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**The Right to Food and Drinking Water
 in International Law: New Developments**

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I. Introduction

The lack of access to adequate food and drinking water remains one of the most critical and appalling global issues. Between 1998-2000, FAO estimated that some 840 million people world-wide were undernourished and this figure is declining by only 2.5 million a year - less than previously thought. Developing countries (799m) compromised most of this figure.¹ In fact, one child dies every seven seconds

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¹ FAO, *The State of Food Insecurity in the World* (2002). China remains the most impressive success story, having reduced its number of hungry by 74m, or almost half, reflecting its increased commitment to agricultural development. Other countries where sharp reductions were made include Indonesia, Thailand, Vietnam, Peru, Ghana and Nigeria. However, in the rest of the developing world the number of hungry people has increased by more than 80m, partly the result of the drastic worsening of the situation in a small number of countries. The worst performer was Democratic Republic of Congo where internal conflict has caused hunger to triple. India was the second-worst performing country, because continued population growth has outstripped agricultural production, leaving an extra 18m

from hunger and 25,000 people die from the effects of hunger each day.² Moreover, chronic hunger and malnutrition causes mental retardation and physical stunting in developing children.³

In the poorest developing countries, one in five children dies before the age of five mainly from water-related diseases arising out of insufficient water availability, both in quantity and quality.⁴ An estimated 1.1 billion persons lack access to clean drinking water.⁵

In 1996 the World Food Summit (WFS) adopted by consensus the Rome Declaration on World Food Security and the WFS Plan of Action. Since then, there has been some progress in defining the right to food and developing mechanisms to enforce the right at both the international and national levels. Unfortunately, this progress has been inadequate in coping with the reality of the current food situation. At present rate, the commitments made at the WFS to halve the number of undernourished people in the world by 2015 would take over 60 years to achieve.⁶

There has been, however, some normative and institutional progress in the development of the right to adequate food. The Committee on Economic, Social and Cultural Rights adopted General Comment No.12 to better define the right to food as codified in Article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).⁷ On 17 April 2000, the Commission on Human Rights also established its Special Rapporteur on the right to food for a period of three years.⁸ On a national level, the right to food and other economic and social rights have begun to be developed and adjudicated in a few countries. In addition, States at the 2002 World Food Summit: *five years later*, renewed their commitment to the goal set out at the WFS. Moreover, they called for the FAO Council to establish an inter-governmental working group to elaborate “a set of voluntary guidelines to support Member States’ efforts to achieve the progressive realisation of the right to adequate food in the context of national food security”.⁹

With regard to the right to drinking water, the Committee adopted in 2002 General Comment No. 15 developing the right to water as codified in Articles 11 and 12 of the ICESCR.¹⁰ Furthermore, on 22 April 2002, the Commission on Human

malnourished. Other countries recording dramatic increases in malnutrition include Iraq, Bangladesh and Tanzania. Sub-Saharan Africa remains the worst-affected region with the highest prevalence of undernourishment, which threatens the lives of more than 14m people across southern Africa. While poverty remained the main cause of hunger, other factors included conflict, drought, flood and political and economic disruption. On the contrary, the key features of successful countries were good governance, lack of conflict, strong and stable economies that invested in agriculture, and targeted social programmes to protect the weak.

² The World Health Organization (WHO) ranked hunger as the highest health risk causing deaths around the world. MIP/01/APR.SDE.3, WHO (2000): *Progress Report: Nutrition*.

³ WFP (2002): *World Hunger Map*.

⁴ “A Framework for Action on Water and Sanitation”, Water and Sanitation, Energy, Agricultural Productivity, Biodiversity and Ecosystem Management and Health Working Group (WEHAB) (August 2002).

⁵ UNDP (2002): *Human Development Report*.

⁶ FAO (2002): *Mobilizing the Political Will and Resources to Banish World Hunger*, paragraph 2.27.

⁷ E/C.12/1999/5, CESCR General Comment 12 (1999). For a good summary of the right to food see Asbjorn Eide, *Notes on a Human Rights Approach to Food Security*, IFPRI/IPRFD Round-table discussion (15 January 2001).

⁸ Resolution 2000/10.

⁹ Declaration of the World Food Summit: five years later, adopted on 13 June 2002, paragraph 10.

¹⁰ E/C.12/2002/11, CESCR General Comment 15 (2002). For a good discussion on the right to water see Henri Smets, *Le droit à l'eau*. Paris, Académie de l'eau et Conseil européen du droit de

Rights authorized its Sub-Commission on the Promotion and Protection of Human Rights to establish a Special Rapporteur to conduct a detailed study on the relationship between the enjoyment of economic, social and cultural rights and the promotion of the realization of the right to drinking water supply and sanitation.¹¹

Although these developments demonstrate progress in conceptualizing the right to adequate food and drinking water as a fundamental right, they remain only small steps forward in the realisation of this right as a justiciable binding norm of international human rights law. This would entail the necessary drafting of a *treaty on the right to adequate food and drinking water* drawing on the current developments of international human rights law. Such a treaty should establish legal binding standards to all States parties and should provide appropriate basis for enforcement and monitoring mechanisms at both international and domestic levels.

Further legal developments should include the expansion of the role of the Commission on Human Rights' Special Rapporteur on the right to food to enable him to deal with individual complaints, as well as the adoption of the draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights allowing its Committee to deal with individual complaints. Only then will the seriousness of this fundamental right truly be recognized in international law, paving the way for significant legal progress towards eradicating world poverty.

II. Normative Developments

1. 1996-2002: FAO World Food Summits

As mentioned above, in 1996 the FAO held the WFS in Rome. During the Summit a Plan of Action was adopted with the aim of halving the number of undernourished people in the world by 2015. The Plan of Action contained seven commitments that were to act as guiding principles. Specifically, Commitment No. 7 called for an improved implementation of the right to adequate food. Objective 7.4(e), “*invite[d] the United Nations High Commissioner for Human Rights, in consultation with relevant treaty bodies, and in collaboration with the relevant specialized agencies and programs of the United Nations system and appropriate intergovernmental mechanisms, to define better the rights related to food in article 11 of the International Covenant on Economic, Social and Cultural Rights and to propose ways to implement and realize these rights as a means of achieving the commitments and objectives of the World Food Summit, taking into account the possibility of formulating voluntary guidelines for food security for all*”.

