

The “Breakthrough” of the Right to Food: The Meaning of General Comment No. 12 and the Voluntary Guidelines for the Interpretation of the Human Right to Food

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- I. Sources of the Right to Food
 1. Major Human Rights Instruments
 2. Humanitarian Law
 3. Declarations
 4. Regional International Law
 5. National Constitutions
- II. General Comment No. 12
 1. State Obligations Under the Right to Adequate Food
 - a. Respect
 - b. Protect
 - c. Fulfil
 2. The Normative Content of Article 11 ICESCR
 - a. Adequacy
 - b. Availability
 - c. Accessibility
 3. The General Principles of the ICESCR
 - a. “Maximum of Available Resources” and “Progressive Realisation”
 - b. Minimum Core Content/Core Obligation
 - c. Non-Discrimination
 - d. Participation
 - e. Extraterritorial Obligations

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- III. Voluntary Guidelines
 - 1. Background
 - 2. Legal Status
 - 3. Content
 - a. Main Content
 - b. Structure and Content
 - 4. Significance

The right to food was finally established in international law in article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) as a legal binding norm, but it did not receive the necessary attention for a long time.

FoodFirst Information and Action Network (FIAN) was set up in 1986. As an NGO it focussed on the right to food; the Committee on Economic, Social and Cultural Rights (CESCR) was established as an expert body of ECOSOC and became operative in 1987. It started to improve the state reporting procedure of the ICESCR States parties. Finally the Office of the High Commissioner for Human Rights (OHCHR) began by promoting and coordinating the human rights efforts of the UN since 1993.

But from a legal point of view there was still the need to clarify the right to food. It was necessary to analyse the normative content of article 11 to guide States parties on their way to realise the right to adequate food. More than all other documents or commentaries *General Comment No. 12 on The Right to Adequate Food* and the *Voluntary Guidelines to Support the Progressive Realisation of the Right to Adequate Food in the Context of National Food Security* are of outstanding significance concerning the interpretation of the right to food.

I. Sources of the Right to Food

1. Major Human Rights Instruments

The right to food was first established in 1948 in the – non-binding, but universally recognised – Universal Declaration of Human Rights,² in

² A/RES/217 (III) of 10 December 1948; M. Haedrich, “Von der Allgemeinen Erklärung der Menschenrechte zur internationalen Menschenrechtsordnung”, *JA* 31 (1999), 251 et seq.

article 25 and has since been spelt out in various declarations and treaties. But the most important binding guaranty of the right to food became and remained the ICESCR.

Article 11 ICESCR reads:

“1. The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food ... The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.

2. The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed:

(a) To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources;

(b) Taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need.”

A systematic research reveals that quite a number of other international human rights instruments include norms that deal with the right to food. Among them are article 6 of the International Covenant on Civil and Political Rights of 1966; article 12 of the Convention on the Elimination of All Forms of Discrimination against Woman of 1979; article 24 (2) e) and article 27 of the Convention on the Rights of the Child of 1989 and para. 19 of the United Nations Millennium Declaration (2000).

2. Humanitarian Law

International humanitarian law is also regulating the supply of food.³ But humanitarian law, as strictly binding law, is only applicable under certain circumstances, namely in armed conflicts.

3. Declarations

In para. 31 of the Vienna Declaration and Programme of Action of the 1993 World Conference on Human Rights states are called upon,

“to refrain from any unilateral measure not in accordance with international law and the Charter of the United Nations that creates obstacles ... and impedes the full realization of the human rights set forth in the Universal Declaration of Human Rights and international human rights instruments, in particular the rights of everyone to a standard of living adequate for their health and well-being, including food ... The World Conference ... affirms that food should not be used as a tool for political pressure.”⁴

The Rome Declaration on World Food Security of 1996 reaffirms the right of everyone to have access to safe and nutritious food, consistent with the right to adequate food and the fundamental right of everyone to be free from hunger. Its World Food Summit Plan of Action reaffirms in para. 12 that each state should contribute to the full enjoyment by all of their human rights in order to achieve the objective of food security for all. The United Nations Millennium Declaration required “to halve, by the year 2015, the proportion of the world’s people whose income is less than one dollar a day and the proportion of people

³ For example in article 7 Hague Convention (IV) respecting the Laws and Customs of War on Land (1907); arts 18, 20, 26, 28, 31, 46, 51 Geneva Convention Relative to the Treatment of Prisoners of War (1949); arts 15, 23, 36, 40, 49, 50, 51, 55, 59, 60, 61, 62, 76, 87, 89, 91, 100, 108, 127 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War (1949); Para. 6 Declaration on the Protection of Women and Children in Emergency and Armed Conflict (1974) and arts 54, 69, 70 of the Additional Protocol to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (1977); arts 5, 14, 18 of the Additional Protocol to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (1977).

⁴ Doc. A/CONF.157/23 of 12 July 1993.

who suffer from hunger ...” and, “to promote gender equality and the empowerment of women as effective ways to combat poverty, hunger and disease and to stimulate development that is truly sustainable.”

