



Critical Issues in Realising the Right to Food in South Africa
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The Right to Food in International Law

Table of contents

Summary	1
Introduction	2
Treaties	3
Interpretation & Implementation	4
Normative Content of the Right to Food	8
Definition	8
Implementation	9
IGWG - RTFGs	10
Mandate & Process	10
Discussions & Difficulties	12
Conclusion: Implications for South Africa	15

Summary

In this paper, the key international historical milestones in the development of the right to food will be reviewed. The content of the right to food and main obligations are primarily contained in Articles 2 and 11 of the International Covenant on Economic, Social and Cultural Rights, which is complemented by General Comment 12 on the right to adequate food. The right to food under international law implies the right to means of production or procurement of food of sufficient quantity and quality, free from adverse substances and culturally acceptable. This right can be fulfilled by individual's own efforts or in community with others, and must be enjoyed by all without any adverse distinction based on race, religion, sex, language, political opinion or other status.

The paper discusses the process underway in FAO, namely the work of the Intergovernmental Working Group (IGWG) to elaborate a set of voluntary guidelines on the progressive realization of the right to adequate food in the context of national food security, including some of the fundamental and practical issues facing the IGWG. Finally, the paper links what has been learned and the IGWG process to the situation of South Africa.

Introduction

The right to food is recognized in several legally binding international instruments, such as the International Covenant on Economic, Social and Cultural Rights (ICESCR), where it is recognized as part of an adequate standard of living, which also includes housing and clothing, and separately as the fundamental right to be free from hunger

FAO's Constitution sets out the purpose of FAO, in its preamble, as "raising levels of nutrition and standards of living ... and thus ... ensuring humanity's freedom from hunger."¹ The Constitution was amended in 1965 to this effect, at the same time as the ICESCR was in its final drafting stages. FAO views the right to food as central to its mandate.²

The right to food under international law implies the right to means of production or procurement of food of sufficient quantity and quality, free from adverse substances and culturally acceptable. This right should primarily be fulfilled by individual's own efforts or in community with others, and must be enjoyed by all without any adverse distinction based on race, religion, sex, language, political opinion or other status.

Under the ICESCR, State Parties are obliged to take all appropriate steps, to the maximum of available resources, to progressively realize the right to food for all. A distinction is made between obligations of conduct and of results, and violations can be of commission or of omission. A distinction is also made between the unwillingness and the inability of States to take action.

Under international law, the State is accountable for the enjoyment of human rights within its territory. However, the State may assign responsibilities to different levels of government, and should indeed, through its national strategy or legislation, assign as precise a responsibility for action as possible, especially in addressing multisectoral and multidimensional problems such as food insecurity.

State obligations can also be viewed as being at different levels, to respect, protect and fulfil the right to food. While the importance of creating an enabling environment where everyone can enjoy the right to food by their own efforts should be stressed, it remains incumbent on the State to ensure that those who are unable to do so for themselves are adequately provided for, so that as a minimum, no one suffers from hunger.

In the following, the key international milestones will be reviewed, including the numerous treaties that recognize the right to food and the main events in the development of a better understanding this right. Then the normative content and main obligations concerning the right to food in international law will be briefly explained, before turning to the process underway in FAO to elaborate a set of voluntary guidelines on the

¹ FAO, Basic Texts, Rome, 1999

² Jacques Diouf, Director-General of FAO, Address to International Workshop on "Policies Against Hunger", Berlin, 22 May 2002. Available on <http://www.fao.org/english/dg/2002/berlin2205.htm>

progressive realization of the right to adequate food in the context of national food security which will conclude with some remarks about its relevance to South Africa.

Key international milestones

Freedom from want was one of the fundamental freedoms identified by the founders of the United Nations in the wake of the Second World War.³ They felt it was evident that hungry people could not be free. In order to be able to enjoy freedom of speech and assembly and other civil rights, people must be adequately fed. Death by starvation has the same final result as death by bullets: death. Hunger is not only painful; it cuts at the very dignity of the human being.

The Universal Declaration of Human Rights (UDHR), which was adopted by the United Nations General Assembly in 1948, declares a range of human rights, all of which are indispensable for human dignity. The UDHR has been so widely accepted that many scholars believe that at least certain of its provisions have become customary international law.⁴ The status of the right to food as customary norm, is however uncertain. In any case, the UDHR enjoys a higher status than normal soft law instruments, also because it is very much linked to the fundamental principles and purposes of the United Nations, as spelled out in the UN Charter, the highest treaty in international law.

