

State Obligations in the Context of Unhealthy Diets: Paving the Way within the Inter-American Human Rights System¹

Obligaciones estatales en el contexto de dietas no saludables:
allanando el camino dentro del sistema interamericano de
derechos humanos

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Abstract: Noncommunicable diseases (NCDs) are the leading cause of morbidity, mortality, and disability in the Americas. NCDs are largely preventable because of the modifiable nature of their risk factors, including the elevated consumption of processed and ultra-processed products that can be traced to the recurrent practices of the food and beverage industry. This article explores diet-related risk factors to NCDs as a human rights issue that can and should be addressed within the Inter-American Human Rights System (IAHRS). In particular, we argue that States can potentially be held responsible for their failure to comply with the obligation to guarantee human rights; specifically, by not acting with due diligence through the

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regulation of the food and beverage industry. Moreover, we argue that States can also potentially be held responsible for failing to comply with the obligation to respect human rights, considering its complicity with the food and beverage industry.

Keywords: Inter-American Human Rights System; noncommunicable diseases (NCDs); food and beverage industry; due diligence; prevention; complicity; corporate capture.

Resumen: Las enfermedades crónicas no transmisibles (ENT) son la principal causa de morbilidad, mortalidad y discapacidad en las Américas. Las ENT son en gran medida prevenibles dada la naturaleza modificable de sus factores de riesgo, incluyendo el consumo elevado de productos procesados y ultra-procesados, asociado con las prácticas de la industria de productos comestibles y de bebidas. Este artículo explora los factores de riesgo de las ENT relacionados con la dieta como un asunto de derechos humanos que puede y debe ser abordado en el ámbito del Sistema Interamericano de Derechos Humanos. Se argumenta que los Estados podrían ser responsables por incumplir la obligación de garantizar los derechos humanos; específicamente, al no actuar con la diligencia debida y regular la conducta de la industria de productos comestibles y bebidas. Además, se argumenta que los Estados también podrían resultar responsables por el incumplimiento de la obligación de respetar los derechos humanos, considerando su complicitad con la industria de productos comestibles y bebidas.

Palabras claves: Sistema interamericano de derechos humanos (SIDH); enfermedades crónicas no transmisibles (ENT); industria de productos comestibles y bebidas; debida diligencia; prevención; complicitad; captura corporativa.

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1. Introduction

The interplay between law, health, and human rights has never been so discussed in the region of the Americas as with Covid-19. The social and economic impact of this pandemic, while not yet fully quantifiable, is believed to be unprecedented (Pan-American Health Organization 2020a). The current health crisis has pushed the legal community to address a number of related issues, such as access to health care, including prevention and treatment; the disproportionate, discriminatory, or excessive use of criminal law; and the need for accountability across the board (UNAIDS 2020). However, not enough attention has been devoted to one crucial issue that Covid-19 has brought to light: the impact of diet-related risk factors to noncommunicable diseases (NCDs)—and the corporations that fuel them—on the enjoyment of human rights.

The Pan-American Health Organization (PAHO) defines NCDs as “a group of conditions that are not mainly caused by an acute infection, result in long-term health consequences[,] and often create a need for long-term treatment and care” (Pan-American Health Organization 2020d). NCDs disproportionately affect people in low-income and middle-income countries, where more than three

quarters of global NCD deaths —32 million— occur. Examples of NCDs are cancers, cardiovascular diseases, chronic respiratory diseases, and diabetes (World Health Organization 2018). In the Americas, NCDs are the leading cause of morbidity, mortality, and disability, causing approximately 5.5 million deaths per year, representing 80.7% of all deaths in the region. Moreover, of the total deaths from NCDs, 38.9% are premature deaths occurring in people under 70 years of age. In this sense, NCDs represent a serious threat to both public health and social and economic development (Pan-American Health Organization 2019a).

NCDs are largely preventable, since there are several modifiable factors which increase the risk to these diseases (World Health Organization 2018). One such risk factor is unhealthy diets, closely linked with overweight, obesity, and diet-related NCDs (Pan-American Health Organization 2020b). In this sense, the *Global action plan for the prevention and control of noncommunicable diseases 2013-2020* set the goal of reducing risk factors to NCDs through the creation of health-promoting environments, and also included a number of recommendations for States to promote healthy diets, some of which implied no or little costs to the States (WHO 2013). Ultimately, as Gostin puts it, “the moral tragedy lies in the fact that much of this suffering and early death is preventable, and at reasonable cost” (Gostin 2014).