4. Regional International Law

Another scope of the right to food is regional international law. The most relevant instruments here are the regional bills of rights. Following the example of the Universal Declaration of Human Rights and the core international human rights instruments of the United Nations, these regional covenants are in a better position to define the important human rights aspects in the specific regions of the world, e.g. cultural or economic aspects. The right to food is protected among others in article 12 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, the so called Protocol of San Salvador (1988). Article 17 of the Cairo Declaration on Human Rights in Islam (1990) which states, “... the right of the individual to a decent living which will enable him to meet all his requirements and those of his dependents, including food ...”. Article 34 of the European Charter of Fundamental Rights of the European Union of 2000 and article 15 of the Additional Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa of 2000 entail a guaranty of social security and social assistance, respectively the right to food security.

5. National Constitutions

The right to food (either for the whole population or for vulnerable groups) can also be found in some national constitutions such as: Brazil, Colombia, Congo, Costa Rica, Cuba, Ecuador, Ethiopia, Guatemala, Guyana, Haiti, Iran, Malawi, Moldova, Namibia, Nicaragua, Nigeria, North Korea, Pakistan, Paraguay, Peru, the Philippines, Puerto Rico, South Africa, Sri Lanka, Suriname, Uganda, Ukraine, Macedonia and Russia. Furthermore, there are several constitutional provisions protecting a broader spectrum, such as an adequate standard of living, dignified life, or the right to social security which include the right to food.

II. General Comment No. 12

In 1999 the CESCR issued its General Comment No. 12 on the Right to Adequate Food.⁵ This is currently the most authoritative interpretation of the right to food within the UN human rights system and reflects the present state of international law. However, it must be borne in mind that the CESCR has finalised since then six more General Comments on thematic issues, which interpret other rights enshrined in the Covenant, thereby describing further aspects of the enjoyment of these rights. Therefore the General Comments must be interpreted in a coherent manner.

1. State Obligations Under the Right to Adequate Food

The nature of the legal obligations of States parties is defined in article 2 of the ICESCR and has as well been dealt with in the Committee's General Comment No. 3 (1990).⁶ States parties under the CESCR have three different levels of obligations, in particular to respect, protect and fulfil.⁷

a. Respect

Para. 15 of the Comment reaffirms that “the obligation to *respect* existing access to adequate food requires States parties not to take any measures that result in preventing such access.”⁸ The obligation to respect requires the state, and hence all its organs and agents, to abstain from doing anything that violates the integrity of the individual or infringes

⁵ Doc. E/C.12/1999/5 of 12 May 1999.

⁶ The nature of States parties Obligations, Doc. E/1991/23 of 1 January 1991.

⁷ The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, 1997, para. 7, *NQHR* 15 (1997), 244 et seq.; M. Craven, *The International Covenant on Economic, Social, and Cultural Rights – A Perspective on its Development*, 1995, 109 et seq.; M.M. Sepúlveda Carmona, *The Obligations of the State under the International Covenant on Economic, Social and Cultural Rights*, 2002, 167 et seq.; W. Kälin/ J. Künzli, *Universeller Menschenrechtsschutz*, 2005, 100 et seq.; E. Riedel, “The Human Right to Water”, in: K. Dicke/ S. Hobe/ K.U. Meyn/ A. Peters/ E. Riedel/ H.J. Schütz/ C. Tietje (eds), *Weltinnenrecht – Liber amicorum Jost Delbrück*, 2005, 593 et seq.

⁸ Emphasis in original.

on his or her freedom to use the material resources available, which best satisfy the personal basic needs.⁹

b. Protect

The obligation to protect requires measures by the state to ensure that enterprises or individuals do not deprive the access to adequate food. The full realisation of the right to food obliges States parties to protect every human being against restrictions from third parties. State parties have to guarantee with all appropriate means the protection of the affected population.

c. Fulfil

The obligation to fulfil requires the state to take the measures necessary to ensure for each person opportunities to obtain satisfaction of those needs, according to the right to food, which cannot be secured by personal efforts.¹⁰ Much more than the obligation to respect and protect, this obligation is dependent on the availability of resources. The obligation to fulfil (facilitate) means the state must pro-actively engage in activities intended to strengthen people’s access to and utilisation of resources and means to ensure their livelihood, including food security. The obligation to fulfil (promote) – that can not be found in General Comment No. 12 but in all the following General Comments – requires States parties to ensure that the right to food is taken into consideration in the conduct of public affairs and in any significant decision – making processes. The obligation to fulfil (promote) obliges the respective State party also to take steps to ensure that there is appropriate education concerning an adequate nutrition (e.g. breastfeeding and micronutrients). Finally, whenever an individual or group is unable, for reasons beyond their control, to enjoy the right to adequate food by the means at their disposal, states have the obligation to fulfil (provide) that right directly. This obligation is also true for victims of natural or other disasters.

⁹ A. Eide, “National Sovereignty and International Efforts to Realize Human Rights”, in: A. Eide/ B. Hagtvet (eds), *Human Rights in Perspective*, 1992, 5 et seq.

