



ISSN 1014-6679

FAO
LEGISLATIVE
STUDY

77

The right to adequate food in emergencies



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for the

FAO Legal Office

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FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS
Rome, 2002

FOREWORD

The right to adequate food has been affirmed in international treaties and declarations for more than fifty years, and has received increased attention after the World Food Summit called for the clarification of its normative content (objective 7.4 of the World Food Summit Plan of Action). Since then, a substantial amount of conceptual work has been undertaken by FAO, by other bodies, agencies and programmes of the United Nations system (particularly the Office of the High Commissioner for Human Rights, the Committee on Economic Social and Cultural Rights, and the Special Rapporteur on the Right to Food), and by actors outside the UN system. This work has resulted in a better understanding of the right to adequate food and of its implications.

The "right of everyone to have access to safe and nutritious food" was recently reaffirmed by the Declaration "International Alliance Against Hunger" adopted at the World Food Summit – Five Years Later, which also invited the FAO Council to establish an Intergovernmental Working Group to elaborate voluntary guidelines on the realization of that right. FAO, in collaboration with relevant UN bodies, agencies and programmes, is to assist the Intergovernmental Working Group in its activities.

This study was undertaken by the FAO Legal Office within the broader context of FAO's activities to clarify the normative content of the right to adequate food. In particular, it builds on Legislative Study No. 68, which was published in 1999 and contains extracts from a wide range of international and regional instruments relating to the right to adequate food. The purpose of this study is to clarify the meaning of the right to adequate food with specific regard to emergency situations, including both natural and man-made disasters.

The study identifies and analyses the applicable principles, rules and standards of international law related to the right to food in emergency situations. In so doing, it draws on several branches of international law, including international human rights,

humanitarian, refugee, economic and environmental law. This holistic approach, encompassing bodies of international law that are often treated in isolation, follows the philosophy of Legislative Study 68 and is one of the main contributions of the study. Reference is also made to some principles and standards embodied in internationally recognised codes of conduct, which are not legally binding and are not part of international law.

The study analyses the obligations and responsibilities of States, particularly those affected by natural or man-made disasters, and of non-State actors to realize the right to adequate food, and examines the principles and standards applicable to food and food-related aid programmes.

The target audience is primarily legal professionals and researchers working on human rights and humanitarian law. The study may also be of interest for practitioners involved in training and macro-planning, and may serve as a useful resource for field-oriented guides and training materials.

The study was prepared by Lorenzo Cotula, FAO Consultant, and Margret Vidar, Legal Officer. The authors of this study have sought and received advice and comments on its structure and contents at various stages in the process from a variety of colleagues within FAO and other international organizations, to whom the Legal Office extends its gratitude.

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LIST OF ABBREVIATIONS

ACHR	American Convention on Human Rights
AP I or II	Additional Protocol I or II to the Geneva Conventions
CA 3	Common article 3 of the four Geneva Conventions
CAT	Convention against Torture
CBD	Convention on Biological Diversity
CEDAW	Convention on the Elimination of all Forms of Discrimination Against Women
CERD	Convention on the Elimination of Racial Discrimination
CESCR	Committee on Economic, Social and Cultural Rights
Codex	Codex Alimentarius Commission
CRC	Convention on the Rights of the Child
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECOSOC	UN Economic and Social Council
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICRC	International Committee of the Red Cross
IDPs	Internally displaced persons
IPPC	International Plant Protection Convention
NGO	Non-governmental organization
OUA	Organization for African Unity
OIE	Office international des épizooties
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNGA	United Nations General Assembly
UNSC	United Nations Security Council
WFS	World Food Summit
WHO	World Health Organization
WTO	World Trade Organization

INTRODUCTION

This study analyses the normative content of the right to adequate food in emergency situations, examining the provisions of human rights law as well as those of other relevant branches of international law, including international humanitarian law, refugee law, criminal law, economic law and environmental law.

Under international human rights law, every human being has a right to adequate food. In the words of the Committee on Economic, Social and Cultural Rights, this means that every man, woman or child, alone or in community with others, has the right to have physical and economic access at all times to adequate food or to the means for its procurement (General Comment No. 12, 1999). Each State has a legal obligation to take steps in order to progressively realize this right, individually and through international assistance and cooperation, and to the maximum of its available resources. As a fundamental human right, the right to adequate food applies in emergency situations. These are defined here as including both natural disasters (droughts, floods, hurricanes, earthquakes, etc.) and man-made disasters (international and internal armed conflicts).

In armed conflicts, the protection granted by human rights law is supplemented by international humanitarian law, mainly consisting of the four 1949 Geneva Conventions and the two 1977 Additional Protocols. Many provision of international humanitarian law are aimed at ensuring that persons or groups not (or no longer) taking part in the hostilities are not denied food or access to food, by prescribing certain conduct (e.g. with regard to permitting and facilitating access by humanitarian agencies) and prohibiting certain behaviour (e.g. the use of starvation as a method of warfare). Serious violations of these norms are crimes punishable under international law.

Moreover, other branches of international law (refugee law, economic law, environmental law) contain norms that are

relevant for the right to adequate food within both natural and man-made disasters. For instance, international economic law contains norms on food aid, both within the framework of the World Trade Organization and within international commodity agreements (Food Aid Convention). Further food standards are developed and harmonized by the FAO/WHO Codex Alimentarius Commission.

The study also refers to principles and standards embodied in non-binding, internationally recognized codes of conduct. Although these are not part of international law, they are referred to here because they may provide insights on the interpretation and operationalization of the right to adequate food in emergency situations.

Given its focus on emergency situations, and given the importance of aid in these contexts, the study deals at length with food and food-related aid. Food-related aid refers to the forms of humanitarian assistance that are directly instrumental to producing food (particularly with regard to the provision of agricultural inputs, e.g. seeds). In any case, it should be remembered that the right to adequate food per se is not centred on aid, as it is to be primarily realized by right-holders themselves through their economic and other activities.

The study uses the analytical framework classifying the obligations relating to the right to adequate food in obligation to respect, obligation to protect and obligation to fulfil. Although this classification has been elaborated with regard to State obligations under human rights law, it provides a useful framework to analyse also principles, rules and standards embodied in other bodies of law.

The study is organized in three chapters. The first chapter identifies and reviews applicable principles, rules and standards. The second chapter examines the obligations of States and of non-State actors in realizing the right to adequate food in emergency situations. The third chapter analyses the principles and standards applicable to food and food-related aid programmes.

I. APPLICABLE LAW AND PRINCIPLES

1.1. Complementarity between different branches of law

Several branches of international law contain norms that are relevant for the right to adequate food in emergency situations: human rights law, humanitarian law, refugee law, criminal law, economic law and environmental law. All these bodies of norms must be taken into account in construing the normative content of the right to adequate food. Studies on the right to adequate food are often limited to the human rights law provisions directly concerning that right, while humanitarian operators often refer only to international humanitarian law. However, a comprehensive approach is necessary in order to strengthen respect, protection and fulfilment of the right to adequate food in emergency situations. This chapter reviews the relevant branches of international law, analyses to what extent they are applicable to emergency situations, and explores their complementarity.

Furthermore, principles concerning the right to adequate food and/or concerning food aid are spelt out in international codes of conduct prepared by international and non-governmental organizations. These principles are not legally binding and do not constitute part of international law. However, they are referred to in this chapter as they may provide insights on the interpretation of the right to adequate food and/or on the design and implementation of food aid programmes.

1.2. International human rights law

1.2.1. Overview

Human rights law is the branch of international law that affirms the universal rights and freedoms to which all human beings are entitled. Right-holders are individuals or groups that have certain entitlements (e.g. life, health, education, etc.) and protections (e.g. non-discrimination, right not to be subject to torture, etc.). For each right there is a corresponding duty to respect, protect and fulfil that right. The duty-bearers are all

States bound by human rights law. Human rights law is based upon customary international law and international treaties, as well as soft-law instruments.

The Universal Declaration of Human Rights (UDHR), adopted by the United Nations General Assembly on 10 December 1948, contains a list of civil, cultural, economic, political and social rights. Although the Declaration is not a legally binding treaty, it may be argued that it contains an authoritative interpretation of articles 55 and 56 of the United Nations Charter, which is a treaty binding for all UN member States. Furthermore, at least some of its provisions have become customary international law.

Human rights are also affirmed in international treaties, which are binding upon the States that ratified them: the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), and the Convention on the Rights of the Child (CRC).

Furthermore, human rights are protected by regional treaties and bodies: in Europe, the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and its Protocols, and the European Social Charter; in Africa, the Banjul Charter on Human and Peoples' Rights; in the Americas, the American Convention on Human Rights (ACHR) and the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador).

Several human rights treaties and instruments recognize the right to adequate food, namely: the UDHR (art. 25); the ICESCR (art. 11(1)); the CEDAW (art. 12(2)); the CRC (arts. 24(2)(c) and 27); and, at regional level, the Protocol of

San Salvador (art. 12). Moreover, article 11(2) of the ICESCR guarantees the right to freedom from hunger, i.e. the right to the minimum nutritional intake ensuring survival (without the "adequacy" standard entailed by the right to adequate food).

In addition, since all human rights are interrelated and interdependent, the full realization of the right to adequate food is intertwined with the realization of other rights (including e.g. health and education). For instance, research has shown that countries guaranteeing freedom of thought and expression are less likely to experience famines, because of the pressure to act exercised on the government by the existence of a free press¹. However, due to space and time constraints, this study focuses only on norms directly concerning the right to adequate food.

1.2.2. Ratification gaps and customary law

Human rights treaties are not ratified by all States. As of July 2002, for instance, the ICCPR had been ratified by 148 States, and the ICESCR by 145. However, it is widely accepted that some fundamental human rights are recognized, in whole or in part, under customary international law, and are thus binding for all States, irrespective of whether they have ratified human rights treaties.

Whether a human right is protected under customary law is to be assessed on a case-by-case basis, with regard to each right or aspect of it. The analysis is to be carried out on the basis of State practice and *opinio juris* (i.e. the conviction that a conduct constitutes a legal obligation under international law), as emerging at national and international level. Prohibition of slavery, genocide and torture are examples of customary law norms.

¹ Jean Drèze and Amartya Sen, 1989, *Hunger and Public Action*, Oxford, Clarendon Press. It would be interesting to undertake further research and analysis on this issue, with particular regard to the 2000 drought in the Horn of Africa (where democratisation processes were underway in several States).

It may be argued that the right to adequate food, at least in its basic form of right to be free from hunger, is part of customary international law. Indeed, in that basic form, the right to food is directly linked to the right to life, which is one of the most widely recognized human rights. Moreover, international humanitarian law provisions that are relevant for the right to freedom from hunger, such as the prohibition of starvation of civilians as a method of warfare, are widely recognized as part of international customary law (see section 1.3 below).

1.2.3. Limitation and derogation clauses

Human rights law applies in peace and war, in ordinary periods as well as in emergencies. However, there are provisions in human rights law instruments which: (a) limit the scope of the protected human rights; and (b) provide for suspension of/derogation from certain rights in time of public emergencies.

Limitation clauses permit States lawfully to restrict the free exercise of human rights in order to protect public health, public safety and morals, to restore order, and to protect fundamental rights and freedoms of others. Examples of such provisions are article 29(2) of the UDHR and articles 12(3), 18(3), 21 and 22(2) of the ICCPR.

As for the right to adequate food, the ICESCR contains a general limitation clause, whereby the States Parties may subject the rights affirmed by the Covenant "only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society" (art. 4). These requirements (determination by law; compatibility with the nature of the rights; general welfare purpose) condition and limit restrictions on economic, social and cultural rights.

Derogation clauses permit States to suspend some rights in narrowly determined situations, particularly situations of public emergency. For example, article 4(1) of the ICCPR states: "in time of public emergency which threatens the life of the nation

and the existence of which is officially proclaimed, the States parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin". Similar norms are contained in the American Convention (art. 27(1)) and in the European Convention (art. 15(1)). However, all these treaties list rights which cannot be derogated even in emergency situations ("absolute rights"; art. 4(2) of the ICCPR, art. 27(2) of the American Convention, and art. 15(2) of the European Convention). Under all these instruments, the right to life cannot be derogated.

The ICESCR does not contain any explicit derogation clause. In its basic form of right to freedom from hunger, the right to food is directly related to the non-derogable right to life, and cannot be suspended even in emergencies. As for the "adequacy" standard, it must be remembered that economic, social and cultural rights are to be realized "progressively" and "to the maximum of [the] available resources" of the State; therefore, it may be argued that emergency situations may justify a derogation from the adequacy standard.

1.2.4. Documents of human rights institutions

Human rights institutions (for the right to adequate food, particularly the Committee on Economic, Social and Cultural Rights, CESCR) monitor the implementation of human rights protected under international law. Moreover, they adopt "General Comments" on the interpretation of treaty provisions. While not binding per se, these General Comments constitute the interpretation of the UN body institutionally responsible for monitoring the application of the treaty, and enjoy therefore a particular authority. Particularly relevant for the right to adequate food are General Comment 12 ("The Right to Adequate Food") and General

Comment 3 ("The Nature of States Parties Obligations") of the CESCR².

1.3. International humanitarian law

International humanitarian law is the branch of international law governing armed conflicts and other related situations (occupation). Its aim is to protect persons or property that are or may be affected by an armed conflict and to limit the rights of the parties to a conflict to use means and methods of warfare of their choice. Humanitarian law does not apply to emergency situations other than armed conflicts (namely natural disasters).

The main sources of international humanitarian law are the four 1949 Geneva Conventions and the two 1977 Additional Protocols³. Given the nearly universal ratification of the Geneva Conventions, it is widely accepted that the provisions of these treaties have acquired the status of international customary law, and are therefore binding upon all States irrespective of their ratification of the treaties. Indeed, in his 1993 Annual Report, the UN Secretary-General stated: "the part of conventional international law which has beyond doubt become part of international customary law is the law applicable to armed conflicts as endorsed in the Geneva

² Committee on Economic, Social and Cultural Rights, General Comment 12, *The Right to Adequate Food*, 12 May 1999, E/C.12/1999/5; Committee on Economic, Social and Cultural Rights, General Comment 3, *The Nature of States Parties Obligations*, 14 December 1990.

³ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (I Geneva Convention); Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (II Geneva Convention); Geneva Convention Relative to the Treatment of Prisoners of War (III Geneva Convention); Geneva Convention Relative to the Protection of Civilian Persons in Time of War; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I); and Protocol Additional to The Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-international Armed Conflicts (Additional Protocol II).

Conventions of 12 August 1949 [...]”⁴. On the other hand, ratification of the two Additional Protocols is less universal, and whether their provisions constitute norms of customary law must be assessed on a case-by-case basis.

Although international humanitarian law is not formulated to protect human rights, it is instrumental to realize the right to adequate food by prohibiting certain behaviour such as the starvation of civilians as a method of warfare (Additional Protocol I, art. 54, and Additional Protocol II, art. 14), and by regulating humanitarian assistance activities, including food and food-related aid programmes (e.g. Additional Protocol II, art. 18, Additional Protocol I, art. 70, Fourth Geneva Convention, art. 59, etc.).

International humanitarian law applies both to international armed conflicts (four Geneva Conventions, Additional Protocol I) and to internal armed conflicts (article 3 common to the four Geneva Conventions and Additional Protocol II). Moreover, there is an inverse relationship between the degrees of applicability of international humanitarian law and international human rights law in emergencies not amounting to armed conflict, in internal armed conflicts and in international armed conflicts.

In situations of internal tensions and disturbances (such as riots, isolated or sporadic acts of violence and other acts of a similar nature which do not reach the level of armed conflict) or of natural disasters, international humanitarian law does not apply. Human rights law applies, subject only to possible limitations.