Unhealthy diets are associated with the excess intake of sugars, fats, and sodium, which, in turn, is driven largely by the widespread availability, affordability, and promotion processed and ultra-processed foods (Pan-American Health Organization 2020b). In this sense, the health challenges in this scenario are partly caused by the elevated consumption of processed and ultra-processed foods that can be traced to specific and recurring practices of the food and beverage industry. Such companies are widely acknowledged as key drivers of the epidemic of diet-related NCDs around the globe. Food products with little nutritional value are often manufactured to be cheap, tasty, and easy to preserve for long periods of time, making

them highly profitable for the food and beverage industry (Fredeunberg 2014). These companies contribute to—and actively benefit from—unhealthy food environments.

The Covid-19 pandemic is an opportune time to stir up the discussion around diet-related risk factors to NCDs. The link between Covid-19 and NCDs has been well documented (UN Interagency Task Force on NCDs 2020), with evidence signaling, for example, that the high prevalence of individuals with obesity exacerbates the threat to their health (Popkin et al. 2020). Meanwhile, the actions of the corporations behind unhealthy commodities, including the food and beverage industry, have also been well documented, ranging from the shaping of policy environments to marketing tactics that leverage the conditions created by the pandemic (NCD Alliance and Spectrum Consortium 2020). This is a powerful example of the complex interplay between infectious and noncommunicable diseases, which has long been known but not effectively addressed (Gostin 2014).

While progress to address the diet-related risk factors of NCDs has lately been made at the national level, such as the adoption and implementation of front-of-package warning labels in some countries in the Americas (Pan-American Health Organization 2020c), much remains to be done at the regional level. In recent years, the Inter-American Commission on Human Rights (Inter-American Commission or IACHR) has begun approaching the issue of NCDs, including diet-related risk factors, by means of a thematic report (Inter-American Commission on Human Rights 2019a), whereas the Inter-American Court of Human Rights (Inter-American Court) is yet to analyze a case or advisory opinion specifically about this issue, as will be discussed further along.

The present article seeks to help fill this gap by analyzing the State obligations to guarantee and respect human rights in relation to the food and beverage industry within the Inter-American Human Rights System (IAHRS), respectively building on the concepts of due diligence and complicity. To this end, we will: (i) touch upon the

current understanding of diet-related risk factors to NCDs as a human rights issue, both at the international and regional levels; (ii) elucidate the role of the food and beverage industry in the epidemic of diet-related NCDs; and (iii) analyze how due diligence and complicity—as developed within the IAHRs—unfold in relation to the State obligations to guarantee and respect human rights in the context of unhealthy diets. Finally, we will conclude that diet-related risk factors to NCDs are a human rights issue that can and should be addressed within the IAHRs.

2. Diet-related risk factors to NCDs as a human rights issue

Diet-related risk factors to NCDs are a human rights issue, as we will now explore. This is a complex topic that affects a number of human rights and their related obligations. However, we will not extend our analysis to all such human rights and obligations. Rather, at this point, our goal is merely to establish that diet-related risk factors to NCDs have already been recognized as a human rights issue both at the international and the regional levels.

At the international level, risk factors to NCDs have been analyzed from a human rights perspective on multiple occasions, including the creation of a treaty focused on tobacco control (FCTC 2005), as well as statements from the Committee on Economic, Social and Cultural Rights about health and tobacco use in Argentina, in 2018, and health and NCDs in Mauritius, in 2019, as part of periodic reporting (Committee on Economic, Social and Cultural Rights 2018, 51-52; 2019, 51-52). Regarding diet-related risk factors to NCDs, former United Nations Special Rapporteurs on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health (Anand Grover 2014; the Office of the United Nations High Commissioner for Human Rights 2020) and former United Nations Special Rapporteurs on the right on the right to food (Jean

Ziegler 2001; Hilal Elver 2016) have explicitly discussed the matter from a human rights perspective.

From the standpoint of the right to health, in 2014, Grover issued a report entitled *Unhealthy foods, non-communicable diseases and the right to health*, in which not only did he frame the issue of unhealthy diets in relation to the rights to health and adequate food, but also exposed the food and beverage industry for spending billions of dollars on “persistent and pervasive promotion and marketing of unhealthy foods” (Anand Grover 2014). In turn, Puras released a statement only a few months ago discussing the adoption of front-of-package labelling as a much-needed regulatory measure to address diet-related risk factors to NCDs, endorsed by the United Nations Special Rapporteur on the right to food and the Working Group on the issue of human rights and transnational corporations and other business enterprises. It is important to note that Puras extensively criticized the food and beverage industry’s undue influence on government decision-making (Office of the United Nations High Commissioner for Human Rights 2020).