Following this requirement, the Office of the UN High Commissioner for Human Rights (OHCHR) has undertaken several initiatives, among them, organizing three expert consultations on the right to food. These were held in close collaboration with relevant treaty bodies, United Nations specialized agencies and programs, interested non-governmental organizations (NGOs) and the Special Rapporteur on the right to food.¹² These consultations contributed greatly to the

l'environnement, 2002, 160 p. ; and H. Smets : « Le droit de chacun à l'eau », *Revue européenne de droit de l'environnement*, num. 2, 2002, pp. 129-170.

¹¹ Decision 2002/105.

¹² For a summary of the expert consultations, see C. Villán Durán, “Achievements in Relation to the Right to Food in International Human Rights Law”, in M. Borghi and L. Postiglione Blommestein

development and operationalization of the right to food including the drafting of General Comment No.12.

In July 2002 the FAO organized the World Food Summit: *five years later* as a follow up to the WFS. The international community, at the 2002 Summit, seems to have made little progress on the right to food. However, the final Declaration of the Summit looked to enact voluntary guidelines to achieve the progressive realization of the right to food in the context of food security. In addition, paragraph 10 of the final Declaration invited the FAO Council to establish an Intergovernmental Working Group (IGWG) to elaborate such voluntary guidelines in a period of two years. The IGWG would then report on its work to its parent body, the FAO Committee on World Food Security. The IGWG is discussed below in further detail.¹³

2. Definitions

2.1. The Right to Adequate Food

The right to adequate food as a component of a broader category, the right to an adequate standard of living, is recognized in several instruments in international law. In accordance with article 25(1) of the Universal Declaration of Human Rights (UDHR), “everyone has the right to a standard of living adequate for the health and well-being of himself and of his family”. In addition, under the Convention on the Rights of the Child (CRC), article 27 recognizes “the right of every child to a standard of living adequate for the child’s physical, mental, spiritual, moral and social development”. Moreover, there are several more regional instruments that incorporate or make reference to the right to food.¹⁴

However, the most detailed regulation of the right to food is found in the International Covenant on Economic, Social and Cultural Rights (ICESCR). Article 11.1 establishes that States parties recognise “the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions”. The phrase in article 11.1 “for himself and his family” implies that this is a right for all individuals, including woman and children.

More specifically, article 11.2 reads that States parties to the ICESCR recognize the fundamental right of everyone to be free from hunger. They shall take individually and through international co-operation measures, including specific programmes to achieve this end. Article 11.2(a) specifically provides for programmes “to improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources.” Article 11.2(b) obliges States parties to take into account “the problems of both food-

(eds.), *For an Effective Right to Adequate Food*. Fribourg (Switzerland), University Press, 2002, pp. 53-61

¹³ See below, Section III.3: The FAO Intergovernmental Working Group.

¹⁴ See Asbjorn Eide, “The Right to an Adequate Standard of Living Including the Right to Food”, Section 3 in Chapter 8 of A. Eide, C. Krause and A. Rosas: *Economic, Social and Cultural Rights- a Textbook* (2001). All UN human rights documents and instruments may be found at the OHCHR’s Website: <http://www.unhchr.ch>

importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need”.

The right to adequate food is also protected under the principles of international humanitarian law. The Geneva Conventions of 1949 and two Additional Protocols of 1977 primarily contain the majority of international humanitarian law provisions. Although international humanitarian law does not mention specifically “the right to food”, many of its provisions encompass this right by guaranteeing that people are not denied access to food during conflict.

The starvation of civilians as a method of warfare is prohibited in both international and non-international armed conflict.¹⁵ In this regard, “[i]t is prohibited to 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 installation and supplies and irrigation works...”¹⁶

Article 49 of the Fourth Geneva Convention prevents forced displacement, including the individual or mass forcible transfers of civilians in situations of occupation, unless necessitated for the safety of the population or for imperative military reasons.¹⁷ Specific categories of persons who cannot feed themselves are also protected by international humanitarian law. Prisoners of war should be given adequate food and water during captivity and any subsequent transfer.¹⁸ Article 26 of the Third Geneva Convention requires that, “basic daily food rations shall be sufficient in quantity, quality and variety to keep prisoners of war in good health and to prevent loss of weight or the development of nutritional deficiencies.” Furthermore, State parties are bound by similar obligations toward civilian prisoners.¹⁹ Finally, State parties must provide pregnant and nursing mothers and children under the age of 15 with additional food “in proportion to their physiological needs”.²⁰

There also exist rules governing humanitarian assistance in times of armed conflict. These rules pertain to both the rights of affected civilians to receive aid and the rights of humanitarian agencies to deliver it. It is important to mention some of these rules. State parties must, inter alia, “permit the free passage of all consignments of essential foodstuffs, clothing and tonics intended for children under fifteen, expectant mother and maternity cases”.²¹ In addition, State parties have specific obligations to impartial organizations that provide humanitarian assistance. Optional Protocol I allows for, subject to the agreement of parties concerned, “rapid and unimpeded passage of all relief consignments, equipment and personnel provided... even if such assistance is destined for the civilian population of the adverse Party.”²²

¹⁵ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), article 54, paragraph 1; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), article 14.

¹⁶ Protocol I, article 54, paragraph 2; Protocol II, article 14.

¹⁷ Geneva Convention relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention).

¹⁸ Geneva Convention relative to the Treatment of Prisoners of War (Third Geneva Convention), articles 20 and 46.

¹⁹ Fourth Geneva Convention, articles 89 and 127.

²⁰ *Ibidem*, article 89.

²¹ *Ibidem*, article 23.

²² Protocol I, article 70, paragraph 2.

