketing really work? Does it really work? Support the individual responsibility, a combination of the governmental responsibility and individual responsibility.

Boyd Swinburn: On what level do you want the documentation to be convincing that it works? Ex: Nutrient declaration. What is the cost- effectiveness of implementing it? That is one way, but it is hard to take it all the way to the physiological testing. It is a consumer right to know what is there. The evidence is hopefully secondary.

Fabio Gomes: Looking at the evidence of what works, you will identify that most effective actions are the ones that rigorously reduce the demand for products that are bad for health, this includes price control (e.g. taxation), advertisement regulation, and other economic and legislative measures. Individual level measures such as education and information provision are the least effective ones. If

we leave the decision to individuals they will always be driven by persuasive tactics from corporations in order to 'want' their products, regardless the education they have received. Brazil: If we want the 70% of what we eat to be healthy, we need to stop the aggressive stimuli, especially over children, that drive them to eat unhealthy products.

Catarina: We cannot regulate everything. We have to respect the autonomy of choice.

Judith Richter: This has nothing to do with autonomy, this is pushing foods and products through enormous marketing efforts, which aim at the subconscious mind not only on children but also adults.

Kjell Havnevik: Reflect on a world of colonizers. The issues of HR are linked to universality. In this context of diversity, can universality be a mechanism of dominance?

Graham Dukes: Why is it that in matters like this, that governments don't act where they could and should have? Historical British example: 1/3 was undernourished in the 1850-90 low and middle class, but no one acted. What changed? Britain wanted to go to war against South Africa, but the recruited soldiers were undernourished and not fit. This had a big impact on nutrition policy and changed in the decades after.

## **Session 5: Summarizing and advancing the issues to be brought forward through research, advocacy and recommendations**

Moderator: Sidsel Roalkvam

Speakers and commentators: Michael Windfuhr, Boyd Swinburn, Anna Glayzer, Usman Mushtaq, Malcolm Langford, Judith Richter, Allan Lerberg Jørgensen

## Summing up of the first day and plan for the second

Moderator

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(Transcript)

I have the pleasure of being the moderator this morning and I have the mixed pleasure to sum up yesterday's discussion. It is a mixed pleasure because it was extremely rich, very exciting, lot of new areas and it is very hard to do justice to it all. But I will try.

I am going to start where we ended yesterday, when Tim Lobstein said, "I hope we will enter the debate of what is the driver of politics". Graham Dukes showed us and came up with an example also towards the end of yesterday about how the war with the Boer and the Brits was the birth for radical social policies. Those of us who have read our Foucault, know that the birth of social medicine, as he saw it, came out of the industrial revolution. We needed healthy worker. That's when the world started to clean up their cities and give fresh water, to come and find a healthy work stock.

The driver of today's politics – what could that be? Well, we heard it yesterday. It's consumerism. That is the driver. We are told all over the world when we enter economic crisis that we should go out and consume more to overcome it. Tim Lobstein's opening session showed us exactly how big foods organise themselves and organise their shelves to produce good consumers of us all. Even the 2-years old has his own shelf at the supermarket, packaging and advertisement in order that he or she should grow up and be a splendid consumer. Also we heard from Gomes about the Socrate's stroll, you know walking around in the supermarket and pick out everything that we do not need. Or the new products they are not even food, but they help us to consume more. We consume food that we do not need, and we consume food that is in fact not food. So we are the objects, I guess, of the expanding markets.

Peter Brabeck, current chair (former CEO) of Nestlé uttered in a video clip in 2005 that water is not a human right. Quite the contrary, he argued, water is food stuff that makes life better. And food is not a human right either. As with food stuff, we need to privatise it, he said, in order to recognize its value. This caused a lot of noise on social media and he has later corrected it, now saying it is a right but not a free good.

Can we not see food, water and livelihood without the price tag attached to it? It is a system that according to Boyd Swinburn, and I think I caught you right, that food that used to be for livelihoods and for good life has now become the vector of disease. The price tag has made it the vector of disease. It doesn't have a value in its own. The price tag has also drifted into social policies. *Invest in health – it pays*, has been a slogan for many years. When Hillary Clinton visited Norway two years ago, the slogan was *invest in women – it pays*. The argument being that women entering the work force in Norway 150 years ago has meant more to Norwegian economics than oil and gas. And instead of being proud of that fact, I kind of felt offended. So, if it didn't pay off, were we not to be invested in? Isn't it all a human right?

Social policies all over the world also take on market like structures. The discourse around health and food is about cost effectiveness. It's a strong belief that it is the economic rationalities that drives us all. Health interventions increasingly judged by their cost effectiveness, not what they necessarily are able to do. Governments are reduced to administrations and administer market flow,

not necessarily any longer the driver of politics. And for one direct investment, or the harvest of deregulation becomes in many part of the world the destroyer of social policies.

I think one of the achievements of this conference and I think maybe at this particular conference, the human rights lens helped us to do that. We start to talk about difference. We are not similar. Oliver De Schutter ended his talk and said “Do not assume that the private sector and governments have the same objectives. They shouldn’t have.” Small farmers or smallholders hold interests that are not the same as those of corporations. We talked about difference and different life worlds. We did not talk about an endless similarity of consumers.

Kjell Havnevik followed up. It is not the case, he said, that small holders want to live in the city and get a job. They are forced off their land and fall prey for the idea of ineffectiveness of their agricultural practice. Havnevik asked us to trust in experience rather than models. He said, how we wish the world to be is not how it appears to be on the ground. There is a gap between what the market model is thought to be doing and what it actually does. Market is not a substitute for social policies.

We had fantastic and scary examples from Axel Tømte and Anne Hellum who actually showed us how this works out on the ground. The palm oil industry or the commodification of water. They told us about serious human rights violations, uncompensated losses and a situation where the smallholders themselves become the problem. They don’t have a price tag – they are too small. The stories they told us also made explicit the power asymmetries. The very uneven playing field, the difference that people have in bargaining power. Hellum reminded us that poor operations and smallholders co-exist. And how can we help them do so? We have -plus guidelines, she said, why do we not put them into use.