Treaties

The right to food is recognized in a number of international instruments,⁵ the adoption of each of which represents further recognition and reaffirmation of the right itself.

- The right to an adequate standard of living, including food, clothing and housing was proclaimed in the Universal Declaration of Human Rights in 1948.
- This right was codified in the International Covenant on Economic, Social and Cultural Rights of 1966, which also recognized the fundamental right to be free from hunger.
- The protection of the right to life in the International Covenant on Civil and Political Rights has been interpreted to also cover death from malnutrition.

³ F.D. Roosevelt, "State of the Union" address, 1944. Quoted UN, *Right to Adequate Food as a Human Right*, Human Rights Study Series 1, New York, 1989, final report of Asbjørn Eide, Special Rapporteur on the right to adequate food of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities (E/CN.4/Sub.2/1987/23). This was the so-called "four freedoms speech", the four being freedom from fear, freedom from want, freedom of religion, freedom of expression.

⁴ H. Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, (1995) 25 Georgia J. Intl & Comp. L.289 at 317ff.

⁵ FAO Legislative Study 68, *Extracts from international and regional instruments and declarations, and other authoritative texts addressing the right to food*, Rome, 1999.

- The Convention on the Prevention and Punishment of the Crime of Genocide of 1948 proscribes deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part.
- Prisoners of War, internees and other persons in the power of a Party to the Geneva Conventions of 1949 enjoy wide-ranging rights to be fed. In addition, the deliberate starvation of civilians is prohibited and warring parties must allow relief consignments to go through.
- The Convention relating to the Status of Refugees of 1951 and the Convention relating to the Status of Stateless Persons of 1954 accord the same treatment to refugees and stateless persons relating to rationing and public relief as to nationals.
- The Convention on the Elimination of All Forms of Discrimination Against Women of 1979 establishes the obligation to ensure adequate nutrition to women during pregnancy and lactation. It also contains provisions of access to resources for rural women.
- The Convention of the Rights of the Child obliges States to combat malnutrition and to provide adequate and nutritious foods, as well as to provide material support to nutrition programmes.
- The Statutes of the International Criminal Court of 1998 defines genocide in the same way as the Genocide Convention and specifies that crimes against humanity include deprivation of access to food calculated to bring about the destruction of part of the population. War crimes include the deliberate starvation of civilians, including by wilfully impeding relief supplies.

International Covenant on Economic, Social and Cultural Rights

Article 11

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, clothing and housing, and to continuous improvement of living conditions. 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.

(In Annex to UN General Assembly Resolution 2200A (XXI), 16 December 1966)

Interpretation & Implementation

The global reaffirmation and recognition of the right to food is by itself not sufficient. The right must be understood and the corresponding obligations implemented and enforced. There has been considerable progress in understanding the meaning of the

right to food, in developments that started in the 1980s and accelerated in the follow-up to the World Food Summit of 1996.

The seminal work of Mr Asbjørn Eide as Special Rapporteur of the Sub-Commission on the Prevention of Discrimination and Protection of Minorities in the 1980s had a great influence, but was perhaps somewhat before its time, given the global geopolitics at the time.⁶

In the preparations for the World Food Summit, some countries, and most of the NGOs, attempted to obtain agreement on the adoption of a Code of Conduct regarding the right to food. In the end, however, the idea proved not politically feasible at the time, and the Plan of Action of the WFS contains only a rather vague reference to such a code, as discussed below. The Rome Declaration on World Food Security reaffirmed the right to adequate food and fundamental right to be free from hunger and recognized the role of other human rights and democracy in creating the environment for achieving food security.⁷

Rome Declaration on World Food Security

We, the Heads of State and Government, or our representatives, gathered at the World Food Summit at the invitation of the Food and Agriculture Organization of the United Nations, reaffirm 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.

...

Democracy, promotion and protection of all human rights and fundamental freedoms, including the right to development, and the full and equal participation of men and women are essential for achieving sustainable food security for all.

Report of the World Food Summit, part one, appendix, FAO, Rome, 1997.

The main purpose of Objective 7.4 of the WFS Plan of Action is to call for the clarification of the content of the right to adequate food and how it may be implemented.⁸ These questions were among the main objections made to considering and adopting a code of conduct on the right to food: there could be no discussions about a code of conduct unless the normative contents and effective ways of implementation are clearer.

