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QUESTIONNAIRE

Contact Details

Please provide your contact details in case we need to contact you in connection with this questionnaire. Note that this is optional.

Type of Stakeholder (please select one)	<input type="checkbox"/> Member State <input type="checkbox"/> Observer State <input checked="" type="checkbox"/> Other (Business Organization)
Name of State Name of Survey Respondent	United States Council for International Business (USCIB)
Email	blowry@uscib.org
Can we attribute responses to this questionnaire to your State publicly*? *On OHCHR website, under the section of SR health	Yes No Comments: N/A

Background

Within the framework of Human Rights Council resolution 51/21, the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, has identified analyzing the progress and challenges to attaining the Sustainable Development Goals (SDGs) as one of the strategic priorities during her tenure, along with analysing the role of the underlying determinants of health, such as climate change and environment, water and sanitation, education and gender equality (See: [NHRC/47/28 para. 108](#)). In compliance with her mandate and in line with these priorities, she has decided to devote her next thematic report to the General Assembly, to be held in October 2023, to the issue of "Food, nutrition and the right to health".

Objectives of the report

In the report, the Special Rapporteur will turn her attention to the underlying determinants of health, with a focus on how food and nutrition positively or negatively impact the right to health. In particular, she will rely on the frameworks of the social and commercial determinants of health to address how colonialism, racism, and other power asymmetries continue to build and maintain inequitable food systems and environments, influencing activities across the production, aggregation, processing,

All Permanent Missions to the United Nations Office and Observers Missions at Geneva

distribution, consumption, and disposal of food products,¹ and ultimately shaping the context in which consumers acquire, prepare, and consume food.² The Special Rapporteur's analysis will consider the double impact of malnutrition,³ which refers to the co-existence of undernutrition with diet-related non-communicable diseases (NCDs) such as diabetes, cardiovascular diseases, and cancer. In this sense, she will emphasize that rights-based approaches to food and nutrition must reconcile and address both concerns, often misconstrued as competing. The Special Rapporteur will also report on new and emerging trends related to the impact of climate change, conflict, and COVID- 19 on food and nutrition, as well as related responses.

Importantly, the Special Rapporteur will adopt an intersectional approach and consider the multiple forms of discrimination affecting persons in the context of food and nutrition. She will analyse the links between inequities in accessing adequate food and sex, gender, poverty, class, and the rural and urban divide, as well as related systems of oppression.

The Special Rapporteur intends to analyse the obligations and responsibilities of actors, such as States and corporations respectively, in relation to food and nutrition under the framework of the right to health. The Special Rapporteur would therefore like to identify specific challenges and opportunities related to food and nutrition in countries and within communities around the world. She would also like to identify good practices that affirm the right to health in this context, as well as seek examples of how to combat discrimination in accessing adequate food.

Glossary of definitions for the purpose of this questionnaire:

- **Double burden of malnutrition:** refers to "the coexistence of undernutrition along with overweight, obesity or diet-related NCDs, within individuals, households and populations, and across the life-course."⁴
- **Food environments:** refer to "the physical, economic, political and socio-cultural context in which consumers engage with the food system to make their decisions about acquiring, preparing and consuming food."⁵
- **Food systems:** refer to "the entire range of actors and their interlinked value-adding activities involved in the production, aggregation, processing, distribution, consumption and disposal of food products. Food systems comprise all food products that originate from crop and livestock production, forestry, fisheries and aquaculture, as well as the broader economic, societal and natural environments in which these diverse production systems are embedded."⁶

¹ FAO, IFAD, UNICEF, WFP and WHO. 2020. The State of Food Security and Nutrition in the World 2020. Transforming food systems for affordable healthy diets. Rome, FAO, available at: <https://doi.org/10.4060/ca9692en>

² HLPE, Nutrition and food systems. A report by the High-Level Panel of Experts on Food Security and Nutrition of the Committee on World Food Security, 2017, Rome, available at: <https://www.fao.org/3/i7846e/i7846e.pdf>

³ World Health Organization, The double burden of malnutrition: Policy brief, 2017, available at: [WHO/NMH/NHD/17.3](https://www.who.int/nmh/nhd/17.3)