In non-international armed conflicts, a distinction must be made between conflicts under common article 3 and conflicts under Additional Protocol II. In both cases, international humanitarian law is automatically applicable whenever a conflict breaks out, with no need for any formal statement.

⁴ Report S/25704, 3 May 1993, paragraph 35.

Article 3 common to the four Geneva Conventions applies to all armed conflicts not of an international character occurring in the territory of a High Contracting Party, including both conflicts between government forces and dissident or other armed groups, and "anarchic conflicts" (i.e. armed conflicts between armed groups in the context of State breakdown⁵). Common article 3 is binding not only for ratifying States but also for all armed groups fighting within their territory ("... each Party to the conflict shall be bound ...", art. 3(1)).

Additional Protocol II has more stringent requirements for application than common article 3:

- The conflict must be between a State and dissident or other organized armed groups;
- The dissident or other organized armed group must control a relevant (though not quantified) part of the territory of the State;
- The dissident or other organized armed group must be under "responsible command", and must be able to carry out "sustained and concerted military operations" and to implement the provisions of the Protocol (art. 1(1)).

Once these requirements are met, Additional Protocol II and common article 3 apply cumulatively.

In internal armed conflicts (both under common article 3 and under Additional Protocol I), human rights law applies, subject to limitations and derogations; however, the right to life and the right to freedom from hunger, among others, are non-derogable.

International armed conflicts are conflicts fought between the armed forces of two or more States. In these situations, the four 1949 Geneva Convention and Additional Protocol I apply. "The Convention[s] shall also apply to all cases of

⁵ See for instance the conflict between rival militias in Somalia in the 1990s.

partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets no armed resistance" (common article 2(2))⁶. In international armed conflicts, human rights law is applicable, subject to the limitations and suspensions provided for by human rights law; however, the right to life and the right to freedom from hunger, among others, cannot be derogated.

In some cases, elements of both internal and international armed conflicts are combined, as in the case of internal conflicts where the armed forces of one or more foreign states intervene⁷. These cases are extremely complex and the applicability of rules governing international and non-international armed conflicts to the parties involved must be established depending on the facts of each case.

1.4. International criminal law

International law contains rules establishing the criminal responsibility of individuals for acts or omissions that constitute particularly serious violations of international law. Punishable crimes include genocide, crimes against humanity and war crimes. The denial of food or access to food in well-specified, particularly serious circumstances could amount to one of these crimes (1948 Convention on the Prevention and

⁶ Under article 1(4) of Additional Protocol I, the Conventions and the Protocol also apply to wars of national liberation, i.e. to "armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right to self-determination". The 1980–1988 Iran-Iraq war, the 1991 Gulf War, and the recent Ethiopia-Eritrea war were international armed conflicts. For the application of international humanitarian law, there is no need for a formal declaration of war by the parties; indeed, humanitarian law applies "even if the state of war is not recognized by one of them" (article 2(1) common to the four Geneva Conventions).

⁷ E.g. the 1992–1995 conflict in Bosnia and Herzegovina (where the armies of the Federal Republic of Yugoslavia and of the Republic of Croatia, although at different stages, intervened), and the conflict in the Democratic Republic of Congo (where several neighbouring countries intervened in the internal armed conflict).

Punishment of the Crime of Genocide and 1998 Rome Statute of the International Criminal Court - ICC Statute).

1.5. International refugee law and guiding principles on internal displacement

As man-made disasters are one of the main causes that force people from their homes, international refugee law, where applicable, can contribute to protect human rights in emergency situations, including right to adequate food.

At global level, the protection of refugees is provided by the 1951 Geneva Convention Relating to the Status of Refugees and by its 1967 Protocol Relating to the Status of Refugees. In the 1951 Convention, refugees are defined as "any person who [...], owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it" (art. 1). Therefore, fleeing a country where an armed conflict is taking place entails qualification as refugee only where these specific requirements (e.g. evidence of individual "well-founded fear of being persecuted") are met.

The 1951 Convention does not limit the application of its provisions only to formally recognized refugees, and provides an important basis for standards of treatment for asylum-seekers (who may later be recognized as refugees).

The benefits provided under the various provisions of the 1951 Convention have different levels of applicability depending on the nature of the refugee's sojourn or residence in the country. While some provisions envisage a minimum treatment for all refugees (for example, article 33, on non-refoulement), others extend the treatment enjoyed by nationals to refugees present "within" the country (for example, article 20, on rationing) and to "refugees lawfully

staying in the territory" (for example, article 23, on public relief).

International protection of refugees is also provided by regional instruments, such as the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa and the 1984 Declaration of Cartagena adopted in the framework of the Organization of American States. Such regional instruments expand the definition of refugees to persons who flee their country of origin or nationality due to foreign aggression, foreign domination, and events seriously disturbing public order; the OAU Convention includes also occupation, while the Cartagena Declaration includes massive violations of human rights and domestic conflict (article I(2) of the OAU Convention and paragraph 3 of the Cartagena Declaration). Although the Declaration of Cartagena is not a legally binding international treaty, its provisions are widely recognized as reflecting customary law.

Unlike refugees, internally displaced persons (IDPs), i.e. persons displaced but not crossing an international border do not enjoy a special legal status under international law. Nevertheless, apart from domestic law, IDPs, as civilians, are protected by international humanitarian law in situations of armed conflict and remain protected by international human rights law. Indeed, Security Council Resolution 1296 (2000) "notes that the overwhelming majority of internally displaced persons and other vulnerable groups in situations of armed conflict are civilians and, as such, are entitled to the protection afforded to civilians under existing international humanitarian law" (para. 3). In 1998, the UN Representative of the Secretary-General on IDPs issued the Guiding Principles on Internal Displacement⁸. While the principles per se are not legally binding, they draw on (binding) international humanitarian and

⁸ Representative of the Secretary-General on Internally Displaced Persons, Guiding Principles on Internal Displacement, issued in 1998 as an addendum to the Representative's Report on Internal Displaced Persons (UN Doc. E/CN.4/1998/53), UN Doc. E/CN.4/1998/53/Add.2.

human rights law⁹. Some of the principles are relevant for the right to adequate food in emergencies and for food aid (principles 1, 3, 4, 10, 18, 24–27, 30, etc.).

1.6. International environmental law

International environmental law is the branch of international law aimed at protecting the environment. Among its fundamental principles, it states the integration of environment protection in the development process (principle 4 of the 1992 Rio Declaration on Environment and Development) and regulates environmental impact assessment (e.g. principle 17 of the 1992 Rio Declaration on Environment and Development; article 14 of the 1992 Convention on Biological Diversity; article 4(1)(f) of the 1992 Framework Convention on Climate Change; article 12 of the 1997 Convention on the Law of the Non-navigational Uses of International Watercourses; article 206 of the 1982 Convention on the Law of the Sea; as well as numerous regional instruments). This study explores the relevance of these norms in relation to the design and implementation of food and food-related aid programmes.

1.7. International economic law

International economic law is the branch of international law that regulates economic relations among States, including trade, financial flows and other economic activities. International economic law is based on treaties, which are binding only for the States ratifying them. Commodity agreements are international treaties that regulate international trade in specified commodities, such as cocoa, coffee, grains, rubber, sugar, etc.

The International Grains Agreement 1995 consists of the Grains Trade Convention 1995 and of the Food Aid Convention 1995, which was subsequently renewed in 1999 (Food Aid Convention 1999). At the time of writing, the 1999 Convention had been ratified by seven States and by the EC

⁹ See Guiding Principles on Internal Displacement, *Introductory Note by the Representative of the Secretary-General on Internally Displaced Persons*.

and its member States. The objectives of the Food Aid Convention are "to contribute to world food security and to improve the ability of the international community to respond to emergency food situations and other food needs of developing countries" (art. I). The Convention contains quantitative commitments for States to supply food aid to countries affected by disasters and elaborates principles concerning the delivery of food aid.

Moreover, rules relevant for food aid are embodied in treaties annexed to the Agreement Establishing the World Trade Organization (1994). The Agreement on Agriculture contains criteria to distinguish food aid from subsidisation of agricultural exports (which is permitted in a restricted number of circumstances and is subject to reduction commitments). Relevant provisions are also contained in the Ministerial Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least-Developed and Net Food-Importing Developing Countries (also annexed to the WTO Agreement).

The Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement), which was also attached to the WTO Agreement, makes specific reference to guidelines and recommendations established by other international organizations in the realm of human, animal and plant life and health.¹⁰ Such internationally referred standards then become the benchmarks in international trade, greatly enhancing their status. International food and food related aid, as far as these standards are concerned, fall under the concept of international trade. The SPS Agreement explicitly recognizes different sources of international standards in these fields, which are further described in section 1.8 below.

1.8. Other international instruments

Relevant provisions are also contained in other international instruments.

¹⁰ *Understanding the Codex Alimentarius*, FAO/WHO, Rome, 1999.

Standards and guidelines developed by internationally recognized bodies are relevant to food and food related aid, especially international aid. These are not binding per se, but as discussed above in section 1.7., some of them are recognized in the SPS Agreement and thus become the accepted norms in international trade. They are regarded as benchmarks for national measures and regulations and enjoy separately the recognition of the membership of the standard-setting body itself. Where there is no national legislation, these standards could be used directly, in order to ensure the safety of international food and food related aid. The international standards of most relevance to food and food related aid are the following:

First, the Codex Alimentarius Commission develops standards regarding food safety and quality, including food additives, veterinary drug and pesticide residues, contaminants, methods of analysis and sampling, and codes and guidelines of hygienic practice.

Second, the *Office international des épizooties* (OIE), or World Organization for Animal Health, sets standards relevant to the import and export of animals and animal produce, including the International Animal Health Code (10th edition published in 2001) and the International Aquatic Animal Health Code (last revised in 2001).

Third, phytosanitary standards developed under the International Plant Protection Convention are important to control the introduction and spread of pests. Standards thus developed include those related to plant quarantine, pest risk analysis, certification and emergency measures.¹¹

Furthermore, the Codex Alimentarius has also established a voluntary Code of Ethics for International Trade in Food, which provides some guidance. Its principal objective is to stop exporting countries and exporters from dumping poor-

¹¹ FAO, 2002. *Law and sustainable development since Rio: Legal trends in agriculture and natural resource management*, Legislative Study No. 73, Rome.

quality or unsafe food on to international markets, but it contains some explicit provisions for food aid.¹²

Finally, the 1994 Convention on the Safety of United Nations and Associated Personnel, applicable to UN and associated personnel and to UN operations, includes provisions applicable to the delivery of humanitarian consignments, including food aid¹³.

1.9. United Nations resolutions

principles concerning humanitarian assistance are also embodied in United Nations resolutions. A distinction must be made between binding and non-binding resolutions. Non-binding instruments include resolutions adopted by the UN General Assembly (e.g. Resolutions 43/131 of 1988, 45/100 of 1990 and 46/182 of 1991) and those adopted by the UN Security Council outside Chapter VII of the UN Charter (e.g. Resolution 1296 of 2000, affirming general principles concerning humanitarian crises). Although not legally binding, these resolutions spell out the fundamental principles to be

¹² FAO/WHO, 1999. *Understanding the Codex Alimentarius*, Rome.

¹³ For the purposes of the Convention: (a) "United Nations personnel" means: (i) Persons engaged or deployed by the Secretary-General of the United Nations as members of the military, police or civilian components of a United Nations operations; (ii) Other officials and experts on mission of the United Nations or its specialised agencies [...] who are present in an official capacity in the area where a United Nations operations is being conducted; (b) "Associated personnel" means: (i) Persons assigned by a Government or an intergovernmental organization with the agreement of the competent organ of the United Nations; (ii) Persons engaged by the Secretary-General of the United Nations or by a specialised agency [...]; (iii) Persons deployed by a humanitarian non-governmental organization or agency under an agreement with the Secretary-General of the United Nations or with a specialised agency [...] to carry out activities in support of the fulfilment of the mandate of a United Nations operation; (c) "United Nations operation" means an operation established by the competent organ of the United Nations in accordance with the Charter of the United Nations and conducted under United Nations authority and control" (art. 1). The Convention has been ratified by 62 States (as of 21 August 2002).

followed by the institutions of the UN system when designing and managing relief programmes. Moreover, they provide guidance on application of international principles and may indicate the emergence of norms of customary international law. Finally, UN resolutions may be considered binding on the UN Secretariat, insofar at least that the resolutions are directed to it.

Binding resolutions are those adopted by the United Nations Security Council under Chapter VII of the UN Charter ("Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression"). In recent years, the Security Council has adopted several Chapter VII resolutions on issues concerning humanitarian assistance, thus considering humanitarian crises and mass violations of human rights as a threat to international peace and security. This possibility is explicitly recognized in the above-mentioned Resolution 1296 of 2000, where the Security Council stated that "...the committing of systematic, flagrant and widespread violations of international humanitarian and human rights law in situations of armed conflict may constitute a threat to international peace and security...", and reaffirmed "its readiness to consider such situations and where necessary, to adopt appropriate steps". Chapter VII resolutions usually refer to specific situations of massive violation of human rights and humanitarian law; in this sense, they are mainly aimed at restoring respect for international law in those situations (e.g. by calling on States or other armed groups to allow access by humanitarian organizations), rather than at formulating rules of general application.

1.10. International conferences

Some international conferences have adopted documents containing provisions relevant to the right to adequate food in emergencies. These instruments are not legally binding. However, they express the trends prevailing in the international community and provide principles and guidelines for action (soft law). Particularly relevant for the right to adequate food are:

- The Universal Declaration on the Eradication of Hunger and Malnutrition, adopted by the World Food Conference (Rome, 1974) and affirming the inalienable right of every man, woman and child to be free from hunger and malnutrition (para. 1);
- The World Declaration on Nutrition, adopted by the International Conference on Nutrition (Rome, 1992) and recognizing that "access to nutritionally adequate and safe food is a right of each individual" (para. 1);
- The Vienna Declaration on Human Rights, adopted by the World Conference on Human Rights (Vienna, 1993), reaffirming the right to adequate food (para. 31);
- The Cairo Programme of Action, adopted by the International Conference on Population and Development (Cairo, 1994), also reaffirming the right to adequate food (principle 2);
- The Copenhagen Declaration on Social Development, adopted by the World Summit on Social Development (Copenhagen, 1995), includes commitments on the elimination of hunger and malnutrition (commitments 1(f) and 2(b));
- The Declaration on World Food Security and World Food Summit Plan of Action (Rome, 1996), reaffirms the right to adequate food (first paragraph of the Declaration) and contains commitments to achieve food security, a commitment on food security in emergency situations (commitment 5 of the Plan of Action) and a specific objective on the clarification and implementation of the right to adequate food (Objective 7.4 of the Plan of Action).
- The Declaration "International Alliance Against Hunger", adopted by the World Food Summit: *five years later* (Rome, 2002), reaffirms the "right of everyone to have access to safe and nutritious food" (third preambular paragraph) and invites the FAO Council to establish an Intergovernmental Working Group to elaborate, in a period of two years, a set of voluntary guidelines on the progressive realization of the right to adequate food (para. 10).

1.11. Codes of conduct adopted by NGOs and humanitarian agencies

Relevant principles and standards are also embodied in codes of conduct elaborated by non-governmental organizations (NGOs) and humanitarian agencies. These documents are not legally binding and are not part of international law. Nonetheless, they are referred to in this study as they may provide useful insights on the interpretation and operationalization of certain aspects of the right to adequate food.