⁶ UN, *Right to Adequate Food as a Human Right*, Human Rights Study Series 1, New York, 1989, final report of Asbjørn Eide, Special Rapporteur on the right to adequate food of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities (E/CN.4/Sub.2/1987/23). Mr Eide updated his study in 1999 at the request of the Sub-Commission, UN, Sub-Commission on the Promotion and Protection of Human Rights. *Updated study on the right to food*, submitted by Mr. Asbjørn Eide, UN Document No E/CN.4/Sub.2/1999/12, 28 June 1999.

⁷ *Rome Declaration on World Food Security*, paragraphs 1 and 4. Report of the World Food Summit, part one, appendix, FAO, Rome, 1997. See also Objectives 1.1; 1.2 b); 1.3; 1.4; 2.1; 2.2; 2.3 and 2.4 for provisions on rights, equitable access, support to vulnerable groups, etc.

⁸ FAO, *World Food Summit Plan of Action*, Objective 7.4, Report of the World Food Summit, part one, appendix, Rome, 1997.

Of course, this was not the only objection, but this need for clarification did provide the basis for the consensus that emerged.⁹

World Food Summit Plan of Action:

Objective 7.4

To clarify the content of the right to adequate food and the fundamental right of everyone to be free from hunger, as stated in the International Covenant on Economic, Social and Cultural Rights and other relevant international and regional instruments, and to give particular attention to implementation and full and progressive realization of this right as a means of achieving food security for all.

To this end, governments, in partnership with all actors of civil society, will, as appropriate:

(a) Make every effort to implement the provisions of Article 11 of the International Covenant on Economic, Social and Cultural Rights (the Covenant) and relevant provisions of other international and regional instruments;

(b) Urge States that are not yet Parties to the Covenant to adhere to the Covenant at the earliest possible time;

(c) Invite the Committee on Economic, Social and Cultural Rights to give particular attention to this Plan of Action in the framework of its activities and to continue to monitor the implementation of the specific measures provided for in Article 11 of the Covenant;

(d) Invite relevant treaty bodies and appropriate specialized agencies of the UN to consider how they might contribute, within the framework of the coordinated follow-up by the UN system to the major international UN conferences and summits, including the World Conference on Human Rights, Vienna 1993, within the scope of their mandates, to the further implementation of this right;

(e) Invite the UN High Commissioner for Human Rights, in consultation with relevant treaty bodies, and in collaboration with relevant specialized agencies and programmes of the UN system and appropriate intergovernmental mechanisms, to better define the rights related to food in Article 11 of the Covenant and to propose ways to implement and realize these rights as a means of achieving the commitments and objectives of the World Food Summit, taking into account the possibility of formulating voluntary guidelines for food security for all.

Report of the World Food Summit, part one, appendix, FAO, Rome, 1997.

The NGO Forum at the WFS also adopted a declaration and called for the drafting of a Code of Conduct on the human right to adequate food.¹⁰ After the WFS, three NGOs took the lead in the preparation of a Code of Conduct, FIAN International, WANAHHR and the International Jacques Maritain Institute. A draft was produced in 1997 and more than 800 NGOs supported it.¹¹

The WFS gave rise to increased interest and momentum within FAO and the human rights community. While respecting that the human rights bodies should take the lead, FAO took an active role in assisting the High Commissioner for Human Rights with her

⁹ Gerald Moore and Margret Vidar, *FAO and the Right to Adequate Food*, in Notes et Documents, n.s. 56, septembre - décembre 1999, Institut International Jacques Maritain.

¹⁰ FAO, *Statement by the NGO Forum to the World Food Summit, Report of the World Food Summit*, part one, Rome, 1997.

¹¹ FIAN, *The Code of Conduct on the Right to Adequate Food, Hungry for What is Right*, No 19, August 2000.

mandate and concluded a Memorandum of Understanding to that effect with her Office. FAO also issued publications¹² and a website¹³ on the right to food. As part of the follow-up to the WFS, the UN High Commissioner for Human Rights, prompted and supported by FAO, organized a series of Expert Consultations in 1997, 1998 and 2001¹⁴. The first two - along with the NGO Code of Conduct - inspired the work of the Committee on Economic, Social and Cultural Rights, which in May 1999 issued General Comment 12 (GC12) on the right to adequate food, giving an authoritative interpretation of that right as contained in Article 11 of the International Covenant on Economic, Social and Cultural Rights.¹⁵