⁴ *Ibid.*

⁵ HLPE, Nutrition and food systems. A report by the High-Level Panel of Experts on Food Security and Nutrition of the Committee on World Food Security, 2017 Rome, available at: <https://www.fao.org/3/i7846e/i7846e.pdf>

⁶ FAO, IFAD, UNICEF, WFP and WHO, The State of Food Security and Nutrition in the World 2020. Transforming food systems for affordable healthy diets Rome, 2020, available at: <https://doi.org/10.4060/ca9692en>

Questionnaire

The questionnaire can be downloaded below in English (original language), French and Spanish (unofficial translations). Responses can address some of the questions or all of them, as feasible or preferred.

- Download the questionnaire (WORD): English | Francais | Espanol

How and where to submit inputs

Inputs may be sent by e-mail by 24 March 2023.

E-mail address	ohchr-srhealth@un.org
E-mail subject line	Contribution to GA report - SR right to health
Word limit	750 words per question
File formats	Word, PDF (Please note that only word docs will be posted online)
Accepted languages	English, French, Spanish

Treatment of inputs/comments received

Please note that all responses will be published on the official webpage of the Special Rapporteur.

Key Questions

You can choose to answer all or some of the questions below. (750 words limit per question).

Introduction

USCIB is grateful for the opportunity to contribute to the thematic report of the UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of health ("Special Rapporteur"), related to "Food, nutrition and the right to health." This response addresses the question posed in the Questionnaire: "What legislative or regulatory measures (such as those related to nutrition standards, labelling, marketing, procurement in institutional settings including-but not limited to-schools and prisons, and fiscal measures) have been considered or adopted in your country and/or community to improve food and nutrition, especially for persons in vulnerable situations? Where relevant, how are those measures being enforced?"

Our submission focuses on clarifying and elucidating the critical distinction between the human rights obligations of states, and the human rights responsibilities of business enterprises. That distinction is important analytically and tangibly. While states are expected to "respect, protect and fulfil the human rights of individuals within their territory and/or jurisdiction," businesses have a distinct responsibility, to "respect human rights."⁷ We discuss the contours of this specific business responsibility under international human rights norms, including in particular the United Nations Guiding

⁷ See United Nations Office of the High Commissioner for Human Rights, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework* (New York and Geneva: United Nations, 2011) ("UNGP"), at 4.

Principles on Business and Human Rights ("UNGPs"), with a focus on the right to health in the context of companies that produce and/or market foods and beverages.

Human rights under international law traditionally have been state-centric concepts. The UNGPs created a framework for responsible business conduct in this space, directing companies to conduct due diligence to identify and address potential human rights risks and impacts with which they might be involved directly or indirectly. While responsible businesses have embedded the right to health within their human rights due diligence programs, this is an area that has had limited guidance for companies that produce and/or market foods and beverages. We address some of the relevant considerations below and respectfully welcome further, practical insight on this issue from the Special Rapporteur.

The Right to Health and the Duties of States

Article 12 of the International Covenant on Economic, Social, and Cultural Rights (ICESCR) is the cornerstone of the right to health. Article 12 affirms "the right of everyone to the enjoyment of the highest attainable standard of physical and mental health."⁸ Article 12 enumerates four types of measures expected of states to "achieve the full realization of this right":

- Measures to ensure healthy birth and child development.
- Measures to improve environmental and industrial hygiene.
- Measures to prevent, treat and control disease.
- Measures to assure to all medical service and medical attention in the event of sickness.⁹

States bear three types of obligations to realize the right to health: to respect, to protect, and to fulfil.

The obligation to *respect* requires States to refrain from interfering directly or indirectly with the enjoyment of the right to health. The obligation to *protect* requires States to take measures that prevent third parties from interfering with Article 12 guarantees. Finally, the obligation to *fulfil* requires States to adopt appropriate legislative, administrative, budgetary, judicial, promotional and other measures towards the full realization of the right to health.¹⁰