From the standpoint of the right to adequate food, in 2001, Ziegler issued a report where he touched upon the need for legislative reform—including labelling—to protect consumers from foods considered dangerous (Jean Ziegler 2001). Moreover, in 2016, Elver issued a report about nutrition that touched upon the growing threat of NCDs in relation to unhealthy diets, as well as the harmful effects of the unregulated marketing of food products (Hilal Elver 2016). Notably, she remarked that “marketing strategies are particularly harmful when they target untapped markets in developing nations, a spillover from the ‘saturation’ of markets in developed countries,” and added that “the effect of introducing fast food on the diet quality of poorer populations is especially dangerous when there is a lack of knowledge or education and where individuals are vulnerable to manipulative marketing practices” (Hilal Elver 2016, 34).

At the regional level, the first time the IAHRs directly considered a risk factor to NCDs, acknowledging that this was indeed a human rights issue that fell under its mandate, was in 2016. On that occasion, the Inter-American Commission granted the O'Neill Institute for National and Global Health Law at Georgetown Law, in collaboration with the Fundación InterAmericana del Corazón Argentina and Action on Smoking and Health, a thematic hearing on the *Right to Health and Tobacco Addiction in the Americas*, which explored the intersection between tobacco control and human rights (Cabrera and Constantin 2020).

However, it was not until 2019, with the publication of a thematic report on Business and Human Rights: Inter-American Standards (Inter-American Commission on Human Rights 2019a), authored by the IACHR Special Rapporteur on Economic, Social, Cultural, and Environmental Rights, that the Inter-American Commission touched upon diet-related risk factors to NCDs. When discussing corporate undue influence in policymaking, it specifically used the food and beverage industry as an example, citing their lobby against regulating the marketing of unhealthy food to children, adopting warning labels in ultra-processed food, and taxing sugar-sweetened beverages. In this regard, the Inter-American Commission noted that such power dynamics have a greater impact on the populational groups that are in a vulnerable situation, compromising the rights to health, food, water, and the environment (Inter-American Commission on Human Rights 2019a, 265).

Moreover, in the context of the rights of children and adolescents, the Inter-American Commission highlighted the concerning rates of overweight and obesity in the region. Specifically, it indicated that this scenario may derive from the actions of corporations, through the employment of strategies to increase sales while simultaneously hindering the implementation of rights-compliant regulations. Examples of such strategies are lobbying or pressuring decision-makers, threatening to bring suits against the government, and financing unobjective studies to support their own

interests. In this respect, the Inter-American Commission recalled that the States must establish and enforce measures that effectively prevent, address, and sanction the negative impact of commercial activities on the rights of children and adolescents. Moreover, corporations must adjust their decision-making processes and operations in light of the impact of their commercial activities on the rights of children and adolescents (Inter-American Commission on Human Rights 2019a, 360-361).

Importantly, in the aforementioned thematic report, the Inter-American Commission also established due diligence as an essential benchmark in respect to business and human rights, reinforcing that not only does it refer to the conducts required of States, but also to the conducts that States must, in turn, require of corporations. This would consist in an ongoing management process informed by the particular circumstances of the corporation, the sector it operates in, and the context surrounding its activities. In this sense, due diligence lies in the establishment of effective systems and processes to identify, prevent, mitigate, and account for harm which States and corporations cause, contribute to, or are otherwise linked to (Inter-American Commission on Human Rights 2019a, 37-38).

Based on the above, it is clear that diet-related risk factors to NCDs are widely accepted as a human rights issue, both at the international and regional levels. Now we will turn our attention to corporations that drive them.

3. The role of the food and beverage industry in the epidemic of diet-related NCDs

The rise of diet-related NCDs in the region did not happen by chance. It was fueled by the actions of the food and beverage industry, taking advantage of the free rein they were given by States, as we will now explore.

The impact of corporations on public health is widely acknowledged, having led to the crafting of the term “commercial determinants of health,” which is relevant in the context of unhealthy diets despite applying to a broader range of corporations. This emerging concept refers to “strategies and approaches used by the private sector to promote products... that are detrimental to health” (Kickbusch et al. 2016, e895). Corporations are accused of causing an “industrial epidemic” in which corporations themselves are “vectors of disease” (Mialon 2020, 4). This framing offers an important alternative perspective to the widespread notion that NCDs are primarily self-inflicted, and, as Lee and Crosbie put it, that people must simply be convinced of the error of their unhealthy ways (Lee and Crosbie 2020). In doing so, it shines a light on the role of corporations, and the food and beverage industry.