Optional Protocol I stresses that “such relief shall not be regarded as interference in the armed conflict or as unfriendly acts.”²³

2.2. The Right to Drinking Water

The Right to Drinking Water is mentioned explicitly in a few international legal instruments. Article 14 of the Convention on the Elimination of Discrimination against Women (CEDAW) recognizes the right of rural women “to enjoy living conditions, particularly in relation to ... sanitation ... and water supply”. CRC article 24 establishes within the context of the right to health that States parties shall “take appropriate measures to combat disease and malnutrition ... through the provision of adequate nutritious foods and clean drinking-water, taking into consideration the dangers and risks of environmental pollution”.

According to General Comment No. 15, article 11.1 of the ICESCR includes the right to drinking water as one of the number of rights emanating from, and indispensable for, the realization of the right to an adequate standard of living.²⁴ In addition, the right to drinking water is essential to article 12.1 of the ICESCR which ensures the right to the highest attainable standard of health and article 11.1 regarding the right to adequate food.²⁵

The right to drinking water is also referred to in the Protocol on Water and Health to the Convention on the Protection and Use of Trans-boundary Water Courses and International Lakes.²⁶ Article 5 of the Protocol provides that “equitable access to water, adequate in terms both of quantity and of quality, should be provided for all members of the population, especially those who suffer a disadvantage or social exclusion”. Article 4.2(a) requires States parties to ensure “adequate supplies of wholesome drinking water which is free from any micro-organisms, parasites and substances which, owing to their numbers or concentration, constitute a potential danger to human health. In addition, article 4(2) obliges States parties to provide water that is of “adequate sanitation of a standard which sufficiently protects human health and the environment”. Finally, Article 6.1 states that “the Parties shall pursue the aims of: (a) access to drinking water for everyone; (b) provision of sanitation for everyone”.

3. General Comment No. 12

The Committee on Economic, Social and Cultural Rights, on recommendation by the 1997 Expert Consultation organized by the OHCHR, adopted General Comment No. 12 on 11 May 1999 on the Right to Adequate Food.²⁷ It builds on Article 11 of the ICESCR, and constitutes the first full and authoritative clarification of the right to adequate food in international law made by the relevant treaty body. In

²³ *Ibidem*, article 70, paragraph 1. For further discussion of international humanitarian assistance refer to the second report of the Special Rapporteur on the right to food to the Commission on Human Rights, doc. E/CN.4/2002/58, pp. 22-28.

²⁴ E/C.12/2002/11, paragraph 3.

²⁵ *Ibidem*, paragraph 3.

²⁶ MP.WAT/2000/1, adopted in London on 17 June 1999 under the auspices of the United Nations Economic Commission for Europe, and the WHO regional office for Europe.

²⁷ See note 4 above.

formulating the Comment, the Committee reviewed, inter alia, relevant documentation and reports from a number of international organizations, including the Commission on Human Rights, and the then Sub-Commission on Prevention of Discrimination and Protection of Minorities.²⁸ In addition, the Committee considered the draft international code of conduct on the human right to adequate food prepared by international non-governmental organizations.²⁹

The General Comment has firmly placed the right to food into a rights-based approach to human rights, where countries have positive and negative obligations to fulfil, respect and protect this right in all human beings. The Comment has gone into considerable detail to illustrate when States would in fact violate the right to adequate food. Furthermore, it suggests steps to implement legislation at a national level and stresses the importance of including the right to safe drinking water as complimentary to the right to food.

General Comment No. 12 stresses 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. The right to adequate food implies availability of food in a quantity and quality sufficient to satisfy the dietary needs of individuals, free from adverse substances and acceptable within a given culture, and accessibility of such food in ways that are sustainable and do not interfere with the enjoyment of other human rights.” This definition acknowledges cultural and regional differences when defining “adequate”.³⁰

The right to adequate food imposes three levels of obligations on State parties: the obligations to *respect*, to *protect* and to *fulfil*. The obligation to *fulfil* incorporates two more subcategories: the obligations to *facilitate* and *provide*. The State should progressively realize its obligatory goals. This concept of “progressive realisation” does not apply, however, to the immediate core obligation of providing minimum essential food sufficient to ensure freedom from hunger. The obligation to *respect* is essentially a negative obligation and requires States not to take any measures that would interfere with access to food.³¹

The obligation to *protect* and *fulfil* are positive obligations, meaning that the State needs to play an active role meeting these obligations. The obligation to *protect* requires actions by States to ensure that enterprises or individuals do not deprive individuals of their access to adequate food. The obligation to *fulfil* means that States must pro-actively seek and provide access to food for the most vulnerable groups, including people who have no access to food because of natural disasters. In effect, the obligation to *fulfil* imposes responsibility on the State to prevent any person from going hungry.³²

General Comment No. 12 goes into significant detail regarding violations of the right to food. Violations of the ICESCR occur when a State fails to provide the minimum essential food for an individual to be free from hunger. The Comment stresses the inability to comply with its minimum requirements as distinguished from the unwillingness to comply. Violation of the right to food can occur both through direct State action, or the omission of State action. Examples include, inter alia, the

²⁸ Renamed Sub-Commission on the Promotion and Protection of Human Rights. For a good explanation of the role of the Committee on Economic, Social and Cultural Rights see, Allan McChesney, Promoting and defending Economic, Social & Cultural Rights. Washington, 2000.

²⁹ General Comment 12, paragraph 3.

³⁰ *Ibidem*, paragraphs 6 and 8.

³¹ *Ibidem*, paragraphs 15 and 17.