So what are the tools? We have tons of codes, agreements, guidelines and treaties and I don’t know what. When we worked with the UiO-Lancet Commission, we were sitting with this huge book of everything people have agreed on at global level. It has become its own industry. Michael Windfuhr pointed to the complexity of the global system. How you could use 20 years to negotiate and then it falls completely to the ground. It’s not ratified by anyone and it’s dead. Because of this, the world has entered into pragmatic approaches. The pragmatic approach that Addo talked about and defended, and the Ruggie Principles, is criticised of course for not moving fast enough. But he said it is a framework. It is not meant to be one size fits all. It’s above all not a tool kit. It is not the final solution. Rather, he argues, it is an important process. And I think would I agree with him on that. It is a moving train, constantly evolving as long as we make it move. He also stressed the importance of an impatient, pushing civil society wanting more. Constantly wanting more.

The question remains, how can we build in human rights principles to counteract big foods and see the production. In fact change the rules of the game of the global food chain. To take on the global food chain is to fight the global system, or the order of the day.

Anna Maria Suarez-Franco calls for a binding treaty. It is time to hold both governments and corporations to account. It should be inclusive and democratic process. That makes it also tedious and difficult to achieve.

Asbjørn Eide suggests that we should develop concrete recommendations. Address the big industries one by one. Big Foods are not the same as extractive industries and they have different forms of violations. Corporations should also have positive obligations.

Birgit Toebe suggested soft law instruments are also powerful tools.

Allan Jørgensen suggested we should work inside the big corporations. We should engage to change business using, to the best of our abilities, human rights impact assessment, develop it as we move

along. Of course there are dangers working inside. Power asymmetries do not cease to exist. When we move inside the corporation, there is a danger they become, what I have called an ethical veil. That everything looks good at the outside, but does it really? Again we have to remember Havnevik: we should look at the experience of what is really going on. Not only trust homepages and social statements. We should play, and I think it is important, that in order to advocate and move things forward we could also enter the same game in order to push sector standards, and use the forces of the competition and market.

We should have sector-wise ethics as Graham Dukes suggested, self-monitoring in order that they kind of they don't like each other really and that we can build on that.

Tim Lobstein reminded us also yesterday about the monitoring and accountability systems. How important it is that we put facts to our statements. And he cut out the role of both researchers and civil society in this endeavour. We need to create a factual base in order to make the dialogue powerful. Here too there are dangers, I think. Because we may enter into an endless debate about what is evidence and what is not. When we fight the Big Foods or whatever, they usually come back and say that we have other evidence that proves otherwise.

It is an uneven playing field. States' autonomy to protect and fulfil human rights is constantly undermined by the WTO. And states' ability to take public health measures. The Convention of Tobacco control has showed us that. That strong states with money, power and resources can fight back. Weak states find it very difficult to take the battle.

So how can we use human rights in such an uneven playing field? Tim Lobstein talked about the rights regime and the risk regime. The rights regime is a normative regime. It is when we say things are just not right. And that's what we go by. A risk regime takes a constant production of evidence and can constantly be contested. I think we probably need both. But when we answer the risk regime we should keep the norms and hold the norms high up in order to not lose them of sight. Most importantly, I think we have learned, and then I would like to quote Gomes, "Eating is a political act". And I think yesterday showed us how it was a political act. By just taking a glass of milk like every Norwegian does every morning, we are connected to an uneven playing field, power and resources and how actually the global system is being run.

Today we are going to advance the issue. We are going to discuss the role of research, advocacy and recommendations. And to that I certainly need some help. I think what we tried to do at this conference was to show how we can connect the small-holder farmer to the Big Foods, the whole value chain of food. The focus on Big Foods has helped us to do that. As Big Foods increasingly takes control over the entire food value chain, so the small-holders fighting for livelihoods, the NCD crisis is both aspects of folk lines within the global system. And somehow I think in our research, advocacy, recommendations, whatever they might be, we should try to keep these things together.

## **Livelihood, HR and sustainability requirements on the producer side – which standards to promote, requirements on the ground. Illustrated by efforts of the Committee on World Food Security**

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Podcast: <http://www.uio.no/english/research/interfaculty-research-areas/leve/news-events/podcasts/2014/0912-windfuhr-michael-global-food-systems-and-hr.html>

- Who are hungry? Rural population, smallholder farmers, landless laborers and people living on collective economies.
- Rural areas have been forgotten: underinvestment, under-focused and under-financed by most countries, including a failure to meet own commitments (AU Maputo Decision of investing 10 % of budgets in agriculture). The investments that have been made have only reach a small percentage of potential benefits. Forgotten by donor community as well (from around 20% of budgets in 1980 to 3.5% in 2005).
- Before world food crisis many countries did not produce food, because of bad economic conditions.
- Trade-based food security
- Adjustment policies leading to closing many rural institutions supporting smallholders
- Consequences - smallholders have been and are the largest investment in agriculture, rural infrastructure is extremely weak.
- Problem is that many of these households are having one or two products that they sell in the market, they are not subsistence farmers, and they are therefore more affected by food price crises.
- Women smallholders –how will they be able to survive in the world market? Who is responsible for this?
- Crisis in 2008 with increasing food prices led to the question: Is this not good for smallholder farmers? But no, most are still net food buyers. Because they grow few crops and bad infrastructure they could not make use of rising food prices. Only large operators could benefit from this.
- After the food crisis they have started investing again in agriculture, the political response increased investment.
- What policy approach: Production-oriented or support of those living in rural areas? Ongoing difficult debate at CFS. There was more recognition of the second at CFS.
- CFS' reaction: VG Land (Voluntary Guidelines on the Responsible Governance of Tenure of Land); Principles of Responsible Agricultural Investments (RAI)
- What is the 80% poor living in the rural areas going to do if they cannot benefit of these investments? Do we need just more production or do we need better protection of the people living there?