The NGO Code of Conduct on the Right to Adequate Food was proposed in September 1997 by three NGOs (FIAN, WANAHHR and Institute Jacques Maritain International) and subsequently endorsed by over 800 NGOs. It clarifies the normative content of the right to adequate food and provides "general principles and guidelines for domestic and international implementation of the right to adequate food" on the part of the States and of other relevant actors (preamble and art. 1).

Furthermore, NGOs and international agencies have adopted codes of conduct concerning the design and implementation of humanitarian operations, which are applicable to food and food-related aid programmes. Among the most widely recognized codes are:

The 1994 Code of Conduct for the International Red Cross and Red Crescent Movement and NGOs in Disaster Relief, adopted in 1994 by the ICRC and by NGO members of the Steering Committee for Humanitarian Response (SCHR)¹⁴.

¹⁴ Caritas Internationalis, Catholic Relief Services, the International Federation of the Red Cross and Red Crescent Societies, International Save the Children Alliance, Lutheran World Federation, Oxfam, the World Council of Churches.

The 1998 Humanitarian Charter and Minimum Standards in Disaster Response, developed by the Sphere Project Management Committee¹⁵.

Table 1 - Applicable law and principles

	Natural disasters	Internal tensions and disturbances	Internal armed conflicts under CA 3	Internal armed conflicts under AP II	International armed conflicts
Art. 11 ICESCR	✓	✓	✓	✓	✓
Art. 6 ICCPR	✓	✓	✓	✓	✓
CA 3			✓		
Art. 18 AP II				✓	
Art. 70 AP I					✓
Art. 14 AP II				✓	
Art. 54 AP I					✓
Art. 6 ICC Statute	✓	✓	✓	✓	✓
Art. 2 Genocide Convention	✓	✓	✓	✓	✓
Art. 7 (2) ICC Statute	✓	✓	✓	✓	✓
Art. 8(2)(b) (xxv) ICC Statute					✓
UNSC Res. 1296 (2000)			✓	✓	✓
UNGA Res. 46/182	✓	✓	✓	✓	✓

¹⁵ The Sphere Project is an initiative launched in 1997 by the SCHR and by Inter-Action, a coalition of over 150 US-based NGOs, in cooperation with ICRC, UNHCR, OCHA, UNICEF, WFP, WHO, UNDP, VOICE, ICVA, other NGOs and bilateral donors. The standards are not expressed in quantified terms. Rather, each standard consists of the statement of the minimum levels to be attained and of key indicators, i.e. quantitative and/or qualitative "signals" that show whether those levels have been attained. For instance, General Nutritional Support Standard 2, relating to Minimum Standards in Nutrition, states: "food that is distributed is of sufficient quality and is safely handed so as to be fit for human consumption". The key indicators for this standard include the absence of food-borne diseases, the absence of complaints on the part of the beneficiary population, the existence of quality controls, etc.

II. OBLIGATIONS TO RESPECT, PROTECT AND FULFIL THE RIGHT TO ADEQUATE FOOD IN EMERGENCIES

2.1. The normative content of the right to adequate food

The right to adequate food is a fundamental human right recognized by international law in several dimensions:

- **Right to an adequate standard of living, including food.** Article 25 of the UDHR states: "everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food [...]". Article 11(1) of the ICESCR states: "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 [...]".
- **Freedom from hunger and right to life.** Article 11(2) of the ICESCR recognizes "the fundamental right of everyone to be free from hunger", i.e. the right to at least a nutritional intake ensuring survival. This provision is to be read in conjunction with those concerning the right to life (the UDHR; art. 3, the ICCPR, art. 6; the CRC, art. 6; the ECHR, art. 2; the ACHR, art. 4; and the African Charter, art. 4). Although there is a widespread narrow interpretation of the right to life merely as a safeguard against arbitrary killing, the Human Rights Committee rejected such restrictive interpretation and invited States to adopt "positive measures" to protect the right to life in a broader sense, including "measures to eliminate malnutrition and epidemics"¹⁶.
- **Rights of the child.** Article 27(1) of the CRC recognizes "the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development". The States Parties to the Convention have the duty to "take appropriate measures" to assist parents

¹⁶ Human Rights Committee, General Comment 6, 30 April 1982, UN Doc. A/37/40(1982), paragraph 5.

in fulfilling their primary responsibility to implement such right, "particularly with regard to nutrition" (art. 27(3)). Moreover, article 24(2)(c) of the CRC commits States to combat child malnutrition.

- **Women's rights.** Under article 12(2) of the CEDAW, States have to ensure to women "adequate nutrition during pregnancy and lactation".
- **Deprivation of food and of means of subsistence.** Article 1(2) of the ICCPR and of the ICESCR states that "in no case may a people be deprived of its own means of subsistence".
- **Food as an instrument for political and economic pressure.** This aspect of the right to adequate food is only addressed in non-binding instruments. The Rome Declaration on World Food Security and the Vienna Declaration on Human Rights state that "food should not be used as an instrument for political and economic pressure" (seventh paragraph and paragraph 31, respectively). The same principle was reiterated in the Declaration "International Alliance Against Hunger" adopted by the World Food Summit – Five Years Later (fourth preambular paragraph) and in several resolutions of the Commission on Human Rights (preamble of Resolutions 1997/8, 1998/23, 1999/24, 2000/10, 2001/25 and 2002/25).

In its General Comment 12, the CESCR clarified 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" (para. 6). According to the General Comment, the realization of the right to adequate food requires:

- "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" (para. 8); and

- the "accessibility" of adequate food, including both economic accessibility ("personal or household financial costs associated with the acquisition of food for an adequate diet should be at a level such that the attainment and satisfaction of other basic needs are not threatened or compromised") and physical accessibility (i.e. physical access to food, including for vulnerable groups, such as children, elderly people, physically disabled, etc.) (paras. 8 and 13)¹⁷.

A distinction must be made between the right to adequate food and the right to be free from hunger. The right to be free from hunger ensures a minimum daily nutritional intake and the bare survival of the person. The right to adequate food goes beyond freedom from hunger to include also an "adequacy" standard (in terms of quality, quantity and cultural acceptability).

2.2. Obligations for States and non-State entities

2.2.1. Primary responsibility of affected States and role of international cooperation

States are the duty-bearers under international human rights law and, together with other armed groups, are bound by the norms of international humanitarian law. Each State has primary responsibility to take care of the victims of natural or man-made emergencies occurring in its territory (cf. UNGA Resolutions 43/131, second preambular paragraph; 45/100, third preambular paragraph; and 46/182, paragraph 4 of Annex I). Several norms of international law, particularly international humanitarian law, create obligations also for non-State entities (see section 2.2.7 below).

¹⁷ As for the accessibility aspect, the General Comment builds on economic literature noting that famines are not caused only by insufficient global food supplies (i.e. food availability), but also by the lack of "entitlements" enabling people to procure available food; Jean Drèze and Amartya Sen, *Hunger and Public Action*, Oxford, Clarendon Press, 1989.

International cooperation also has a role in supplementing the efforts of States directly affected by natural or man-made disasters. Article 2(1) of the ICESCR spells out the obligation of States "to take steps, individually and through international assistance and cooperation, [...] with a view to achieving progressively the full realization of the rights recognized in the [...] Covenant" (emphasis added). A similar norm is contained in article 11(2) of the Covenant with specific regard to the right to freedom from hunger, to the effect that States shall take measures, individually and through international cooperation (emphasis added). The notion of international cooperation, however, may be qualified by the wording of paragraph 1 of article 11, which provides that State parties will take appropriate steps to ensure the realization of the right to an adequate standard of living, "recognizing to this effect the essential importance of international cooperation based on free consent" (emphasis added). The existence of a legally binding obligation to provide international food aid is not widely recognized by States, although some donor countries consider it a moral duty to do so. In particular, States are likely to resist the notion that they had a specific obligation that could be enforced in specific instances by the country requesting food aid. However, the supplementary role of the international community in general is well established and was also emphasised by the UN General Assembly in its Resolution 46/182 (paras. 4 and 5).

Under international law, States have both "progressive" and immediate obligations to realize the right to adequate food. State obligations may be classified in three categories: the obligation to respect, the obligation to protect and the obligation to fulfil. In turn, the obligation to fulfil includes an obligation to facilitate and an obligation to provide. This classification has been endorsed by the CESCR in its General Comment 12, as well as by a great number of scholars. It may provide a useful analytical framework to consider obligations under all relevant branches of international law, and will therefore be followed in this analysis.

2.2.2. Progressive realization and immediate obligations

The fundamental obligation of States under the ICESCR is to "take steps [...] with a view to achieving *progressively* the full realization of the rights" (article 2(1), emphasis added). This concept was clarified by the CESCR in its General Comment 3: "the concept of progressive realization constitutes recognition of the fact that full realization of all economic, social and cultural rights will generally not be able to be achieved in a short period of time. [...] Nevertheless, the fact that realization over time, or in other words progressively, is foreseen under the Covenant should not be misinterpreted as depriving the obligation of all meaningful content. [...] The Covenant [...] imposes an obligation to move as expeditiously and effectively as possible towards that goal. Moreover, any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources" (para. 9).

Furthermore, some State obligations under the Covenant are of immediate effect, namely:

- The obligation not to discriminate in the exercise and enjoyment of all rights recognized under the Covenant, including the right to adequate food (ICESCR, arts. 2(2) and 3);
- The obligation for States to implement the right to adequate food "to the maximum of [their] available resources" (ICESCR, Art. 2(1)); in this sense, the Covenant limits States' discretion in allocating their resources, directing them to give due priority to the realization of the rights recognized in the Covenant;
- The obligation to pursue the full realization of the right to adequate food "by all appropriate means" (ICESCR, art. 2(1)); therefore, while States have wide discretion in deciding what measures to take, a standard of "appropriateness" is established, which can be used by the

CESCR when reviewing measures adopted by States parties (cf. General Comment 3, para. 4).

In addition, a State violates its obligations under the Covenant if it "fails to ensure the satisfaction of, at the very least, minimum essential level required to be free from hunger", provided that this failure is due to unwillingness on the part of the State (rather than to inability linked to lack of resources) (General Comment 12, para. 17; cf. also General Comment 3, para. 10).

2.2.3. Obligation to respect

The obligation to respect requires States not to take any measures that would result in preventing individuals from having access to adequate food. Indeed, the right to adequate food is primarily to be realized by right holders themselves through their economic and other activities. States have a duty not to unduly hinder the exercise of those (lawful) activities. This obligation to respect stemming from human rights law is applicable in both natural and man-made disasters. In armed conflicts, it is underpinned by international humanitarian law provisions prohibiting the use of starvation of civilians as a method of warfare. Furthermore, the intentional deprivation of food constitutes in certain circumstances a crime punishable under international criminal law (genocide, crime against humanity or war crime). Some issues of particular interest relating to the obligation to respect are examined more in detail below.

Deliberate starvation of civilians

In international armed conflicts, "starvation of civilians as a method of warfare is prohibited" (Additional Protocol I, art. 54(1)). A party to the conflict cannot "attack, destroy, remove or render useless objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works, for the specific purpose of denying them for their sustenance value to the civilian population or to the adverse Party, whatever the

motive, whether in order to starve out civilians, to cause them to move away or for any other motive" (Additional Protocol I, art. 54(2)). Objects indispensable to the survival of the civilian population "shall not be made the object of reprisals" (Additional Protocol I, art. 54(4)).

As for non-international armed conflicts, article 14 of Additional Protocol II prohibits starvation of civilians as a method of combat using a wording similar to that of article 54 of Additional Protocol I. Additional Protocol II is binding both for States and armed groups.

It is worth noting that the violation of the prohibition to use starvation as a method of warfare does not require starving a population to death; a violation occurs whenever a party to a conflict is deliberately "causing the population to suffer hunger, particularly by depriving it of its sources of food or of supplies"¹⁸.

The attacking, destroying, removing or rendering useless of objects indispensable to the survival is prohibited only in so far as it is carried out "for the specific purpose", i.e. with the intention, of depriving the civilian population of its access to food or means for its production. This intention may be difficult to prove. However, it may be inferred not only from the attacker's explicit statement, but also from the factual circumstances of the attack (e.g. efforts on the part of the attacker to distinguish between civilian and military targets, permission on the part of the attacker for relief convoys to reach the affected population, etc.). By requiring this "specific purpose", the Protocols allow blockades, i.e. measures aimed at "depriving the adversary of supplies needed to conduct hostilities and not to starve civilians"¹⁹.

¹⁸ International Committee of the Red Cross, Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, Geneva-Dordrecht, 1987, paragraph 2089.

¹⁹ *Ibidem*, paragraphs 2093–2095.

The use of starvation of civilians as a method of warfare in international armed conflicts, "including wilfully impeding relief supplies as provided for under the Geneva Conventions", and "wilfully causing great suffering [...] not justified by military necessity and carried out unlawfully and wantonly" constitute war crimes and grave breaches of international humanitarian law (respectively, the ICC Statute, art. 8(2)(b)(xxv), and the Fourth Geneva Convention, art. 147).

Deliberate starvation, whether in war or peace, may also constitute genocide or a crime against humanity, under international criminal law. Genocide is defined as "deliberately inflicting on [a national, ethnical, racial or religious] group conditions of life calculated to bring about its physical destruction in whole or in part" (Genocide Convention, art. 2, and the ICC Statute, art. 6(c)); this may also take the form of the denial of access to food for a group affected by a natural or other disaster²⁰. Crimes against humanity are defined as widespread or systematic attacks against the civilian population carried out with knowledge of the attack; the crime against humanity of extermination "includes the intentional infliction of conditions of life, *inter alia*, the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population" (ICC Statute, arts. 7(1)(b) and 7(2)(b)). It should be noted that a "widespread or systematic attack" may be committed either in peacetime or in war.

In emergency situations where international humanitarian law is not applicable (e.g. natural disasters), or where the acts do not constitute genocide or crimes against humanity, deliberate starvation of civilians is still prohibited under international human rights law. This stems from several treaty provisions, particularly those concerning the right to adequate food and the right to life. Moreover, it may be argued that it was never intended that the protection granted by States to their own people (under international human rights law) should be less than that granted to the population of enemy States (under international humanitarian law).

²⁰ *Ibidem*, paragraph 2097.

Prevention of access to food aid

Another aspect of the obligation to respect relates to access to humanitarian assistance, including food and food-related aid. International humanitarian law imposes upon parties to an armed conflict the obligations not to hinder the passage of humanitarian consignments for affected populations, and to protect humanitarian supplies, equipment and personnel. These obligations are analysed more in detail below (section 2.3).

Obligation to respect and specific circumstances regulated by international humanitarian law

International humanitarian law also contains provisions ensuring that specified categories of persons are not deprived of their access to food. As for prisoners of war, for instance, the Third Geneva Convention requires that effects and articles used for feeding remain in the possession of prisoners of war (art. 18) and that prisoners of war be allowed to receive individual parcels or collective shipments containing *inter alia* foodstuffs (art. 72). During occupation, the Fourth Geneva Convention limits requisitions of foodstuffs available in the occupied territory by the occupying power (art. 55), and states that, subject to strict exceptions, protected persons in occupied territories must be permitted to receive individual relief consignments sent to them (art. 62). In places of internment, the reduction of food rations as a disciplinary measure is prohibited, and internees must be allowed to receive individual parcels or collective shipments containing foodstuffs (Fourth Geneva Convention, arts. 100 and 108).

Obligation to respect and landmines

As mined land cannot be used to produce food, landmines are, among other things, a major obstacle to agricultural production and food security. Moreover, landmines may impede the delivery of international assistance, including food aid. In this sense, the use of landmines may entail a violation of the obligation to respect.