⁸ *International Covenant on Economic, Social and Cultural Rights* ("ICESCR"), adopted 16 December 1966, entered into force 3 January 1976, 993 UNTS 3, art. 12. Numerous international human rights treaties have codified the right to health. Article 5(e)(iv) of the International Convention on the Elimination of All Forms of Racial Discrimination requires States to prohibit discrimination in "public health, medical care, social security and social services." *International Convention on the Elimination of All Forms of Racial Discrimination*, adopted 21 December 1965, entered into force 4 January 1969, 660 UNTS 195, art. 5(e)(iv). Article 12 of the Convention on the Elimination of All Forms of Discrimination against Women requires that women receive equal access to health care and that they also receive pregnancy-related care. *Convention on the Elimination of All Forms of Discrimination against Women*, adopted 18 December 1979, entered into force 3 September 1981, 1249 UNTS 13, art. 12. The Convention on the Rights of the Child contains many protections including, for example, guarantees for necessary pediatric care and access to information on pediatric health and nutrition. *Convention on the Rights of the Child*, adopted 20 November 1989, entered into force 2 September 1990, 1577 UNTS 3, mt. 24.

⁹ ICESCR, art. 12.

¹⁰ United Nations Committee on Economic, Social and Cultural Rights ("OHCHR"), *General Comment No. 14 (2000): The right to the highest attainable standard of health (article 12 of the International*

The Office of the High Commissioner for Human Rights ("OHCHR") has further clarified that a state's responsibility to "fulfil" can be understood to require "supporting people in making informed choices about their health."¹¹

Critically, the right to health is understood to be independent of health outcomes. As the OHCHR has explained, "The right to health is not to be understood as a right to be healthy."¹² The OHCHR has further emphasized that, "in particular, good health cannot be ensured by a State, nor can States provide protection against every possible cause of human ill health."¹³ Thus, the OHCHR has clarified, "The right to health contains both freedoms and entitlements. The freedoms include the right to control one's health and body...and the right to be free from interference...By contrast, the entitlements include the right to a system of health protection that provides equality of opportunity to enjoy the highest attainable level of health."¹⁴

Accordingly, the normative content of Article 12 recognizes individual freedom to make health-related choices, including as to diet. States must allow individuals to enjoy "a variety of facilities, goods, services and conditions necessary for the realization of the highest attainable standard of health,"¹⁵ and to support people in making decisions that are "informed about their health" choices, but cannot compel such decision making.

How International Human Rights Apply to Business Enterprises under the UNGPs

As mentioned earlier, human rights under international law traditionally have been State-centric concepts.¹⁶ While States are expected to "respect, protect, and fulfil the human rights of individuals within their territory and/or jurisdiction," businesses have a responsibility to "respect human rights."¹⁷ The UNGPs provide the framework for how companies can "respect human rights," including the right to health.

As Pillar II of the UNGPs make clear, a corporation's respect for human rights under the UNGPs includes an obligation to conduct human rights due diligence to identify, prevent and mitigate potential negative human rights impacts.¹⁸ The UNGPs contemplate that companies assess potential risks and impacts across their entire value chain-including in connection with the impact or use of their products and services.¹⁹

Under the UNGPs, where a company identifies potential negative impacts associated with its products and services, there is a responsibility to "prevent or mitigate" those potential impacts.²⁰ Prevention and mitigation in this context have defined meanings. "The prevention of adverse human rights impact refers to actions taken to ensure such

Covenant on Economic, Social and Cultural Rights), U.N. Doc. E/C.12/2000/4 (2000), "General Comment 14", 33 (emphasis in original), <https://www.refworld.org/pdfid/4538838d0.pdf>.

¹¹ *Id.* P. 37.

¹² *Id.* P.P. 4, 8 (emphasis in original).

¹³ *Id.* P. 9.

¹⁴ *Id.* P. 8.

¹⁵ *Id.* P. 9.

¹⁶ Yoav Dotan, *The 'Public', the 'Private', and the Legal Norm of Equality* 20:2 *Can. J.L. & Soc.* 207 (2005).

¹⁷ UNGP 1, Commentary at 4 (emphasis added).

¹⁸ UNGP 15.

¹⁹ UNGP 17.