- The VG land has three parts: Land registration –who are using the land? Land transfer. Land administration. It is all rights based.
- Broad participation in the regulation of this: FPIC for indigenous communities. One of the best participation descriptions according to High Commissioner.
- RAI process: high participation, particular highlight of smallholder investment, human rights-based process, due diligence for private actors. Civil society on board. Addresses states to be active: home, host and investors. They are making use of the Ruggie principles.
- RAI principles extending the responsibilities, e.g. to banks supporting the investing companies. Long term requirement for sustainability - strengthen CFS as a global governance hub.
- How to make agricultural investments responsible? What type of investments do we need? Political decision, hard to regulate, but still belongs to states.
- Continued high run for land as there are different uses for it, like fuel, food, settlement, industry, etc. and conflicts will increase. Political decision needed – what will we use land for? What is really needed is a political level land use plan, for forest, agriculture, cities.
- Land use plan is missing in most countries due to weak states and reluctance to govern. In this context there is more need for regulation of investors or of host country.
- What is the long time sustainability requirement? Adaptation to climate change, climate friendly agriculture, soil and water degradation, image of rural areas - technical infrastructure and alternative.
- Adaptation is not happening in Africa. This is a problem that has to be taken into account
- Image of rural areas – there is nothing keeping young people there.
- How are the investments affecting the people in the rural areas? This is the most important question.

## Discussion after Windfuhr

Anne Hellum: There is a gap in guidelines regarding water and security of water uses, the focus is often on the land. Community based investments exist, but there is lacking rights and investments in water.

Windfuhr: Many investments are made, but they go to the areas with the best conditions (areas with irrigation, etc.). We do not know how much water they are using. Water should be included in land use plans. There are some, but extremely weak, regulation on water. 70 % of water is used for agriculture, and there is a strong connection between right to food and water and agric. How much of it goes to smallholder farmers? We need to emphasize and find out more.

Kjell Havnevik: We also need to emphasize that the sustainability issue is not only related to Africa, but to the global system. We must think not only of the south, but also our own role our own consumption, and identify priorities. Today's development decisions are still taken by big business and states, excluding the smallholders. We must fight to change the structure and include smallholders. They have an important role in the north and south. We must think of them not as weak, but as people with resources, knowledge that can play a role in sustainability and development.

Windfuhr: Agree. And yes, it is related to consumption.

Bård A. Andreassen: There is a lot of water and land being grabbed. What are mechanisms for remedy? These are weak states, weak policies.

Windfuhr: We need to strengthen legal system in lands, and also have mechanisms for when legal systems are weak. We need a complaint system for developing institutions.

# Civil Society increasing the demand for action – what responses to mobilise?

*NB: Highlights from this session by Rapporteur team's minutes only*

## Introduction

Boyd Swinburn

Podcast: <http://www.uio.no/english/research/interfaculty-research-areas/leve/news-events/podcasts/2014/0912-swinburn-boyd-global-food-systems-and-hr-comm.html>

- What can civil society do? Citizens, consumers, communities, etc. There is a role for each one of them.
- Climate-related disease issues: recent report shows that 4 degrees of temperature increase will lead to under-nutrition being the biggest health problem by 2080-2100. This will not be the richest countries/regions, but the poorest. The urgency is upon us. People who will live through this are alive today.
- Accountability framework (refers to framework presented in Kraak et al., 2014, Publ. Health Nutr.): holding to account is difficult and our focus here.
- Accountability framework: leverage civil society can have at different levels, the biggest being level 3 - holding to account. For example legal, quasi-regulatory approaches, policy advisory committees, elections, public communications of criticism or praise, private communications with people in Government, consumer protection, litigation, codes of ethics, voluntary guidelines, shareholder activism, consumer demand, investment / disinvestment.
- Consumer demand: preferences manipulated, dictated by the food system, especially children.
- Need for protection for manipulation of demands. Tools are labelling, but mainly benefit health-seeking consumers. . Crowd-sourcing data to engage consumers, like the George Institute app (FoodSwitch)
- Pressure to change from citizens: what is the issue that will mobilize people on this area? What is the uniting narrative for food?
- Stealth-interventions for obesity (Robinson T, Obesity 2010)? Found that there is very little social mobilization for this case, but other related movements that can be coupled and could be used to make a coalition movement (e.g. environmental issue)?
- Community mobilization: local mobilization for own benefit, systems reorientation for healthier food environments, systems approach only way to achieve community change at scale. Communities mobilize themselves - example on how communities found resources to continue after project had finished, having learned skills and established a process.
- Changing systems and communities from within can lead to a mobilizing virus effect, where communities learn from each other, and achieve changes and benefits from the "original" project. This has large potential. Self-issued changes could be more sustainable.
- NGOs and quasi-regulatory approaches can hold governments and food companies to account

- Researchers: strategic science (Brownell). Research can have a more policy-relevant focus and appliance to be more relevant to decision makers, do collaborative research with end users, and create robust knowledge exchange systems (eg. INFORMAS).

## Commentators to Swinburn

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- What can Consumers International and consumer groups do? On the ground monitoring of company practices, especially where the government don't have capacity or won't do the monitoring themselves. Advantages of a global network like Consumers International is that they can expose double standards in a company.
- For example, a report they did on breakfast cereals from Kelloggs and Nestlé showed that formulations and nutritional values differed between countries, depending upon the country and their standards. The countries with lower salt levels are the countries in which there has been government actions to achieve this. (Consumers International, 2008, [Cereal Offences: A wake-up call on the marketing of unhealthy food to children](#))
- The same with front of pack labelling, which vary tremendously. Traffic light in UK is the result of push from consumer groups and government. It is still voluntary but CocaCola Company now says they will do that in the UK (first country).
- This shows companies will do whatever they can get around with doing in different places.
- Companies are now pushing new markets in low- and middle income countries due to saturation in high-income countries.
- Consumers International has produced an alternative guideline from Consumers International and World Obesity regarding framework convention for healthy diets ([this one](#)), with stronger goals than the UN high-level panel report. In terms of policy requests, there is nothing in the report that was radical, it is actually based on consensus - define what healthy diets are, education within schools and public, calorie labelling at the point of sale, restriction to marketing including cross-border marketing, nutrition standards in public institutions, subsidies and taxes. These are implemented partially in different countries. What would be new would be a binding instrument. There is a lot of consensus about the need for global action.

