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## **Mandate of the Special Rapporteur on the right to food**

### **Regulating Transnational Corporations: A Duty under International Human Rights Law**

#### **Contribution of the Special Rapporteur on the right to food, Mr. Olivier De Schutter, to the workshop “Human Rights and Transnational Corporations: Paving the way for a legally binding instrument” convened by Ecuador, 11-12 March 2014, during the 25<sup>th</sup> session of the Human Rights Council**

## **1. Introduction**

On 13 September 2013, during the 24th regular session of the UN Human Rights Council, Ecuador called upon the Council to recognize “the necessity of moving forward towards a legally binding framework to regulate the work of transnational corporations and to provide appropriate protection, justice and remedy to the victims of human rights abuses directly resulting from or related to the activities of some transnational corporations and other businesses enterprises”. It was speaking on behalf of the African Group, the Arab Group, Pakistan, Sri Lanka, Kyrgyzstan, Cuba, Nicaragua, Bolivia, Venezuela, Peru and Ecuador. A large number of non-governmental organizations subsequently supported the suggestion to move towards negotiating a legally binding instrument on human rights and transnational corporations within the framework of the United Nations.

The Special Rapporteur on the right to food welcomes this opportunity to provide suggestions for the debate that is being launched. He offers the following comments for consideration.

## **2. The status of the Guiding Principles on Business and Human Rights**

The Guiding Principles on Business and Human Rights, endorsed by Human Rights Council resolution 17/6 on 16 June 2011, are now seen as the most authoritative statement of the human rights duties or responsibilities of States and corporations adopted at UN level. These Guiding Principles go beyond the plethora of voluntary initiatives, often sector-specific, that existed hitherto. They have been widely endorsed, by business organizations and in intergovernmental settings. For instance:

- When it revised its Guidelines on Multinational Enterprises in 2011, the Organization for Economic Cooperation and Development (OECD) included a chapter IV on human rights, that is based on the ‘Protect, Respect and Remedy’ framework: this enables the National Contact Points (NCPs) that the OECD member States must establish to promote the Guidelines and to address ‘specific instances’ to be much more explicit as regards their expectation that companies will comply with human rights;
- Within the European Union, the European Commission developed specific guidance for various sectors of the industry as well as for small- and medium-sized business enterprises reflecting the key components of the Guiding Principles;
- When the International Finance Corporation revised its Sustainability Framework, including both Sustainability Principles and Performance Standards, references to human rights were included, reflecting core concepts of the GPs such as the responsibility of IFC clients to respect human rights and to exercise due diligence in order to ensure that they do not negatively affect human rights;

- ISO26000, the social responsibility tool developed by the International Organization for Standardization, the world's largest and most influential standard-setter for the private sector, now includes a human rights chapter (6.3.) closely tracking the GPs.

In order to encourage the further implementation of the Guiding Principles on Business and Human Rights, the Working Group on the issue of human rights and transnational corporations and other business enterprises and the United Nations Forum on Business and Human Rights could deepen their monitoring of such efforts, and ensure that these initial steps be further built upon.

It is, however, important to note that the Guiding Principles on Business and Human Rights are not a legal instrument which imposes new obligations to guarantee that States shall effectively protect human rights by adequately regulating corporations; that corporations shall effectively respect human rights, including by acting with due diligence to avoid infringing on human rights and to address adverse impacts with which they are involved; and that victims of violations of human rights shall have access to effective remedies.

Indeed, the Guiding Principles were not conceived as a new international instrument, providing avenues for redress for victims and imposing new obligations on States. Rather, they were intended to provide a conceptual framework restating existing obligations, under the umbrella of which a wide range of hitherto disparate and incoherent initiatives could be organized.

The call for a stronger, legally binding framework was at the heart of the statement delivered by Ecuador to the Human Rights Council last year. It is based on the concern that, if international human rights are insufficiently robust to protect victims from human rights violations by corporations, the Guiding Principles on Business are inadequate to fill this protection gap.