The use, stockpiling, production and transfer of antipersonnel mines are prohibited by the 1997 Ottawa Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Antipersonnel Mines and on Their Destruction (art. 1(1)). In addition, the deployment of landmines in "agricultural areas for the production of foodstuffs", in "drinking water installations" and in "irrigation works", with the "specific purpose of denying them for their sustenance value to the civilian population", constitutes a violation of the prohibition to destroy or render useless "objects indispensable to the survival of the civilian population" embodied in article 54 of Additional Protocol I and in article 14 of Additional Protocol II.

Obligation to respect and economic sanctions

The obligation to respect has also implications for State conduct affecting the right to adequate food of individuals located in the territory of other States, particularly in relation to the imposition of economic sanctions. This issue has been addressed by the CESCR in its General Comment 8²¹, and is outside the scope of this study.

2.2.4. Obligation to protect

The obligation to protect requires measures by the State to ensure that third parties (individuals, armed groups, enterprises, etc.) do not deprive right-holders of their access to adequate food. Under the obligation to protect, the State could be held liable for violations of the right to adequate food committed by non-State actors. Indeed, several judgements and reports issued by international human rights bodies (although with regard to human rights other than the right to adequate food) held States responsible "because of the lack of due diligence to prevent the violation [committed

²¹ Committee on Economic, Social and Cultural Rights, General Comment 8, *The Relationship between Economic Sanctions and Respect for Economic, Social and Cultural Rights*, 5 December 1997, E/C.12/1997/8.

by non-State actors] or to respond to it"²². With specific regard to the right to adequate food, the CESCR listed among the examples of violations the "failure to regulate activities of individuals or groups so as to prevent them from violating the right to food of others" (General Comment 12, paragraph 19). In conflict situations, for instance, the obligation to protect entails that the State must take appropriate steps to prevent armed groups and other non-State actors from looting foodstuffs and depriving civilians of access to food.

2.2.5. Obligation to facilitate

The obligation to facilitate requires States to adopt measures aimed at improving right-holders' access to and utilisation of resources and means to ensure their livelihood. This is exemplified by article 11(2) of the ICESCR, which reads: "the States Parties to the present Covenant [...] shall take [...] the measures [...] which are needed [...] 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 utilisation of natural resources [...]".

The obligation to facilitate also applies in natural and man-made emergency situations, for instance with regard to the

²² Inter-American Court of Human Rights, *Velásquez Rodríguez v. Honduras*, 29 July 1988, Series C, No. 4, paragraph 172. The case involves the "disappearance" of a person. The Court found violations of articles 1, 4, 5 and 7 of the American Convention on Human Rights. See also Human Rights Committee, *Delgado Paez v. Colombia*, (Communication 195/1985), UN Doc. A/45/40, in Report of the Human Rights Committee 1990, Volume II. The case concerned threats to a person. The Committee found a violation of article 9 of the ICCPR (right to security) because "the State Party has not taken, or has been unable to take, appropriate measures to ensure Mr. Delgado's right to security of the person" (p. 43). Moreover, see European Court of Human Rights, *Osman v. United Kingdom*, 28 October 1998, Reports, 1998-VIII, in particular paragraph 115; no violation was found in this case.

facilitation of transit of humanitarian consignments. In armed conflicts, international humanitarian law explicitly affirms that States have an obligation to grant free passage to humanitarian relief and to facilitate the work of the humanitarian agencies and the distribution of food aid (Fourth Geneva Convention, arts. 23 and 59(3); Additional Protocol I, art. 70(2); Additional Protocol II, art. 18).

The obligation to facilitate also applies to transit States, i.e. to States not directly affected by the natural or man-made disaster but in the territory of which international personnel and equipment need to transit. article 5 of the Convention on the Safety of United Nations and Associated Personnel reads: "a transit State shall facilitate the unimpeded transit of United Nations and associated personnel and their equipment to and from the host State". As for international armed conflicts, article 70(2) of Additional Protocol I states that (not only the States parties to the armed conflict, but) "each High Contracting Party shall allow and facilitate rapid and unimpeded passage of all relief consignments, equipment and personnel [...]". Calls for transit facilitation are also contained in non-binding UN resolutions (paragraph 7 of UNGA Resolution 46/182, paragraph 6 of UNGA Resolution 43/131 and paragraph 7 of UNGA Resolution 45/100).

For facilitation measures that are not explicitly determined by international instruments, States have a wide margin of discretion as to which measures are the most appropriate. An example of possible facilitation activity in emergencies is the adoption of regulations permitting and promoting private trade in such a way that it can supply food to regions affected by food shortages, so as to complement inflows of food aid provided by the government or by international humanitarian agencies.

2.2.6. Obligation to provide

The obligation to provide entails that the State, as a last resort, must provide food "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" (General Comment 12,

para. 15). Emergency situations, because of their very nature, often entail a shift from the obligation to facilitate to the obligation to provide. The State may of course delegate the implementation of the obligation to provide to the local level, but it remains ultimately responsible for such provisions taking place.

In international conflicts involving the occupation of a territory, article 55 of the Fourth Geneva Convention states that "to the fullest extent of the means available to it, the Occupying Power has the duty of ensuring the food [...] of the population; it should, in particular, bring in the necessary foodstuffs [...] if the resources of the occupied territory are inadequate". This obligation to provide is confirmed and strengthened by article 69 of Additional Protocol I. Specific obligations to provide are also embodied in international humanitarian law with regard to specified categories of persons (e.g. for prisoners of war, articles 20, 26, 28 and 46 of the Third Geneva Convention; for detainees, articles 87 and 89 of the Fourth Geneva Convention; etc.).

Under refugee law, States have to grant refugees the same treatment as their nationals with regard to public relief and assistance (article 23 of the 1951 Convention Relating to the Status of Refugees) and any rationing system (article 20 of the same Convention).

There is a great variety of ways to implement the obligation to provide: gratuitous relief or work-for-food programmes; provision of food or of cash (in the latter case, measures to fulfil/provide can be coupled by measures to fulfil/facilitate the access of private trade to the affected region); etc.

Domestic provision of food aid and WTO law

Irrespective of the existence of a natural or man-made disaster, the WTO Agreement on Agriculture lists expenditures or foregone revenue in relation to the provision of domestic food aid to the needy among "Green Box" measures, i.e. among the forms of domestic support exempted from reduction commitments under article 6.1 and Annex 2 of the Agreement.

Under paragraph 4 of Annex 2, domestic food aid must be in the form either of direct food distribution to recipients or of provision of means allowing recipients to purchase food (either at market or at subsidised prices); food aid must be distributed according to "clearly-defined criteria related to nutritional objectives"; food purchases by the government in relation to domestic food aid must be made at market prices; and the administration and the financing of food aid instruments must be transparent.

Norms on international food aid

The obligation to provide also entails that if a state is unable to directly fulfil this obligation, it has a duty to request the assistance of the international community in order to do so. In the words of the CESCR, "a State claiming that it is unable to carry out its obligation for reasons beyond its control [...] has the burden of proving that [...] it has unsuccessfully sought to obtain international support to ensure the availability and accessibility of the necessary food" (General Comment 12, para. 17).

Some international legal instruments (though not linked to human rights law) provide the framework for the supply of specified amounts of food aid by the donor countries ratifying them. This is the case of the Food Aid Convention. States parties to the Convention "agree to provide food aid [...] or the cash equivalent thereof" in annual amounts specified in the Convention (art. III(a) and (e)). Under article III(e), the States having an obligation to provide food aid under the Convention are: Argentina, Australia, Canada, the European Community and its Member States, Japan, Norway, Switzerland and the United States. Food aid is to be provided to least-developed countries, low-income countries, lower middle-income countries, and other countries included in the WTO list of Net Food-Importing Developing Countries (art. VII(a)).

Food aid under the Food Aid Convention can be supplied in different forms: grants of food or of cash; sales of food for the non-transferable and non-convertible currency of the recipient

country; and sales of food on concessional credit. However, all food aid to least-developed countries is to be made in the form of grants, and, in any case, the aid in the form of grants is to represent not less than 80% of food aid (article IX). The aid is to be channelled bilaterally or through international agencies (particularly the World Food Programme) or non-governmental organizations (art. XI (a) and (b)). "If a member is unable to provide the amount specified in paragraph (e) of article III in a particular year, it shall report the circumstances to the [Food Aid] Committee as soon as possible [...]. Unless the Committee decides otherwise, the unfulfilled amount shall be added to the member's commitment for the following year" (art. VI (b)).

Relevant provisions are also included in the WTO Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least-Developed and Net Food-Importing Developing Countries, annexed to the WTO Agreement. Under the Decision, WTO members "agree to establish appropriate mechanisms to ensure that the implementation of the results of the Uruguay Round on trade in agriculture does not adversely affect the availability of food aid at a level which is sufficient to continue to provide assistance in meeting the food needs of developing countries, especially least-developed and net food-importing developing countries". To this end, WTO members must:

- review the level of food aid provided under the Food Aid Convention, and "initiate negotiations in the appropriate forum to establish a level of food aid commitments sufficient to meet the legitimate needs of developing countries during the reform programme"; and
- "adopt guidelines to ensure that an increasing proportion of basic foodstuffs is provided to least-developed and net food-importing developing countries in fully grant form and/or on appropriate concessional terms" (para. 3).

Finally, WTO rules also include norms limiting the discretion of food aid donors as to the form of food aid, particularly with regard to the use of food aid as a disguised means of

agricultural export promotion. Under the Agreement on Agriculture, non-commercial transactions cannot be used to circumvent subsidy reduction commitments, and in particular:

- Donors cannot directly or indirectly tie food aid to commercial exports of agricultural products to recipient countries;
- Food aid must be provided in accordance with the FAO "Principles of Surplus Disposal and Consultative Obligations"²³;
- Food aid must be provided "to the extent possible" in fully grant form or on terms no less concessional than those provided in the Food Aid Convention (art. 10(4)).

2.2.7. Non-State entities

States are the duty-bearers under international human rights law. Therefore, the right to adequate food entails "immediate" and "progressive" obligations to respect, protect and fulfil for the States concerned. However, emergency situations, especially armed conflicts, are often characterised by the presence of non-State entities (armed groups, etc.). These entities are covered by a variety of international instruments. International humanitarian law applies to both States and non-State entities (cf. common article 3 and Additional Protocol II). The provisions of international criminal law are also applicable to non-State actors. International resolutions are increasingly addressed to all parties involved in armed conflicts, including the States directly involved, non-State entities, neighbouring States with some degree of involvement, etc. An example is Security Council Resolution 1296 of 2000, which consistently refers to "all parties concerned", and in some cases explicitly refers to "non-State parties".

²³ This is a handbook of the rules and procedures developed over the years by the FAO Consultative Sub-Committee on Surplus Disposal, established in 1954 to monitor shipments of surplus agricultural produce used as food aid, with a view to minimising their harmful impact on commercial transactions.

This means that the obligations reviewed in the previous sections are applicable, to varying degrees, also to non-State actors. This is certainly the case, for instance, of the obligation to respect in relation to deliberate starvation of civilians and prevention of access to food aid, and of the obligation to facilitate in relation to transit of humanitarian consignments (see sections 2.2.3 and 2.2.5 above).

2.3. Obligations concerning humanitarian assistance

The previous section examined the general framework of the obligations concerning the right to adequate food in emergency situations. This section goes more in depth into a key issue concerning that right in the context of natural or man-made disasters: the issue of access to humanitarian assistance, particularly food and food-related aid.

2.3.1. The principle of State consent

One of the cornerstones of the UN Charter is the principle of State sovereignty (art. 2(1)). This entails that external humanitarian assistance is to be provided upon request by the States affected by natural or man-made disasters, or at least with their consent. This principle has been reaffirmed on numerous occasions (e.g. UNGA Resolution 46/182, para. 3, and the World Food Summit Plan of Action, para. 43). In situations of international and internal armed conflicts, the principle of State consent is also underpinned by the provisions of international humanitarian law, namely article 70 of Additional Protocol I (international armed conflicts) and article 18(1) of Additional Protocol II (internal armed conflicts).

3.2.2. Limits to refusing consent

On the other hand, several principles and norms of international law restrict the scope of States' discretion in refusing consent.

Offers are not to be considered unfriendly acts

First, it is a well-established principle of international law that offers of humanitarian assistance by impartial humanitarian

agencies are not to be regarded as unfriendly acts or interference in a State's internal affairs. This principle, explicitly stated with regard to international armed conflicts in article 70 of Additional Protocol I, is widely considered as a norm of customary international law. This was recognized by the International Court of Justice in the case *Nicaragua v. United States*²⁴.

Refusals must be justified by valid reasons and consent may be presumed in exceptional cases

Second, article 70 of Additional Protocol I states that humanitarian and impartial relief action "shall be undertaken". This wording limits the discretion of receiving States, which can refuse their agreement only "for valid reasons, not for arbitrary or capricious ones"²⁵. Similarly, the wording used in article 18(2) of Additional Protocol II ("relief actions [...] shall be undertaken subject to the consent", emphasis added) constitutes a strong limitation of the discretionary power of the State²⁶. In the words of the Commentary on the Geneva Conventions and the Additional Protocols, "the fact that consent is required does not mean that the decision is left to the discretion of the parties. If the survival of the population is threatened and a humanitarian organization fulfilling the required conditions of impartiality and non-discrimination is able to remedy this situation, relief actions must take place. [...] The authorities [...] cannot refuse such relief without good grounds"²⁷.

Finally, "in exceptional cases when it is not possible to determine which are the authorities concerned, consent is to

²⁴ International Court of Justice, *Case Concerning the Military and the Paramilitary Activities in and against Nicaragua (Nicaragua v. United States) (Merits)*, 27 June 1986, ICJ Reports 1986, p. 14, paragraphs 239-245.

²⁵ International Committee of the Red Cross, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Geneva-Dordrecht, 1987, paragraphs 2795 and 2805.

²⁶ *Ibidem*, paragraph 4886.

²⁷ *Ibidem*, paragraph 4885.

be presumed in view of the fact that assistance for the victims is of paramount importance and should not suffer any delay"²⁸.

Refusal could be a violation of human rights law

The obligation to take steps to realize the right to adequate food stemming from articles 2 and 11 of the ICESCR also entails that the State cannot arbitrarily withhold its consent when it is unable or unwilling to provide necessary humanitarian assistance. A State arbitrarily denying its consent to humanitarian assistance in such circumstances would violate its obligations under article 11 of the ICESCR, particularly the obligation to respect. Indeed, General Comment 12 includes among the violations of the right to adequate food "the prevention of access to humanitarian food aid in internal conflicts or other emergency situations" (para. 19). Moreover, where the denial would threaten the lives of the affected population, the State would violate the right to life.

Refusal could amount to a war crime, genocide or a crime against humanity

Article 70 of Additional Protocol I has to be read in conjunction with article 54, prohibiting the use of starvation of civilians as a method of warfare; this rule could be violated by an unjustified refusal of the consent on the part of a State²⁹. Similarly, article 18 of Additional Protocol II must be read in conjunction with article 14³⁰. The intentional use of starvation of civilians as a method of warfare in international armed conflict constitutes a war crime under the ICC Statute (art. 8(2)(b)(xxv)). Deliberately inflicting on a national, ethnical, racial or religious group conditions of life calculated to bring about its physical destruction in whole or in part, including in the form of denial of access to food, could constitute genocide (Genocide Convention, art. 2; ICC Statute, art. 6). Moreover, the intentional deprivation of access to food could amount,

²⁸ *Ibidem*, paragraph 4884.

²⁹ *Ibidem*, paragraphs 2805 and 2808.

³⁰ *Ibidem*, paragraph 4885.

under specific circumstances, to a crime against humanity (ICC Statute, art. 7(2)(b)).