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- How to spread the message from this conference? And other scientific fora?
- Environmental issue related to food production- solving the climate change problem without talking about food, without solving the food industry issue, is impossible. In addition, the food system is also related to deforestation, soil degradation, etc.
- Food system now is related to both NCDs and environment, but these two are separated in discourse. The silo system still exists. Synergies of different agendas crucial to achieve social equality and development.

- Process leading up to UN NCD Summit, document greatly influenced by companies and influential countries. Civil Society and some states are very displeased with the watered down result.
- Unfortunate that Civil Society has different stands within, especially in the NCD area. This does not correlate to the need for a stronger voice of CS.
- Access to multilateral meeting can be a great barrier to affecting the outcomes and processes.
- We need to look more to the sustainable development movement which have the most advanced Civil Society modalities. They have been successful in impacting the sustainable development goals, which will have ramifications for the global food system.
- Civil Society organizations need to invest their limited resources to converge
- EAT Forum, founded in 2009, seeks to advance on integrated agendas of food, health and sustainability. Seek synergetic solutions to different agendas, multilateral partnerships among all stakeholders including industry, build upon strengthening successful initiative in the field. Main focus is research driven agenda that also sets the tone for private sector and governments.

## Discussion after Swinburn & commentators

Peter Milton Rukundo: Consumer protection in Africa is weak. What has Consumers International done in Africa? Legal measures? Case examples? We need a stronger push and to build coalition for consumer protection. Should we use litigation to force the state to take measures such as labelling?

Anna Glayzer: It is too early to see cases of litigation in obesity happen. Building global coalitions is fundamental, and this conference can contribute to that.

Ana Maria Suarez: The question of the right to food is absent in the treaty bodies and UN system. Standards can move national regulations, legislation and policies. More holistic approach needed in processes and reports, FIAN willing to collaborate.

Anna Glayzer: The idea is to have member states drive the proposal forward (the Framework Convention proposal) and act as champions at the UN level.

Boyd Swinburn: All forums are saying the same things, UN can be an arena to bring the different initiatives together.

Usman Mushtaq: A key recommendation from the Lancet and UN is a multi-stakeholder approach. Private sectors maybe should not be, but are, a part of UN processes, so we have to find a way to deal with it.

David Clark: We must not underestimate the scope in legal measures we already have. Litigation has changed corporate behavior, for example in marketing in India. This is a powerful tool to fight for consumer protection.

Brigit Toebes: Seems this conference has two big problem themes: The livelihood producer one and then the outcomes of the junk food industries and the health problems they produce. How to merge these two? Don't we need to find the language to build up the two themes and bring them together?

Boyd Swinburn: Language is a problem. There are some descriptors that we need to think about. Tim Lang is pushing for sustainability that entails equity and health. Then, is it food systems, is it diets? Some suggestions sit around diet. Because it puts the human component around it. If focusing on diets, we focus on the human being. We should therefore aim for the "sustainable diets", it is a term that captures all the aspects and has the human focus.

University of Copenhagen participant: What about how we work with and talk about people with obesity? This patient group is not involved, as opposed to other patient groups. This is a problematic issue that may conflict with the human right to not be discriminated.

Ushman Mushtaq: There needs to be a trust exercise between civil society and governments. But also, the UN bodies should not have a prerequisite of trust between governments and civil society and then rely on intergovernmental negotiations behind closed doors. Civil society should be able to attend UN bodies and negotiations without the prerequisite of trust with their national governments.

# **Towards an empirical theory of human rights and corporate behavior?**

## **Reflections on a future research agenda**

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*From Minutesby Rapporteur team*

- Three ways of thinking about corporations and social issues:
  - Distributive justice: relationship between state and capital, equity, fairness, just and rights of the citizen have been the perspective here. Who gets what? Massive inequalities in health and education in LMICs. Corporations are a large part of that share of inequalities. These inequalities are problematic legally.
  - Corporate Social Responsibility (CSR): Has been a dominant paradigm. Focuses on the good things that business can do
  - Business and human rights: It is not only about the good things that corporations can do but also the bad things that can come with it. Child labour, etc. This approach puts a focus on state obligations. These two things are lacking from a CSR perspective.
- Global standards for Multinationals on CSR and business and human rights: more than 300 standards exist, and more than half includes references to human rights
- The state of global standards is a reflexive form of regulation that is polycentric and embedded in a multi-level governance framework (argues that we should be careful about imposing too much of your own self system into another), it is neo-medievalist (overlapping and concurrence of multiple legitimate authorities within the same decision-making framework), and the autonomy of market actors is viewed positively but the importance of external triggers is also recognized.
- The result is that this regime is predominantly quasi-legal and with few formal penalties, investigative or remedial mechanisms although many standards contain certification mechanisms.
- Not yet clear whether this model is static or the first step towards more state-centric, juridified regulation (see, e.g., anti-corruption).
- There is also some evidence of the integration of soft principles in domestic law: suggests potential for harmonized domestic laws and national extra-territorial laws.
- Not clear whether this is static or a first step towards more state-centric, juridified regulation.
- Literature on human rights is predominantly normative. What is the best model that best ensures both effective and efficient regulations? Self-regulation, other?
- Little empirical investigation of efficiency in practice. Need more evidence-based understanding on when/under which conditions models work or not, e.g. regulatory models.



- Research needs more mixed methods analysis, should identify which actor strategies support or harm the models. Symbolic effects. How do we measure, how do we determine it? Test different theories and hypotheses.
- Conclusions: Think of conditions. Is it the nature of the standards that determine their effectiveness? (Soft versus hard law, vague vs specific, state vs self-regulation, etc). It could also be affected by the strictness or adaptability of the standard.
- Other conditions that might affect efficiency are nature, levers, visibility of compliance, transmitters, broader political economy factors (corporate profitability could be key driver), and broader legal factors.
- Legal overview and quantifying impacts: the International Code of Marketing of Breast-milk Substitutes can be used for evaluation. This has been in place in 30 years in 199 countries, we should draw on experiences of when have they worked, and under which conditions?