The Commission on Human Rights appointed a Special Rapporteur on the Right to Food in the year 2000.¹⁶ The Special Rapporteur, Mr Jean Ziegler, reports both to the Commission and to the General Assembly. He has a wide mandate to investigate issues and situations and to make recommendations. He has issued several reports, discussing, *inter alia*, justiciability, gender, international trade and international humanitarian law, and undertaken missions to Niger, Brazil, Bangladesh and the Occupied Palestinian Territories.¹⁷

The joint and separate activities of FAO on the one hand and human rights bodies and NGOs on the other, mentioned above, contributed greatly to the clarification of the normative content of the right to adequate food and its implementation. The Expert

¹² FAO, *The right to food in theory and practice*, 1998, Rome. FAO Legislative Study 68, *Extracts from international and regional instruments and declarations, and other authoritative texts addressing the right to food*, Rome, 1999 (In English, French and Spanish).

¹³ www.fao.org/Legal/rtf/rtf-e.htm, launched in commemoration of the 50th Anniversary of the Universal Declaration and dedicated to the right to food.

¹⁴ UN, *The right to food*, Report of the High Commissioner for Human Rights, UN Document No E/CN.4/1998/21, 15 January 1998. *The right to food*, Report of the High Commissioner for Human Rights, UN Document No E/CN.4/1999/45 20 January 1999. 15 January 1999. *The right to food*, Report of the High Commissioner for Human Rights, UN Document No E/CN.4/1999/45, 20 January 1999. *The right to food*, Report on the Third Expert Consultation on the Right to Food, UN Document No E/CN.4/2001/148, 30 March 2001.

¹⁵ Committee on Economic, Social and Cultural Rights, *General Comment 12, the Right to Adequate Food (Article 11 of the Covenant)*, UN Document No E/C/12/1999/5, 12 May 1999.

¹⁶ Commission on Human Rights Resolutions 2000/10, 17 April 2000. See also General Assembly Resolution 56/155, The right to food, 15 February 2002.

¹⁷ UN, *The right to food*, Report by the Special Rapporteur on the right to food, Mr. Jean Ziegler, submitted in accordance with Commission on Human Rights resolution 2000/10, UN Document No E/CN.4/2001/53, 7 February 2001; *The right to food*, Report by the Special Rapporteur on the right to food, Mr. Jean Ziegler, submitted in accordance with Commission on Human Rights resolution 2001/25 and General Assembly resolution of ****, and *Addendum, Mission to Niger*, UN Document No E/CN.4/2002/58/Add.1, 23 January 2002; *The right to food*, Note by the Secretary-General**, UN Document No A/56/210, 23 July 2001; *The right to food*, Note by the Secretary-General, UN Document No A/57/356, 27 July 2002; *The right to food*, Report by the Special Rapporteur on the right to food, Mr. Jean Ziegler, submitted in accordance with Commission on Human Rights resolution 2000/10, and *Addendum, Mission to Brazil*, UN document E/CN.4/2003/54/Add.1, 3 January 2003. These and advance unedited reports of the missions to Bangladesh and the Occupied Palestine Territories are available on the website of the Special Rapporteur www.righttofood.org

Consultations used the NGO Code of Conduct, which then fed into the drafting of General Comment 12. The Special Rapporteur has contributed both to the clarification of the right to food and constitutes a way of implementing it. Discussions are also underway on a possible Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, which would allow for individual and group complaints over State Party performance.

These developments led to a mounting pressure for the next step to be taken, namely to negotiate a Code of Conduct on the Right to Food, or as mentioned in Objective 7.4, above, “voluntary guidelines for food security for all”.

Normative Content of the Right to Food

Before moving on to events at the World Food Summit: five years later, it is opportune to describe the current understanding of the right to food, as it emerges from the developments described above. The right to food is taken to encompass both the right to adequate food as part of the right to an adequate standard of living (Art.11:1 ICESCR) and the fundamental right to be free from hunger (Art. 11:2 ICESCR).

Definition

The most authoritative definition of the right to food as set out in Article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) is to be found in General Comment 12 (GC12) of the Committee on Economic, Social and Cultural Rights (CESCR). In addition, GC12 spells out the obligations of State Parties to respect, protect and fulfil this right, defines violations and gives guidance on the implementation of the right to food. The following elaboration of the normative content of the right to food is based on the General Comment.¹⁸

Definition of the right to food:

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

The **core content** of the right to adequate food implies:

- 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;
- The accessibility of such food in ways that are sustainable and that do not interfere with the enjoyment of other human rights.