### **3. The state of international human rights law**

The need for a new international instrument should be assessed, therefore, not in comparison to what was achieved by the Guiding Principles, which in any case did not have the intention of moving international law forward by imposing new obligations on States or on private actors, but in comparison to the existing tools already provided by international human rights law. In other terms, the question is not whether the Guiding Principles provide sufficient guarantees that victims of human rights violations by transnational corporations and other business enterprises shall have access to effective remedies: it is clear that they do not. The question, rather, is whether existing mechanisms under international human rights law do provide such guarantees, or whether there remain gaps that a new instrument should fill.

The Special Rapporteur on the right to food notes in this regard that, at the present stage of its development, international human rights law already impose the following obligations on States:

#### ***3.1. A general duty of States to protect human rights***

All States are under a duty to regulate the conduct of private groups or individuals, including legal persons, in order to ensure that such conduct shall not result in violating the human rights of others, and to provide an effective remedy to victims of human rights violations.<sup>1</sup> Both the duty to protect human rights by controlling private actors and the duty to ensure access to effective remedies for human rights violations apply in transnational situations. Indeed, the Guiding Principles on Business and Human Rights recall in this regard that “States should take appropriate steps to ensure the effectiveness of domestic judicial mechanisms when addressing business-related human rights abuses, including considering ways to reduce legal, practical and other relevant barriers that could lead to a

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<sup>1</sup> Olivier De Schutter, *International Human Rights Law. Cases, Materials and Commentary*, Cambridge University Press, 2010, chap. 4.

denial of access to remedy,” noting that such legal barriers can include “where claimants face a denial of justice in a host State and cannot access home State courts regardless of the merits of the claim”.<sup>2</sup>

Human rights courts and expert bodies established under widely ratified human rights treaties have repeatedly affirmed the duty of States to protect human rights by controlling non-State actors. Under the International Covenant on Civil and Political Rights, the Human Rights Committee takes the view that “the positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities”.<sup>3</sup> This is also the position adopted by the Committee on Economic, Social and Cultural Rights under the International Covenant on Economic, Social and Cultural Rights.<sup>4</sup> Regional human rights courts or expert bodies under regional human rights instruments have routinely affirmed that the responsibility of the State may be engaged as a result of its failure to appropriately regulate the conduct on private persons.<sup>5</sup>

### ***3.2. A duty to protect that extends to situations occurring outside the State's national territory***

The duty of the State to protect human rights extends to situations that occur outside its national territory. The recognition of so-called extraterritorial human rights obligations of States can be seen as an extension of the prohibition that international law imposes on the State to allow the use of its

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<sup>2</sup> Guiding Principles on Business and Human Rights, A/HRC/17/31 (Principles 2 and 3 to 10 (operationalizing the duty of States to protect human rights) and Principle 26)).

<sup>3</sup> Human Rights Committee, *General Comment No. 31, Nature of the General Legal Obligation Imposed on States Parties to the Covenant* (CCPR/C/21/Rev.1/Add.13), 26 May 2004, para. 8.

<sup>4</sup> Committee on Economic, Social and Cultural Rights, *General Comment No. 12 (1999): The right to adequate food (Art. 11)*, UN doc. E/C.12/1999/5, para. 15 ('The obligation to *protect* requires measures by the State to ensure that enterprises or individuals do not deprive individuals of their access to adequate food').

