

Regulating corporations to ensure the right to food: Towards the end of *business as usual*?



Louise Pigeolet¹

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Pour que la Terre tourne plus JUSTE !

¹ Volunteer at Entraide et Fraternité.

The right to food is a fundamental right that is often jeopardized by the activities of large multinational corporations specializing in agribusiness and the extraction of mineral and forest resources around the world. People who are deprived, as a result of land grabs, of this right and of the income their lands generate are most often left defenceless in the face of these giants. Apart from seeing their right to food confiscated by a foreign multinational, these people may also suffer from the lack of access to remedy enabling them to obtain compensation for the harm they have endured. Several factors help to explain this state of affairs, some of which are rooted in the deficiencies of current international law. The binding treaty that is now being drafted by the United Nations would be a way to overcome some of those deficiencies and give people the means necessary to fight back in this David and Goliath scenario.

Introduction

In 1999, the UN's [Committee on Economic, Social and Cultural Rights](#) recalled that the right to food is of crucial importance, is inseparably linked to human dignity and is indispensable for the fulfilment of all other human rights enshrined in the Universal Declaration of Human Rights of 1948. It therefore follows that States have an obligation to take the necessary measures to ensure that companies and individuals do not deprive anyone of access to adequate food.

At the same time, the member states of the United Nations agreed on 17 Sustainable Development Goals (SDGs), the second of which aims to achieve “zero hunger”. While companies are increasingly considered privileged partners in development efforts, especially in relation to this particular goal (see sidebar), it often happens that their activities also lead to human rights violations, including the right to food.

The Strategic Note “Agriculture and Food Security” (2017) of the Belgian Development Cooperation: A major role for the private sector

In 2017, the Belgian Directorate General for Development Cooperation issued a new strategic note on agriculture and food security expressing a desire to encourage work with the private sector.

The note, entitled *De l'agriculture de subsistance à l'entreprenariat agricole* (From Subsistence Farming to Agribusiness), seeks to overcome farmers' poverty by including them in *value chains and local, regional and international markets*. That means focussing primarily on farm holdings that have commercial potential and are able to attract private investment. This vision overlooks the farming communities located in far-flung areas whose profitability is deemed insufficient or those that do not have access to resources such as land, a large share of whom suffer from hunger.

By backing that vision, the Belgian government gives priority to economic revenue over fundamental human rights, such as access to food and resources.²

² See the policy note from the Coalition contre la faim, *Le rôle du secteur privé dans la coopération au développement dans le secteur de l'agriculture, la sécurité alimentaire et nutritionnelle* (The role of the private sector in development cooperation in agriculture, food and nutritional security), November 2018; and the analysis from Entraide et Fraternité by Carmelina Carracillo, *Pour lutter contre la faim, la Coopération belge mise sur le « secteur privé » : Lequel ?* (To combat hunger, Belgian Development Cooperation is focussing on the private sector: but which one?), October 2017.

One [example](#) we could mention involves a Belgian investment firm in the agricultural sector, the SIAT company (*Société d'Investissement pour l'Agriculture Tropicale*) that is active in agribusiness on three continents. The Côte d'Ivoire government granted it a concession of 11,000 hectares to operate a palm oil monoculture farm, to the detriment of the people in the villages of Famienkro, Koffessou-Groumania and Timbo who live on the land and derive their livelihood from it. These farmers who made a living from working the land suddenly saw their income and access to food be conditioned to performing hard work for a foreign company that came and set up on their territory without consulting anybody, and without the local population giving their consent or any compensation provided for their loss.

Belgium, greedy for foreign land

The example of SIAT, a multinational company investing abroad in a subsidiary in order to exploit farmlands, is not unique. A [study](#) conducted in 2017 for the European Parliament shows that 7 different Belgian companies own or control 251,808 ha of land in 7 different foreign countries.

Belgium is in fourth place behind the United Kingdom, France and Italy for the number of land tenure agreements it has signed.

In all, there are no fewer than 182 European companies exploiting land located abroad, the great majority for the purpose of developing agribusiness.

This case is one among others (see sidebar) and demonstrates that the right to food, while recognized internationally, is an illusion for the numerous victims of land grabs by large companies³. What needs to be done to make the right to food, and all human rights, more effective in a world where “globalization” goes hand in hand with “deterritorialization” – a separation of cultures from their territories? How can we better control the behaviour of powerful economic players, i.e. transnational companies that are able to cross national borders, such as SIAT, which is active in 3 African countries through 5 subsidiaries?