Initially, it is important to note that ultra-processed foods and beverages are considered generally unhealthy (Pan-American Health Organization 2019b). PAHO defined them as “industrial formulations manufactured mostly or entirely from substances derived from constituents of foods, together with additives used to imitate and intensify the sensory qualities of unprocessed or minimally processed foods” (Pan-American Health Organization 2019b, 6). Such products are nutritionally unbalanced, meaning that “[t]hey are high in free sugar, total fat, saturated fat and sodium, and low in protein, dietary fiber, minerals and vitamins” (Pan-American Health Organization 2019b, 2).

Notably, Fredeunberg indicated that these “hyperpalatable foods”, as he called them, generally increase the profits of corporations, partly because they are high in cheap components such as fats and sugar, partly because of frequent subsidies of corn, sugar, and soy production (Fredeunberg 2014). Focusing on the soda industry, Nestle also touched upon the profitability of these corporations, pointing out the irony that the extraordinary returns of sugary drinks cost practically nothing to manufacture, since their principal ingredient—water—comes at low cost at the government’s

expense. She highlighted that, in many gas stations, supermarkets, and fast-food chains, sodas actually cost less than bottles of water (Nestle, 2015).

Covid-19 has underscored the recurrent tactics used by the food and beverage industry to increase their profits at the expense of public health. During the pandemic, these corporations extended offers of collaboration to the authorities, engaged in practices strategically labelled as “corporate social responsibility” (CSR) or philanthropy, and used marketing strategies to leverage the pandemic across the world (NCD Alliance 2020). They also tried to capitalize on the pandemic by thwarting the implementation of public health measures, such as the front-of-package warning labelling in Mexico (Grupo REFORMA 2020). These tactics, though outrageous amid a pandemic made worse because of the high rates of overweight, obesity, and diet-related NCDs, are far from new. Many actors in civil society, academia, and international bodies have been documenting them for years.

On the one hand, the food and beverage industry employs aggressive marketing and advertising of unhealthy products, influencing the behavior of consumers in the context of unhealthy environments (Tangcharoensathien et al. 2019). First, the food and beverage industry designs “hyperpalatable foods”, which provide eaters with greater physiological and psychological rewards than traditional foods, by blending or layering fat, salt, and sugar, as well as including several additives. Then, it magnifies people’s exposure to such products through elaborate marketing strategies (Fredeunberg 2014), which have a profound impact on the purchasing and eating patterns of communities (Pan-American Health Organization 2019b). In short, corporations—including those in the business of food and beverage—, have leveraged this power to make their products seem more appealing, acceptable, and desirable to consumers (Kickbusch et al. 2016). These marketing strategies are particularly effective on children and adolescents (Pan-American Health Organization 2019b).

On the other hand, the food and beverage industry has long thwarted rights-compliant regulations, dedicating a significant amount of resources to prevent the adoption and implementation of measures that threaten its profits (Roache et al., 2018). Tactics include co-opting legislators and regulators, financing organizations that appear to be community-based and scientists that are friendly to its interests, and litigating against the measures adopted by the government—all to stop or weaken regulations that are likely to be effective in curbing unhealthy eating (Gostin 2016). A powerful example is, once again, the hindering of front-of-package labeling, which civil society has recently documented. Throughout the legislation, regulation, and implementation processes in multiple countries, the food and beverage industry used various strategies aimed at obstructing this regulatory measure (Colectivo de Abogados José Alvear Restrepo and El Poder del Consumidor 2020).

By fiercely opposing rights-compliant regulations, the food and beverage industry has been relatively free to formulate, sell, and market unhealthy products, arguing that it can regulate its own behavior in order to prevent harm (Gostin 2016). However, there is no evidence whatsoever of self-regulation's effectiveness (Moodie et al. 2013). On the contrary, there is substantive research pointing to the inefficacy of such measures (Pan-American Health Organization 2011), which are "insufficient in scope and coverage, use weak nutrition criteria, and lack enforcement and penalties strong enough to ensure compliance" (Global Food Research Program 2020, 9). In this respect, Gostin warned that self-regulation usually results in rules that are highly permissive and —on top of it— deter government from acting more forcefully (Gostin 2016).

This dynamic of opposition to rights-compliant regulations has recently been recognized in the aforementioned statement by the former United Nations Special Rapporteur on the right to health Puras. Discussing front-of-package labelling, he was on-point in describing the practices of the food and beverage industry:

However, the food and beverage industry continues to strongly and extensively oppose front-of-package warning labelling regulations. This includes covering up the harmful effects of food products with excessive amounts of critical nutrients through multiple tactics, including sponsoring research to downplay links to health problems. (...) Where States have effectively adopted front-of-package warning labelling regulations to promote public health, some companies have resorted to or threatened litigation. They have also drawn on other campaigns and tactics to delay and/or block implementation of these regulatory measures, to overturn them or diminish their effect (Office of the United Nations High Commissioner for Human Rights 2020).