³² *Ibidem*, paragraph 15.

formal repeal or suspension of legislation necessary for the continued enjoyment of the right to food, including prevention of accessing humanitarian food aid and the adoption of legislation conflicting with legal obligation to the right to food; the failure to regulate activities of non-State actors that interfere with the right to food; or the failure of a State to take into account the legal obligations regarding the right to food when entering into agreements with other States or international organizations.³³

When discussing the national implementation of the right to food, the General Comment allows for States to have a margin of discretion in choosing their own approaches. This would require States to adopt a national strategy to ensure that the right to adequate food is based on human rights principles that define the objectives, and the formulation of policies and corresponding benchmarks. The formulation and implementation of a national strategy would require good governance and compliance with principles of accountability, transparency, people's participation, decentralization, legislative capacity and the independence of the judiciary. Proper institutional mechanisms should be devised to secure a representative process towards the formulation of a strategy. The strategy should give special attention to the need to prevent discrimination in access to food, and that the right to adequate food is especially addressed for the most vulnerable population groups.³⁴

States should set verifiable benchmarks for national and international monitoring. With regard to national implementation, States should adopt a framework law as part of their national strategy that should include targets to be achieved and a timeframe for achieving them, the means of achieving these goals, national mechanisms for monitoring and possible recourse procedures. This process should involve sufficient collaboration with civil society organizations and the private sector. In addition, appropriate United Nations programmes and agencies, like FAO and UNICEF, should assist, upon request, in drafting the framework legislation.³⁵

The Comment stresses that States should maintain mechanisms to monitor progress towards the realization of the right to adequate food. This includes access to effective legal remedies, including the incorporation of international legal instruments recognizing the right to food to serve as a foundation for such remedies. Courts would play an important role in adjudicating violations of the core content of the right to food, by direct reference to obligations under the ICESCR.³⁶

States should also have obligations towards other States. In this regard, States should take steps to respect the enjoyment of the right to food in other countries, to protect that right, to facilitate access to food and to provide the necessary aid when required. Furthermore, States should refrain at all times from food embargoes or similar measures which interfere with access to food in other countries. States also have responsibility to provide humanitarian relief in times of emergency, including assistance to refugees and internally displaced persons.³⁷

4. General Comment No. 15

³³ *Ibidem*, paragraphs 17 and 19.

³⁴ *Ibidem*, paragraphs 21-28.

³⁵ General Comment No. 12, paragraphs 29 and 30.

³⁶ *Ibidem*, paragraphs 31-33.

³⁷ *Ibidem*, paragraphs 36 and 37.

The Committee on Economic, Social and Cultural Rights adopted General Comment No. 15 on the right to water on 26 November 2002.³⁸ It clarifies that articles 11 and 12 of the Covenant ensures the right to water. Similar to General Comment No. 12, it has placed the right to water into a rights-based approach to human rights which requires specific legal obligations and has linked the right to water with numerous other rights, including the right to adequate food and the right to health. It also covers in detail violations of the right to water, implementation of the right to water at a national level and obligations of actors other than States.

As mentioned above, General Comment No. 15 provides for the normative content of the right to food in Articles 11.1 and 12.1 of the Covenant, under the broader category of the right to an adequate standard of living, the rights to adequate housing and food and the right to the highest attainable standard of health. The Comment delineates that “the human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses. An adequate amount of safe water is necessary to prevent death from dehydration, reduce the risk of water-related disease and provide for consumption, cooking, personal and domestic hygiene requirements”.³⁹

The Comment goes into considerable detail when defining the *adequacy* of water in the context of the right to water. *Adequacy* entails *availability, quality and accessibility*. Furthermore, *accessibility* also contains four overlapping dimensions, namely: *physical accessibility, economic accessibility, non-discrimination and information accessibility*.⁴⁰ *Adequacy* entails that the water supply must be sufficient and continuous for personal and domestic uses, inter alia, drinking, personal sanitation, washing of clothes, food preparation, personal and household hygiene. In addition, the quantity of water available should correspond to WHO guidelines. *Quality* equates to the safety of the water, meaning it should be free from hazardous elements, and should be of acceptable colour, odour and taste. Finally, *accessibility* means that water, and adequate water facilities and services, should be within safe physical reach for all section of the population (*physical accessibility*), water must be affordable to all (*economic accessibility*), accessible to all, including the most vulnerable or marginalized sections of the population without discrimination (*non-discrimination*) and the right to water includes the right to seek, receive and impart information concerning water issues (*information accessibility*).⁴¹

Similar to the right to adequate food, the right to water imposes on States parties the obligations to *respect, protect* and to *fulfil*. In addition, the obligation to *fulfil* includes the obligations to *facilitate, promote* and *provide*. Although the Covenant provides for the progressive realization of the rights including in it, States parties have immediate core obligations in relation to the right to water, “such as the guarantee that the right will be exercised without discrimination of any kind (Article 2(2)) and the obligation to take steps (Article 2(1)) towards the full realization of Articles 11(1) and 12. Such steps must be deliberate, concrete and targeted towards the full realization of the right to water”.⁴² In addition State parties have the core obligation to, inter alia, ensure access to the minimum essential amount of water sufficient and safe for personal and domestic uses to prevent disease; to ensure personal security is not threatened when having to physically access water; and to

³⁸ See notes 10 and 24 above.

³⁹ General Comment No. 15, paragraph 2.

⁴⁰ *Ibidem*, paragraph 12.

⁴¹ *Ibidem*

⁴² *Ibidem*, paragraph 17.

adopt relatively low-cost targeted water programmes to protect vulnerable and marginalized minorities.

The obligation to *respect* requires States parties to refrain from interfering indirectly with the enjoyment of the right to water. This includes States obligations under international humanitarian law during armed conflicts, emergency situations and natural disasters. The obligation to *protect* requires State parties from interfering in any way with the enjoyment of the right to water. The obligation to *fulfil* means that States parties must adopt the necessary measures directed towards the full realization of the right to water including facilitating improved and sustainable access to water, particularly in rural and deprived urban areas.⁴³

General Comment No. 15 also discusses a number of international obligations on States parties required by articles 2.1, 11.1 and 23 of the Covenant. In this regard, the obligation to *respect* applies to other countries. For example, States parties should refrain at all times from imposing embargoes that prevent the supply of water as well as goods and services necessary in accessing water. States parties should prevent their own citizens and companies from violating the right to water of individuals and communities in other countries.⁴⁴ The General Comment also calls on developed countries to help facilitate the realization of the right to water in developing States.⁴⁵

General Comment No. 15 specifies a number of violations of the right to water. At the most basic level, State parties must show, as obliged under article 2.1, that they have taken necessary and feasible steps to the maximum of their available resources towards the realization of the right to water.⁴⁶ Failure to act in good faith in order to take such steps violates the right to water. Furthermore, similar to the right to adequate food, the core obligations of the States parties are non-derogable.⁴⁷ Violations of the right to water can occur both through acts and/or omissions of States parties. Examples include, inter alia, the formal repeal or suspension of legislation necessary for the continued enjoyment of the right to water, the adoption of retrogressive measures incompatible with the core obligations, the failure to have a national policy on water, and the failure to enforce relevant laws.⁴⁸

Like General Comment No. 12, States parties when implementing the right to water at a national level have a margin of discretion in assessing their own measures. States are obliged to adopt a national strategy or plan of action to realize the right to water based on human rights law and principles, covering all aspects of the right to water and the corresponding obligations of states parties, defining clear objectives, setting targets to be achieved and the time-frame for achieving them and formulating adequate policies and corresponding benchmarks and indicators.⁴⁹ The formulation and implementation of the national strategy and plan of action should be based on good governance and respect the principles of non-discrimination, people's participation, accountability, transparency and independence of the judiciary.