State obligations:

¹⁸ Committee on Economic, Social and Cultural Rights, *General Comment 12, the Right to Adequate Food (Article 11 of the Covenant)*, UN Document No E/C/12/1999/5, 12 May 1999.

The principal obligation of a State Party is to take steps to achieve *progressively* the full realization of the right to adequate food. This imposes an obligation to move as expeditiously as possible towards that goal. Every State is obliged to ensure for everyone under its jurisdiction access to the minimum essential food which is sufficient, nutritionally adequate and safe, to ensure their freedom from hunger.

The right to adequate food, like any other human right, imposes three types or levels of obligations on States parties: the obligations to *respect*, to *protect* and to *fulfil*. In turn, the obligation to *fulfil* incorporates both an obligation to *facilitate* and an obligation to *provide*.

The obligation to *respect* existing access to adequate food requires States parties not to take any measures that result in preventing such access. The obligation to *protect* requires measures by the State to ensure that enterprises or individuals do not deprive individuals of their access to adequate food. The obligation to *fulfil (facilitate)* means the State must proactively engage in activities intended to strengthen people's access to and utilization of resources and means to ensure their livelihood, including food security. 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 also applies for persons who are victims of natural or other disasters.

Implementation

There are a number of institutional, legal and policy measures that need to be taken by States to implement the Right to Food. Article 2 of the ICESCR specifies that a State Party undertakes to:

- a. take economic, technical and other steps
- b. to the maximum of its available resources
- c. with a view to achieving progressively the full realization of the [right to food]
- d. by all appropriate means
- e. including particularly the adoption of legislative measures.

It must therefore be an explicit policy goal to realize the right to food. According to GC12, States should adopt national strategies to achieve it, with targets and benchmarks. These must be monitored, so statistics must be collected.

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. Good governance is essential to the realization of all human rights, including the elimination of poverty and ensuring a satisfactory livelihood for all.

On the institutional side, it is necessary to determine roles, responsibilities and accountability of the different government bodies, as well as to ensure that they act in a coordinated way when they are dealing with issues that touch upon the right to food. In

the same manner, there are a number of sector policies that potentially affect the enjoyment of the right to food. These include food production, marketing and food safety measures as well as general poverty eradication, economic and trade policies and questions of health care, education, sanitation, water and infrastructure.

Any law that is inconsistent with the right to food should be amended, and legislation generally should provide a framework in which the right to food is respected, protected and fulfilled. Establishing and maintaining the rule of law is of major importance, ensuring respect for fundamental civil and political rights, and so is adequate sector legislation in such fields as food safety, social security, access to natural resources and the functioning of trade and other economic activities. The rule of law must be brought to bear on food security.

FAO has long advocated for the adoption of framework law¹⁹ to act as a common point of reference and to increase accountability. It could foster better coordination and ensure the enforceability of principles, thus empowering people to realize their right to food.

IGWG - RTFGs

The Intergovernmental Working Group on Right to Food Guidelines (IGWG-RTFGs) is a major new development in the field of socio-economic rights. This is also the first time that the right to food is discussed in substance and detail within an FAO body. In the following, the establishment, mandate and process of the IGWG will be reviewed, before discussing some of the main issues and difficulties arising in the discussions so far.

Mandate & Process

At the World Food Summit: *five years later* (WFS:*fyl*) in 2002, Heads of State or Government decided to establish within FAO an Intergovernmental Working Group (IGWG) to elaborate a set of voluntary guidelines to support the progressive realization of the right to adequate food.²⁰ The FAO Council formally established the group in November 2002²¹

The mandate given to the new IGWG has several significant elements, which merit mentioning:

- a. The Guidelines shall be “voluntary”, i.e. they shall not create any new legally binding obligations. This is of particular relevance to countries that are not State Parties

¹⁹ FAO, *The Right to Food in Theory and Practice*, Rome, 1998.

²⁰ FAO, *Declaration of the World Food Summit: five years later, International alliance against hunger*, Operative paragraph 10, Report of the World Food Summit: five years later, part one, Appendix, Rome, 2002.