It is worth noting that Puras not only described the aforementioned tactics, but expressly acknowledged that misinformation and pressure from the food and beverage industry interfere with States' efforts to adopt public health laws, regulations, and policies. Most importantly, he called this behavior an attempt to "interfere or directly influenc[e] government decision-making processes," outright qualifying it as the undue influence of corporations on government decision-making. Lastly, he indicated that this situation should be addressed by States to ensure rights-compliant regulations that prevent harm to people's health derived from the consumption of unhealthy foods and beverages (Office of the United Nations High Commissioner for Human Rights 2020).

The aggressive marketing and advertising on the part of the food and beverage industry, coupled with its thwarting of rights-compliant regulation on the part of the government, makes it clear that the epidemic of diet-related NCDs is not random. Rather, it is the product of deliberate action on the part of the food and beverage industry, which has only been allowed to happen because of the lack of effective measures by States.

4. The obligations to guarantee and respect human rights in the context of unhealthy diets within the Inter-American Human Rights System

The practices described above leave no doubt about the role of the food and beverage industry in the epidemic of diet-related NCDs and, therefore, on the enjoyment of human rights—particularly, the rights to health and adequate food, as a minimum. Notably, it has already been settled by the Inter-American Court that such rights are autonomously protected under article 26 of the American Convention on Human Rights (American Convention) (Inter-American Court of Human Rights 2018a; 2018b; 2020a).

Despite the incipient progress in directly addressing risk factors to NCDs, including those that are diet-related, the Inter-American Commission and Court have consolidated two concepts that prove relevant in this scenario: the first one is due diligence, in relation to the State obligation to guarantee human rights; and the second one is complicity, in the form of tolerance, acquiescence, and collaboration, in relation to the State obligation to respect human rights. Both concepts help define the content and scope of the State obligations that stem from article 1.1 of the American Convention in connection with the aforementioned rights in the context of unhealthy diets.

a. Obligation to guarantee human rights

The idea of due diligence has long been present in international law, meaning that States have the duty to both abide by international law and ascertain that State and non-State agents within its jurisdiction do the same (Cantú 2017). In the Americas, the Inter-American Court established the duty of due diligence decades ago, in *Velázquez Rodríguez v. Honduras*, explaining that:

...in principle, any violation of rights recognized by the Convention carried out by an act of public authority or by persons who use their position of authority is imputable to the

State. However, this does not define all the circumstances in which a State is obligated to prevent, investigate and punish human rights violations, nor all the cases in which the State might be found responsible for an infringement of those rights. 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 (Inter-American Court of Human Rights 1988).

To this day, this precedent has guided the regional case-law on due diligence, solidifying its traditional understanding as the duty to take all the necessary measures to accomplish the protection of human rights, including the investigation, sanction, and redress of harm caused by private actors (Cantú 2017).

However, the interpretation of due diligence has expanded throughout the years to address different sets of circumstances; for instance, focusing on prevention through specific and general approaches. Thus, in this preventive form of due diligence, the Inter-American Court has sometimes established (and followed) criteria that are primarily centered around the notion of risk at an individual or group level (Inter-American Court of Human Rights 2009). Other times, it has established the related duties to regulate, supervise, and monitor at a populational level. Both types of preventive due diligence are not unrelated, given that a situation of generalized risk helps define the predictability and avoidability of a particular risk (Abramovich 2010, 179).

The first type —the specific approach to preventive due diligence— can be exemplified by *González et al. (Cotton Field) v. Mexico*, a case about the forced disappearances of women, where the Inter-American Court established the following criteria regarding risk: (i) there must be a situation of real and immediate risk; (ii) this

situation must threaten a specific individual or group; (iii) the State must know or should have known of the existence of the risk; and (iv) the State could have reasonably prevented or avoided the materialization of the risk (Cabrera 2020). In all cases, “the specific circumstances of the case and the discharge of such obligation to guarantee must be taken into account” (Inter-American Court of Human Rights 2009, 280).