## Commentators to Langford

*Judith Richter*

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- I would like to remind us of the Standpoint Theory by Sandra Harding – there is no such thing as objective theory in soft sciences such as the social or political sciences. This is why researchers should best specify how their thinking developed. This way others can judge how this informs their research approach and results.
- I have long worked on corporate accountability issues. This included examining how TNCs have resisted international regulation and set agenda not just through their power and money but also through corporate strategic public relations.( What was earlier called “engineering of consent” is nowadays called issues management PR) . I was also privileged to analyse as UNICEF consultant the efforts to regulate infant food companies - work which resulted in a book and PhD on the broader question on how to hold corporations accountable. I have also looked at which safeguards are needed to ensure that public interest actors can and do act in the public interest. Below just a few questions and issues which such a perspective raises:
- How to hold transnational corporations accountable, especially to the citizens of developing countries and vulnerable populations? .
- We should more clearly distinguish between so-called corporate social responsibility and corporate accountability.
- When researching how to hold corporations accountably, it is important to look at the context: For example, we had efforts to work for a UN Code (and the International Code on Marketing of Breastmilk Substitutes comes from that time), then Business and Human Right Norms, which were displaced by “multi-stakeholder” elaboration of the UN Guiding Principles, and in June 2014 work on a legally binding Treaty on Business and Human Rights has started.
- From a corporate accountability perspective, it may be less fruitful to look at the nearly 1000 CSR codes, than to look what interaction between governments, UN agencies and civil society organisations in which context allows to come to legally binding measures. For example, why was the strong Tobacco Convention not immediately followed by strong marketing regulation of

junk food industries and how could we get back on track? When talking about health, nutrition and food, we may need to look at TNCs practices not only with respect to marketing practices but also to their contribution to the creation of hunger through low salaries, price speculations, land and water grabbing.

- Global democratic governance is a big word and people talking about food issues often get intimidated or confused by it. Best is to remember that it comes from the Greek word *kybernan*, which means to take the helm and 'steer' Governance is about basically about formal and informal rule-setting, about who decides, who steers our boat into which direction.
- In this regard it is important to be aware of the World Economic Forum's (WEF) Global Redesign Initiative (GRI) that talks now about a global polycentric "stakeholder" governance – international rule setting that does not necessarily have UN fora at its centre The GRI implies that if corporations decide that the UN is not doing their job the way they like it (i.e. if they want to regulate them) they can sideline the UN for a and move decision-making to so-called "alliances of the able and the willing", which may rely on corporate or venture philanthropy funding. .
- What is strange is that regulation of economic actors at national level is expected is portrayed as unacceptable internationally. For example we lack international regulatory institutions where we would have one at national level. The same applies to conflict of interest policies. This issue has been portrayed as an "obstacle to more flexible type of working" when WHO started promoting global public-private partnerships in the late 1990s.
- One of the most concerning issues of corporate resistance, is the acceptance of the word 'stakeholder' governance - corporations have gained power to claim they are legitimate stakeholders in public affairs (see for example the reports on corporate influence on the Post-2015 agenda and the UN's business and human rights agenda by the Global Policy Forum) ). Why is it that we accept corporate claims that companies only have human rights "responsibilities"? ? TNCs' fiduciary duty is to make profit for shareholders; they can at most work in an "enlightened self-interests." Why then is the current dominant discourse is that we need business in all our public fora and we call this multi-stakeholder engagement?.
- Let us not use the term "voluntary" anymore when we talk about CSR and regulation. CSR is about ethical obligations; ethics is not voluntary. In our discourse we should talk about "legally non-binding" versus "legally-binding" ( Moreover, many of the so-called voluntary guidelines did not come about "voluntarily". When looked at them in context, many of them came about at a time of pressure for legally binding measures and are frequently used to undermine regulation instead of supporting and going beyond it as ethics should) .
- Also let us not use the word stakeholder for corporations either. The word stakeholder was originally used for those groups who were affected by the operations of big corporations. The issue was to ask corporations to not only take shareholders' interest but also other stakeholders' interests into account. This has now been turned around. As said above, THE stakeholder in public affairs not be be left out are corporations. This is against rules of global democratic governance and also against accepted rules of good science.

Allan Lerberg Jørgensen

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- As a national HR institution, it is a challenge how to take on the decline of the national state.
- There are some very familiar challenges in business and human rights, that have been challenges in implementing human rights in other areas.
- The state is supplying foods to the citizens, in the middle of the system between state and citizens, are the corporations and other actors. How do we secure and enable HR (to food) in this system, in an international structure?
- Demand side human rights holders: How do we ensure and regulate their right and ability to claim human rights? Access to information is a very powerful tool, corporate lobbying is a classical human rights governance discussion. Working around the enabling environment for rights holders to demand their rights is important but it is not a new thing. One of the key things that are inhibiting accountability is information disclosure. Another important thing is mechanisms for rights holders to claim their rights.
- Supply side (states): What are states actually doing to ensure human rights? One thing is tax. This is a problem in developing countries with weak taxation systems, especially in the international character of the economic system. If they had more efficient systems they could raise incomes to ensure human rights for the citizens.
- The issue of language is important, especially in dialog with companies. For example companies constantly referred to stakeholders, when they should be talking of right holders. That way they could prioritize the stakeholder that could cause most problems, not the most vulnerable. Illustrates the importance of language.
- Industry is reluctant to regulations not only due to self-interest, but also because of a very inconsequent follow-up of regulations. They do not know how regulations will affect them, or if the regulations will affect their competitors equally.
- Normative debates: we are sometimes at risk of instrumentalizing human rights, but human rights are a means to an end. We need to discuss the implications and ramifications of this idea. E.g. using HR as a mean to economic growth leads to an understandable argument for decision-makers, but are we digging our own grave, reducing human rights to something that should not be a goal in itself?
- Indicators are important, but we are only measuring processes, not outcomes.