²⁰ UNGP 13(b).

impact does not occur."²¹ In contrast, "[t]he mitigation of adverse human rights impact refers to actions taken to reduce its extent, with any residual impact then requiring remediation. The mitigation of human rights risks refers to actions taken to reduce the likelihood of a certain adverse impact occurring."²²

How the Food Industry May Respect the Right to Health under the UNGPs

UNGP-aligned due diligence by food companies regarding the right to health requires a nuanced approach to recognize the OHCHR's distinction between the right as it is properly understood, and health outcomes. As noted above, "The right to health is not to be understood as a right to be *healthy*."²³

Unless a product is inherently dangerous-such that any consumption of it poses a material risk to individual or public health-the relevant business responsibilities for the right to health related to food and beverage production or marketing largely surround enabling stakeholders to make free and informed choices.²⁴ We illustrate below three tangible components of that responsibility: (1) information and transparency, (2) consideration of populations that may be more vulnerable in context, and (3) diversity of choice.

Information and Transparency

As part of their responsibilities to respect human rights, relevant businesses might use their leverage to help consumers make decisions about their diets that are appropriately informed. As the European Court of Human Rights has opined in the context of the right to health, individuals who may face "risks to their health" must "have access to information enabling them to assess those risks."²⁵ This aligns with prior Special Rapporteur's reports, calling on businesses to respect and fulfill the right to health by "supporting people in making informed choices about their health."²⁶ As with States, a business cannot be charged with making health-related decisions on behalf of consumers; nor can it be expected to ensure that individuals are healthy.²⁷ However, human rights norms do provide that where relevant business enterprises have a responsibility to take steps to assist consumers in making dietary decisions that are reasonably informed.

²¹ OHCHR, United Nations Office of the High Commissioner for Human Rights, *The Corporate Responsibility to Respect Human Rights, An Interpretive Guide* ("UNGP Interpretive Guide"), <https://www.ohchr.org/sites/default/files/Documents/publications/hr.puB.I2.2.en.pdf>, at 7.

²² *Id.* at 8.

²³ General Comment 14 PP.14, 8 (emphasis in original).

²⁴ See, e.g., BSR, 10 Human Rights Priorities for the Food, Beverage and Agriculture Sector, #9 ("Increasingly, the human right to health and well-being is applied to consider the risk implications of unhealthy products"), see <https://www.bsr.org/en/primers/10-human-rights-priorities-for-food-beverage-and-agriculture-sector>; *id.* ("how companies market such products ... raises concerns about the disproportionate impacts of these health risks on marginalized and vulnerable populations," including children); see also Report of the Special Rapporteur, "Unhealthy foods, non-communicable diseases and the right to health," /HRC/26/31: *Unhealthy foods, non-communicable diseases and the right to health*, (1 April 2014) P. 29 ("the food industry should desist from promoting false or misleading health claims about their products, consistent with their responsibility to respect the right to health") ("SR Unhealthy Foods Report"); *id.* P. 31 ("the [food] industry should consider adopting standards ... to improve labelling and information on their products ...").

²⁵ *Botoyan v. Armenia*, ECtHR, Judgment, No. 5766/17, 8 February 2022, P. 93.

²⁶ General Comment 14 P. 37.

²⁷ *Id.* PP 4, 8 (emphasis in original).

That responsibility can be discharged through several means. They include printing accurate and detailed nutritional information on the packaging of the foods they sell.²⁸ They also may include supporting collective or multi-stakeholder efforts, such as through business organizations or partnerships with advocacy organizations or governments, to promote education around nutrition and food and beverage choice. Steps also might include ensuring accurate and clear marketing efforts to help all low for decision-making that is appropriately informed, and avoiding advertisements that may be misleading to certain segments of the population.²⁹

Consideration of Populations That May Be Vulnerable in Context

As the OHCHR has made clear, as part of due diligence, business enterprises have a responsibility to pay "particular attention" to their actual and potential impacts "on marginalized or vulnerable groups."³⁰ "Vulnerable individuals, groups and communities are those that face a particular risk of being exposed to ... adverse human rights impact[s]."³¹ In the context of the right to health, that focus on vulnerable populations comports with the finding of the Special Rapporteur that companies "should give particular attention to the needs of disadvantaged individuals, communities and populations," including children and women.³²