The second type — the general approach to preventive due diligence— can be found in a series of decisions in the context of the right to health. In *Ximenes Lopes v. Brazil*, a case about the death of a person institutionalized at a private psychiatric clinic that operated in the public health system, the Inter-American Court established that “States must regulate and supervise all activities related to healthcare given to the individuals under the jurisdiction thereof, as a special duty to protect life and personal integrity, regardless of the public or private nature of the entity giving such healthcare” (Inter-American Court of Human Rights 2006, 89). Other health-related cases followed the same reasoning (Inter-American Court of Human Rights 2013; 2015; 2018; 2019). Notably, in *Gonzales Lluy et al v. Ecuador*, a case about HIV contagion through a blood bank whose management had been delegated to the Red Cross, the Inter-American Court emphasized the severity of the illness involved, as well as the high risks that the victim might have faced at different moments of her life, understanding the State’s obligation to guarantee human rights as a somewhat enhanced due diligence (Inter-American Court of Human Rights 2015).

The Inter-American Court has also applied the duty to regulate, supervise, and monitor in contexts other than healthcare involving private actors. In the *Case of the Fazenda Brasil Verde Workers v. Brazil*, about contemporary slavery, the Inter-American Court analyzed how due diligence unfolds into the duty of inspection of private actors (Inter-American Court of Human Rights 2016). In the *Case of the Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina*, about a land dispute, the Inter-American

Court stated the duty to regulate, supervise, and monitor in relation to the right to adequate food and other rights (Inter-American Court of Human Rights 2020a). Finally, in the *Case of the Employees of the Fireworks Factory of Santo Antônio de Jesus v. Brazil*, about an explosion in a fireworks factory that killed multiple people, the Inter-American Court stated the duty to regulate, supervise, and monitor in the context of dangerous activities, again exploring the implications of high risks for the enjoyment of human rights (Inter-American Court of Human Rights 2020b).

The development of due diligence within the IAHRs is largely incorporated into *Business and Human Rights: Inter-American Standards*, which occasionally draws parallels with the United Nations Guiding Principles on Business and Human Rights (United Nations Guiding Principles). On this topic, it is important to bear in mind that the United Nations Guiding Principles explore due diligence as part of the responsibility to respect human rights that falls upon business enterprises. It is described as an “ongoing management process that a reasonable and prudent enterprise needs to undertake, in the light of its circumstances (including sector, operating context, size and similar factors) to meet its responsibility to respect human rights” (United Nations Office of the High Commissioner 2012, 6). In particular, Guiding Principle 17 states that due diligence should cover adverse human rights impacts that the business enterprises cause, contribute to or are directly linked to, towards the goal of identifying, preventing, mitigating, and accounting for such impacts. Moreover, this process should vary according to considerations about the corporation itself and the nature and context of its operations (United Nations Office of the High Commissioner 2012).

In many aspects, this definition is similar to the one subsequently used by the Inter-American Commission in the thematic report on *Business and Human Rights: Inter-American Standards*, as described in the sections above. Exploring the role of due diligence in the context of business and human rights, they also construed it as an ongoing

process; went beyond causation to include contribution or linkage to harm; established the goal of identifying, preventing, mitigating, and accounting for harm; and indicated that this process should be informed by the particular circumstances of the corporation, the sector in which it operates, and the context surrounding its activities. However, there is one crucial difference: in *Business and Human Rights: Inter-American Standards*, the focus of due diligence is not on corporate responsibility but on State obligations, insofar as due diligence is required of States; and they, in turn, must require certain conducts of corporations (Inter-American Commission on Human Rights 2019a, 37-38).

In this sense, the Inter-American Commission built on the long-standing, solid jurisprudential line discussed above, focusing on the fact that States are primarily obliged to guarantee human rights, and may therefore be held liable for failing to act with due diligence in relation to non-State actors. In doing so, the Inter-American Commission explained how the obligation to guarantee human rights unfolds into several duties in the context of business and human rights (Inter-American Commission on Human Rights 2019a). Here, we focus on the duty to regulate because of its particular importance in light of the previously described practices of the food and beverage industry; specifically, the recurring hindering of the adoption and/or implementation of rights-compliant regulation.

The duty to regulate includes not only the suppression of norms or practices that undermine human rights, but also the adoption of internal legislation and relevant policies that uphold human rights in relation to the corporate activity in question (Inter-American Commission on Human Rights 2019a, 104). In the context of business and human rights, this means adapting the legal framework on both substantive and procedural matters, including administrative, civil, and criminal law, as well as their extraterritorial applicability (Inter-American Commission on Human Rights 2019a, 111). Ultimately, the regulation of companies consists in a structural approach to due

diligence, facilitating and reinforcing the related duty of prevention (Inter-American Commission on Human Rights 2019a, 89-90).