The first proposed text for the UN treaty on corporations and human rights

Since 2014, negotiations have been taking place in the United Nations to draw up a legally binding instrument for transnational corporations and human rights. It is the continuation of an approach that began several years ago which has seen the emergence of the following documents: in 2010 the World Bank code of conduct that set out the “Principles for Responsible Agricultural Investment that Respects Rights, Livelihoods and Resources”; in [2011](#) the Guiding Principles on Business and Human Rights; in [2012](#) the Voluntary Guidelines for Responsible Governance of Land Tenure systems; and in [2014](#) the Principles for Responsible Investment in Agriculture and Food Systems.⁴ **These principles and guidelines are commendable for**

³ While cases of land grabs are the most cited phenomena relating to the infringement by companies of the right to food, the aspects of access to water, seeds and a healthy environment are also essential parts of this right that are all too often threatened by agribusiness giants. This analysis will focus on the example of land grabs.

⁴ For further details, see the analysis from Entraide et Fraternité by Carline Martinez and Maxime Caudron, *Droit international : légitimation des accaparements de terre* (International Law: Legitimizing land grabs), December

seeking to uphold the right to food but they still depend on the good will of States and companies. The matter of redress for victims is scarcely dealt with. The adoption of a *binding* treaty, which gives priority to access to justice, would consequently be a complementary step towards greater justice. This treaty, which would aim to apply to all human rights recognized by international and national law, could be the means that human rights defenders and the victims themselves sorely need to claim and assert their rights and to defend their food sovereignty.

From 15 to 19 October 2018, the 4th session of the Open-ended intergovernmental working group was held⁵. The working group was charged with drafting this instrument whose overall aim is to strengthen human rights through regulation that is more precise and stricter towards the activities of companies that operate across borders, as in the case of SIAT. Very recently, a [zero draft](#) of the treaty in progress was published. This groundwork is promising from several standpoints:

1. The proposed text calls for a very broad scope of application that could target **any company that is active transnationally**. One of the main reasons this treaty is needed is to combat the impunity that certain companies enjoy because of their transnational nature.

2. The treaty would require States to impose an obligation of **due diligence** on transnational corporations under their jurisdiction, as France did in March 2017 by passing a [law](#) to that effect (see sidebar).

3. We have seen a willingness to take advantage of globalization by offering victims of fundamental rights violations a **choice of the State in which they wish to act**, i.e. either the country of origin of the company or the country in which the company conducts the activities that caused the harm. The choice of jurisdiction would therefore no longer be a privilege reserved for powerful companies but would also be granted to individuals harmed by their activities. This last point is fundamental because it reinforces access to remedy for the victims of multinational companies.

What is due diligence?

The zero draft talks about requiring transnationals to fulfil *due diligence obligations*. This term refers to the French notion of *devoir de vigilance* that is defined by the European Coalition for Corporate Justice (ECCJ) as *an obligatory standard of behaviour giving rise to civil liability*.¹ The binding treaty would go even further than the mere exercise of reasonable diligence, which is considered a desirable goal, by *imposing* a due diligence obligation that has legal force and is enforceable.

¹ Claudia Saller, “*Obligation de diligence raisonnable en matière de droits humains en Europe : survol juridique et politique*”, (A reasonable diligence obligation in human rights in Europe: a legal and policy overview), ECCJ.

2018, available in French on: <https://www.entraide.be/le-droit-international-legitimation-des-accaparements-de-terres>

⁵ For the opinion of Entraide et Fraternité on this session, see the report by H el ene Capocci, *Trait e Entreprises et droits humains : l’appel de la soci et e civile ne peut rester sans r eponse de la part de l’Europe* (The treaty on corporations and human rights: Europe must answer the call from civil society), October 2018, available in French on: <https://www.entraide.be/l-appel-de-la-societe-civile-ne-peut-rester-sans-reponse-de-la-part-de-l-europe>

The current state of international law towards companies

Of course, there is already a plethora of instruments and measures that seek to regulate the activities of companies, but they are not sufficient. In this sense, Professor Olivier De Schutter, former UN Special Rapporteur on the right to food, regrets that there is a **lack of clarity** concerning the scope of the obligations imposed on States in the aforementioned 2011 [Guiding Principles](#). It is difficult to know to what extent States are bound by **extraterritorial obligations**⁶, in other words, obligations that would extend beyond their state borders and that would encompass specifically *extraterritorial* or *transnational* situations. For example, the principles do not clarify how Belgium should ensure the respect of fundamental rights, including the right to food, of the inhabitants of Côte d'Ivoire who have been affected by the agribusiness activities of the Belgian company SIAT, or how the victims can receive compensation if abuses have been committed.