²¹ FAO, *Establishment of the Intergovernmental Working Group requested in Paragraph 10 of the Declaration of the World Food Summit: five years later*, Report of the 123rd Session of the Council, 28 October to 2 November 2002, paragraphs 26-28 and Appendix D.

to the ICESCR, but may also be used as an argument to use non-obligatory language (“may wish” instead of “should”).

b. They shall give guidance on the “progressive realization” of the right, which may imply that there are no immediate obligations.

c. They shall address the right to “adequate” food, which may imply that there is no such thing as a right *to food* without qualifications.

d. The guidelines shall be in the “context of national food security”, which may imply that no international aspects should be discussed.

e. The Voluntary Guidelines shall be drafted “with the participation of stakeholders”. This means that international non-governmental organizations (NGOs) with a relevant mandate may participate fully in discussions, without having to wait until all Governments have spoken²². Only members, i.e. States, have the right to vote, however, which implies that NGO objections do not count in the search for consensus. National NGOs can participate either as members of international NGOs or as part of their national delegations. FAO also encourages States to include representatives of human rights commissions, public defenders and ombudspersons in their delegation. Finally, intergovernmental organizations are also stakeholders who participate in the IGWG. FAO issued a call to all stakeholders in the beginning of 2003 to submit their views on the Voluntary Guidelines, which were then synthesized for the First Session of the IGWG.²³

The IGWG was instructed by the WFS:*fyl* and by Council to complete its task in a period of two years, which is quite a short time. The First Session of the IGWG was convened in Rome on 24-26 March 2003 and was attended by delegates from 87 members of FAO and the United Nations, observers from over twenty other organizations, and by the United Nations Special Rapporteur on the Right to Food. At this First Session, the IGWG held a general debate on the various submissions, opinions and views submitted by States and stakeholders. The general debate was conducted in an innovative way that enabled both state and non-state participants to contribute equally to a constructive exchange of views. The IGWG entrusted its Bureau with the task of preparing a first draft of Voluntary Guidelines in time for its Second Session and extended the deadline for States and stakeholders to submit their views and proposals on the structure and content of the Voluntary Guidelines until 7 April 2003.²⁴

The Bureau of the IGWG met for three days in July and five days in September to finalize its draft for the Voluntary Guidelines, on the basis of a “zero draft” prepared by the Secretariat. The draft Voluntary Guidelines were then submitted to the Second Session of the IGWG which was held in Rome from 27 to 29 October 2003. At this

²² See Appendix D, *op.cit.*

²³ All IGWG documents are available on www.fao.org/righttofood

²⁴ Report on the First Session of the Intergovernmental Working Group for the Elaboration of a Set of Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security, FAO document CFS: 2003/4.

Session, Members and Stakeholders gave their views on the draft and made suggestions for amendments. However, no negotiations took place at this session; rather it was decided to establish a Working Group composed of a number of spokespersons for members and observers, which were mandated to start the negotiations in preparations for the Third and final Session of the IGWG. The Working Group will meet in February 2004, and the Third Session will be held in June or July 2004, in time for submission to the Committee on World Food Security in September 2004.²⁵ From there, the Voluntary Guidelines could be submitted to the FAO Council and the FAO Conference for adoption, but this is not yet decided.

Discussions & Difficulties

The right to food is, in this author's opinion, one of the most complex and difficult human rights. Unfortunately there is also a fundamental difference of opinion as to the nature of this right and any obligations in that relation, which has surfaced in the IGWG. One can only speculate as to why the right to food meets so much resistance. This difficulty may date back to the onset of the Cold War and manifests itself, *inter alia*, in insistent calls for always using the term "progressive realization" in the guidelines, rather than referring to obligations to respect, protect and fulfil, which, as is rightly pointed out, does not exist in the language of any legally binding treaty. There is pressure for as narrow as interpretation as possible of the terms of the mandate of the IGWG.²⁶

The status of General Comment 12 has also been the subject of much discussion, including whether it should be explicitly or even implicitly referred to. Those that do not agree with the interpretation of the right to food contained in GC12 fear that any reference in a negotiated document would lend it unwarranted legitimacy and even lead to the establishment of new international norms. This is a fundamental question, as many others maintain that GC12 contains a straightforward interpretation of Article 11 of the ICESCR. It should also be recognized that the ICESCR has 147 State Parties, which is less than universal ratification amongst FAO and UN Member States, all of which have the right to participate in the IGWG.

Also emerging from the first two Sessions of the IGWG is a fundamental question of what to do with the international dimensions of the right to food. Even though the ICESCR explicitly refers to the importance of international cooperation, richer countries have never accepted that there are specific, legally binding obligations to render assistance to persons in other countries, not even in a state of emergency.²⁷ There is also here a question of overlapping of forums, for instance, the Agreement on Agriculture is currently under re-negotiation under the auspices of the World Trade Organization (WTO), and many of its members, especially those from the North, strongly resist discussing those issues within the IGWG. However, there is very strong pressure from the South to list at least some standards of conduct that would apply in negotiating and

²⁵ The Report of the Chair of the IGWG is not published at the time of writing.