Emerging right to humanitarian assistance

Receiving humanitarian assistance necessary for survival, entailing the obligation not to hinder the delivery of aid, is increasingly considered a right by the international community. While this is not stated in any legally binding treaty, and is therefore still to find a solid basis under international law, it is recognized or implied in numerous non-binding instruments. For instance, although with no reference to a "right" to humanitarian assistance, several UN resolutions call upon affected States to facilitate the work of humanitarian agencies, to grant them humanitarian access and not to divert food aid (e.g. Security Council Resolution 1296 of 2000, para. 8; General Assembly Resolution 46/182, para. 6, Resolution 43/131, para. 4, and Resolution 45/100, para. 4). Similarly, among internationally recognized codes of conduct (which are outside the scope of international law), principle 1 of the Code of Conduct for the International Red Cross and Red Crescent Movement and NGOs in Disaster Relief states that "the right to receive humanitarian assistance [...] is a fundamental humanitarian principle which should be enjoyed by all citizens of all countries".

Moreover, albeit without any reference to a "right" to humanitarian assistance, Security Council resolutions adopted under Chapter VII of the UN Charter with regard to specific humanitarian crises have called for safe and unhindered access for humanitarian assistance to those in need (e.g. Resolution 1258 of 1999, on the Democratic Republic of Congo); since these resolutions do not contain general statements of principles but rather directives for the resolution of specific crises, they are more related to implementation and are dealt with more in detail below (section 2.4.4).

All these binding and non-binding instruments reveal the increasing acceptance within the international community of a right to receive humanitarian assistance when in need.

2.3.3. Obligations after the State has given consent

"Once relief actions are accepted in principle, the authorities are under an obligation to cooperate, in particular by facilitating the rapid transit of relief consignments and by ensuring the safety of convoys"³¹.

The Convention on the Safety of United Nations and Associated Personnel prohibits making United Nations and associated personnel, their equipment and premises "the object of attack or of any action that prevents them from discharging their mandate" (art. 7(1)). Moreover, "States Parties shall take all appropriate measures to ensure the safety of United Nations and associated personnel" (art. 7(2)). The intentional commission of such attacks, and the threat, attempt or participation in such attacks, constitute crimes punishable under the national law of the States Parties to the Convention (art. 9).

In international armed conflicts, article 71(2) of Additional Protocol I provides that relief "personnel shall be respected and protected", and article 70(4) of the same Protocol states that "the parties to the conflict shall protect relief consignments and facilitate their rapid distribution". In situations of non-international armed conflict, humanitarian workers are, at a minimum, protected under common article 3, which prohibits acts of violence against persons not or no longer taking active part in the hostilities.

Article 70(3) (c) of Additional Protocol I prohibits the diversion of relief consignments from the purpose for which they are intended and the delay of their forwarding. This rule applies both to the parties to the conflict and to all States parties to the Protocol. The norm prohibits for instance the use of humanitarian relief for military purposes (e.g. using food aid for troops rather than for civilians). The only exception allowed is the case of "urgent necessity in the interest of the civilian population concerned". In such cases, delay or diversion is allowed if it is "virtually impossible to do

³¹ *Ibidem*, paragraph 4888.

otherwise"³². For instance, diversion of food aid would be allowed "when there is a delay in the transport of perishable foodstuffs, always provided that they are replaced by fresh provisions as soon as normal conditions are restored"³³. Article 60 of the Fourth Geneva Convention likewise states: "[...] the Occupying Power shall in no way whatsoever divert relief consignments from the purpose for which they are intended [...]".

2.4. Implementing the right to adequate food in emergencies

2.4.1. Domestic courts

The justiciability of economic, social and cultural rights (i.e. the possibility to enforce them through court actions) has long been debated. For long, many held that, differently from civil and political rights (which are immediately effective and entail "negative" obligations for the State, i.e. obligations *not* to take conduct violating those rights), economic, social and cultural rights (including the right to adequate food) were not justiciable, as they were to be realized progressively through "positive" action by the State.

It is now generally accepted that economic, social and cultural rights also entail obligations with immediate effect (e.g. non-discrimination; see section 2.2.2 above), and that these are justiciable. Moreover, the obligation to respect (i.e. to refrain from hindering existing access to food) is a "negative" obligation similar to that for civil and political rights, and is therefore justiciable. This evolution in thinking is witnessed by the 2002 report of the Special Rapporteur on the Right to Food (see section 2.4.2. below), that strongly argues in favour of the justiciability of the right to adequate food³⁴.

³² *Ibidem*, paragraph 2846.

³³ *Ibidem*, paragraph 2847.

³⁴ Commission on Human Rights, Special Rapporteur on the Right to Food, *The Right to Food*, Report submitted in accordance with Commission on Human Rights Resolution 2001/25, 10 January 2002, E/CN.4/2002/58.

Moreover, justiciable aspects exist also with regard to the "progressive" realization of the right to adequate food. An interesting case, albeit with regard to the right to adequate housing, is the Grootboom case, in which the Constitutional Court of South Africa held that a standard of "reasonableness" is to be used to review policies to progressively realize economic, social and cultural rights, taking into account the availability of resources.³⁵

However, in emergency situations, the effectiveness of court remedies may be limited. Court procedures are often complex and time-consuming, compared to the urgent needs characterising emergencies (although interim measures, e.g. to terminate violations of the obligation to respect, may be sought). More fundamentally, natural and, even more, man-made disasters may entail the breaking down of the rule of law and the disruption of public institutions like courts.

2.4.2. International human rights institutions

In the United Nations system, there are two types of organs monitoring the implementation of human rights law: the Charter-based organs, established under the UN Charter, and the treaty-based organs, established under other international treaties.

³⁵ Ms Grootboom and others were homeless illegally occupying a piece of land for residential purposes. On the basis of a magistrate order, they were forcibly evicted by the local municipality and were left with no housing. They then filed a lawsuit to enforce their right to adequate housing, recognized in the South African Constitution. The Cape High Court ordered the government to provide them basic shelter (*Irene Grootboom and Others v. Oostenberg Municipality*, 2000(3) BCLR 277). Upon appeal, the Constitutional Court examined whether the measures adopted by the government within its comprehensive housing programme were "reasonable" for the progressive realization of the right to adequate housing. The Court found that the programme was not "reasonable" in that it did not consider the short-term housing needs of those "in desperate need", and ordered that shelter be provided to these persons (*Government of the Republic of South Africa and Others v. Irene Grootboom and Others*, case CCT 11/00, 4 October 2000, reported in 2000(11) BCLR 1169(CC)).

The most important Charter-based body is the Commission on Human Rights, established by ECOSOC under article 68 of the UN Charter (ECOSOC Resolution No. 5 of 1946). The Commission in turn established the Sub-Commission on the Promotion and Protection of Human Rights (formerly called Sub-Commission on Prevention of Discrimination and Protection of Minorities) and a number of other bodies. The Commission and the Sub-Commission examine complaints on human rights violations under two main procedures (so-called 1503 and 1235 procedures). Moreover, the Commission can establish a Working Group or appoint a Special Rapporteur to monitor human rights implementation on the basis of a "thematic" approach ("themes" can be a specific right, a category of right-holders like IDPs, etc.).

Traditionally, these procedures have been rarely used for violations of economic, social and cultural rights, including the right to adequate food. However, since the 1990s this situation has changed. For example, violations of food rights have been denounced in some reports issued by Special Rapporteurs for specific countries, namely with regard to obstacles to the passage of humanitarian consignments, including foodstuffs³⁶. In 2000, the Commission on Human Rights appointed a Special Rapporteur on the right to food for a period of three years³⁷. The Special Rapporteur *inter alia* presented two reports on the right to adequate food to the Commission on Human Rights (7 February 2001, Doc. E/CN.4/2001/53, and 10 January 2002, E/CN.4/2002/58), presented a report to the General Assembly (23 July 2001, A/56/210), and carried out a mission to Niger (23 January 2002, E/CN.4/2002/58/Add.1). In his work, the Special Rapporteur has attached particular importance to the realization of the right to adequate food in emergencies, and

³⁶ See, for example, Commission on Human Rights, *Report of the Special Rapporteur on the Situation of Human Rights in the Territory of the Former Yugoslavia*, 21 February 1994, E/CN.4/1994/110, paragraph 71.

³⁷ Commission on Human Rights, Res. 2000/10, 17 April 2000, E/CN.4/RES/2000/10.

has taken position on situations like the conflict in Afghanistan (see particularly the report of 10 January 2002).

As for treaty-based bodies, committees to monitor the implementation of human rights treaties were established by the CERD, the ICCPR, the CEDAW, the CAT and the CRC. All these committees receive reports from the States parties to the relevant treaty. Furthermore, the ICCPR Human Rights Committee, the Committee on the Elimination of Racial Discrimination and the Committee against Torture can receive complaints from States and from individuals, provided that the State concerned has recognized their competence to do so (this explicit recognition is not necessary for complaints by States under the CERD). The Committee on the Elimination of All Forms of Discrimination against Women can consider complaints from individuals or groups of individuals (Optional Protocol to the Convention on the Elimination of all Forms of Discrimination Against Women, adopted in 1999).

Unlike other human rights treaties, the ICESCR provides for a system of reports but did not establish a specific treaty body. Its implementation was thus monitored by an ECOSOC working group. However, in 1985, ECOSOC established the Committee on Economic, Social and Cultural Rights (CESCR) to receive the reports submitted by the States parties under the ICESCR (ECOSOC Resolution 17 of 1985). The reports must indicate the measures adopted and the progress made in realizing the rights recognized in the Covenant. They may also indicate "factors and difficulties affecting the degree of fulfilment of obligations under the [...] Covenant" (ICESCR, art. 17(2)). In addition, the CESCR receives information on the implementation of the Covenant through written statements and oral submissions by non-governmental organizations. The CESCR concludes its consideration of States parties' reports by issuing "Concluding Observations". Moreover, the ECOSOC may transmit the reports to the Commission on Human Rights "for study and general recommendation or, as appropriate, for information"

(ICESCR, art. 19). No State or individual complaint procedure has so far been established³⁸.

The coherence and coordination of the UN human rights system has been improved with the establishment of a UN High Commissioner for Human Rights (General Assembly Resolution 48/141 of 1994). The High Commissioner is "the United Nations official with principal responsibility for United Nations human rights activities" and has the task, *inter alia*, of "promot[ing] and protect[ing] the effective enjoyment by all of civil, cultural, economic, political, and social rights" and of "coordinat[ing] the human rights promotion and promotion activities throughout the United Nations system" (Resolution 48/141, para. 4(a) and (i)). Moreover, the High Commissioner is "to engage in a dialogue with all Governments in the implementation of his/her mandate with a view to securing respect for all human rights" (Resolution 48/141, para. 4(g)); in this function, he/she can request governments to provide information, carry out on-site visits, investigate specific violations, etc. In several countries, the Office of the High Commissioner has field offices that can take action in case of violation of food rights.

Overall, UN human rights institutions monitoring the realization of the right to adequate food have strengths and weaknesses. Strengths include for instance the existence of impartial, quasi-judicial institutional machinery and the availability of flexible institutions such as the High Commissioner and Special Rapporteurs (that can directly intervene in emergency situations e.g. by carrying out on-site

³⁸ An Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, envisaging the right of individuals or groups to submit complaints concerning violations of the Covenant, was recommended by the 1993 Vienna Declaration and Plan of Action on Human Rights (Part II, para. 75) and drafted by the CESCR in 1996. However, such Protocol has not yet been adopted. See the Report of the Committee on Economic, Social and Cultural Rights on a *Draft Optional Protocol for the Consideration of Communications in Relation to the International Covenant on Economic, Social and Cultural Rights*, 18 December 1996, E/CN.4/1997/105.

visits, denouncing violations, etc.). Weaknesses include the time-consuming nature of monitoring procedures (compared to the urgent needs characterising emergency situations), the absence of a complaint-based mechanism under the ICESCR, and the lack of any enforcement mechanism in case of established non-compliance.

Human rights institutions are also in place at regional level: the European Court of Human Rights; the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights; and the African Commission on Human and Peoples' Rights (a Protocol to the African Charter establishing an African Court of Human and Peoples' Rights was adopted in 1998 but is not yet in force). Due to space constraints, the procedural norms relating to these institutions are not covered in this study. Suffice to say that in the European and American systems (not in the African one) economic, social and cultural rights are treated separately from civil and political rights. Under both systems, it is not possible to have recourse to the relevant regional court to obtain redress for violations of the right to adequate food. Separate monitoring systems are in place for the European Social Charter (State reports to the European Committee on Social Rights and collective complaints submitted to the Committee by NGOs and trade unions) and for the Protocol of San Salvador (State reports to the Inter-American Commission on Human Rights).

2.4.3. International humanitarian law

Measures to ensure full respect for the rules of international humanitarian law include both measures to be adopted once the armed conflict has begun and measures to be adopted in peacetime³⁹. These measures are necessary to ensure that both civilians and the military personnel are familiar with the rules of humanitarian law; that the structures, administrative arrangements and personnel required for compliance with the

³⁹ This section draws on ICRC, *Implementing International Humanitarian Law: From Law to Action*, available on the ICRC website.

law are in place; and that violations of humanitarian law are prevented and punished.

States have primary responsibility for effectively implementing international humanitarian law through measures adopted at national level by the government, by the legislature, by the courts, by the armed forces, or by other State bodies. Measures include for instance:

- Translating the Geneva Conventions and the Additional Protocols into the national language(s), and spreading knowledge of their provisions both within the armed forces and the general population;
- Appointing and training persons qualified in international humanitarian law, in particular legal advisers within the armed forces;
- Repressing violations of the Conventions and Protocols and, in particular, adopting criminal legislation that punishes war crimes;
- Ensuring that protected persons enjoy judicial and other fundamental guarantees during armed conflict;

Some of these measures require the adoption of legislation or regulations; others require the development of educational programmes, the recruitment and/or training of personnel, the production of identity cards and other documents, the setting up of special structures, and the introduction of planning and administrative procedures.

Measures have also been taken at the international level to deal with violations of humanitarian law. An International Fact-Finding Commission has been set up and States are encouraged to use its services. Tribunals have been set up to deal with violations committed during the conflicts in Rwanda and in the former Yugoslavia, and an International Criminal Court has been established under the 1998 ICC Statute (see below).

2.4.4. Individual criminal responsibility

Particularly serious violations of international law create an international responsibility (not only of States but also) of the individuals committing them, whether or not acting as State organs. International humanitarian law envisages the individual criminal liability of persons committing or ordering the commission of grave breaches of its rules (war crimes; see e.g. Fourth Geneva Convention, arts. 146 and 147, and Additional Protocol I, art. 11 and 85). War crimes are also punishable under customary international law and under the ICC Statute (art. 8). The 1948 Genocide Convention establishes the criminal liability of persons committing acts amounting to genocide (art. IV). Customary international law and the ICC Statute (art. 7) establish the criminal liability of persons committing crimes against humanity. As discussed earlier in this chapter, the intentional deprivation of access to food under specific circumstances can amount to these crimes.

The punishment of these crimes firstly rests with domestic courts. Jurisdiction rules vary according to the crime. With regard to war crimes, universal jurisdiction and the rule *aut dedere aut iudicare* (extradite or prosecute) apply (see e.g. Fourth Geneva Convention, art. 146(2)). Therefore, any State in the territory of which a suspected perpetrator is found is obliged to try such person or to extradite him/her to another country where he/she can be tried. As for genocide, the universality principle is not mandatory under article 6 of the 1948 Genocide Convention; however, it is recognized as a rule of customary international law⁴⁰.