Gaps in the law: the duties of transnational corporations

Today, multinational corporations are not subject to any direct international obligations. Naturally, they are free to comply on a voluntary basis with codes of conduct and/or may be bound by national legal obligations, but **in international law there is no legally binding obligation for them to respect human rights**. At the end of the day, the accountability of multinational corporations is reflected more in terms of bad reputation or economic impacts than in terms of concrete legal sanctions. As the law stands today, **in the field of legal obligations, multinational corporations are bound only by the national law that applies to them**. However, these companies are also bound by moral, ethical and political commitments arising from the principle of corporate social responsibility (CSR), which entails a company voluntarily including social and environmental concerns in its policies. But that also falls short because all too often it depends on the good will of the companies, and because such accountability rests on relatively vague commitments that cannot be verified except through a system of reporting that is most often prepared by the company itself.

It is therefore apparent that there are persistent **gaps in the accountability of multinational corporations**, which may have negative impacts on individual victims of human rights violations committed by these companies.

Imbalances in the law: the rights of transnational corporations in investment treaties and free trade agreements

States, in their international relations, are signing more and more free trade agreements and bilateral investment treaties (BITs). Most, if not all, of these agreements, tend to contain extremely favourable clauses for private investors, such as multinational corporations. The most noteworthy are those that seek to stimulate foreign investment, or rather to guarantee the profits of companies,⁷ and that contain rules relating to **direct or indirect expropriation**, which may

⁶ Speech delivered at the conference of the United Nations Association on 3 October 2018, in Brussels (via video from Geneva).

⁷ Robert Joumard, *Traités de libre-échange : citoyens bafoués, multinationales souveraines* (Free trade treaties: abused citizens, sovereign multinationals), 2016.

be defined by a range of indices that ultimately involve a strict limitation of the host state's regulatory powers. A national measure that *would impact the economic value of an investment*, or that would *impact the reasonably defined expectations underlying the investment*, may be considered to lead to an expropriation that runs counter to the trade and investment treaty. We also find in these agreements so-called **fair and equitable treatment** clauses through which an investor company has the right to demand compensation based on the simple fact that it did not take part in a project that it believes it was capable of managing and, as a result, the company did not generate the profits it expected.

In addition, a transnational corporation has the right to summon a State before an investment arbitral tribunal⁸ if the subsidiary or branch that the corporation set up in the foreign host country equates to an investment, which is the case for most agriculture projects.⁹ The company can do this on the basis of a claim of *indirect expropriation* that the company argues it suffered if the host state where the investment took place adopts measures that harm the company or if the company claims that the State failed in its obligation to provide *fair and equitable treatment*, thereby causing harm to the *legitimate expectations of the investors*.¹⁰ **Transnational corporations therefore enjoy significant rights through investment treaties which they can use to safeguard their interests, to the detriment of local communities.**

With that in mind, the binding treaty on businesses and human rights seeks to restore priority to human rights by setting out a hierarchy that places such rights above those of investors. This aspect of the treaty is essential to ensuring that the actions taken by investors do not hinder the fulfilment of human rights.¹¹

Access to remedy for people affected: a prerequisite for the fulfilment of human rights

The right to effective remedy is essential in international human rights law because it gives concrete expression to all other rights by offering the opportunity to individuals to seek compensation in cases of infringement. In the absence of any possibility of effective remedy, the people in the villages of Famienkro, Koffessou-Groumania and Timbo have very little chance of ever obtaining compensation for the loss of their lands. Many problems can hamper access to effective redress for the victims; firstly, the multiplicity of judges who may be brought into play and the fact that the judges can send the case back and forth between them; secondly, the question of which law applies to transnational corporations; and, thirdly, the use by these corporations of arbitration clauses in investment and trade treaties. Let us examine how the

⁸ Provided that the country is tied to the company's country of origin by a treaty containing a clause protecting private investors and an arbitration clause indicating the jurisdiction of an arbitral tribunal in case of a dispute.