¹⁰ A. Eide, “Economic, Social and Cultural Rights as Human Rights”, in: A. Eide/ C. Krause/ A. Rosas (eds), *Economic, Social and Cultural Rights*, 2nd edition, 2001, 24 et seq.

2. The Normative Content of Article 11 ICESCR

As mentioned above, the right to adequate food is enshrined in article 11 ICESCR. Article 11 contains two rights,

“the right of everyone to an adequate standard of living ... including adequate food ...”, in article 11 para. 1,

and the “fundamental right of everyone to be free from hunger”, in article 11 para. 2.

It may be noted that the right to freedom from hunger is the only right in the Covenant termed “fundamental”. This attribute was meant to highlight the essential meaning of this right for the enjoyment of all other economic, social and cultural as well as civil and political rights.

Para. 1 is noticeably much broader than para. 2. Strictly speaking the right to freedom from hunger only recognises the justified claim to food in order to prevent hunger and imposes the corresponding core obligations to take the necessary action to mitigate and alleviate hunger as provided in para. 2, even in times of natural or other disasters.

The right to adequate food, on the other hand, is a part of the right to an adequate standard of living. Para. 6 of the Comment warns that,

“The *right to adequate food* shall therefore not be interpreted in a narrow or restrictive sense which equates it with a minimum package of calories, proteins and other specific nutrients.”¹¹

This sentence of the Comment refers to its definition of the normative content linked to the right to adequate food in the preceding sentence of para. 6, namely that,

“The right to adequate food is realized when every man, woman and child, alone or in community with others, has physical and economic access at all times to adequate food or means for its procurement.”

a. Adequacy

The normative content of the human right to adequate food in Comment No. 12 is, *inter alia* developed around the notion of adequacy. Adequate food must be “sufficient to satisfy the dietary needs of individuals, free from adverse substances, and acceptable within a given cul-

¹¹ Emphasis in original.

ture.”¹² Adequacy includes satisfaction of dietary needs, free from adverse substances and acceptability. The Comment states that “the notion of *sustainability* is intrinsically linked to the notion of adequate food or food *security*, implying food being accessible for both present and future generations.”¹³ “Adequacy” is to a large extent determined by prevailing social, economic, cultural, climatic, ecological and other conditions, while sustainability incorporates the notion of long-term availability and accessibility.

Satisfaction of dietary needs is the positive qualitative side of the right to food. Dietary needs require a mix of nutrients for physical and mental growth, development and maintenance depending on the respective occupation, gender, or age. As para. 9 states it,

“Measures may therefore need to be taken to maintain, adapt or strengthen dietary diversity and appropriate consumption and feeding patterns, including breast-feeding, while ensuring that changes in availability and access to food supply as a minimum do not negatively affect dietary composition and intake.”

Food must be free from adverse substances. This demand is the negative qualitative side of the right to food. Adverse substances include those that originate through contamination or adulteration in the food chain, but also naturally occurring toxins.

Cultural and consumer acceptability implies the need also to take into account, as far as possible, perceived non nutrient-based values attached to food and food consumption and informed consumer concerns regarding the nature of accessible food supplies. The acceptability is very closely linked to the rights enshrined in article 15 ICESCR and this interaction will be highlighted.

b. Availability

Para. 12 of the General Comment specifies the availability of food,

“*Availability* refers to the possibilities either for feeding oneself directly from productive land or other natural resources, or for well-functioning distribution, processing and market systems that can move food from the site of production to where it is needed ...”¹⁴

¹² Para. 8.

¹³ Para. 7.

¹⁴ Emphasis in original.

Long-term availability points to the ecological limitations of food production and distribution.

c. Accessibility

“*Accessibility* encompasses both economic and physical accessibility,” according to para. 13 General Comment.

Food is economically accessible for a person or community if the person or community has access to food as a result of its economic activities in the widest sense. These economic activities can be direct food production based on access to natural productive resources (land, water, forest, pastures, fishing grounds) and other resources and means of production. Without means for the procurement of food, economic access to food is impossible. The normative content containing both economic and physical access to food implies therefore the entitlement to access, the means for its procurement such as natural resources and other resources (skills, knowledge, markets etc.). The Comment mentions a few groups whose economic access to food is particularly threatened,

“Socially vulnerable groups such as landless persons and other particularly impoverished segments of the population may need attention through special programmes.” “A particular vulnerability is that of many indigenous population groups whose access to their ancestral lands may be threatened.” “Victims of natural disasters, people living in disaster-prone areas and other specifically disadvantaged groups may need special attention ...”.¹⁵

“Economic accessibility implies that personal and household financial costs associated with the acquisition of food for an adequate diet should be at a level that the attainment and satisfaction of other basic needs are not threatened or compromised.”¹⁶

In contrast to the economic accessibility of food, the physical accessibility of food ignores whether or not the accessed food is an effect of economic activity, entitlement or acquisition pattern. It puts the emphasis on the mere question of immediate access. “Physical accessibility implies that adequate food must be accessible to everyone ...” Physical accessibility of food is unconditional, just as the right to an adequate standard of living in article 11 is unconditional. Access to food, is in

¹⁵ Para. 13.