²⁶ Personal notes from First and Second Session of IGWG.

²⁷ Lorenzo Cotula and Margret Vidar, *The Right to Food in Emergencies*, FAO Legislative Study 77, Rome, 2003.

implementing trade agreements. Linked with this issue is the question of whether a State can have human rights obligations towards people living in other countries. If such an obligation were to be recognized by the IGWG, this could at the very least entail that there was a duty not to take any action that adversely affects the enjoyment of the right to food of individuals in other countries. Here again, there are a number of political reasons for some countries to resist such a notion.

Even if there were no fundamental differences of opinion within the IGWG, elaborating Voluntary Guidelines on the Right to Food would be a formidable task, because of the very complexity of the rights and obligations. Inherent problems include questions of agency, of asymmetry and the nature of the goods in question, in addition to difficulties owing to lack of experience and widespread misunderstanding of the right to food.

Problem of Agency. Enjoyment of the right to food by everyone depends on the proper functioning of a great deal of institutions. Breakdown in production, distribution, pricing, information and general poverty may all cause hunger. The government policies and institutions that influence and control these factors are myriad. It may therefore be unclear who exactly is responsible and should be held accountable for a particular individual's plight. At the international level it is clear that the State is accountable, but international law does not say which ministries or institutions could be held to account at the national level. The only solutions to this problem are judicial decisions and national legislation that identifies the agency and its role at all levels.

The process of food acquisition is not simply a one-step transaction between an impersonal market and a free individual. The reality is a complex process, of interactions between large number of agents, sometimes called the "food system", which begins with land rights and food production and extends to food marketing, product labelling and food safety. The individual's income, and hence claims on food (whether on the market place or from his or her own produce) is, in turn, dependent on a large number of transactions. At each step in the process, the Government may be an agent alongside private institutions. The Government's responsibility can be identified in areas ranging from minimum wage and land tenure legislation to food quality control and product description in the market place as well as direct food assistance. A hungry, landless peasant could have multiple claims for action, so many that in fact, each agent can point to another and thus avoid responsibility.

There is also more **asymmetry** involved in the right to food than with many other rights. For instance, the obligation to respect the right to freedom from torture is incumbent on the State, and more specifically the police, military and security services of a country can be held accountable. However, the right to food is more complex. There may in some instances be a right to be fed and there is often a legal obligation to feed one's children, but there is also a more general right to live in an environment in which one may feed oneself, a claim that is difficult to assign responsibility for, and where the right and the obligations do not mirror one another exactly. At all levels of obligations, there is also the question of the different levels of government, from the national to the regional and local levels, all of which may have different responsibilities. The only way to clarify the

asymmetry and to assign more exact responsibilities is through the judiciary or national legislation with identification of institutional accountability as well as definition of entitlements and enforceable rights.

Enjoyment of the right to food by all is for the public good, just as general peace and security are. While no human right, whether civil, political, economic or social, comes without cost, food distinguishes itself by its nature as **private goods** in the sense that it is produced by (mostly private) farmers and distributed through markets. Food is the most commodified right there is. Most other rights are seen as public in some way. They can be public in the sense of public goods, for instance, the enjoyment of the right to vote by one person does not diminish the possibility of another to enjoy the same right. Other rights are seen as “natural” public service issues, in the sense that the role of government is not fundamentally disputed, such as for health and education.

The private goods nature may be one of the reasons for problems that some have with the right to food. It is feared that the right to food lays an untenable burden on the State to provide this food, which in turn could lead to disastrous interventions in market forces. However, as explained in GC12, the right to be fed should always be seen as a last resort. The fact remains that the obligation to provide is there and should not be neglected if necessary to save lives. In that sense, the fundamental difficulty cannot easily be solved. FAO affirms that the financial, natural, human and organizational resources exist in the world to eliminate hunger.²⁸ The question is whether there is political will to do so, and whether that will can be turned into the necessary action.