⁹ CCSI – IIED – IISD: Agricultural Investments under IIL

¹⁰ In an [informative note](#) in 2018, the Columbia Center on Sustainable Development summarizes in a clear fashion the link between international law on investments and agriculture and warns against the dangers that the former poses to the latter.

¹¹ A review of the investor-state dispute settlement system is also crucial to ensure respect for human rights.

binding UN treaty on businesses and human rights would help to remove these three obstacles that constitute major and persistent gaps in today's international law.

The problem of the competent court: the judges pass the buck

Under the specific heading of human rights violations by transnational corporations, the issue of access to remedy is being raised with increasing persistence. Because they act internationally, they have a greater chance of evading any action taken against them if the court involved refuses to adjudicate. In other words, **because of the multiplicity of states where these transnational corporations are active, there are many jurisdictions where legal action can be taken.** It may happen that several different national judges who have jurisdiction to handle the case will all recuse themselves, claiming that another judge is better suited to deal with the case. By constantly passing the buck, the judges in fact leave the victims defenceless and without recourse against the corporation that violated their rights.

By establishing the right for individuals who have been harmed by the activities of a transnational corporation to take legal action either in the state where the harmful activities took place, or in the courts of the state where the corporation has its registered office, central administration, substantial business interests, subsidiary, branch or other similar facility, the **treaty promotes access to a forum for redress.** In fact, the treaty offers a considerable choice between various alternatives by affirming the jurisdiction of several courts based on the various connecting links with the defendant company or the place where the harm occurred.

The example of *forum non conveniens*

The problem of jurisdictional conflicts is paramount in the *forum non conveniens* mechanism. Mainly applied in common law countries, such as Canada or the United States, it allows a court to refuse to handle a petition submitted to it on the pretext that it is not the appropriate court. The application of *forum non conveniens* is a major obstacle for victims of human rights violations seeking to act in a court of law before a judge in the transnational corporation's state of origin when the alleged violations occurred in another state. It is sufficient for national court to claim that the case brought before it does not have sufficient links or connections with the state on whose behalf it renders justice, to deprive the victims of an effective remedy. The *forum non conveniens* mechanism is a dangerous tool in the hands of such giants as transnational corporations that do not balk at using it as a means to avoid being judged in their country of origin, especially when it respects human rights in a "less lenient" fashion than the host state where the abuse took place. Today, the Member States of the European Union are no longer allowed to invoke *forum non conveniens*.

The problem of the legal status of transnational corporations

In order to obtain justice, the victims of harm perpetrated by a transnational corporation in a state must base their action on what is generally called a **cause of action, i.e. a legal basis on**

which to build their claim. When a party seeks compensation for harm suffered, the basis is most often the violation of a standard of conduct that caused the harm. **The transnational nature of certain corporations makes it very difficult to identify the reference standard.** How can one decide to which law a company is bound if its headquarters are in Belgium but it acts through its subsidiaries or branches in Côte d'Ivoire, Ghana, Gabon, Nigeria and Cambodia, as in the case of SIAT?

In spite of the international nature of their activities, multinationals are still subject to national law, i.e. the law of the state where the company has established its legal personality (its country of origin) and the law of the state in which it conducts its activities (the host country). In any event, the State, as the primary holder of the obligation to protect and promote human rights, remains the indispensable mediator in the implementation of the right to food, among other rights. It is up to the State to impose obligations on companies in order to protect human rights, to make sure they are respected and to provide compensation to victims of any violations.

Today, a multinational corporation cannot, in principle, be held directly and legally liable at international level for having violated the right to food of a community, a village or an individual. While some multinational corporations are more powerful than even some countries, at least financially speaking,¹² these companies do not have a status that carries obligations similar to those of a state in international law. In that respect, the following two remarks are worthy of note.