¹⁶ Ibid.

particular, not conditional on economic activities or specific merits (whether or not people “deserve” aid). If a person could buy food, then food is obviously accessible to this person. If a person could not access or buy food (or could do so only under unacceptable hardships affecting the enjoyment of other human rights), food is not physically accessible to this person.

Some groups will probably not be in a position to access food. Such groups “including physically vulnerable individuals, such as infants and young children, elderly people, the physically disabled, the terminally ill and persons with persistent medical problems, including the mentally ill”.¹⁷ Such a situation would trigger states obligations as described below.

Ever since General Comment 13,¹⁸ the CESCR added “non-discrimination” as a new aspect to the accessibility principle. Non-discriminating accessibility means, food must be accessible to all, including the most vulnerable or marginalised sections of the population, in law and in fact, without discrimination on any of the prohibited grounds.

Accessibility includes the right to seek, receive and impart information concerning food issues. The information has a special meaning for the issue of hidden hunger,¹⁹ with regard to information on the nutritional substance of food. Access to information also applies to knowledge and awareness about the right to food and related rights among right holders, i.e. where to claim the right to food when violated.

3. The General Principles of the ICESCR

a. “Maximum of Available Resources” and “Progressive Realisation”

The full realisation of the right to adequate food does not need to be fulfilled immediately with the entering into force of the Covenant (which would be too much to expect from many governments). The right to food must however be realised progressively to the maximum

¹⁷ Ibid.

¹⁸ General Comment No. 13, The Right to Education (1999), Doc. E/C.12/1999/10 of 8 December 1999.

¹⁹ Hidden hunger does not refer to the overt and obvious hunger of poor people who are unable to feed themselves, but to the more insidious hunger caused by eating food that is cheap and filling, but deficient in essential vitamins and micro-nutrients.

of available resources. These principles have been defined in article 2 para. 1 of the Covenant and also pointed out by the Committee in its General Comment No. 3, para. 10. The Covenant states,

“Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.”²⁰

This implies that states have to prove that they have used the maximum of the resources available to ensure the right to food for its population. The General Comment states that,

“in determining which actions or omissions amount to a violation of the right to food, it is important to distinguish the inability from the unwillingness of a State party to comply. Should a State party argue that resource constraints make it impossible to provide access to food for those who are unable by themselves to secure such access, the State has to demonstrate that every effort has been made to use all the resources at its disposal in an effort to satisfy, as a matter of priority, those minimum obligations.”²¹

To achieve progressively the right to food imposes an obligation to move as expeditiously as possible towards this goal.²² Obligations which can be met immediately may be demanded immediately from states. This includes all obligations to respect the economic and physical access to adequate food. Taking the steps progressively (rather than immediately) is only acceptable due to lack of resources and this can occur only under the obligations to fulfil and (to some extent) the obligation to protect.²³

“A state claiming that it is unable to carry out its obligation for reasons beyond its control therefore has the burden of proving that this

²⁰ Article 2 para. 1 ICESCR.

²¹ General Comment, para. 17.

²² Ibid. para. 14.

²³ Craven, see note 7, 131 et seq.; K. Klee, *Die progressive Verwirklichung wirtschaftlicher, sozialer und kultureller Menschenrechte: eine Interpretation von Art. 2 Abs. 1 des internationalen Pakts für wirtschaftliche, soziale und kulturelle Rechte*, 2000, 213 et seq.; A. Bierweiler, “Summary of Discussion”, in: E. Riedel (ed.), *Social Security as a Human Right: Drafting a General Comment on Art. 9 ICESCR – Some Challenges*, 2007, 183 et seq.

is the case and that it has unsuccessfully sought to obtain international support to ensure the availability and accessibility of the necessary food.”²⁴

b. Minimum Core Content/Core Obligation

In a situation of insufficient resources to protect and fulfil the full normative content of the right to food, some priority content of the right to adequate food has to be met first. This priority setting relates also to states that might not be resource-poor, but have so far failed to fully implement the normative content. The terms of minimum core content/obligation emerged from the need to clarify further what can be expected from states immediately and what can only be expected progressively. In some General Comments, such as General Comment No. 12 the CESCR uses the concepts “core content” and “core obligations” in parallel. Whereas the term “core content” is not precisely defined, “core obligation” is defined in General Comment No. 3 as that States parties “have a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels” of each of the rights spelt out in the Covenant. Therefore, “core obligation” is the more appropriate term to use in identifying what States parties have to do as a minimum, while the term “core content” seems to reduce the scope of the right.

For a long time it was considered that the “core obligation” derived from the notion of “the fundamental right ... to be free from hunger”, as stated in article 11 para. 2 of the ICESCR, and not the provision made in article 11 para. 1 recognising the right of everyone to an adequate standard of living, including adequate food. Out of the two provisions in article 11, the CESCR then formulated, in its General Comment No. 12, two different levels of “core” provisions.