Furthermore, the Inter-American Commission highlighted the imbalance between businesses and the people affected by their activities, reflecting on the influence of the former—in detriment of the latter— over the institutional processes that shape regulations. Thus, States must ensure spaces for transparency and effective participation when it comes to legal frameworks; spaces in which those whose rights are threatened are seriously taken into account (Inter-American Commission on Human Rights 2019a, 111). Examples include the extractive, textile, and agro industries, as well as the provision of essential services or supply chains in general, among others.

The above considerations about the duty to regulate leave room for further development of the preventive dimension of due diligence at the populational level, beyond the circumstances already identified by the Inter-American Court. In continuing to build on this approach to due diligence, while applying it to the context of business and human rights, the Inter-American Commission set the stage for other corporations. The food and beverage industry, for one, appears to be ripe.

b. Obligation to respect human rights

Beyond due diligence, one could also argue that the State's closeness with the food and beverage industry could entail a violation to the obligation to respect human rights within the IAHRs.

In *Business and Human Rights: Inter-American Standards*, the Inter-American Commission indicated that the obligation to respect human rights implies that States must refrain from engaging in conducts related to corporate activities that endanger human rights. For example, upon the adoption of commercial and/or investment agreements that go against human rights obligations, as well as the assistance for or control over corporations, both public and private,

which implicate human rights violations, including when this takes place through international bodies tied to corporate activities (Inter-American Commission on Human Rights 2019a, 69). It is noteworthy that the closer a corporation is to the State, and the more it depends on a public entity or on tax-payer support, the greater the need to ascertain the State's respect for human rights (Inter-American Commission on Human Rights 2019a, 69).

The Inter-American Commission then investigated the circumstances in which the actions or omissions of corporations might lead to the State being held responsible for directly violating the aforementioned obligation. Specifically, they examined the following situations in detail: corporations carrying out functions of the public power (Inter-American Commission on Human Rights 2019a, 71), taking orders from or being effectively controlled by the State (72), and performing an act that the State unilaterally claims and adopts as its own (73).

However, the Inter-American Commission went one step further, indicating that this roster may be broadened under the doctrine of complicity when there is State acquiescence, tolerance, or collaboration in respect to the acts in question. Though these factors have been analyzed around specific issues within the IAHRs, such as the actions of paramilitary groups, the Inter-American Commission clarified that there is a jurisprudential basis for its continued development in the context of business and human rights (Inter-American Commission on Human Rights 2019a, 74). In this case, certain parameters ought to be considered, such as the closeness between the State and corporations and the level of sponsorship, coordination, protection, permissibility, tolerance, or inaction shown by the State in regard to the abuse committed by corporations (75).

In this regard, it is useful to draw a parallel with the United Nations Guiding Principles' approach to complicity. The United Nations Guiding Principles turn to both non-legal and legal definitions of complicity, but apply them to business enterprises

instead of the State. In this sense, the focus is on whether a given business enterprise can be perceived as complicit in the acts of another party or can be considered complicit in either the commission of a crime that entails criminal liability or the causation of a harm that entails civil liability (Office of the United Nations High Commissioner 2012). The context in which business enterprises operate may increase the risk of their being considered complicit in gross human rights abuses, which is why—in light of the United Nations Guiding Principles—this risk is a legal compliance issue (Office of the United Nations High Commissioner 2011).

In contrast, the Inter-American Commission explores the concept of complicity in relation to the obligation to respect human rights that falls upon the States. As stated above, this would entail acquiescence, tolerance, or collaboration with the acts of third parties, pathways that could be further explored based on the closeness between the State and corporations, considering to the level of sponsorship, coordination, protection, permissibility, tolerance, or inaction shown by the State in respect to the abuse committed by corporations.

On the topic of complicity in relation to unhealthy diets, the relationship between States and corporations can be more or less obvious. In some cases, it could take the form of explicit aid to the food and beverage industry. In Brazil, for example, activists have denounced that the government is subsidizing the production of soda through tax exemptions to sugar syrup in a particular region, leading to benefits in the purchase of such product by bottling companies all over the country (Johns et al. 2020). In other cases, complicity can be more subtle, manifesting through the corporate capture of the State as understood by the Inter-American Commission: the capture of public institutions or the undue influence from corporations on public decision-makers, for the benefit of corporations (Inter-American Commission on Human Rights 2019a, 39).