1. When the zero draft was prepared, States decided to withdraw any reference to direct obligations on transnational corporations. They preferred instead to continue stressing the primary role of States in the fight against impunity and their duty to impose obligations on transnational companies under their jurisdiction. The lack of any direct obligation on transnational corporations may be regarded as regrettable because it reduces the added value of the treaty, but it also reflects a measure of caution. Nevertheless, a large segment of civil society is calling for the re-establishment of direct obligations on companies.

2. The introduction of direct obligations on non-state entities such as transnational corporations is nothing new. Olivier De Schutter¹³ highlighted in his comments relating to the 2011 Guiding Principles that “[I]The responsibility to respect human rights is a general standard of conduct that we expect of all companies wherever they operate. That responsibility exists independently of the capacity and/or the determination of states to fulfil their own human

¹² According to a [report by Global Justice Now](https://www.journaldunet.com/economie/magazine/1159250-classement-entreprises/), 157 of the world's 200 most powerful economic entities are corporations and not countries. Walmart, a US mass retail multinational company, was in first place in 2017 on a list of 500 companies and recorded turnover of 485.873 billion dollars in 2016 (<https://www.journaldunet.com/economie/magazine/1159250-classement-entreprises/>). At the same time, the United States was at the top of the list of countries, with a GDP of 19,000.377 billion dollars in 2017 (<https://www.cgpiigroup.fr/blog/classement-pib-les-pays-les-plus-riches-du-monde.html>) and Belgium's GDP was 492.7 billion dollars. A corporation, Walmart, therefore recorded an annual turnover nearly equivalent to the GDP of Belgium.

¹³ O. De Schutter, "The elements for the draft legally binding instrument on transnational corporations and other business enterprises with respect to human rights", A Comment, 2017.

rights obligations without any restrictions.” The Guidelines of the OECD also allude to “internationally-recognized human rights” with reference to multinational companies in order to designate the legal framework in which these companies are encouraged to act. The only novelty introduced by the UN treaty is the binding nature of these rules.

Companies’ right to take legal action against states

It is ironic that companies which are under no direct and binding obligations flowing from international law nevertheless hold significant rights under trade and investment agreements, as described above. Accordingly, the Columbia Center on Sustainable Development pointed out that “These obligations can restrict the host state’s ability to regulate investment in agriculture by effectively precluding the adoption of new laws or regulations and judicial or administrative decisions.”

As mentioned above, transnational corporations benefit from a specific mechanism that enables them to take action against a state which has adopted measures that may harm their investments. Often, such action begins with demands from the local population that harm investments, for example, a local population’s fight against the establishment of a subsidiary of a multinational corporation on lands that had previously been grabbed by the state. The dispute then disrupts the smooth running of the activity and causes a financial loss for the company. Legal action may also be taken against a host state that, in response to protests, adopts measures that are “harmful” to investors, for example a law to protect the land rights of individuals who are impeding the acquisition of land by agribusiness companies, or a court ruling recognizing certain rights of citizens to the detriment of the rights granted to such corporations in investment agreements. Consequently, the corporations can evade any judicial remedy taken against them by the aggrieved local community thanks to the prerogatives granted them by such treaties. **As a result, current international investment law is regarded by civil society as undermining international efforts to promote the responsible conduct of companies and respect for human rights.**

When a corporation takes action before an arbitral tribunal, it circumvents state jurisdictions and can even overturn a ruling that those state jurisdictions had previously handed down. This type of arbitration, called Investor-State Dispute Settlement (ISDS) and Investment Court System (ICS)¹⁴ is now included in many trade and investment treaties between the European Union and third parties. It constitutes a threat to human rights and the protection of the environment because it provides a parallel dispute settlement mechanism through which the investors can sidestep conventional state procedures for enforcing the law.

The treaty, by imposing respect for human rights in the event of a conflict with investors’ rights under trade or investment agreements, would reverse the balance of power by favouring the rights of the many over the rights of private interests.

¹⁴ See CNCD articles on the topics of Investor-State Dispute Settlement and the Investment Court System: <https://www.cncd.be/+tag-arbitrage-+>

Conclusion: the need for a binding international instrument for businesses and human rights

States have long recognized the importance of protecting, promoting and implementing fundamental human rights. Despite the countless existing instruments, these rights are constantly violated. Of course, there are transnational corporations that use their particular position, their power and their structural organization to support the development of human rights. But others, on the contrary, use their resources in a way that is harmful to the environment and to people. As shown in numerous [documented](#) examples, large companies working in agribusiness give preference to commercial return over the wellbeing of their workers or the local populations by disregarding their rights and claims.