(1) The availability of food in a quantity and quality sufficient to satisfy the dietary needs of individuals, free from adverse substances, and acceptable within a given culture and (2) the accessibility of such food in ways that are sustainable and that do not interfere with the enjoyment of other human rights.

This definition does not offer sufficient clarity. First core obligations that relate to article 11 para. 2 are defined, and then a broader definition is given of the “core content” of the right to adequate food which is principally equivalent to the overall normative content of the right to

²⁴ General Comment para. 17.

adequate food. Thus, there is no definition of “core content” spelt out, only “core obligation”.

Parts of the core obligations are also spelt out in the provisions in paras 6 and 12 of the Comment. “The *right to adequate food* shall therefore not be interpreted in a narrow or restrictive sense which equates it with a minimum package of calories, proteins and other specific nutrients.” Furthermore, “States have a core obligation to take necessary action to mitigate and alleviate hunger [...] even in times of natural or other disasters.”²⁵ This means that even at the core obligation level, states have to make sure that the right to food is more than the right to be fed; food must also have a certain quality and be nutritionally adequate and safe as well as accessible in a way that respects dignity. It must also be expected from governments that the most severe situations should be addressed and as soon as possible be overcome.

As no clear definition exists about the notion of “core content”, there is still a debate on how to use this term. Many authors within the economic, social and cultural rights area use the concept differently; some avoid using the term, as it can be seen as reducing a broader understanding of “adequate food” to a very minimum. Nevertheless, the “core obligation” gives a concrete requirement on what governments should focus on. Necessary steps have to be taken immediately, but for the full realisation of the normative content, all steps cannot be taken at the same time.

c. Non-Discrimination

One of the corner-stones for human rights is the principle of non-discrimination. The non-discrimination principle has to be applied immediately in spite of resources and of level of development. The principle is stated in article 2 para. 2²⁶ of the ICESCR and defined and specified in relation to the right to food in para. 18 of the Comment:

²⁵ General Comment para. 6, emphasis in original.

²⁶ “The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin property, birth or other status.” Non-discrimination is further specified in article 3 that demands, “The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant.”

“... any discrimination in access to food, as well as to means and entitlements for its procurement, on the grounds of race, colour, sex, language, age, religion, political or other opinion, national or social origin, property, birth or other status with the purpose or effect of nullifying or impairing the equal enjoyment or exercise of economic, social and cultural rights constitutes a violation of the Covenant.”

Discrimination can *de jure* be incorporated into the legal system, in goals for policies or in institutions that benefit certain groups at the expense of others. It can also *de facto* be shown in the results and effects of certain policies. In para. 19 of the Comment violations by the states or other entities related to discrimination are defined as “(...) denial of access to food to particular individuals or groups, whether the discrimination is based on legislation or is pro-active (...)”

In the chapter dealing with strategies for the implementation at the national level the Comment emphasises (paras 21-26) the kind of actions states have to take to avoid discrimination when implementing the right to food.

“The strategy should give particular attention to the need to prevent discrimination in access to food or resources for food. This should include: guarantees of full and equal access to economic resources, particularly for women, including the right to inheritance and the ownership of land and other property, credit, natural resources and appropriate technology; measures to respect and protect self-employment and work which provides a remuneration ensuring a decent living for wage earners and their families (as stipulated in article 7 (a) (ii) of the Covenant); maintaining registries on rights in land (including forests).”²⁷

d. Participation

Participation is another fundamental principle for human rights and should be applied when the rights are being interpreted and developed, as well as when states develop their programs for realising the rights. If the groups concerned participate in programs and decisions related to human rights it is more likely that people’s needs will be met. Participation as a human right is established in article 25 lit. (a) of the ICCPR, as well as the Limburg Principles. The General Comment reaffirms the importance of participation,

²⁷ General Comment para. 26.

“The formulation and implementation of national strategies for the right to food requires full compliance with the principles of accountability, transparency, people’s participation, decentralization, legislative capacity and the independence of the judiciary.”²⁸

e. Extraterritorial Obligations

The primary responsibility to ensure the right to food lies with the state. But the extraterritorial obligations of states, have also been stressed by *inter alia*, the CESCR. They include the obligations to respect, protect and fulfil the right to food of citizens in other countries. The Committee clarifies that states,

“should take steps to respect the enjoyment of the right to food in other countries, to protect that right, to facilitate access to food and to provide the necessary aid when required.”²⁹

This means that states should, at the very least, endeavour to ensure that their own policy choices (e.g. international trade policies) do not negatively affect the right to food of citizens in other countries.³⁰

International cooperation is expressed most strongly in the commitment to the right to food, under article 1 para. 2, arts 11 and 23 of the ICESCR. The CESCR states that international cooperation for the realisation of economic, social and cultural rights is an obligation of all states, in accordance also with Articles 55 and 56 of the UN Charter and well-established principles of international law. The importance of States parties to recognise the essential role of international cooperation is also emphasised in the above mentioned Rome Declaration of the World Food Summit and the Voluntary Guidelines for the implementation of the right to adequate food.