In this regard, it is relevant to turn to another thematic report by the Inter-American Commission, titled *Corruption and Human Rights: Inter-American Standards* (Inter-American Commission on Human Rights 2019b). It discussed the role of private actors in the context of corruption, touching upon the problem of decision-making that serves private interests rather than the common good. In particular, the Inter-American Commission referred to two concepts: “State capture” and “macro-corruption.” The first is defined as a form of corruption in which private actors have the power to influence the decision-making of authorities, achieving benefits through a dynamic that generates dependence. The second is an umbrella-like concept that congregates systemic forms of corruption, with illicit schemes that go beyond individuals and are not necessarily hierarchical; lawful and unlawful actions coexist, as do State and non-State agents, in a complex network without clear territorial limits (Inter-American Commission on Human Rights 2019b).

In its aggravated form, macro-corruption can even be considered a stand-alone concept. The Inter-American Commission used the co-opting of institutions as an example, explaining that “this form of corruption is characterized by lawful and unlawful acts that capture a [public] institution and put it at the service of the interests of State and non-State actors, distorting its regular functions” (Inter-American Commission on Human Rights 2019b, 111). Examples cited include the capture of the customs, social security, and public works, which have meant not only the misappropriation of large public funds, but also the impossibility of these institutions fulfilling their purpose (Inter-American Commission on Human Rights 2019b).

By co-opting decision-making processes, including those leading to policies that apply to their own economic activity, the food and beverage industry establishes a truly promiscuous relationship with the government. Such industry’s well-documented tactics lead to the impairment of the regulatory capacity of relevant institutions; a state of affairs that could eventually be framed as sponsorship, coordination, protection, permissibility, tolerance, or inaction on the

part of the State. In this sense, it is useful to couple the reading of *Business and Human Rights: Inter-American Standards* to that of *Corruption and Human Rights: Inter-American Standards*, given that corporate capture is key in informing the obligation to respect human rights in relation to complicity.

Finally, it is worth considering whether there is a sustained failure by the State to prevent the violation of human rights by the food and beverage industry. In the *Case 11,227, Officials and members of the Patriotic Union (Unión Patriótica, UP by its Spanish acronym), with regard to Colombia*, the Inter-American Commission argued (i) that there had occurred multiple, successive violations of the right to life, forced disappearances, and displacements in large-scale; and (ii) that there was a convergence of a failure to fulfil the obligations to protect and respect human rights, “in instances involving direct actions and acquiescence, tolerance, collaboration and also a flagrant and sustained failure to comply with the obligation to prevent such events” (Inter-American Commission on Human Rights 2018).

While this case has its particularities, it nevertheless lays the groundwork to consider the obligation to respect human rights in light of the reiterated failure to prevent human rights violations through acquiescence, tolerance, or collaboration. It is a useful concept for the realm of business and human rights, including the food and beverage industry.

5. Conclusion

The threat posed by the food and beverage industry to the enjoyment of human rights is not collateral damage. As Freudenberg puts it, “food executives are always in the quest of the blockbuster product, one that will sell itself, win over new consumers, and return a generous profit” (Fredeunberg 2014, 7). Part of this quest is aggressively marketing and advertising unhealthy products, while simultaneously thwarting regulations that would limit their ability to

do so, as explored throughout this article. States are also to blame for this situation. Captured by the food and beverage industry, they have allowed policymaking to serve the interests of these corporations at the expense of failing to uphold human rights.

In this article, we analyzed this situation based on the obligation to guarantee human rights, in relation to due diligence, and to the obligation to respect human rights, in relation to complicity, in light of two recent thematic reports issued by the Inter-American Commission, as well as the jurisprudence of the Inter-American Court. Though there is still much to be done, our conclusion is that — within the IAHRs— States can potentially be held responsible for their failure to comply with the obligation to guarantee human rights; particularly, for not acting with due diligence through the effective regulation of the food and beverage industry. Furthermore, beyond due diligence, we argued that the States can also potentially be held responsible for failing to comply with the obligation to respect human rights. First, because the close relationship between the State and the food and beverage industry can be framed as sponsorship, coordination, protection, permissibility, tolerance, or inaction from the former in respect to the latter. Second, because of the State's flagrant and sustained failure to comply with the obligation to prevent human rights violations by the food and beverage industry.

In the end, governments cannot expect the food and beverage industry to solve a problem that it not only created, but also continues to fuel—even in the midst of the Covid-19 pandemic. After all, while there is no evidence whatsoever of self-regulation's effectiveness, there is *plenty* of evidence of what happens when the food and beverage industry is left unchecked. Therefore, it is necessary to apply the existing human rights frameworks, among which the IAHRs, to the context of unhealthy diets. More than relying on businesses to respect human rights, States must act; or be held accountable for their own failure to guarantee and/or respect human rights.

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