In addition to the violations themselves, individuals who are affected by the disastrous consequences of transnational corporations also suffer from the fact that they are not at all sure they will be heard or that they will achieve justice because of the many hurdles hindering their access to effective redress. It is time to establish a legal instrument that defends the downtrodden in this David and Goliath situation.¹⁵ While respect for the right to food obviously does not depend solely on a better regulation of companies, such regulation is a prerequisite.

The adoption of a legally binding treaty, such as the one that has been outlined would, on the one hand, help to impose **obligations on transnational corporations relating to human rights**, and, on the other hand, provide a real opportunity to obtain **redress for the affected people** by giving them a choice of jurisdiction where they can take action. Such an instrument would also have the much needed and urgent merit of **establishing a connection between respect for human rights and the regime of trade and investment protection treaties** that serve the interests of the companies, with the aim of giving priority to human rights.

In all cases, such an instrument would have the advantage of being *hard law*, contrary to soft law. In other words, it would have the force to be more demanding in the area of companies and human rights, in particular the right to food. Furthermore, it would be **part of a series of national and European initiatives that have emerged in recent years to reinforce the protection of fundamental human rights and the environment in response to the abuses of large companies**, by imposing extraterritorial obligations on these companies. It would also reflect the growing awareness of risks arising from this type of company and is a dynamic that should be welcomed and encouraged. The process has already begun in **France** with the adoption of a law requiring due diligence on the part of large multinational companies. In **Switzerland** a Responsible Business Initiative is underway. In the **Netherlands**, draft legislation has been put forward concerning due diligence in the supply chain relating to child labour. In the **United Kingdom**, there is a Modern Slavery Act. Further afield, **California** has a law on transparency in the areas of slavery and trafficking. And in **Australia**, draft legislation has been prepared on modern slavery, inspired by the UK model. While the European Union

¹⁵ Joana Van Wynserberghe, *Droits humains et agrobusiness : David(s) contre Goliath(s) ?* (Human rights and agribusiness: David versus Goliath?), a study by Entraide et Fraternité, 2014, available in French on: <https://www.entraide.be/Droits-humains-et-agrobusiness>

initially showed the way forward with EU regulations on conflict minerals and illegally logged timber, it appears that the **European Union** is now reticent about adopting the treaty.

Along with more than 190 organizations around the world,¹⁶ Entraide et Fraternité is asking the European Union, as well as Belgium, to change their tune at the next working group session in 2019 and to take on a leadership role instead of standing on the sidelines of negotiations as it did at the last session.¹⁷ The aforementioned initiatives are partial and most focus only on specific sectors, such as minerals, timber, etc. and only concern physical abuse, such as torture and slavery, or only take aim at a very restrictive category of companies.¹⁸ That is why it is urgent that States and the European Union mobilize to harmonize the rules in this area at global level, in order to align their scope. Such harmonization would also be good for the companies and would ensure a level playing field so that all companies are on an equal footing vis-à-vis the rules applying to them in the context of competition and competitiveness.

With this binding treaty, transnational corporations could no longer manipulate the law so easily to serve their interests, and the victims would have a more solid legal basis to claim their rights. Entraide et Fraternité, in concert with other Belgian and international NGOs¹⁹ (including CIDSE network), defends this treaty in order to put an end to corporate impunity, to ensure respect for the right to food and to give precedence to human rights over economic interests.

¹⁶ See the [press release](#) from the Treaty Alliance, the Global Campaign to Reclaim Sovereignty, Dismantle Corporate Power and Stop Impunity, and trade unions putting forward recommendations for the 5th Session of the UN treaty negotiations in 2019.

¹⁷ See the analysis from Entraide et Fraternité by Hélène Capocci, *Entreprises et droits humains : l'appel de la société civile ne peut rester sans réponse de la part de l'Europe* (The corporations and human rights treaty: Europe must answer the call from civil society), October 2018.

¹⁸ To cite one example, the French law on due diligence by multinational companies only concerns companies located in France and employing a minimum of 5,000 employees in France or 10,000 outside of France; this currently involves some 150 companies.

¹⁹ More than 1,000 organizations around the world are members of the [Treaty Alliance](#).