## Discussion after Langford and commentators

University of Cologne participant: 1. What is the follow-up in in the implementation of the report DIHR made with Nestlé (presented in Jørgensen's speech Thursday)? 2. How can food regulation influence what is going on with the smallholders?

Allan Jørgensen: When an impact assessment has been done they develop an action plan to address the gaps, and then we need to police. But in our approach there is nobody to police but Nestle itself. Our work is helping Nestlé to see how and where they can improve HR. Don't see how this can be regulated through hard legal laws, because this is already in the HR obligations.

Save the children: when it comes to talking about legally binding versus non-legally binding: certification schemes - do they help or undermine civil society calls?

Malcolm Langford: We must think more on systemic effects of our measures.

Judith Richter: CSR and human rights due diligence certification is not the same as ensuring corporations do not violate human rights.

Malcolm Langford: Appropriation by states and counter appropriation by civil society, concepts such as accountability, advocacy - even by CSOs with doubtful backgrounds. We need more research about incentives and restraints, positive and adverse effects. And we much watch the appropriation of terminology by industry.

Judith Richter: WHO reform involves work on a Framework of engagement with so-called “non-state actors” . This term is often used interchangeably with “stakeholders” and blurs distinctions between corporate and other market oriented actors and those who (should) work in the public interest. We need to come together to discuss the issue of TNCs and venture philanthropies gaining more influence in the food and nutrition arena under the term non-state actors. The WHO reform ends in May 2015 so the need for debate is now. Also when looking at the ICN2 process, it is important to ensure that the nutrition debate meets with the broader debate of the right to people to feed themselves, and does not risk to focus on narrow micronutrient based under the name of multistakeholder alliances. The Industry is very involved in both processes, they are invited to speak as if they were legitimate actors in the public interest. Civil Society and social movements may need to reflect on how to prevent that corporations gain more influence in the nutrition arena following the ICN2. .

Participant (no name): Where can due diligence be used to shift power?

## **Session 6: How to take the issues forward – by whom and to whom? A result-oriented dialogue for the future**

### **Final Roundtable:**

Moderator: Asbjørn Eide

Speakers: Åse Elin Bjerke, Fabio Gomes, Anna Glayzer, David Clark,  
Lina Mahy, Michael Addo

Minutes by rapporteur team

## Introduction by the Moderator

- Let me come back to previous presentation by Malcolm Langford – what kind of future world order is likely to emerge? Will transnational social rights emerge to modify the extreme differences in income and wealth that globalization has caused?
- The unification under the nation state since Westphalia (1648) was challenged during the industrial revolution by the social conflict between capital and labour. In Western Europe, the compromise solution was gradually found in the form of national welfare states. It was consolidated after World War II, but has been challenged by neoliberalism from around 1980. Today we see that corporate-driven economic globalization, facilitated by unregulated international trade and investments, have made it possible for capital to escape from the regulatory and redistributive functions of the state that made the welfare state possible. What will be the follow up?
- Research and advocacy must distinguish between “probabilism” and “possibilism”. We should not only be concerned with what is likely to happen, but also about what we would like to happen. That includes a combination of normative and empirical work for researchers. This important distinction between “probabilism” and “possibilism” in social science was apparently first introduced by the Norwegian philosopher Arne Næss.
- The new aspect of the seminar is the link drawn by corporate activities between the producer and consumer side. Eating is a political act as Fabio Gomes stated. We must be aware of the relations between production and consumption as this makes us understand that eating is a political act.
- The last session will concentrate on the promotion of healthy diets.

## Panel Discussion

### Speaker 1. Åse Elin Bjerke – The Norwegian Ministry of Foreign Affairs

- Would like to congratulate with the conference, which has taught me a lot about the dilemmas and possible avenues for solutions.
- How should we go forward? Since 2007, one of the key priority areas of the Norwegian development assistance has been health – especially maternal and child health and Communicable diseases by supporting GFATM and GAVI. The priority of the new government is in addition education for development and they recently launched a white paper on this.
- Historically, Norway has engaged in nutrition at the global level through WHO (code on marketing of breast milk substitutes, marketing of unhealthy food to children) and FAO (CFS). Nutrition needs a cross-sector approach in development policies. It is important that sectors work closely together, both nationally as well as internationally.
- Nutrition was not part of the MDGs, although important in order to realize the MDGs. The Open working group on the sustainable development goals has recently put forth a report with 17 sustainable development goals. Nutrition features strongly in the proposed SDGs, indirectly and explicitly in goal nr. 2.
- Concerning Norway’s preparations for the Second International Conference on Nutrition (ICN2) in November it has been important to engage several relevant ministries:

- The Ministry of Foreign Affairs is responsible for coordinating the Norwegian ICN2 preparations. The process leading up to the conference has not been very transparent and it has been difficult to follow. This is a process initiated by WHO and FAO and no countries have really taken a lead in the preparations and the process. WHO and FAO want to achieve a lot. The preparatory work to the conference outcome did not start until March this year. The joint working group were only able to circulate a first draft by beginning of September. The draft political Declaration is now being reviewed by several ministers in Norway. A Framework for action has also been circulated. Much work remains in a very short time. This conference should feed into the post 2015 process and be constructive in the development discourse.

Comment by moderator Asbjørn Eide: The initiative for adoption of a framework convention for healthy diets is something the Norwegian government could keep in mind.