It is also well established that States parties should refrain from food embargoes which endanger the access to food in other countries as well as using food as an instrument of political and economic pressure in another country. To respect the right to food thus means that states, with regard to extraterritorial obligations, should,

²⁸ Ibid. para. 23.

²⁹ Ibid. para. 36, as well as General Comment No. 15 paras 30-36, The Right to Water (2002), Doc. E/C.12/2002/11 of 20 January 2003.

³⁰ Second Submission of Jean Ziegler, Special Rapporteur on the Right to Food to the Intergovernmental Working Group for the Voluntary Guidelines on the Right to Adequate Food, para. 15.

“refrain at all times from food embargoes or similar measures which endanger conditions for food production and access to food in other countries. Food should never be used as an instrument of political and economic pressure.”³¹

Besides respect-bound obligations, State parties are also obliged to ensure that private actors from their own country do not contribute to violations of human rights in other countries.³² The obligation to fulfil requires the state according to para. 36 to cooperate internationally and “ensure that the right to adequate food is given due attention and consider the development of further international legal instruments to that end.” In other words, states must cooperate in creating an environment where the right to food can be realised. Food aid should, as far as possible, be provided in ways which do not adversely affect local producers and local markets and products included in international food trade or aid programmes must be safe and culturally acceptable to the recipient population.³³

As outlined by the CESCR states should ensure that their actions as members of international organisations take account of the right to food. States should take their obligations into consideration when they act within such organisations, including the IMF, World Bank and the World Trade Organisation. The Comment calls in para. 41 for greater attention to the protection of the right to food in lending policies and credit agreements and in international measures to deal with the debt crisis, ensuring, for example, that the right to food is protected in the structural adjustment programmes.³⁴ This suggests, for example, that agreements concerning trade liberalisation should not hinder another country’s capacity to ensure the full realisation of the right to food.

³¹ Para. 37, as well as General Comment No. 8, The Relationship between Economic Sanctions and Respect for Economic, Cultural and Social Rights (1997) Doc. E/C.12/1997/8 of 12 December 1997; the Vienna Declaration and the Voluntary Guidelines.

³² Para. 36.

³³ Para. 39.

³⁴ As also outlined in General Comment No. 2 para. 9, International Technical Assistance Measures (1990) Doc. E/1990/23.

III. Voluntary Guidelines³⁵

1. Background

At the outset, a code of conduct on the right to food was planned as an instrument to reduce the number of undernourished people world-wide by half by the year 2015. Due to the opposition of some states the idea of a binding codex was abandoned in favour of mere guidelines. The Voluntary Guidelines aim at the implementation of the human right to food on an international and national level³⁶ in order to achieve the goal stated at the World Food Summit. With the Guidelines, states would receive appropriate guidance in order to support efforts to achieve the progressive realisation of the right to adequate food. In the long run, the implementation of the Guidelines should improve world-wide food security by enforcing the (human) right to food. On 24 November 2004, the FAO Council adopted the Voluntary Guidelines during its 127th session. The Guidelines are intended to provide governments with a practical instrument for the implementation of the right to adequate food nationally and for the fulfilment of their obligations with regard to the ICESCR.

2. Legal Status

The Voluntary Guidelines are sometimes described as “soft law”, i.e. gradually emerging patterns of behaviour, which lack a legally binding quality.³⁷ The notion of soft law was invented for some of the supposedly legally relevant pronouncements formulated in international organisations and amongst states.³⁸ Soft law does not constitute a source of international law. However, the creation of soft law is not completely insignificant because it may form the basis for a long-standing practice and thus eventually lead to customary international law. Soft law is difficult to classify by way of legal terminology due to the fact that it is

³⁵ The entire title is: *Voluntary Guidelines to Support the Progressive Realisation of the Right to Adequate Food in the Context of National Food Security*.

³⁶ Voluntary Guidelines, Section I, No. 1.

³⁷ P. Malanczuk, *Akehurst's Modern Introduction to International Law*, 7th edition, 1997, 54.

³⁸ E. Riedel, “Standards and Sources”, *EJIL* 2 (1991), 59 et seq.

not legally binding, but typically on the cusp of binding standards of international law. Accordingly, states often behave in line with a soft law rule even before this turns into a true legal obligation. As a general rule, consensus as to the content of a certain behaviour can be established more easily, if that behaviour is not required under international law, i.e. in the phase before this behaviour becomes a binding standard of international “hard law”.³⁹

The Voluntary Guidelines are expected to have exactly such an effect. They can offer a useful contribution to the creation of customary international law, because they constitute soft law which might be followed by a conduct which becomes accepted as international law. But the Voluntary Guidelines cover a combination of binding and non-binding content, as they are only partly declaratory. Thus, the Voluntary Guidelines cannot be declared as “soft law”, the notion of “zebra law” is more suitable for their legal classification.⁴⁰

3. Content

a. Main Content

Member States of the FAO reaffirm “the right of everyone to have access to safe and nutritious food.”⁴¹ Member States should orient themselves towards the Voluntary Guidelines in order to align their policies more intensively with the goal of food security. The Voluntary Guidelines offer a detailed catalogue of measures, which provide a basis for the implementation of the right to adequate food: democracy, the rule of law, measures for the economic development and strategies of food security are outlined, besides the questions of efficient market systems and a legal framework for the protection of biological diversity and sustainability. The Voluntary Guidelines are a road map for the necessity to guarantee every human being the possibility to either secure one’s nutrition through one’s own work or through access to social security benefits.