Furthermore, international criminal institutions have recently been established. Tribunals have been established by the Security Council for crimes committed in the Former

⁴⁰ See Yoram Dinstein, *International Criminal Law*, in 5 *Israel Yearbook on Human Rights*, 55 (1975), published in Henry J. Steiner and Philip Alston, *International Human Rights in Context*, Oxford and New York, 1996, pp. 1027–1029. See also American Law Institute, *Restatement (Third), Foreign Relations Law of the United States*, 1987, paragraph 404.

Yugoslavia and in Rwanda (in 1993 and 1994, respectively)⁴¹. An International Criminal Court has been established on a permanent basis under the ICC Statute adopted in 1998.

2.4.5. Intervention by the Security Council

Violations of the norms of international humanitarian law that are relevant for the right to adequate food may also be addressed by the United Nations Security Council. In recent years, the Security Council has intervened under Chapter VII in several humanitarian crises to call parties to the conflict (both States and non-State entities) to allow humanitarian access, which includes food aid.

A leading resolution in this regard is Resolution 688 (1991), adopted in the aftermath of the 1991 Gulf War. The resolution, "reaffirming the commitment of all Member States to the sovereignty, territorial integrity and political independence of Iraq and of all States in the area", "insisted" "that Iraq allow immediate access by international humanitarian organizations to all those in need of assistance in all parts of Iraq" (preamble and paragraphs 1 and 3). It is not possible to review here all the other resolutions with similar content that have been adopted since the 1990s. Just to mention an example, Resolution 1258 (1999), concerning the civil war in the Democratic Republic of Congo and adopted after the 1999 Lusaka Ceasefire Agreement, "calls for safe and unhindered access for humanitarian assistance to those in need in the Democratic Republic of Congo and urges all parties to the conflict to guarantee the safety and security of United Nations and humanitarian personnel and to respect strictly the

⁴¹ Ad Hoc Tribunal on War Crimes in the Former Yugoslavia, created for the prosecution of persons responsible for serious violations of international humanitarian law in the territory of the former Yugoslavia, UN Security Council Resolution 827 (1993); International Criminal Tribunal for Rwanda, created for the persecution of persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States, Security Council Resolution 955 (1994).

relevant provisions of international humanitarian law" (para. 11).

The intervention of the Security Council under Chapter VII creates a legal obligation for States to grant humanitarian agencies access to civilians. However, violations of this obligation do not entitle automatically other States or international organizations to intervene and distribute relief against the will of affected States, unless the Security Council specifically authorises it. This has been done in some exceptional circumstances, where States were authorised "to use all necessary means", including armed force, to give humanitarian agencies access to persons in need. For example, during the conflict in Somalia, Resolution 794 (1992) authorised the UN Secretary-General and all Member States "to use all necessary means to establish as soon as possible a secure environment for humanitarian relief operations in Somalia" (para. 10).

III. PRINCIPLES AND STANDARDS FOR FOOD AND FOOD-RELATED AID

3.1. Introduction

This chapter identifies the principles and standards that are applicable to food and food-related aid, once relevant institutions (international organizations, donor governments, NGOs, etc.) have determined to provide aid. Identifying such principles and standards presents important difficulties:

- Different principles have very different legal nature. While some principles (e.g. non-discrimination) are recognized in legally binding international instruments, others are mainly stated in non-binding international documents (Codex Alimentarius standards and guidelines, General Assembly resolutions, declarations adopted by international conferences, etc.), and have therefore softer legal authority.
- Where principles are stated in general terms within international instruments, their application to practical situations may give rise to controversial issues, particularly where trade-offs between different principles, interests and needs emerge.
- In some cases, different principles may be applicable to different actors. For instance, while a UN agency may not determine the country allocation of aid merely on the basis of factors like religious solidarity, governments and NGOs may do so. The principles enshrined in the Food Aid Convention are applicable to food aid provided under the Convention by States party to it.
- Needs and resources vary considerably across different humanitarian crises, and each crisis has its specific features. Therefore, universal principles and standards for relief programmes may not always be appropriate, especially if rigidly interpreted and applied.

In this chapter, the principles and standards identified are those that would be relevant for relief operations by States and international organizations, in particular intergovernmental organizations. With regard to intergovernmental organizations, this builds on an important assumption. International treaties are ratified by, and binding upon, States. Therefore, principles and standards on aid programmes stemming from these treaties are to be followed by States rather than by international organizations. However, it is argued here that they are to be taken into account by a UN agency. First, the protection of human rights is one of the fundamental purposes of the United Nations (UN Charter, art. 1), and is seen as a cross-cutting issue of interest for all organizations of the UN system. Secondly, the fact that many relevant treaties have been adopted by UN bodies or conferences, and that the overwhelming majority of the States members of the United Nations and of organizations of the UN system have ratified them, may be considered as entailing that the fundamental principles stemming from those treaties are to be taken into account by organizations of the UN system.

Because of these difficulties and assumptions, this contribution can only constitute a further step in the ongoing debate over principles and standards applicable to food and food-related aid programmes. While for some issues the norms of international law are relatively clear and undisputed (e.g. impartiality and non-discrimination), for others the law is much less clear, and it is only possible to summarise ongoing debates and set the terms of the problem (e.g. participation). In any case, addressing these issues contributes to a better understanding of the implications of the right to adequate food, which in emergencies is strictly linked to the distribution of food and food-related aid.

In the chapter, reference is made to assistance and protection. Assistance is the provision of aid (foodstuffs, shelter, medical services, etc.) to populations affected by natural or man-made disasters. Protection activities are aimed at protecting populations from violence, discrimination, and other violations of human rights and humanitarian law.

3.2. Impartiality and non-discrimination

3.2.1. Definitions

Impartiality is the principle whereby humanitarian operators cannot be biased in favour of one of the parties to an armed conflict or, more generally, in favour of a particular national, religious, political, social or other group⁴². Impartiality is strictly linked to the principle of neutrality, i.e. the principle by which humanitarian organizations may not take sides in hostilities.

Discrimination is "any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms". However, "not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under [human rights law]"⁴³.

While impartiality and non-discrimination are different principles of international law, they are dealt with together in this section, as the implications they have for aid programmes are strictly related.

⁴² For a definition of impartiality, see International Committee of the Red Cross, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Geneva-Dordrecht, 1987, paragraphs 2800–2802; and *Fundamental Principles of the International Red Cross and Red Crescent Movement, Principle of Impartiality*.

⁴³ Human Rights Committee, General Comment 18, *Non-discrimination*, 10 November 1989, paragraphs 7 and 13. Cf. also the definition of discrimination in article 1 of the CEDAW (see section 3.4. below).

3.2.2. Impartiality and non-discrimination under international law

International humanitarian law affirms both the principle of non-discrimination and that of impartiality. Non-discrimination is affirmed for instance in common article 3(1), in articles 13, 27(3) and many others of the Fourth Geneva Convention, in article 75 of Additional Protocol I, and in articles 2(1) and 4(1) of Additional Protocol II. The principle of impartiality is affirmed with specific regard to the delivery of humanitarian relief (common article 3(2) explicitly refers to "an impartial humanitarian body"; similar expressions are found in article 59(2) of the Fourth Geneva Convention, article 70(1) of Additional Protocol I, and article 18(2) of Additional Protocol II).

Non-discrimination is also a fundamental principle of international human rights law (UN Charter, arts. 1(3), 13(1) and 55(c); UDHR, arts. 1, 2 and 7; ICCPR, arts. 2(1), 3, 4(1), 26 and several other provisions; ICESCR, arts. 2(2) and 3; CRC, art. 2; the CERD and the CEDAW; ECHR, art. 14; ACHR, arts. 1 and 24; and the African Charter, arts. 2, 3 and 18(3)). Specifically on the right to adequate food, the principle of non-discrimination is stated in articles 11 and 3 of the ICESCR. As for the right to life, it stems from articles 6 and 3 of the ICCPR.

The principle of non-discrimination applies in emergency situations. Article 4 of the ICCPR allows suspension of certain obligations in time of public emergency "provided that such measures [...] do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin". Similar clauses are included in article 27(1) of the ACHR and article 15(1) of the ECHR; the latter provision allows derogations "provided that such measures are not inconsistent with [the Contracting Party's] other obligations under international law", which certainly include the obligations enshrined in article 4(1) of the ICCPR. Moreover, while the right to adequate food is to be realized "progressively" under article 2 of the ICESCR, non-discrimination in the enjoyment

and exercise of that right is an obligation with immediate effect (see section 2.2.2 above).

The principle of non-discrimination against refugees in public relief programmes is affirmed in articles 3, 20 and 23 of the 1951 Refugee Convention. As for IDPs, although they do not enjoy a special legal status under international law, they are protected against discrimination under the general norms of human rights and humanitarian law (cf. principle 1(1) of the UN Guiding Principles on Internal Displacement).

Impartiality and non-discrimination were also at stake in the 1986 Nicaragua Case, where the International Court of Justice found that the support given by a State to an armed group involved in an internal armed conflict could not be regarded as humanitarian aid, as it was limited to a party to the conflict only, and therefore violated the non-discrimination and impartiality principles with which humanitarian operations must comply⁴⁴.

The principle of impartiality was further affirmed in soft-law instruments, such as Security Council Resolution 1296 (2000) (para. 11), General Assembly Resolutions 46/182, 45/100 and 43/131, and the 1996 World Food Summit Plan of Action (para. 43).

3.2.3. The application of impartiality and non-discrimination to food and food-related aid

Non-discrimination and impartiality do not entail that food and food-related aid is to be distributed equally to all individuals, groups or parties to an armed conflict. Rather, they mean that food and food-related aid has to be distributed only on the basis of need, regardless of any other consideration. The only ground on which a specific group can be given special protection and assistance is the existence of particular needs (e.g. vulnerable groups such as children, the elderly, etc.;

⁴⁴ International Court of Justice, *Case Concerning the Military and Paramilitary Activities in and against Nicaragua*, Nicaragua v. United States of America, Merits, 27 June 1986, ICJ Reports 1986, p. 14, paragraphs 239–245.

see below). Therefore, the imposition of allocation conditions for the passage of humanitarian convoys, such as the requirement that similar quantities of aid be distributed to the group benefiting from the passage and to the entity allowing the passage, have no legal basis⁴⁵.

Most humanitarian agencies explicitly apply the principle of non-discrimination in their relief programmes. For instance, the Code of Conduct for the International Red Cross and Red Crescent Movement and NGOs in Disaster Relief states that "aid is given regardless of the race, creed or nationality of the recipients and without adverse distinction of any kind", and that "aid priorities are calculated on the basis of need alone" (principle 2).

3.3. Special protection and assistance for vulnerable groups

In its General Comment 12, the CESCR stated that "priority in food aid should be given to the most vulnerable populations" (para. 38). Special protection and assistance for vulnerable groups flows from the principle of distribution of aid according to need only (see section 3.2 above) and from specific norms of international humanitarian and human rights law.

As for international humanitarian law, article 70(1) of Additional Protocol I (applicable in international armed conflicts) states: "in the distribution of relief consignments, priority shall be given to those persons, such as children, expectant mothers, maternity cases and nursing mothers, who, under the Fourth Convention or under this Protocol, are to be accorded privileged treatment or special protection" (see also

⁴⁵ Requirements of this kind were for instance imposed in the 1992–1995 armed conflict in Bosnia and Herzegovina. On these episodes, see Special Rapporteur of the Commission on Human Rights, *Situation des droits de l'homme dans le territoire de l'ex-Yugoslavie*, 21 February 1994, E/CN.4/1994/110, paragraphs 65, 69 and 71.

article 23(1) of the Fourth Geneva Convention). Similar norms are applicable in non-international armed conflicts.

Under human rights law, action aimed at granting special protection and assistance for particularly vulnerable groups or individuals is not contrary but complementary to the principle of non-discrimination. Thus, provisions on special measures for some groups and individuals are stated with regard to children (CRC, art. 3(2)), the elderly (e.g. Protocol of San Salvador, art. 17; African Charter, art. 18; etc.), people belonging to minority racial groups (e.g. the CERD, art. 1(4)), etc.

Possible implications for food and food-related aid programmes include taking into account special nutritional needs (e.g. of children, expecting mothers, etc.) and other particular needs (e.g. attention to those not able to work within food-for-work programmes). For instance, with regard to aid provided under the 1999 Food Aid Convention, article VIII of the Convention states that "members shall pay attention to meeting the particular nutritional needs of [...] children", and that "food aid for free distribution should be targeted on vulnerable groups". Similar principles are also reflected and operationalized in internationally recognized, non-binding codes of conduct (see e.g. the "targeting standard" for food aid of the Sphere Project, and guidance note 1 of that standard).

Under international treaties and soft-law instruments, vulnerable groups include:

- **Children**⁴⁶: as for international humanitarian law, see articles 23(1) and 24(1) of the Fourth Geneva Convention, articles 70(1), 77 and 78 of Additional Protocol I, and article 4(3) of Additional Protocol II; as for human rights law, see articles 3(2), 24(2)(c) and 27 of the CRC; the special needs of children are also acknowledged in soft-law instruments, both in general (principle 2 of the 1959

⁴⁶ Under human rights law, a child is defined as "every human being below the age of eighteen years unless under the law applicable to the child majority is attained earlier" (CRC, art. 1).

Declaration of the Rights of the Child; several other resolutions of the General Assembly, e.g. Resolution 52/107 of 1998; resolutions of the Commission on Human Rights, e.g. Resolutions 2000/85, 1999/80, 1998/76, 1997/78, etc.), and with regard to the girl child (see e.g. paragraph 7 of UNGA Resolution 54/148).

- **The elderly:** see article 17(a) of the Protocol of San Salvador and article 18(4) of the African Charter⁴⁷.
- **Persons with disabilities**⁴⁸: see principle 8 of the Declaration on the Rights of Disabled Persons and, at regional level, article 18(4) of the African Charter. The special needs of children with disabilities are addressed by article 23 of the CRC.
- **Expectant mothers, maternity cases and nursing mothers:** as for international humanitarian law, see article 23(1) of the Fourth Geneva Convention and article 70(1) of Additional Protocol I; as for human rights law, see article 12(2) of the CEDAW⁴⁹.
- **Refugees and IDPs:** the fact that, by definition, refugees and IDPs have left their home and land limits their possibility to produce food or to work in order to procure it. The obligation to meet the specific needs of refugees and IDPs flows from the principle that aid is to be

⁴⁷ See also principle 4(2) of the UN Guiding Principles on Internal Displacement.

⁴⁸ Article 1 of the Declaration on the Rights of Disabled Persons (General Assembly Resolution 3447 (XXX), 9 December 1975) defines "disabled person" as "any person unable to ensure by himself or herself, wholly or partly, the necessities of a normal individual and/or social life, as a result of deficiency, either congenital or not, in his or her physical or mental capabilities". Armed conflicts bring about great numbers of disabled people, mainly because of wounds suffered in battles and by landmines. Moreover, an alarming practice in armed conflicts, especially in Africa, is the mutilation of hands, arms and legs of civilians. Children are particularly vulnerable to disability in armed conflicts, notably due to landmines.

⁴⁹ See also principle 4(2) of the UN Guiding Principles on Internal Displacement.

distributed according to need⁵⁰. Among refugees and IDPs, particularly vulnerable groups (such as children, expectant mothers, female heads of households, older people and persons with disabilities) are entitled to special protection and assistance⁵¹.

- **Other vulnerable groups.** Vulnerable groups are by no means limited to the above-mentioned groups. A great variety of other groups can be particularly vulnerable in the specific context of each food crisis. For example, in certain situations people belonging to a minority group may be particularly vulnerable. Again, the principle of aid distribution according to need only entails taking their special needs into account.

3.4. Gender

Women are particularly affected by natural and man-made disasters. Discrimination suffered by women in ordinary periods (as for access to natural resources, employment, credit, training, extension, etc.) becomes more acute in periods of emergency. Attention to gender is also justified by the fact that in armed conflicts the number of female-headed households increases, as many men are dead or are at war.