State parties are recommended to adopt framework legislation to operationalize their national strategies that should include targets to be attained and the time-frame for achieving them, the means by which the purpose could be achieved, the intended collaboration with civil society, private sector and international

⁴³ *Ibidem*, paragraphs 25 and 26.

⁴⁴ General Comment No. 15, paragraphs 32 and 33.

⁴⁵ *Ibidem*, paragraph 34.

⁴⁶ *Ibidem*, paragraph 41.

⁴⁷ *Ibidem*, paragraph 40.

⁴⁸ *Ibidem*, paragraphs 42 and 43.

⁴⁹ General Comment No. 15, paragraph 47.

organizations, institutional responsibility for the process, national mechanisms for its monitoring and remedies and recourse procedures.⁵⁰ Furthermore, to assist with the monitoring process, States should identify right to water indicators in the national strategy and follow-up by setting appropriate national benchmarks in relation to each indicator. With regard to remedies, any person or groups who have been denied their right to water should have access to effective judicial or other appropriate remedies at both national and international levels. Such remedies should constitute adequate reparation, including restitution, compensation, and satisfaction or guarantees of non-repetition.⁵¹

The Comment also discusses the obligations of actors other than States. It stresses the cooperation United Nations Agencies and other international organizations concerned with water, such as WHO, FAO, UNICEF, ILO and UNDP, as well as international organizations concerned with trade, such as WTO, with States parties in order to help implement the right to water at the national level. Furthermore, the international financial institutions, notably the IMF and World Bank, should take into consideration the right to water in their various functions.⁵²

5. Legal Status of General Comments

The question remains as to what status general comments have in international law. The general comments were originally made with a “view to assisting States parties in fulfilling their reporting obligations and to provide greater interpretative clarity as to the intent, meaning and content of the Covenant”.⁵³ In this sense, the general comments are not legally binding on States.

General Comments, however, have developed and transcended beyond this initial limited purpose. It can be said that General Comments No. 12 and 15 are an authoritative interpretation of the content and scope of the right to adequate food and drinking water made by the Committee that is responsible for monitoring the implementation of the ICESCR by State parties.

To this purpose, reference should be made to the work of the International Law Commission (ILC) regarding “The Law and Practice Relating to Reservations to Treaties”.⁵⁴ In this context, the ILC appointed a Special Rapporteur (A. Pellet) from whom the ILC has already considered several reports. In 1997 the ILC adopted its preliminary conclusions on the matter. Regarding the role of treaty body opinions, such as the Committee on Economic, Social and Cultural Rights, on reservations to treaties, the ILC

“considers that where these treaties are silent on the subject, the monitoring bodies established thereby are competent to comment upon and express recommendations with regard, inter alia, to the admissibility of reservations by States, in order to carry out the functions assigned to them”.⁵⁵

⁵⁰ *Ibidem*, paragraph 50.

⁵¹ *Ibidem*, paragraph 55.

⁵² General Comment No. 15, paragraph 60.

⁵³ OHCHR Fact Sheet No. 15 (Rev.1).

⁵⁴ See C. Villán Durán, *Curso de derecho internacional de los derechos humanos*. Madrid, Trotta, 2002, pp 244-45.

⁵⁵ Paragraph 5, *Preliminary Conclusions of the International Law Commission on Reservation to Normative Multilateral Treaties including Human Rights Treaties*. Doc. A/52/10, p. 133.

In addition, the ILC noted that

“(…) the legal force of the findings made by monitoring bodies in the exercise of their power to deal with reservations cannot exceed that resulting from the powers given to them for the performance of their general monitoring role”.⁵⁶

Taking this language into consideration, general comments of the Committee on Economic, Social and Cultural Rights are more than just guidance or recommendations to States. If the Committee is acknowledged as “competent” to make these interpretations or recommendations, this imposes some level of legal authority to States parties which they must take into consideration in good faith.

III. Institutional Developments

1. The Special Rapporteur on the Right to Food

The Commission on Human Rights, by its resolution 2000/10, adopted on 17 April 2000, decided to raise the profile and potential implementation of the right to food by appointing for a period of three years a new Special Rapporteur on the right to food. On 4 September 2000 the Chairperson of the Commission appointed Mr. Jean Ziegler (Switzerland) in this capacity. The Special Rapporteur shall carry out the following main activities:

- a. To seek, receive and respond to information on all aspects of the realization of the right to food, including the urgent necessity of eradicating hunger;
- b. To establish the cooperation with Governments, intergovernmental organizations (in particular the FAO), and non-governmental organizations, on the promotion and effective implementation of the right to food, and to make appropriate recommendations on the realization thereof, taking into consideration the work already done in this field throughout the United Nations;
- c. To identify emerging issues related to the right to food worldwide.⁵⁷

In addition, the Commission on Human Rights “[i]nvites Governments, relevant United Nations agencies, funds and programmes, treaty bodies, as well as non-governmental organizations to cooperate fully with the Special Rapporteur in the fulfilment of his mandate, inter alia through the submission of comments and suggestions on ways and means of realizing the right to food.”⁵⁸ The Special Rapporteur has already submitted two reports to the Commission on Human Rights⁵⁹ and two reports to the General Assembly.⁶⁰ His final report will be submitted to the Commission on Human Rights in 2003. He intends these reports to form a “corpus”,

⁵⁶ *Ibidem*, p. 134, paragraph 8.