Another related possible objection to the notion of the right to food regards **efficiency**. The experiments in social markets and blanket food subsidies in the 1970s are widely thought to have been an expensive failure. Economists argue that private markets should allocate private goods, like food. Since the early 1980s, international organisations have been urging their member states to abolish the old marketing parastatals and pull out of food markets.²⁹

However, such criticism denotes a rather outdated understanding of the right to food. Indeed, in the past, socio-economic rights were often associated with heavy intervention in markets, food price subsidies, protectionism, and regulation of trading activities. But to say that the Government must ensure that the food system works does not mean that markets should be micro-managed. There are numerous instruments for ensuring the realisation of food rights that do not conflict with market liberalisation and deregulation and the principles of efficiency. Furthermore, it should be kept in mind that the right to food is an economic right, which demands the freedom for the individual to pursue economic activities in order to produce and procure food.

²⁸ FAO, *Anti-Hunger Programme: Reducing hunger through sustainable agricultural and rural development and wide access to food, Second draft*, Rome, July 2002.

²⁹ Margret Vidar and Ben Watkins, *Discussions on the right to food*, in *Notes et Documents*, n.s. 56, septembre - décembre 1999, Institut International Jacques Maritain.

The draft produced by the Bureau³⁰ of the IGWG was accepted by IGWG2 as the basis for negotiations, which have not started at the time of writing. However, there are a number of practical questions, which the IGWG has already been faced with, but not resolved, in addition to fundamental questions.

One of these is the question of how to structure the guidelines. A number of suggestions have been made, for instance to use the levels of obligations as the basis, rather than the different sectors, as in the current draft. There are also conflicts between the simultaneous wish of the IGWG for a short and clear document and its wish for the guidelines to provide practical guidance. Without some level of detail, the guidance provided will be minimal. There are also inherent difficulties with the notion of margin of appreciation, which is a well-developed legal concept and especially applicable to national implementation of socio-economic rights, and the need for flexibility so that the Guidelines can apply to all countries, no matter what their situation, climate or level of development. All these questions will have to be further discussed and resolved by the IGWG.

The FAO Secretariat must maintain a level of neutrality as the host of the negotiations, so FAO can function as a neutral forum. However, FAO is also a stakeholder in its capacity of a specialized agency with the right to food at the heart of its mandate. Thus, it has expressed some positions in the process and is likely to continue to do so. FAO's position is that the Guidelines should bring together human rights and food security expertise and be a practical tool for countries that want to adopt a rights-based approach to food security and implement the right to food. It should help States with reviewing their strategies, policies, institutions and laws. In that sense, FAO stresses the voluntary nature of the Guidelines. However, in order for the Guidelines to be of any use for those States, the Guidelines cannot be at the level of the lowest common denominator.³¹

Conclusion: Implications for South Africa

South Africa has one of the best constitutional human rights protection in the world. The right to food is very well protected, formulated consistently with the ICESCR, and it is clearly justiciable³². The work of the South African Human Rights Commission (SAHRC) and the draft Food Security Bill are also of great interest to the IGWG and the RTFG process.³³

In the first instance, therefore, South Africa is setting a practical example of legal and institutional measures that countries can take to implement the right to food. South Africa's participation in the negotiations is therefore very important. Its delegates can

³⁰ FAO document IGWG/1/2 (annexed hereto).

³¹ Hartwig de Haen, Assistant Director-General, Economic and Social Department, FAO, in his opening statement to the Second Session of the IGWG.

³² FAO, Recognition of the Right to Food at the National Level, doc. IGWG/2/INF/1

³³ South Africa is one of several countries selected for case studies on its experience with the right to food, being prepared for the IGWG.

November 2003

help alleviate fears by other delegations about strong constitutional provisions or the existence of recourse. The SAHRC can explain its monitoring role to countries where such a role has not yet been established. The reasoning in South African Supreme Court Judgments can inspire judges in other countries. South Africa sent a strong delegation to the Second Session of the IGWG and will hopefully participate actively in the negotiations of the near future.

This being said, of course it is to be hoped that the final Guidelines will be useful for and applied by countries such as South Africa. Even the most food secure countries could improve individual enjoyment of the right to adequate food. There is always scope for more empowerment, better participation and stronger accountability. Continued work about the meaning and application of the right to food in the context of South Africa are therefore to be welcomed.

Internet Links:

IGWG-RTFGs

www.fao.org/righttofood

FAO Legal Office Right to Food webpage

www.fao.org/Legal/rtf/rtf-e.htm

Office of the UN High Commissioner for Human Rights

www.unhchr.ch

UN Special Rapporteur on the Right to Food

www.righttofood.org**Annex:**

Voluntary guidelines to support the progressive realization of the right to adequate food in the context of national food security, Draft prepared by the IGWG Bureau for consideration at the Second Session of the IGWG, FAO document IGWG/2/2