Gender equality is one of the fundamental principles of international human rights law. It encompasses non-discrimination against women and affirmative action in favour of women. The non-discrimination provisions of human rights law have already been dealt with; all the norms quoted in section 3.2.2 above include sex/gender as a prohibited ground

⁵⁰ A particularly difficult issue concerns the relationship between refugees/IDPs living in camps and the local population residing in the surrounding area. In countries with very low standards of living, targeting aid exclusively on refugee and IDP camps can create unfair disparities (and therefore tensions) between people living in camps and the resident population.

⁵¹ See for instance principle 4(2) of the UN Guiding Principles on Internal Displacement; UNGA Resolution 54/145 of 1999, relating to unaccompanied refugee minors, paragraph 6; Commission on Human Rights Resolution 85 of 2000, paragraph 32(a), (c) and (d).

of discrimination, and are not repeated here. Article 2 of the CEDAW prohibits discrimination against women in a very comprehensive way, with regard not only to State action but also to non-State entities (cf. art. 2(e)). Discrimination against women is defined in the CEDAW as "any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field" (art. 1). The principle of non-discrimination remains applicable in emergency situations even where human rights are suspended (cf. art. 4 of the ICCPR).

The second aspect of the principle of gender equality under human rights law is affirmative action. While the removal of *de jure* discrimination is necessary, it is often not sufficient to ensure *de facto* equality between men and women. The principle of affirmative action is stated in article 4(1) of the CEDAW, under which "adoption by States Parties of temporary special measures aimed at accelerating *de facto* equality between men and women shall not be considered discrimination [...]".

Under international humanitarian law, women are entitled to the same protection as men. The general provisions on non-discrimination quoted above (section 2.2) include sex as a prohibited ground for adverse distinction. Moreover, several provisions of international humanitarian law provide for additional protection for women (e.g. providing for separate detention quarters and sanitary facilities for female prisoners of war, providing for special protection and respect for expectant mothers, etc.). Special attention is given to pregnant women and mothers. Under the Fourth Geneva Convention, for instance, consignments of essential foodstuffs intended for expectant and nursing mothers must be allowed free passage (art. 23); internees that are expectant or nursing mothers must receive food in addition to standard daily food rations, in proportion to their physiological needs (art. 89); occupying powers may not hinder the application of food-related

preferential measures which benefit expectant mothers and mothers of children under seven years and which have been adopted prior to the occupation (art. 50)⁵².

For aid provided under the 1999 Food Aid Convention, article VIII of the Convention states that "members shall pay attention to meeting the particular nutritional needs of women".

Women's empowerment is dealt with at length in numerous provisions of non-binding international declarations, particularly the Beijing Declaration and Platform for Action (e.g. paragraphs 13, 16, 19, 24, 35, etc. of the Declaration; cf. also paragraph 43 of the 1993 Vienna Declaration).

3.5. Emergency relief and longer-term concerns

Commitment Five of the World Food Summit Plan of Action commits States to "endeavour to prevent and be prepared for natural disasters and man-made emergencies and to meet transitory and emergency food requirements in ways that encourage recovery, rehabilitation, development and a capacity to satisfy future needs". Therefore, while focusing on urgent and immediate needs, food and food-related aid programmes should (the Plan of Action is not a binding document) take into account longer-term concerns. For aid provided under the Food Aid Convention, this Convention states that "the provision of food aid in emergency situations should take particular account of longer-term rehabilitation and development objectives in the recipient countries" (art. VIII(d)); moreover, "in planning food aid operations, due account shall be taken of [...] the effects that the delivery of the aid may have on marketing of local harvests in the recipient country" (art. X (b)).

This approach is also embodied in internationally recognized, not legally binding codes of conduct (NGO Code of Conduct

⁵² On sex/gender within international humanitarian law, see Charlotte Lindsey, 2001, *Women Facing War*, ICRC, available online on the ICRC website.

on the Right to Adequate Food, art. 7.6, and the Code of Conduct for the International Red Cross Movement and NGOs, principle 8).

Taking into account longer-term rehabilitation and development objectives may have implications for:

- The timing of aid. On the one hand, delays in aid delivery would negatively affect populations struck by natural and man-made disasters; on the other, aid needs to be terminated at an appropriate stage in order to avoid negative effects on the local food production capacity (as inflows of food aid may depress local prices of agricultural products, creating disincentives for local production). For instance, for aid provided under the Food Aid Convention, "members shall aim to ensure that the food aid provided reaches the intended recipients in a timely manner" (art. VIII(d)); moreover, members are to avoid "harmful effects on local harvests, production and marketing structures, by appropriately timing the distribution of food aid" (art. XIII(a)(i)).
- Forms of food aid procurement. In providing aid under the Food Aid Convention, for instance, "members shall give consideration to using or directing their cash contributions for the purchase of food: (i) for supply to the recipient country from other developing countries ("triangular transactions"); or (ii) in one part of a developing country for supply in a deficit area in that country ("local purchases"); the purpose is "to promote local agricultural development, strengthen regional and local markets and enhance the longer-term food security of recipient countries" (art. XII(a)). Some non-binding instruments also grant priority to local and "triangular" food purchases (see objective 5.3(d) of the WFS Plan of Action; and principle 6 of the Code of Conduct for the International Red Cross Movement and NGOs).

3.6. Participation

Increasingly, scholars refer to the existence of a right to participation under international law⁵³. Several norms are indicated as foundations for such right, particularly human rights that are instrumental to participation, such as the rights to freedom of peaceful assembly and association (UDHR, art. 20; ICCPR, arts. 21 and 22; CRC, art. 15(1); ACHR, arts. 15 and 16; ECHR, art. 11; and the African Charter, art. 10 and 11), and the right to political participation (UDHR, art. 21; ICCPR, art. 25; CERD, art. 5(c); CEDAW, art. 7; etc.). Under most derogation clauses, these rights can be suspended in times of public emergency, provided that the criteria specified in the applicable treaties (including e.g. non-discrimination) are complied with. However, the right to political participation is non-derogable under article 27(2) of the ACHR. Human rights law provisions on non-discrimination on the basis of sex (CEDAW, art. 2; UDHR, art. 2; ICCPR, art. 3; ICESCR, etc.) are relevant for the equal right of participation of men and women.

Participation is also referred to in a large number of soft-law instruments (e.g. fourth paragraph of the WFS Declaration and paragraphs 46, 56, 58, 62, etc. of the WFS Plan of Action; principle 10 of the Rio Declaration; paragraphs 8, 24, 25, etc. of the Vienna Declaration and paragraphs 67, 73, etc. of the annexed Plan of Action; paragraphs 16, 19, 20, 25 etc. of the Beijing Declaration and paragraphs 23, 47, etc. of the relevant Platform for Action; and principle 18(3) of the UN Guiding Principles on Internal Displacement, specifically concerning women's participation).

On the other hand, others have noted the obstacles to the recognition of a legal right to participation, namely the fact that the above-mentioned instruments only indirectly refer to participation as such and/or are not legally binding, and that

⁵³ On this debate, see e.g. Celia R. Taylor, *The Right of Participation in Development Projects*, in Konrad Ginther, Erik Denters and Paul de Waart, *Sustainable Development and Good Governance*, Dordrecht - Boston - London, 1995, pp. 204–229.

they do not adequately make clear who is the right-holder (whether individuals or groups, etc.), who is the duty-bearer (whether the national government and/or international bodies) and what is the extent of participation⁵⁴.

In any case, where a "progressive" interpretation of international law entailing the existence of a right to participation is accepted, it is not clear how this right relates to food and food-related aid programmes designed and implemented by international and non-governmental agencies, and how the right to participation is to be given practical effect in emergency situations, where time constraints are very hard and the social structures of affected communities (i.e. the potential vehicle for participation) are often disrupted.

Outside the domain of international law, efforts to clarify methods to incorporate participation in food aid programmes were made in the context of the Sphere Project. For instance, within the Minimum Standards in Food Aid, the "participation standard" reads: "recipients of food aid have the opportunity to participate where possible in the design, management and monitoring of the programme". Key indicators of realization of this standard include: "representatives from across the disaster affected population are consulted and are involved in decision making that relate to needs assessment and programme design"; "people from the affected population (both women and men) participate in the management and implementation of the food aid programme". Other standards envisage participation in all the different stages of food aid operations, from needs assessment (analysis standard 1, at key indicator 2) to targeting criteria (targeting standard, at key indicator 1), to programme implementation (capacity standard 2) and to aid distribution (distribution standard, at key indicator 1 and guidance note 1). As for aid distribution, for example, people's involvement in food aid programmes is to be attained *inter alia* through distribution committees representing "gender, ethnicity and socio-

⁵⁴ See Taylor, *The Right of Participation in Development Projects*, op. cit., p. 225.

economic status" as well as "acknowledged political leaders, traditional community leaders and religious leaders".

Some humanitarian agencies have pledged to develop and adopt participatory approaches in their relief programmes. The Code of Conduct for the International Red Cross and Red Crescent Movement and NGOs in Disaster Relief, for instance, states that "ways shall be found to involve programme beneficiaries in the management of relief aid", and commits participating humanitarian agencies to "strive to achieve full community participation in [their] relief and rehabilitation programmes" (principle 7).

3.7. Environmental concerns

General Comment 12 of the CESCR states that the core content of the right to food implies the accessibility of such food in ways that are sustainable and that do not interfere with the enjoyment of other human rights (para. 8). The concept encompasses economic, social and environmental sustainability, which needs to be taken into account also in emergencies, although under such circumstances priority may have to be given to freedom from hunger and the right to life.

3.7.1. The environmental impact of humanitarian crises

All natural and man-made disasters involve some environmental impact. In armed conflicts, the conduct of the hostilities itself has an impact on the environment. Moreover, large refugee and IDP camps may contribute to the degradation of natural resources such as forests, soils and water, and, more generally, of biodiversity⁵⁵; environmental degradation may in turn negatively affect health and social conditions of people living in camps and of the resident population (e.g. through contaminated water). In this context, humanitarian operations can also have a negative impact on

⁵⁵ Under article 2 of the Convention on Biological Diversity, biodiversity is defined as "the variability among living organisms from all sources including [...] diversity within species, between species and of ecosystems".

the environment. For example, the way a refugee camp is conceived (site selection and preparation, organization of the camp, sanitation, etc.) and the kind of aid that is provided (e.g. the variety of seeds in a programme supplying agricultural inputs) may affect natural resources. The environmental impact of food aid may include forest degradation (due to the gathering of fuelwood for cooking purposes), air pollution (due to the burning of cooking fuel), waste (discarded food packaging etc.) and the introduction of pests.

3.7.2. Environment protection in armed conflicts

In armed conflicts, international humanitarian law contains norms aimed at protecting the environment. These norms are indirectly relevant for the right to adequate food, as natural resources constitute a major means for the production of food. Additional Protocol I (applicable in international armed conflicts) prohibits "methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment" (art. 35(3)). Moreover, under article 55(1) of the same Protocol, "care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage". Article 55 also prohibits "the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population", as well as "attacks against the natural environment by way of reprisals". Also relevant are article 56 of Additional Protocol I and article 15 of Additional Protocol II ("protection of works and installations containing dangerous forces").

Moreover, the 1976 Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques prohibits "military or any other hostile use of environmental modification techniques having widespread,

long-lasting or severe effects as the means of destruction, damage or injury to any other State Party" (art. 1)⁵⁶.

Relevant provisions are also contained in the Draft International Covenant on Environment and Development⁵⁷. Under article 32 of the Draft Covenant, devoted to "military and other hostile activities", States parties must observe, outside the areas of armed conflict, all international environmental rules applicable in times of peace, and, within areas of armed conflict, must take care to protect the environment against avoidable harm. Moreover, parties must "not employ or threaten to employ methods or means of warfare which are intended or may be expected to cause widespread, long-term, or severe harm to the environment", and must "not use the destruction or modification of the environment as a means of warfare or reprisal".

3.7.3. Environment concerns and principles for food and food-related aid

Although given the potential environmental impact of humanitarian operations some form of environmental screening is desirable, there is no international law rule requiring humanitarian agencies to assess the environmental impacts of their food and food-related aid programmes. This is because in emergency situations aid aims at meeting the urgent and immediate needs of affected populations, and hard time constraints may make environmental impact assessments impossible.

⁵⁶ The 1997 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Antipersonnel Mines and on their Destruction, mentioned above (section. 2.2.3), also contains environment-related norms, particularly with regard to environmental standards to be observed for the destruction of antipersonnel mines.

⁵⁷ The Draft Covenant was initially elaborated by the World Conservation Union (IUCN) and the International Council of Environmental Law (ICEL) in 1995. A second edition (referred to here) was prepared in 2000. The Draft Covenant has not been adopted by States.

Outside the specific context of humanitarian operations, international law contains numerous norms requiring an environmental impact assessment for activities potentially having a negative impact on the environment (e.g. 1992 Rio Declaration on Environment and Development, principle 17; 1992 Convention on Biological Diversity (CBD), art. 14; 1992 Framework Convention on Climate Change, art. 4(1)(f); 1997 Convention on the Law of the Non-navigational Uses of International Watercourses, art. 12; 1982 Convention on the Law of the Sea, art. 206; as well as regional instruments such as the 1985 ASEAN Agreement on the Conservation on Nature and Natural Resources, the 1991 Espoo Convention on Environmental Impact Assessment in a Transboundary Context, and several regional conventions on the protection of the marine environment).

Moreover, it may be argued that assessing environmental impact constitutes a general principle of international environmental law: as early as 1986 (i.e. before the majority of the above-mentioned documents were enacted), the Experts Group on Environmental Law of the World Commission on Environment and Development identified environmental impact assessment as an "emerging principle of international law", and stated that "States planning to carry out or permit activities which may significantly affect a natural resource or the environment shall make or require an assessment of their effects before carrying out or permitting the planned activities"⁵⁸.

However, the applicability of the norms on environmental impact assessment to food and food-related aid programmes is hindered by two major obstacles:

- The norms identified are binding upon States, rather than upon humanitarian agencies;

⁵⁸ Experts Group on Environmental Law, World Commission on Environment and Development, *Environmental Protection and Sustainable Development: Legal Principles and Recommendations*, 1986, pp. 58–62.

- The norms relate to "development" activities rather than to relief programmes, where time constraints are harder.

Lacking well-established international norms on the environmental aspects of food and food-related aid programmes, some humanitarian agencies have adopted their own internal (non-legal) guidelines. An example is provided by the Environmental Guidelines adopted by UNHCR in 1996, which provide for the integration of environmental planning and action into humanitarian assistance operations. As for food aid in particular, the Guidelines provide for the supply of "food in a form which requires the least amount of energy for cooking (e.g. fresh food, grains which have been milled before distribution, etc.)" and for the promotion of recycling of food waste (para. 5.5(f)).

On the other hand, hard-law norms of international environmental law may be relevant for specific issues concerning food and food-related aid. For instance, the distribution of seeds of an inappropriate variety (e.g. some alien species) can have negative impacts on local species through competition, hybridisation and transmission of diseases and parasites. Under article 6(b) of the Convention on Biological Diversity (CBD), the conservation and sustainable use of biodiversity must be integrated, as far as possible and appropriate, and in accordance with the particular conditions and capabilities of each Contracting Party, into relevant sectoral or cross-sectoral plans, programmes and policies. In addition, each Contracting Party is to prevent "the introduction of, control or eradicate those alien species which threaten ecosystems, habitats or species" (art.8 (h)). Therefore, from the political and ethical standpoint, it may be argued that organizations of the UN system, while not bound by the CBD, should not, in carrying out their programmes and activities, deliberately violate the fundamental objectives and principles of a treaty adopted by a UN conference, such as the CBD. On the other hand, from the legal point of view, if a humanitarian agency were to provide seed varieties threatening ecosystems, habitats or species in recipient States, parties to the CBD,

these States would have a duty to take measures such as preventing the introduction of the seeds in their territory.