⁵⁷ CHR resolution 2000/10, paragraph 11.

⁵⁸ CHR resolution 2002/25 (2002).

⁵⁹ E/CN.4/2001/53; E/CN.4/2002/58, and add. 1 (visit to Niger).

⁶⁰ A/56/210; A/57/356.

with each report building on the conceptual and practical advances of the previous report.

Following General Comment No.12, the Special Rapporteur has defined the right to food as “[t]he right to have regular, permanent and free access, either directly or by means of financial purchases, to quantitatively and qualitatively adequate and sufficient food corresponding to the cultural traditions of the people to which the consumer belongs, and which ensures a physical and mental, individual and collective, fulfilling and dignified life free of fear”.⁶¹

In his second report to the Commission, the Special Rapporteur focused on the justiciability of the right to food. He stressed that justiciability is absolutely essential for the right to food in order to hold Governments accountable. Since justiciable rights are those that are capable of being enforced in a court of law, the Special Rapporteur recognised that at both regional and international levels, the right to food is not yet justiciable.⁶²

Although enforcement capacities of economic, social and cultural rights are traditionally weaker than civil and political rights, international law lends support to economic, social and cultural rights as enforceable rights. The Special Rapporteur argues that putting economic, social and cultural rights on a different ground from civil and political rights is, as the Committee of Economic, Social and Cultural Rights has pointed out, incompatible with the Vienna principle that these rights are interdependent.⁶³ In addition, article 11 of the ICESCR and its General Comment No. 12 support this conceptualisation of the right to food. Only through legal developments and judicial jurisprudence concerning economic, social and cultural rights, will it become clearer how these rights can become fully justiciable.⁶⁴ This would require a fundamental change throughout the international legal community in the perception of the role of economic, social and cultural rights.

The Special Rapporteur supports the Committee on Economic, Social and Cultural Rights’ view that the concept of “progressive realisation” as enumerated in General Comment No. 12 should not prevent the justiciability of the right to adequate food. It generally means an evolving programme depending upon the goodwill and resources of States rather than an immediate binding legal obligation. First, progressive realisation does not apply to the minimum core obligation of States to provide a minimum essential level of nutritional sustenance. Second, progressive realisation does not apply to the obligation to *respect* the right to food as defined by General Comment No. 12, because it is essentially a negative obligation requiring States to refrain from certain activity and a violation of this obligation is very clear.⁶⁵ Finally, a number of constitutional cases in various countries support this view. In South Africa, the Constitutional Court evaluated the “reasonableness” of policies that deal with the economic, social and cultural rights. Similarly, Constitutional Courts in India, Colombia and Switzerland elaborated on the justiciable dimension of economic, social and cultural rights.

At the regional and international level, however, the Special Rapporteur found that the right to food is not yet justiciable, thus the Committee on Economic, Social and Cultural Rights is unable to enforce the right to food since it is not a judicial body

⁶¹ E/CN.4/2001/53, paragraph 14.

⁶² E/CN.4/2002/58 paragraph 30-31.

⁶³ *Ibidem*, paragraph 36.

⁶⁴ *Ibidem*, paragraphs 37-40.

⁶⁵ *Ibidem*, paragraphs 44 and 45.

and its recommendations are not legally binding.⁶⁶ Furthermore, there exists no complaints mechanisms, thus individuals or groups of individuals whose right to food is violated cannot bring complaints to the Committee, nor obtain reparation. In this regard, the Special Rapporteur encourages greater efforts in developing an Optional Protocol to the ICESCR similar to that of the ICCPR which enables the Committee to receive individual complaints.

The Special Rapporteur believes that the primary obligation to realize the right to food rests with national Governments.⁶⁷ At this level, access to land and agrarian reform must play a key part in Government strategies aimed at reducing hunger. Access to land is fundamental for ensuring access to food and sustaining the livelihood to be free from hunger. The Special Rapporteur discourages the persistence of extreme concentration of land ownership to few people and the high level of inequality in land distribution in most of the developing countries. As a means of creating access to land, the Special Rapporteur encourages agrarian reform.⁶⁸ Key elements of good agrarian reform include, inter alia, secure property titles, accurately maintained land records and efficient and fair land administration and bureaucracies that are adequately funded and not corrupt. Agrarian reforms in Japan, the Republic of Korea, Taiwan Province of China, China and Cuba have had a significant impact on reducing poverty and hunger while increasing economic growth. Access to land alone is not enough, however, as it must be accompanied by sufficient access to other inputs, including water, credit, transport, extension services and other infrastructure.⁶⁹

Furthermore, the Special Rapporteur recommended that drinking water be treated as a public good, and thus included into the right to food. Governments should set standards for water quality and ensure access to good quality water resources to protect social justice.⁷⁰

Finally the Special Rapporteur expressed his disappointment with the World Food Summit: *five years later*,⁷¹ particularly the lack of progress in meeting the goals set out in the 1996 World Food Summit. The Special Rapporteur sees the decision to draft voluntary guidelines as one of the few positive developments of the Summit. Although the voluntary guidelines are not the code of conduct many States and NGOs had been fighting for, it remains a small step forward.⁷² In his opinion, the drawing up of guidelines has the potential to strengthen Government's understanding of the right to food. The elaboration of such guidelines will reaffirm the importance of human rights in the fight against hunger and malnutrition and help develop a better understanding of international obligations with regard to the right to food.⁷³

2. Special Rapporteur on the Promotion of the Realization of the Right to Drinking Water and Sanitation

⁶⁶ *Ibidem*, paragraph 51.

⁶⁷ A/57/356 paragraph 22.

⁶⁸ *Ibidem*, paragraph 25.

⁶⁹ *Ibidem*, paragraph 25.

⁷⁰ E/CN.4/2002/58 paragraph 130.

⁷¹ A/57/356 paragraph 6.

⁷² *Ibidem*, paragraph 11.

⁷³ *Ibidem*, paragraph 11.