³⁹ The so-called “limited anticipatory effect”, compare Malanczuk, see note 37, 55.

⁴⁰ Riedel, see note 38, 59.

⁴¹ Voluntary Guidelines, preface No. 2.

Finally, the Guidelines embody voluntary commitments of the rich states, providing financial development assistance up to 0.7 per cent of the GDP,⁴² which was neglected for decades.

b. Structure and Content

The Voluntary Guidelines as a whole are divided into three sections:

Part I of the Voluntary Guidelines includes a preface and introduction. The preface mentions the previous history, developing history and the goals of the Voluntary Guidelines in detail. The introduction deals with the basis of the right to adequate food in international law as well as with the precise content of the right to adequate food and its implementation by food security. This section recognised the obligations of States parties to the ICESCR for the first time to respect, protect and fulfil the right to adequate food. Part II contains the actual 19 Guidelines,⁴³ which immediately or indirectly promote the gradual implementation of the right to adequate food:

Guideline 1 stresses the necessity of democratic structures, the meaning of Good Governance for the stabilisation of individual rights and for the achievement of general prosperity, the adherence to human rights and the importance of the rule of law.

Guideline 2 recommends measures for economic development, including the promotion of economic development as support for political food means, the social and economic evaluation of the national food situation, the provision of supplies of healthy food, strategies against hunger and poverty, social reforms and the fight against rural and urban problems.

Guideline 3 describes suitable strategies for the implementation of the right to food. Such strategies begin with an evaluation of the corresponding national legislation and contain non-discrimination strategies to fight poverty by providing basic services for the poorest. Further strategies are to aim at an increase in productivity, consultations with the civil society, gender specific arrangement of the strategies and support of related national as well as regional strategies.

Guideline 4 deals with the national market systems. The markets may be optimised by the creation of appropriate institutions and the support of civil food security. Consumer protection, regional and

⁴² Guideline 19.1 in conjunction with Section III No. 12.

⁴³ Which are divided into sub-Guidelines.

transnational markets, measures for individual protection as well as the free social market economy, supply systems and compliance with human rights of the third generation should be strengthened.

Guideline 5 encourages activities for the establishment and reinforcement of appropriate institutions, for the coordination of their activities, their transparency, their co-operation with respective institutions of the civil society as well as measures against corruption.

Guideline 6 which is formulated in a concise way aims at granting all stakeholders subjective rights.

Guideline 7 outlines the need to recognise the right to adequate food and to ensure access to effective remedies, including access to justice. It describes a proper legal framework, for instance the consideration of a direct legal realisation of the right to adequate food, suitable information for this right, as well as an enhancement of the legal situation of women.

Guideline 8 tries to clarify the access to financial resources. This access may be particularly granted for vulnerable groups with specific problems of access. Furthermore, a promotion of agriculture, access to research results, enforcement of the rights of women and programs for access and appropriate use of agricultural land are recommended. The promotion of work, improvement of access to the labour market, security of land tenure, the access to water, the meaning of the genetic variety for food and agriculture, the ecological preservation of natural resources and the promotion of services are emphasised.⁴⁴

Guideline 9 contains measures for food security and for consumer protection, in particular food-control systems, the standardisation of food, the creation of a coordinating committee for food, the compliance with the hygiene regulations of food production, the health instruction of food business operators, as well as development assistance and cooperation with the civil society.

Guideline 10 advises Member States to take some special nourishment measures, for instance the special consideration of a balanced diet, specific food and nutrition needs of ill people, the promotion of breastfeeding and baby food. Furthermore information about balanced nutrition, the avoidance of discriminating food practices and the cultural acceptance of food play a vital role.

Guideline 11 stresses the role of education as a basis for appropriate nutrition. It is important to increase awareness concerning the human

⁴⁴ Special titled sub-Guidelines.

rights in general and the right to adequate food in particular. Thus, relevant investments should be made, a discrimination-free primary education is to be guaranteed, and secondary education shall strengthen the individual's consciousness of the right to adequate food. Furthermore, housing conditions and food preparation should be improved. Accordingly, the administration as well as the civil society shall be included and trained, in order to create and strengthen awareness of the right to adequate food.

Guideline 12 entails separate budgetary resources that are to be made available in a transparent way, in particular considering vulnerable groups. Furthermore an enabling legal and economic environment for savings and investments should be established.

Guideline 13 promotes once more the need for a special consideration of the situation of vulnerable groups. To achieve this, the system of "Food Insecurity and Vulnerability Information and Mapping Systems" (FIVIMS)⁴⁵ is recommended. Differentiated analysis for vulnerable groups and a fair selection of the assignment are highly demanded. Finally, it is stressed that food should be distributed to women to strengthen their position in society and ensure that the food is used to meet the household's food requirements.