## **Speaker 2. David Clark, UNICEF**

- Want to emphasize the importance of preventive action and the need to focus on children. Breastfeeding can reduce prevalence of overweight by about 10 %. This should be part of solution. I want to thank Dr Helsing (here present) who has done so much to protect, promote and support breastfeeding – contributing immensely to the field. Research has shown that breast-fed infants are more accepting of new foods than babies who drank the same-tasting formula day after day. A package of 11 studies published in the journal Pediatrics, funded by the CDC and the FDA Administration are suggesting that in terms of diet quality, the die might be cast in the first year.
- PAHO has recently come up with a Draft Plan of Action for the Prevention of Obesity in Children and Adolescents. It states that children are unable to discern the persuasive intent of marketing and advertising and since these promotional campaigns also bypass parental control, they constitute both an ethical and a human-rights concern.
- I would argue that this is not only an issue for children – adults are also vulnerable to the influence of marketing. A precedent for action has been established in terms of the International Code of Marketing of Breast-milk Substitutes– and we should learn from the lessons.
- It is important to have very clear definitions. What is a child? There is disagreement about the age limit (although in UNICEF we follow the Convention on the Rights of the Child which sets that age at eighteen years. We should not only restrict regulations to advertising; labelling, marketing at sport events etc. (not only TV) is also very important. Brazil goes forward as a positive example.
- Governments should be key stakeholders and make sure to avoid conflicts of interests.
- Concerning the International Code of Marketing of Breast-milk Substitutes; I disagree that it is static. Since its adoption in 1981, there have been subsequent resolutions adopted by the World Health Assembly every couple of years to address new marketing techniques, products etc. 39 countries have good national legislation encompassing all of the provisions of the Code, while 50 countries have many provisions in their laws.
- Rather than asking whether regulations work, we should ask: can regulations work? Yes they can under certain circumstances. We need enforcement and monitoring mechanisms and deterrent

sanctions. Code violators are human rights violators. According to the Euromonitor<sup>67</sup> report, baby food corporations find Code regulations “a growing constraint” on their market expansion in countries like India, and look to countries like China where there is little restriction on their promotional practices.

- There is a lack of awareness or commitment from some governments. Corporations often misrepresent any standards we come up with and persuade governments to be reductionist. They constantly come up with new ways of marketing. We must be prepared for and be careful about their tactics: placing responsibility for obesity on the consumer and presenting themselves as part of the solution without taking any responsibility for their role in the obesity epidemic. We must remember that when they say that we “need to work together” it can also mean that it becomes more difficult to criticize your “partners”.

### **Speaker 3. Anna Glayzer, Consumers International (CI)**

- Consumers International wants a global convention to protect healthy diets.
- You can regulate in one area and companies start to market in another area. For example, we investigated the area of smart-phone mobile apps. While you don’t find apps from tobacco companies themselves, you find apps that encourage smoking and our suspicion is that these might be made by tobacco companies. We believe that we can get to a point where junk food is seen as bad as tobacco.
- Obesity prevalence is a real crisis – we need to point it out. Every 7 seconds someone dies from obesity – 70 % of deaths are diet related.

### **Speaker 4. Fabio Gomes, The National Cancer Institute, Ministry of Health, Brazil**

- Concerning the ICN2 process: FAO and WHO Secretariats have very limited role in the way decisions are being made. Member states will make decisions. The time frame is very short. Should we start discussing the ICN3 already? We need more time to discuss the idea of a framework convention to protect healthy diets. The civil society in Oslo and the Norwegian government must prepare to influence ICN2 in the direction of more regulation. And advocate for action for the next ten years. The Brazilian proposal to ICN2 has been proposed merged with the German and Nordic proposal. The proposal discusses a global framework and concerted action between countries.
- We have been talking about the scope and object of how we name the problems and the need for a term to capture production and consumption. In Brazil we have chosen the word “food and nutrition security” – this cover issues from all parts of the food system. We have defined the term and have a policy on it. The policy focus on systematic measures – not only remedies. One must look at the problem broadly and address systematic underlying causes. Complexity is often used as an excuse for not doing anything.
- It is very different how we deal with food in different countries. What are the priorities? All efforts are relevant – but different priorities in different countries. We must be sensitive to specificity of food contexts in different countries.

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<sup>67</sup> the Euromonitor International Report Global Packaged Food: Market Opportunities for Baby Food to 2013



## **Speaker 5. Lina Mahy, UN System Standing Committee on Nutrition (UNSCN)**

- Thanks to organizers for bringing different types of actors together. This is also what the UNSCN tries to do.
- Highlights of what UNSCN currently does:
  - The UNSCN Secretariat supports a joint secretariat of ICN2. UNSCN would like to discuss further about how countries can make themselves heard.
  - UNSCN is a member of CFS advisory group – tries to bring in nutrition into the CFS work which has a very food security and agricultural focus.
  - UNSCN is a member of UN interagency task force for the prevention and control of NCDs – its secretariat under WHO has a very health oriented approach. In the discussions of this task force, UNSCN aims to bridge the food and health divide and focus attention to diet-related risks of NCDs; it also informs the task force about events and initiatives ongoing in the nutrition community including the role of food systems for the prevention and control of NCDs.
- Take-away messages from the conference:
  - Nutrition is politics. Evidence based decision making is what should be done, but what makes the decisions is politics.
  - We have the evidence, the links are there, but in intergovernmental discussions Member States ask for the evidence for links between e.g. marketing of unhealthy food and obesity, but no one ask for evidence about effectiveness of partnerships.
  - Too many silos around – we need coherence. Also within civil society – separation between those working on under- and over-nutrition, food vs health vs agriculture. ICN2 has brought the different groups together.
  - Social science and science use different jargons. Science tends to look down at social science – ask for the evidence that HR approaches work. We need to do more research on impact of HR on nutrition.
  - Appetite for regulation is currently very low among member states. E.g. drafters of the ICN2 declaration said we need to regulate taxation, etc., but it was all taken out.
  - We need clear definitions – what is food, good food, healthy diets? In the ICN2 document the “do no harm” principle was taken out – because states ask “where is the evidence?” and what is the definition?
  - ICN2 outcome must feed into the General Assembly (GA) mechanism. It should be endorsed by the GA and have it monitored and followed up every 5<sup>th</sup> year.
  - Tim Lobstein mentioned risk vs right approach- this was a “Aha” moment for me. We are often pushed into a defensive rather than pro-active state - the right based approach allows us to be pro-active, as we should be.
  - It is a quite unequal fight but that should never refrain you from taking action. Like the saying: “Luck is when preparation meet opportunity”. That is what we have to do.
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- What can UNSCN do?
  - Contact us, we are not HR experts, send us interns who can work on HR and nutrition, conflict of interest etc. .
  - Role of private sector in negotiations – write paper on it and send it to us.
  - There is a need for investment in capacity building: specifically nutrition needs lawyers and negotiators to advice countries involved in trade negotiations and public private partnerships.
  - UNSCN Secretariat is preparing the next edition of the SCN News (#41) which will feature “Nutrition and the Post-2015 Development Agenda”.