The Commission on Human Rights, by its decision 2002/105 of 22 April 2002, taking note of resolution 2001/2 of 10 August 2001 of the Sub-Commission on the Promotion and Protection of Human Rights, approved the appointment of Mr. El Hadji Guissé (Senegal) as Special Rapporteur “to conduct a detailed study on the relationship between the enjoyment of economic, social and cultural rights and the promotion of the realization of the right to drinking water supply and sanitation, at the national and international levels, taking also into account questions related to the realization of the right to development, in order to determine the most effective means of reinforcing activities in this field and defining as accurately and fully as possible the content of the right to drinking water in relation to other human rights”.⁷⁴

In his preliminary report submitted to the Sub-Commission, the Special Rapporteur discussed, inter alia, the causes of the drinking water shortage, the legal basis of the right to drinking water and the right to drinking water and sanitation as a human right.⁷⁵ The Special Rapporteur has defined the right to drinking water to mean that “all persons, without discrimination, must have access for their basic needs to a sufficient quantity and quality of water supplied under the best possible conditions”.⁷⁶ The Special Rapporteur emphasizes that States are obliged to take action to facilitate access to water and sanitation and that the right to drinking water covers access by households to drinking water supplies and waste-water treatment services managed by public or private bodies.⁷⁷

The Special Rapporteur defines the right to drinking water broadly in order to link it to other human rights, particularly economic, social and cultural rights, such as the right to health, housing and education, and the right to life. Additionally, he links the right to drinking water with the right to peace, self-determination, development, to a healthy environment and poverty reduction.⁷⁸

3. The FAO Intergovernmental Working Group

Another important step in the development of the right to food was the establishment of the Intergovernmental Working Group (IGWG) in the 2002 Summit to elaborate voluntary guidelines in a period of two years, to support the States efforts to achieve the progressive realization of the right to adequate food in the context of national food security.⁷⁹ The FAO Council finally established the IGWG who will report on its codification progress to its parent body, the FAO Committee on World Food Security.⁸⁰

Membership to the IGWG will be open to all Member States of both the FAO and the United Nations.⁸¹ The formulation of the guidelines will also involve broad stakeholder participation, including relevant international and regional institutions, as well as non-governmental organizations, civil society groups, parliamentarians,

⁷⁴ Commission on Human Rights decision 2002/105.

⁷⁵ E/CN.4/Sub.2/2002/10.

⁷⁶ *Ibidem*, paragraph 33.

⁷⁷ *Ibidem*, paragraph 19.

⁷⁸ *Ibidem*, paragraphs 37-46.

⁷⁹ See note 9 above.

⁸⁰ FAO Document CL 123/22, Add.1., *Establishment of an Intergovernmental Working Group for the Elaboration of a Set of Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the context of National Food Security: Draft Council Decision for the establishment of the Intergovernmental Working Group* (28 October – 2 November 2002).

⁸¹ *Ibidem*, paragraph 3.

academic institutions, foundations and the private sector.⁸² Stakeholders will participate fully in the discussion at all meetings of the IGWG or any subsidiary bodies that it may create.

However, only States have the right to make decisions, while stakeholders may participate as observers where decisions are being made. In addition, IGWG sessions and meetings should be organized in such a way as to facilitate the participation of representatives of developing countries. The IGWG will look to finalize the voluntary guidelines in the last of three sessions in February or March 2004, or in any additional sessions it may decide to convene.⁸³

The Secretariat of the IGWG will be provided by FAO. It shall work closely with relevant UN bodies, in particular the Office of the High Commissioner for Human Rights (OHCHR) and the Special Rapporteur on the Right to Food, as well as two Rome-based agencies, the International Fund for Agricultural Development (IFAD) and the World Food Programme (WFP). FAO will invite other relevant institutions of the UN system, treaty bodies and the WTO to collaborate.⁸⁴

The IGWG will elect a Bureau consisting of a chair and six vice-chairs at its first meeting. The Bureau, under the leadership of the chair, will elaborate a first draft of the voluntary guidelines, in accordance with opinions, points of views and elements received during the sessions of the IGWG. This draft will serve as a basis for subsequent consultations.⁸⁵

IV. From Soft Law to Hard Law

1. Interrelationship between the NGOs Code of Conduct and General Comment No. 12 on the Right to Adequate Food

The NGO community also reacted to Objective 7.4 of the WFS Plan of Action. In fact, well before the WFS, NGOs from all regions and many Latin American countries started to lobby for a code of conduct on the right to food. Latin American countries especially demanded to highlight the right to adequate food in the WFS Plan of Action. In their regional preparatory conference in Asuncion, Paraguay in June 1996, Latin American countries decided that the Plan of Action should contain the idea of developing a Code of Conduct on the right to adequate food in order to initiate the full implementation of that right by all FAO Member States. In July 1996, the Venezuelan Government held an expert conference, including staff of UN organizations, international lawyers and some NGO representatives, in order to discuss the possible content of the code of conduct.⁸⁶ Ultimately, an agreement at the WFS on a Code of Conduct could not be reached.

The NGO community also placed the idea of the Code of Conduct on the right to adequate food as one of their main lobby aims for the WFS. It was put as one of the two key demands at the parallel NGO-Summit. Although the NGOs did not

⁸² *Ibidem*, paragraph 4.

⁸³ FAO Document CL 123/22, Add. 1, paragraph 8.

⁸⁴ *Ibidem*, paragraph 12.

⁸⁵ *Ibidem*, paragraphs 7 and 15.

⁸⁶ International NGO/CSO Planning Committee for the WFS:fyl, *The Right to Adequate Food in the Process of the World Food Summit Follow Up* (2002), page 6 at <http://www.forumfoodsovereignty.org>.

achieve their goal at the WFS, they did in fact develop their own Code of Conduct. FIAN International, World Alliance for Nutrition and Human Rights (WANAHR) and the International Institute Jacques Maritain coordinated the drafting of the Code, which has been available since September of 1997.⁸⁷ The Code has been endorsed by over 800 NGOs.