Guideline 14 recommends creating suitable safety nets. As social welfare structures, these are to guarantee a self-sufficient, non-discriminating food supply for the population. National actions endangering food supply are always to be coupled with food assistance. Safety nets are to consider the right to adequate food appropriately to be supported by accompanying and supplementing measures and to be carried out in cooperation with the relevant international and civil organisations.

Guideline 15 discusses international food aid. Apart from an optimisation of food aid and food-aid transactions, states and relevant non-state actors are to guarantee the access to food aid, to consider specific situations and humanitarian principles and coordinate international food aid.

Guideline 16 deals with natural and man-made disasters. It is very clearly stressed⁴⁶ that food should never be used as a means of political and economical pressure. Furthermore, the obligation of occupying powers to supply food and the protection of the humanitarian person-

⁴⁵ Established after the World Food Summit.

⁴⁶ Guideline 16.1 is the only "voluntary" guideline mentioning a strict prohibition.

nel is based on the basis of already established international humanitarian law. Sufficient nutrition for refugees and internally displaced persons is to be guaranteed, as well as an appropriate behaviour of the states with regard to disasters, a mechanism of early warning systems and an evaluation of the food situation in emergencies.

Guideline 17 provides a basis for monitoring the implementation of the Voluntary Guidelines. States are to create appropriate monitoring mechanisms for the evaluation of the effectiveness of the undertaken measures concerning the food situation. Guideline 17.3, in particular, describes the possibility to assess the progressive realisation of the right to food with appropriate indicators. These indicators are to be applied explicitly for the evaluation of certain political measures and instruments, as well. Moreover, vulnerable groups attract special attention. States are to deal with the already gathered information.

Guideline 18 describes the co-operation between and the promotion of national human rights institutions concerning the implementation of the right to adequate food.

Finally Guideline 19 specifies the international dimension of the right to food. This Guideline refers, in particular, to the following Section III emphasising the meaning of the definitions of the World Food Summit within the context of the Millennium Declaration.

Section III describes international measures, actions and commitments. First, it mentions the significance of international co-operation in the context of the conferences and the international alliance against hunger. Even if the states are primarily responsible for their own territory, international co-operation is stressed. The states are to avoid measures opposing international law, the UN Charter or the social and economic development of states.

The role of developed countries and international organisations for the support of the developing countries is stressed. Developed and developing countries are requested to intensify their partnership by means of technical co-operation in order to overcome obstacles to food security. International trade is stressed as an effective instrument to attain prosperity and food security. Within the agricultural system, restrictions and distortions of competition are to be corrected and prevented. The obligations and recommendations of the Sao Paulo Consensus are stressed. The foreign debts of poor states are to be fought, in order to generate resources for the fight against hunger. It is planned to support developing countries by public development assistance in the context of

the Monterrey Consensus.⁴⁷ International food assistance should be accompanied by measures for the progressive realisation of the right to adequate food. All states, companies and organisations involved are to realise food security through a coordinated procedure. Finally, the promotion and protection of the right to adequate food by human right organs and specialised agencies is stressed, as well as the international reporting to the Committee on World Food Security.

4. Significance

Through the Voluntary Guidelines states succeeded for the first time – according to the human rights approach – to prepare and adopt an international set of rules to achieve food security on a multilateral level. This step is praised in different comments as a “break-through”, an “important lever for the human rights work” or “pioneer work”, as an “important normative step of the community of states on the way to a world without hunger” or by the statement that “human rights arms are sharpened.”

Such an evaluation surprises at first sight, because of the lack of legal enforceability of the Voluntary Guidelines. After all, international law was not modified with the adoption of the Voluntary Guidelines, since the Voluntary Guidelines do not create new rights or obligations. States are simply encouraged to apply the Voluntary Guidelines when developing their strategies, policies, programmes and activities. However, all facets of this code must be included in a legal evaluation.

To start with, the Voluntary Guidelines are a blueprint for a legally binding implementation of the right to adequate food. Furthermore, it is to be expected that the Voluntary Guidelines will also be consulted for the interpretation of the existing international law guarantees of the right to food.⁴⁸ As described above, the “announcement effect” of the Voluntary Guidelines as soft law is to be considered. Soft law is able to affect customary international law, and, besides, as a tool that has been tested in the field – it can constitute a model for hard law, for instance a binding code of conduct.

Nevertheless, rather than legal implications, the Guidelines will become important as a political tool for the implementation of the right to

⁴⁷ The Monterrey Consensus is to give answers to the questions of development policy of the globalisation.

⁴⁸ Especially article 11 para. 2 ICESCR.

adequate food. Accordingly, all Member States of the FAO must justify a departure from the route towards realisation of the right to food on the international as well as on the national level. The Voluntary Guidelines are therefore to be regarded as confirmation of the political will to achieve effectively the realisation of the right to adequate food. For this purpose legislators will frequently have to play an active role, so that the Voluntary Guidelines will result in laws which serve as indicators for the implementation of the right to adequate food.