Other international standards on the protection of the environment relate to plant and animal health. In particular, pests may be introduced with international food aid causing future outbreaks and thus leading to food insecurity or environmental degradation. Standards set under the International Plant Protection Convention, although not legally binding as such (see section 1.8 above), give guidance on pest control and plant quarantine. Likewise, standards set by the *Office international des épizooties* are relevant to animal diseases, vaccination and other such matters. These standards apply equally under normal circumstances as in emergencies, although implementation by national authorities may sometimes become problematic in emergency situations.

As regards pesticides, besides numerous non-binding guidelines and manuals issued by FAO, the Rotterdam Convention on Prior Informed Consent for Certain Hazardous Chemicals and Pesticides in International Trade (adopted in 1998 but not yet in force) is an important tool, for developing countries in particular, to avoid the import of hazardous pesticides as it initiates a decision making mechanism and allows the banning of those chemicals and pesticides which they cannot manage safely.

In 2002, the issue of genetically modified organisms within food and food-related aid was at issue with regard to food aid provided by multilateral agencies to some Southern African countries. The environmental concerns relating to genetically modified products regard the unintentional dissemination of those products, with possible effects on local biodiversity. As it stands now, international law does not contain any norms specifically addressing problems relating to genetically modified organisms within the context of food aid. Ultimately, acceptance of food aid containing genetically modified organisms rests with the government of the recipient State. The introduction of living modified organisms, on the other hand, is governed by the Biosafety Protocol to the CBD.

3.8. Adequacy standards

The right to adequate food includes an adequacy standard, stemming from the wording of article 11 of the ICESCR ("right [...] to an *adequate* standard of living [...], including *adequate* food")⁵⁹. In its General Comment 12, the CESCR clarified the meaning of the adequacy standard, although not in relation to emergency situations. According to the Committee, food must be "in a quantity and quality sufficient to satisfy the dietary needs of individuals", "free from adverse substances" and "acceptable within a given culture" (para. 8). However, while the ICESCR remains applicable in emergency situations, the adequacy standard may be subject to limitation deriving from lack of resources and time constraints. This is also implicit in the very notion of "progressive" realization of the right to adequate food (see section 1.2.3 above). As for humanitarian assistance, food aid of inadequate quantity may still be better than no aid at all. Food aid of low quality may also be better than none, provided of course that the food is safe for human consumption, as is discussed below.

Various international instruments provide for food standards:

- For food aid provided under the Food Aid Convention, "all products provided as food aid shall meet international quality standards, be consistent with the dietary habits and nutritional needs of recipients and, with the exception of seeds, shall be suitable for human consumption" (art. III(j)).
- Where humanitarian law is applicable, article 89 of the Fourth Geneva Convention requires States to provide daily food rations of sufficient quantity, quality and variety for internees, while article 26 of the Third Geneva

⁵⁹ Cf. the WFS Declaration, which recognizes "the right of everyone to have access to *safe and nutritious* food" (para. 3, emphasis added). The annexed Plan of Action defines food security as follows: "food security exists when all people, at all times, have physical and economic access to *sufficient, safe and nutritious* food to meet their dietary needs and food preferences for an active and healthy life" (para. 1, emphasis added).

Convention contains a similar norm with regard to prisoners of war; article 49 of the Fourth Geneva Convention and article 17 of Additional Protocol II refer to "satisfactory conditions" of nutrition in cases where a population is displaced for its own safety or for imperative military reasons.

- Comprehensive standards were developed under the Codex Alimentarius Commission concerning food additives, veterinary drug and pesticide residues, contaminants, methods of analysis, sampling, etc. Codex has also established codes and guidelines of hygienic practice, all of which are internationally recognized and science-based. These may be used as reference in case of lack of relevant national legislation, and in many cases national legislation adopts these standards. Furthermore, the voluntary Code of Ethics, which refers explicitly to the Universal Declaration of Human Rights and is directed at both importing and exporting countries, may provide further guidance. Article 8 of the Code addresses emergency situations specifically, and stipulates that due regard should always be given to the basic principles of food safety.

National legislation governing some or all aspects of food safety exists in most countries. Furthermore, in most national legal systems, distributing food that is dangerous or harmful for health is unlawful under tort law and/or criminal law. Therefore, once an institution has decided to distribute food aid, it may be argued that it has a "duty of care" *vis-à-vis* programme beneficiaries, i.e. it must adopt all appropriate measures to ensure that the food provided does not result in physical harm for the beneficiaries. These standards are of relevance to locally purchased and imported food. In the absence of such legislation, Codex standards are often used to determine safety and fitness for human consumption of food aid.

Besides these norms, however, international law does not contain guidance on adequacy standards for food aid. However, outside the scope of international law, specific

standards developed within the Sphere Project may give an indication of practical implementation. For instance, "general nutritional support standard 1: nutrient supply" of the Minimum Standards in Nutrition reads: "people's nutrient needs are met". Attached key indicators and guidance notes include standards in terms of intake of vitamins and other nutrient substances, absence of scurvy, pellagra or beri-beri, access to breastmilk or recognized substitutes for infants under six months and overall low levels of malnutrition. The "requirement standard" for food aid reads: "the food basket and rations are designed to bridge the gap between the affected population's requirements and their own food sources".

The Sphere Project's food quality and safety standards should also be mentioned. General nutritional support standard 2 of the Minimum Standards in Nutrition reads: "food that is distributed is of sufficient quality and is safely handed so as to be fit for human consumption". Attached key indicators include the absence of outbreaks of food-borne diseases caused by distributed food, the absence of complaints from the recipients, the existence of appropriate quality checks, etc. General nutritional support standard 4 states: "food is stored, prepared and consumed in a safe and appropriate manner, both at the household and community level". In addition, the resource management standard for food aid includes key indicators concerning food aid storage ("storage is safe and clean", "food commodities are inspected and unfit commodities are certified and disposed of in accordance with standard procedures", etc.).

A safety issue that was raised in 2002 concerned the suitability for human consumption of genetically modified crops supplied as food aid. As mentioned above (section 3.7.), international law does not contain norms specifically addressing this issue, although they are being discussed by the Codex Alimentarius Commission. It is therefore ultimately for the government of the receiving State to determine whether to accept food aid including genetically modified organisms. An interesting question, to which no clear answer exists at present,

is whether the country that refuses such food aid, in the absence of clear scientific basis, is denying the right to have access to food to its citizens, thus violating article 11 of the ICESCR, or whether a country that accepts such food might be considered in violation of the right to adequate food. Guidance could perhaps be obtained from other human rights principles, such as the right to democratic participation, the right to information and the right to informed consent of the intended consumers. Cultural acceptability, which is discussed below, may also be a consideration.

According to the CESCR, "cultural [...] acceptability implies the need also to take into account, as far as possible, perceived non nutrient-based values attached to food and food consumption [...]" (General Comment 12, paras. 8 and 11). In this aspect, the right to adequate food is linked to article 27 of the ICCPR, which recognizes the right of persons belonging to ethnic, religious or linguistic minorities "to enjoy their own culture" (cf. also the CRC, art. 30). Again, in emergency situations the cultural acceptability of food aid is to be pursued as far as consistent with the urgency required and the resources available.

Different cultural aspects may, however, have different relative importance. Religious taboos on certain meats, for instance, may be of such strength that the beneficiaries would rather starve than eat them, which leads to the conclusion that such taboos should always be respected. Habits concerning staples are also important, not only with reference to culture, but also to the prospects of rehabilitation, as production systems may suffer from changed dietary habits, which in turn lead to decreased demand for local produce and hence adverse consequences for local farmers. However, dietary preferences and habits not amounting to taboos may have to be temporarily put aside in order to ensure freedom from hunger and the right to life.

Non-legal instruments like the Sphere Project standards seek to operationalize the cultural aspect of the right to adequate food. General nutritional support standard 3 states: "foods

that are provided are appropriate and acceptable to the population". Key indicators listed are:

- "People are consulted on the acceptability and appropriateness of the foods being distributed and results are fed into programme decisions";
- "Foods distributed do not conflict with the religious or cultural traditions of the recipient or host populations";
- "The staple food distributed is familiar to the population";
- "Complementary foods for young children are palatable and digestible";
- "There is no distribution of free or subsidised milk powder to the general population"; and
- "People have access to culturally important condiments (e.g. sugar or chilli)".

CONCLUSION

This study has analysed the norms of international law that are related to the right to adequate food in emergency situations. In so doing, it has focused on two main issues: the obligations of States and non-State entities to respect, protect and fulfil the right to adequate food in emergencies; and the principles and standards applicable to food and food-related aid programmes implemented by international humanitarian agencies.

Under international human rights law, every human being has the right to have physical and economic access at all times to adequate food or to the means for its procurement. In order to progressively realize this right, each State has a legal obligation to take steps to the maximum of its available resources, both individually and through international assistance and cooperation. As a fundamental human right, the right to adequate food applies in emergency situations, including both natural disasters and armed conflicts.

The recognition of the right to adequate food embodied in human rights law is supplemented by norms contained in other branches of international law (refugee law, economic law, environmental law). Moreover, in armed conflicts, international humanitarian law is applicable.

International human rights law and international humanitarian law (where applicable) are complementary. Human rights law, which is applicable (albeit to different degrees) in both peace and war, recognizes the right of individuals to have access at all times to safe and nutritious food or to the means for its procurement. Humanitarian law, on the other hand, applies only in armed conflicts (and in other related situations, like occupation) and is instrumental to protecting certain basic human rights, including the right to food, in these situations. Many of its provisions are aimed at ensuring that persons or groups not taking or no longer taking part in the hostilities are

not denied food or access to food, by prescribing certain conduct and prohibiting certain behaviour.

Thus, international humanitarian law contains numerous provisions aimed at facilitating humanitarian assistance to persons in need, which impose obligations both upon the parties to the hostilities and upon States not taking part in the conflict. Parties to the conflict must allow humanitarian assistance whenever the basic needs of the civilian population, including food, are not fulfilled and an impartial humanitarian organization offers such assistance. Indeed, while humanitarian assistance is under international law subject to the consent of the affected State, the discretion of the latter in refusing consent is limited by several norms and principles of international (humanitarian and human rights) law: aid offers cannot be considered unfriendly acts; refusals must be justified by valid reasons; refusals could constitute violations of human rights law provisions on the right to food and the right to life; refusals could amount to deliberate starvation of civilians, war crime, genocide or crime against humanity, punishable under international law. Under international humanitarian law, parties to the conflict must also protect relief consignments and facilitate their rapid distribution, and must refrain from delaying or diverting them. In addition, international humanitarian law limits the right of the parties to international and non-international armed conflicts to choose methods and means of warfare, and prohibits the use of starvation of civilians. A party to the conflict cannot attack, destroy, remove or render useless objects indispensable to the survival of the civilian population, such as foodstuff, crops, drinking water installations, or make these objects the target of reprisals.

In specified circumstances, particularly serious violations of international law, including some forms of violation of the right to adequate food (e.g. the use of starvation of civilians as a method of warfare), constitute crimes punishable under international law, namely genocide, war crimes and crimes against humanity. Adjudication over these crimes rests with domestic courts and/or with international tribunals.

International economic law contains norms regulating the provision of food aid, which are binding for the States parties to the relevant treaties. Norms are embodied both within WTO instruments (Agreement on Agriculture; Decision on Least-Developed and Net Food-Importing Developing Countries) and within international commodity agreements (Food Aid Convention 1999, which is part of the International Grains Agreement). The Food Aid Convention provides for the supply of specified quantities of food aid by identified donor States, and for principles and criteria guiding such supply. WTO norms include criteria for domestic food aid (exempting it from reduction commitments concerning domestic support to agriculture) and for international food aid (particularly regulating the relationship between food aid and commercial transactions). International standards on food safety, animal and plant health are applicable in emergency situations.

Finally, principles and standards contained in internationally recognized codes of conduct adopted by humanitarian agencies and NGOs, which are not binding and outside the scope of international law, may provide insights on the interpretation and operationalization of some aspects of the right to adequate food in emergencies.

As for the identification of principles and standards for food and food-related aid, several principles and standards have been identified, namely: impartiality and non-discrimination; special protection and assistance for vulnerable groups; gender approach; consideration for longer-term rehabilitation and development; participation; environment protection; and adequacy standards.

Impartiality and non-discrimination entail that aid must be distributed according to need only. Special protection and assistance must be provided to categories of particularly vulnerable groups, determined in international instruments or identified in each humanitarian programme. A gender approach is to be integrated in aid programmes, by avoiding discrimination against women and by taking women's special

nutritional needs into account (especially with regard to expectant and nursing mothers).

Although food and food-related aid aims at satisfying urgent and immediate needs, it must take into account longer-term rehabilitation and development concerns. Ways in which participation may be integrated within aid programmes are to be devised. While not required to carry out an environmental impact assessment before undertaking their relief programmes, humanitarian agencies should take into account environmental concerns in the design and implementation of their programmes, and respect plant and animal protection standards.

Finally, food and food-related aid must meet certain minimum requirements, especially in terms of food safety for human consumption. Due regard must be given to cultural acceptability.

SELECTED REFERENCES

Commission on Human Rights, Special Rapporteur on the Right to Food. 2002. *The Right to Food*, Report submitted in accordance with Commission on Human Rights Resolution 2001/25, 10 January 2002, E/CN.4/2002/58.

Committee on Economic, Social and Cultural Rights, General Comment 3. 1990. *The Nature of States Parties Obligations*, 14 December 1990.

Committee on Economic, Social and Cultural Rights. 1999. General Comment 12, *The Right to Adequate Food*, 12 May 1999, UN Doc. E/C.12/1999/5.

Eide, A. 1999. *The Right to Adequate Food and to be Free from Hunger*, 28 June 1999, E/CN.4/Sub.2/1999/12, updated study submitted to the Sub-Commission on the Promotion and Protection of Human Rights under Resolutions 1997/107 and 1998/106.

FAO, 2000, *The Right to Food in 2000 and Beyond*, by W. Barth Eide, unpublished, Rome.

FAO, 1999. *Extracts from International and Regional Instruments and Declarations, and Other Authoritative Texts Addressing the Right to Food*, Legislative Study No. 68, Rome.

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

International Committee of the Red Cross, 1987. *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Geneva, ICRC/Dordrecht, Martinus Nijhoff Publishers (available at www.icrc.org).

International Committee of the Red Cross, 1958. *Commentary on the Geneva Conventions of 12 August 1949*, Vol. IV, Geneva (available at www.icrc.org).

Kracht, U. 1999. *Human Rights and Humanitarian Law and Principles in Emergencies - An Overview of Concepts and Issues*, Paper prepared for the UNICEF Regional Office for Eastern and Southern Africa, Nairobi.

Pejic, J. 2001. *The Right to Food in Situations of Armed Conflict: The Legal Framework*, International Review of the Red Cross, Vol. 83.

UNHCHR, 2000. The Right to Food, Report of the High Commissioner for Human Rights submitted in accordance with Commission resolution 1999/24, 13 January 2000, E/CN.4/2000/48, and 20 March 2000, E/CN.4/2000/48/Add. 1.

Windfuhr, M. 1998. Role of International Organizations in the Implementation of the Rights Related to Food and Nutrition, Second Expert Consultation on the Right to Adequate Food as a Human Right, Rome, 18–19 November 1998.