<sup>5</sup> See under the European Convention on Human Rights, European Court of Human Rights (plenary), *Young, James and Webster v. the United Kingdom* judgment of 13 August 1981, Series A, No. 44, para. 49, or European Court of Human Rights, *X and Y v. the Netherlands*, judgment of 26 March 1985, Series A, No. 91, para. 27 ; under the European Social Charter of the Council of Europe, European Committee of Social Rights, collective complaint n° 30/2005, *Marangopoulos Foundation for Human Rights (MFHR) v Greece*, decision on admissibility of 30 October 2005, para. 14 ('the state is responsible for enforcing the rights embodied in the Charter within its jurisdiction. The Committee is therefore competent to consider the complainant's allegations of violations, even if the State has not acted as an operator but has simply failed to put an end to the alleged violations in its capacity as regulator'); under the American Convention on Human Rights, see Inter-American Court of Human Rights, Case of *Velásquez-Rodríguez v. Honduras* (Merits), Judgment of 29 July 1988, Series C No. 4, para. 172 ('An illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention'); under the African Charter of Human and Peoples' Rights, see African Commission on Human and Peoples' Rights, application 74/92, *Commission Nationale des Droits de l'Homme et des Libertés v Chad*, 9th Annual Activity Report of the ACHPR (1995-96); 4 IHRR 94 (1997) ('The Charter specifies in Article 1 that the states parties shall not only recognise the rights, duties and freedoms adopted by the Charter, but they should also “undertake . . . measures to give effect to them”.' In other words, if a state neglects to ensure the rights in the African Charter, this may constitute a violation, even if the State or its agents are not the immediate cause of the violation'), or African Commission on Human and Peoples' Rights, application 55/96, *SERAC and CESR v Nigeria*, 15th Annual Activity Report of the ACHPR (2002), para. 46 ('the State is obliged to protect right-holders against other subjects by legislation and provision of effective remedies. This obligation requires the State to take measures to protect beneficiaries of the protected rights against political, economic and social interferences. Protection generally entails the creation and maintenance of an atmosphere or framework by an effective interplay of laws and regulations so that individuals will be able to freely realise their rights and freedoms').

territory to cause damage on the territory of another State.<sup>6</sup> The International Court of Justice referred to the principle in the advisory opinions it adopted on the issue of the *Legality of the Threat or Use of Nuclear Weapons* and, in contentious proceedings, in the *Gabčíkovo-Nagymaros Project* case opposing Hungary to Slovakia. In these cases, the Court affirmed that “the existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment”.<sup>7</sup> The principle was again referred to by the Court in its judgment of 20 April 2010 delivered in the *Pulp Mills* case opposing Argentina to Uruguay.<sup>8</sup> Expert opinion has derived from these statements that the State “is under the duty to control the activities of private persons within its State territory and the duty is no less applicable where the harm is caused to persons or other legal interests within the territory of another State”.<sup>9</sup>

The obligation of a State to control the conduct of non-State actors where such conduct might lead to human rights violations outside its territory has been explicitly affirmed by various United Nations human rights treaty bodies. The Committee on Economic, Social and Cultural Rights in particular affirms that States parties should “prevent third parties from violating the right [protected under the International Covenant on Economic, Social and Cultural Rights] in other countries, if they are able to influence these third parties by way of legal or political means, in accordance with the Charter of the United Nations and applicable international law”.<sup>10</sup> Specifically in regard to corporations, the Committee on Economic, Social and Cultural Rights has further stated that “States Parties should also take steps to prevent human rights contraventions abroad by corporations that have their main seat under their jurisdiction, without infringing the sovereignty or diminishing the obligations of host states under the Covenant”.<sup>11</sup> Similarly, the Committee on the Elimination of Racial Discrimination has called upon States to regulate the extraterritorial actions of third parties registered in their territory. For example, in 2007, it called upon Canada to “...take appropriate legislative or administrative measures to prevent acts of transnational corporations registered in Canada which negatively impact on the enjoyment of rights of indigenous peoples in territories outside Canada”, recommending in particular that the State party “explore ways to hold transnational corporations registered in Canada accountable”.<sup>12</sup> Under the International Covenant on Civil and Political Rights (CCPR), the Human Rights Committee noted in 2012 in a concluding observation relating to Germany:

“The State party is encouraged to set out clearly the expectation that all business enterprises domiciled in its territory and/or its jurisdiction respect human rights standards in accordance with the Covenant throughout their operations. It is also encourages to take appropriate

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<sup>6</sup> *Trail Smelter Case (United States v. Canada)*, 3 R.I.A.A. 1905 (1941).