For children, the UNGPs and the Children's Rights and Business Principles³³ provide guidance to companies regarding how they can prevent or mitigate potential harms to children in the context of food consumption. The United Nations Children's Fund ("UNICEF") also has issued guidance that is helpful in this respect,³⁴ as have prior reports from the Special Rapporteur.³⁵

These authorities have articulated particular concerns for children in relation to company marketing efforts.³⁶ As children lack the same reasoned decision-making as adults and may be particularly susceptible to advertising, companies may consider limiting where and how they market their products to children. They also may consider supporting educational campaigns for children on the importance of balanced nutrition and healthy lifestyles.³⁷

For women, authorities have similarly singled out marketing as an area of attention for companies. They have expressed concerns that advertising may perpetuate gender stereotypes and contribute to the development of diet-related diseases, such as diabetes

²⁸ SR Unhealthy Foods Report PP 18, 31.

²⁹ *Id.* PP 29, 31.

³⁰ UNGP Interpretive Guide, at 40, Q37.

³¹ *Id.* at 11, Q4.

³² Report of the Special Rapporteur, Interim Report (UNICEF Programming Guidance, *Prevention of Overweight and Obesity in Children and Adolescents* (2020) ("UNICEF Obesity"), at 36, available at <https://www.unicef.org/media/92336/file/Programming-Guidance-Overweight-Prevention.pdf> (2008) ("SR 2008 Report"), U.N. Doc. A/63/263, at Annex.

³³ United Nations Children's Fund (UNICEF), *Children's Rights and Business Principles*, <http://childrenandbusiness.org/the-principles/introduction/>.

³⁴ United Nations Children's Fund (UNICEF), *Prevention of Overweight and Obesity in Children and Adolescents: UNICEF programming guidance*, New York: UNICEF (2019) ("UNICEF Obesity"), <https://www.unicef.org/media/92336/file/Programming-Guidance-Overweight-Prevention.pdf> at 36.

³⁵ See, e.g., SR Unhealthy Foods Report, PP 13-14.

³⁶ See, e.g., *id.* P 13.

³⁷ UNICEF Obesity, at 36; SR Unhealthy Foods Report, at P 39.

or eating disorders, by glorifying foods and beverages that may contribute to negative health impacts.³⁸ They also have expressed concerns about marketing "highly-processed convenience foods" targeting women, who "still bear a disproportionate share of household duties," and may be led to provide "aspirational products that are 'improved' over traditional diets" or "cooked" meals.³⁹ Accordingly, business enterprises could consider mitigations that include avoiding marketing that "perpetuat[es] traditional and unequal gender dynamics to the disadvantage of women,"⁴⁰ and relevant education campaigns directed toward women.

Product Choice

Finally, as the right to health contemplates allowing individuals to make informed and meaningful choices about their dietary decisions, mitigation may include affirming that consumers have reasonable alternatives to products to enable free decision-making.⁴¹ Under the right to health as it is understood, the end-user is respected with the right to make their own choice about their body and their consumption.⁴²

However, if there is only one reasonable option for a food or beverage product, then consumers are arguably impaired in their choices.⁴³ To be clear, reasonable options in this context do not mean companies have an obligation to produce identical alternative products. The alternative options need only be reasonably similar to mitigate the risk that consumers will be left with no viable choices. However, confirming such reasonable options to consumers—which could include a reformulated product with less sugar/salt/fat and/or the option of a smaller portion size, or simply another option in the general food or beverage category—coupled with information and transparency efforts and mindful advertising and marketing strategies, are consistent with the expectations of the UNGPs and the consumer choice that is embedded within the right to health.

Conclusion

USCIB appreciates the opportunity to comment on this important report. We hope our submission has been helpful, and we look forward to your report's discussion of how State duties may apply in this context, and how businesses may meet their responsibilities to respect human rights. That distinction is central in articulating and applying the appropriate scope of Article 12.

³⁸SR Unhealthy Foods Report PP 39-40 (food marketing strategies could create potential risks to the right to health by "emphasiz[ing] sexuality and unattainable 'desirable' body types to promote unhealthy foods").

³⁹SR Unhealthy Foods Report P 39

⁴⁰*Id.*

⁴¹*Id.* P 31.

⁴² General Comment 14 P 9.

⁴³ SR Unhealthy Food Report P 29, 31.