## **Speaker 6. Michael Addo**

I would like to reiterate the nature of this meeting. It has managed to bring together different disciplines despite speaking different languages. We should keep this group and have regular meetings. The group should have a name so that when we put together a proposal, they recognize the group. How do we coordinate it? The first proposal from the group can be Malcolm’s report mapping how different initiatives relate to food and rights.

Ruggie presented us with a piece of firework – what is in the framework can only be seen when we light it up. We should provide the answers – give input into it.

Negotiations for the future: some have started by condemning the present achievements, rather than thinking out what we want and what is possible. It should be a cooperative exercise.

On the framework convention on healthy diets: Why not try to work on it! Treaties spelling out ways and means of state protection in different sectors of business activity can be of good use. Let them bloom!! That can be one way of implementing the Ruggie principles. We can never have only one way of implementing them.

The system is ready for this. The working group is waiting for suggestions for ways forward. We will take the idea and fly with it, just give us the proposal.

## **Discussion**

Ana Maria Suarez-Franco: We have forgotten the global strategic framework on the right to food negotiated within the CFS. Look into children ok, but FIAN concerned about not forgetting mothers. Yes, we should continue to work together and the idea of many treaties is good.

Sabrina Ionata Granheim: I have been to two conferences this week and participated in the organization of both, this one and another organized by WPHNA in Oxford. Two issues came out strongly in both conferences: first, the root of the problem is power imbalance. How do we shift that bringing power back to consumers? Second, the idea of a food treaty /convention is also coming out strongly and clearly, it is popping up everywhere (including in some member-states). But how do we implement that? Is there anything concrete we can do now at ICN2, so that we do not have to wait until ICN3? Also, on the concept of food and nutrition security. There is a paper by CFS called *Coming to terms with terminology*; they advise to use the term food and nutrition security. However,

the term is not officially adopted as all members did not agree to it. This is already the concept adopted by Brazil.

Liv Elin Torheim: Many terms from the HR language are not familiar for public health people. We must learn to speak each other's languages. For information, the University of Oslo and Oslo and Akershus University College of Applied Sciences are starting up a course on food and human rights next year (January-February 2015).

Michael Windfuhr: The SCN is the best organ to harmonize actors' inputs on nutrition. We must talk about how to influence debates on consumer protection at country level – it's where implementation happens. We must reach out to national consumer groups.

Wenche Barth Eide: I am delighted with Michael Addo's idea to keep this network going. We can discuss name of the group further. Another channel: a civil society platform for the CFS was developed as a result of its reform. Also a high-level panel of experts (HLPE) has been established by CFS. This group serves as a think tank for the CFS and consists of a 15 person steering group which appoints project teams to independently undertake studies commissioned by the CFS. The project teams are set up by invitations for issues such as price volatility, climate change, biofuels and many other topics relevant to food security. I was invited to join one team to work on Social Protection and Food Security with a special expectation to include a HR perspective. A suggestion for the Norwegian government could be to propose studies that the CFS should commission through the HLPE, e.g. food and nutrition security and human rights.

A representative from the University of Copenhagen: We have a research group on obesity and human rights and are open for information sharing, collaboration etc.

Kristin Kjæret: What about the UN committees that monitor the HR conventions? They have space in their reports for nutrition. FIAN can help you get in contact with relevant actors. FIAN Norway reported to Committee on Economic, Social and Cultural Rights with concern about Norwegian pension fund not undertaking impact assessments of investment. Norway used to be a champion on the right to food – I am confident that the MFA will let it keep shining.

Asbjørn Eide: The draft conference statement is now distributed. We are not going to adopt it here, but suggestions for slight improvement are welcome. It should not be longer. Please send in suggestions within one week.

Michael Addo: We need integrated action within the UN. We have six treaty bodies preparing HR reports. How do we get this treaty on healthy food? Let's start working on one. We should come up with a draft. I mean it when I say this is an unusual body – we must take advantage of it.

Lina Mahy: Member states of CFS did not agree on the definition of the term "food and nutrition security". The SUN movement Civil Society network and the CFS Civil society group will participate in a CFS side event in Rome. UNSCN, as co-facilitator of the UN Network for scaling up nutrition will also have a side event at ICN2.

Fabio Gomes: Our society must move forward to recognize food and nutrition problems – we are not there yet. We recycle, but problems of food and nutrition are still not recognized as a problem. The key is a shifting of power; we must include those directly affected. But how do you shift power at the global level? The UN reform debate should be about how to develop other governance mechanisms, not only focus on financial and economic issues.

David Clark: We don't intend to leave mothers out. Concerning question about power imbalances: we have been sitting back and allowed it to happen. We have allowed the companies in without looking into potential or actual conflicts of interest– we have to stop that. We must include and

enforce policies around conflict of interests. The SUN movement has tried to address this issue, but many feel that they have not gotten to the heart of the issue, but looked at conflict resolution instead.

Åse Elin Bjerke: Thanks for good advice and suggestions. Good to keep contact with civil society. We see ICN2 as a meeting place where we can reinvigorate discussions on nutrition. We must come up with some concrete suggestions. Regulation is perhaps an avenue for betterment, despite opposition.

### **Conclusion (as summarized by the moderator AE)**

- This has been a successful and interesting conference – much due to engagement from all guests and the constructive way of pursuing dialogues. We have not seen any frustrating stalemates between competing interests.
- Business will always be there. There is no way without it. We must recognize that business has one role and the state, as the agent of the national society as a whole, has a different role. Business seeks profit; the state seeks the integrated welfare of society as a whole. Governments are expected to work for the public, especially for the weakest. We all recognize the necessity of the market and of companies, but we also need the countervailing power of the state. We need a dialogue in one way or another. The question is when and how to have a suitable dialogue.
- Thanks to all the speakers for inputs (also from Oxford conference). Something is happening now in the field of business and human rights, and we are all partners in it.