<sup>7</sup> *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, pp. 241-242, para. 29; *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 78.

<sup>8</sup> Case concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, I.C.J. Reports 2010, par. 193.

<sup>9</sup> I. Brownlie, *System of the Law of Nations. State responsibility*, Clarendon Press, Oxford, 1983, p. 165. See also N. Jägers, *Corporate Human Rights Obligations: in Search of Accountability*, Intersentia, Antwerpen-Oxford-New York, 2002, p. 172 (deriving from ‘the general principle formulated in the *Corfu Channel* case – that a State has the obligation not knowingly to allow its territory to be used for acts contrary to the rights of other States – that home State responsibility can arise where the home State has not exercised due diligence in controlling parent companies that are effectively under its control’).

<sup>10</sup> See, eg, Committee on Economic, Social and Cultural Rights, General Comment No. 14 (2000), The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights), U.N. Doc. E/C.12/2000/4 (2000), para. 39; or Committee on Economic, Social and Cultural Rights, General Comment No. 15 (2002), The right to water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights), U.N. Doc. E/C.12/2002/11 (26 November 2002), para. 31.

<sup>11</sup> Committee on Economic, Social and Cultural Rights, ‘Statement on the obligations of States Parties regarding the corporate sector and economic, social and cultural rights’, UN Doc. E/C.12/2011/1 (20 May 2011), para. 5.

<sup>12</sup> CERD/C/CAN/CO/18, paragraph 17 (Concluding Observations / Comments, 25 May 2007).

measures to strengthen the remedies provided to protect people who have been victims of activities of such business enterprises operating abroad.”<sup>13</sup>

Thus, we have witnessed in recent years a gradual strengthening of the extraterritorial duties of States in the area of human rights, including their duties to regulate the activities of corporations whose conduct they can influence. The endorsement by a range of experts and organizations of the Maastricht Principles on the extraterritorial obligations of States in the area of economic, social and cultural rights is another example of this development.<sup>14</sup> Indeed, this is an area in which the Guiding Principles fall behind the current state of international law. They provide that “States should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations” (Principle 2). Though this includes operations abroad, the Commentary to the Guiding Principles qualifies this principle by stating:

“At present States are not generally required under international human rights law to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction. Nor are they generally prohibited from doing so, provided there is a recognized jurisdictional basis. Within these parameters some human rights treaty bodies recommend that home States take steps to prevent abuse abroad by business enterprises within their jurisdiction.

There are strong policy reasons for home States to set out clearly the expectation that businesses respect human rights abroad, especially where the State itself is involved in or support”

These formulations have now been overtaken by the evolving nature of international human rights law in these areas, as reflected in the interpretations provided by the United Nations human rights treaty bodies.

### ***3.3. A duty to cooperate in transnational situations that lead to violations of human rights***

It is also increasingly acknowledged that, in transnational situations, States should cooperate in order to ensure that any victim of human rights violations caused by the activities of non-State actors has access to an effective remedy, preferably of a judicial nature, in order to seek redress. In transnational situations, where a company domiciled in one State causes violations in another State, there is an increasing recognition of the duty of the home State to cooperate with the host State to ensure that victims have access to effective remedies.

Extraterritorial obligations of international cooperation are contained in several human rights treaties. For example, States parties to the Convention on the Rights of Persons with Disabilities, among the most recent of the core human rights treaties, “recognize the importance of international cooperation and its promotion, in support of national efforts for the realization of the purpose and objectives of the present Convention” and commit to “undertake appropriate and effective measures in this regard...” (article 32). The Convention also lists illustrative measures to fulfil this commitment.<sup>15</sup> A duty to cooperate for the full realization of human is also included in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which requires States parties to provide each other “... the greatest measure of assistance in connection with criminal proceedings ...” relating to torture including “... the supply of all evidence at their disposal necessary for the proceedings”.<sup>16</sup> A

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<sup>13</sup> CCPR/C/DEU/CO/6, para 16.

<sup>14</sup> The text of the Maastricht Principles is reproduced with a commentary in the *Human Rights Quarterly*, vol. 34 (2012), pp. 1084-1171 (commentary authored by Olivier De Schutter, Asbjorn Eide, Ashfaq Khalfan, Marcos Orellana, Margot Salomon and Ian Seiderman). See also Malcolm Langford, Wouter Vandehole, Martin Scheinin and Willem van Genugten (eds), *Global Justice, State Duties. The extraterritorial scope of economic, social and cultural rights in international law*, Cambridge Univ. Press, 2013 (as regards the duty of the State to regulate corporations, see in particularly the chapter by Smita Narula).

<sup>15</sup> Article 32.

<sup>16</sup> Art. 9 (1).

comparable commitment is contained in the International Convention for the Protection of all Persons from Enforced Disappearance.<sup>17</sup> The first two Optional Protocols to the Convention on the Rights of the Child oblige States to cooperate to prevent and punish the sale of children, child prostitution, child pornography and the involvement of children in armed conflict. The two Protocols require States to assist victims and, if they are in a position to do so, to provide financial and technical assistance for these purposes.<sup>18</sup>

The above-mentioned Maastricht Principles on the Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights provide in this regard that “All States must cooperate to ensure that non-State actors do not impair the enjoyment of the economic, social and cultural rights of any persons. This obligation includes measures to prevent human rights abuses by non-State actors, to hold them to account for any such abuses, and to ensure an effective remedy for those affected” (Principle 27). Though the Maastricht Principles are focused on economic, social and cultural rights, this restatement of the duties of States can be extended to all human rights. The implication is that, in transnational situations, States should cooperate in order to ensure that any victim of the activities of non-State actors that result in a violation of economic, social or cultural rights, has access to an effective remedy, preferably of a judicial nature, in order to seek redress.

#### **4. The need for a new international instrument**

As the developments above indicate, international human rights law has already gone a long way towards recognizing duties of States (i) to regulate the activities of corporations in order to ensure that such activities will not lead to human rights violations; (ii) to extend such duties to so-called extraterritorial situations, where the damage occurs on the territory of another State; and (iii) to impose on all States that they cooperate with one another in transnational situations to bring an end to, or to provide effective remedies to the victims of, any such violations.

It is against this background that the need for a new international instrument should be assessed. The negotiation of such an instrument is one among many alternative ways through which the fight against impunity for human rights violations could be further strengthened. Among such alternatives, the following in particular may deserve attention, alone or in combination:

- A request by the Human Rights Council for further clarification as to the scope of States’ obligations to protect human rights by regulating the extraterritorial activities of corporations over which they can exercise jurisdiction or by influencing such extraterritorial activities through other, non-regulatory means;
- An identification of best practices regarding the cooperation between States to ensure access to remedies for victims of human rights violations in which transnational corporations have either been directly involved or complicit (for instance through the sharing of information, the freezing or confiscation of assets for the execution of judicial decisions finding such corporations liable, or other such forms of cooperation);
- The adoption of a resolution by the Human Rights Council drawing the attention of States to the Maastricht Principles on the Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights.

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<sup>17</sup> Article 15 provides that “States Parties shall cooperate with each other and shall afford one another the greatest measure of mutual assistance with a view to assisting victims of enforced disappearance, and in searching for, locating and releasing disappeared persons and, in the event of death, in exhuming and identifying them and returning their remains.”

<sup>18</sup> Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, Art. 10. Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, Art. 7.

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*Olivier De Schutter was appointed the UN Special Rapporteur on the right to food in March 2008 by the United Nations Human Rights Council. He is independent from any government or organization, and he reports to the Human Rights Council and to the General Assembly. All reports are available on <http://www.ohchr.org/EN/Issues/Food/Pages/FoodIndex.aspx>. See [www.srfood.org](http://www.srfood.org) for a thematic classification of all reports and statements of the Special Rapporteur. The Special Rapporteur can be contacted at [srfood@ohchr.org](mailto:srfood@ohchr.org)*