The substance of the Code of Conduct is similar to General Comment No. 12. However, because General Comment No. 12 built on the Code of Conduct and was drafted by the Committee on Economic, Social and Cultural Rights, it elaborates and presents a much more authoritative clarification of the right to adequate food.⁸⁸ In this regard, there are many similarities and some key differences that should be highlighted regarding the Code of Conduct and General Comment No. 12.

The definition of General Comment No. 12 is extremely close to that of the Code.⁸⁹ In addition, General Comment No. 12 contains the three levels of States' obligations enumerated in the Code: the obligations to *fulfil*, *facilitate* and *provide*.⁹⁰ The General Comment, however, describes in much more detail the sub-categories of the obligation to *fulfil*, the obligations to *facilitate* and *provide*. Both the Code and the Comment require States to satisfy their immediate core obligation to ensure as a minimum that people are free from hunger.⁹¹

The General Comment goes into much more detail regarding what constitutes a violation of the right to adequate food. Both the Code and the General Comment recognize the role of civil society and the private sector in ensuring the right to adequate food. The Code, however, holds all actors responsible, while the General Comment 12 holds only State parties to the ICESCR ultimately accountable.⁹²

The Code also differs from the Comment in its approach to national implementation. The Code is much more specific in listing measures as opposed to the discretionary approach of the Comment.⁹³ Both the General Comment and the Code emphasize the need for States to develop mechanisms to monitor the progress of the right to adequate food and to provide for effective remedies and accountability.⁹⁴ The Comment, however, encourages more the incorporation of international instruments recognizing the right to adequate food.

Both the Code and the Comment highlight the need for the States to refrain at all times from food embargoes and other measures that threaten the right to food in other countries.⁹⁵

2. The FAO Voluntary Guidelines

As discussed above, paragraph 10 of the 2002 Declaration of the World Food Summit: *five years later* invited the FAO Council to establish an Intergovernmental Working Group to elaborate in a period of two years a set of "voluntary guidelines" to

⁸⁷ *Ibidem*, page 7.

⁸⁸ For a good comparison of the Code to General Comment No. 12 see Gerald Moore, "The Right to Food: General Comment No. 12 and the Code of Conduct", in M. Borghi and L. Postiglione Blommestein (eds.), *For an Effective Right to Adequate Food*, cit., pp. 202-204.

⁸⁹ International Code of Conduct on the Human Right to Adequate Food, article 4.

⁹⁰ *Ibidem*, article 6.

⁹¹ *Ibidem*, article 6.4.

⁹² *Ibidem*, articles 8 and 10.

⁹³ International Code of Conduct, article 13.

⁹⁴ *Ibidem*, article 14.

⁹⁵ *Ibidem*, article 13.6.

achieve the progressive realisation of the right to food. Most States and NGOs were disappointed when the Declaration made a commitment to establish a set of voluntary guidelines. They had hoped for a more definitive and ambitious intergovernmental “Code of Conduct” as the next step in implementing the right to adequate food.⁹⁶ Unfortunately, neither a code of conduct nor voluntary guidelines are appropriate enough to place the right to food into the forefront of international human rights law where it belongs.

The formulation of guidelines, however, has positive elements. First, ideally the process of formulating the voluntary guidelines will include a wide array of participants. Paragraph 10 of the Declaration asks the FAO to collaborate with relevant treaty bodies, agencies and programmes of the UN system and all stakeholders. As discussed above, the Council Decision for the Establishment of the Intergovernmental Working Group⁹⁷ calls for broad stakeholder participation in drafting the voluntary guidelines. This wide assortment of interested parties will inevitably contribute to a very thorough analysis of the right to adequate food. It will provide all parties, including States, with a strong foundation and understanding of what is needed to develop better the right to adequate food.

Second, voluntary guidelines will hopefully lead to the creation of a more succinct and authoritative intergovernmental statement. Such an instrument can and should fill in important details that have been left out of prior instruments. For example, the most authoritative instrument to date, General Comment No. 12, does not address in sufficient specificity, *inter alia*, various means of national implementation, relation of right to food to trade and agriculture, and the relation of right to food with non-State actors such as inter-governmental organizations (i.e., World Bank, IMF and WTO) and the private sector, in particular trans-national corporations.⁹⁸

3. The Development of Hard Law

There should be a change in the way the international community, both States and civil society, thinks about the right to food. As mentioned earlier, at the recent World Food Summit: *five years later*, many States were disappointed that there was not enough consensus to start discussion of a Code of Conduct. However, all stakeholders aiming to consolidate the right to adequate food and drinking water in international law need to look at the last stage of the codification process, i.e., the adoption of a treaty that would establish binding obligations on all States parties, not just a Code of Conduct.

There are important arguments and developments that already contribute to the idea of the right to adequate food and drinking water as a justiciable right under human rights law, lending support to the development of such a treaty.

⁹⁶ Only the United States opposed the establishment of “voluntary guidelines” referring to them as a “sterile debate”. Furthermore the United States was opposed to the right to food in general, preferring the right to a standard of living adequate for health and well-being as the appropriate terms used. See Annex II, *Explanatory Notes/Reservations* (United States), Report of the World Summit: five years later, Part One (Rome June 2002).

⁹⁷ CL 123/22, Annex 1.

⁹⁸ Peter Rosset, “U.S. Opposes Right to Food at World Summit”, World Editorial and International Law, 30 June 2002.

3.1. Interrelationship between the Right to Food and Drinking Water and the Right to Life and other Human Rights

In order to understand better the importance of the right to food one must look at its interrelationship to other valuable human rights. A violation of the right to food, among other things, deprives a person of his or her right to life, physical integrity and human dignity. The right to life and to be free from torture and other cruel, inhuman and degrading treatments or punishments, are enumerated in a number of international treaties and instruments, including the ICCPR (articles 6 and 7), UDHR (articles 3 and 5), and CRC (article 6). Every human being has the inherent right to life. In this regard, General Comment No. 6 of the Human Rights Committee noted “that the right to life has been too often narrowly interpreted. The expression “inherent right to life” cannot properly be understood in a restrictive manner, and the protection of this right requires that States adopt positive measures. In this connection, the Committee considers that it would be desirable for States parties to take all possible measures to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics.”⁹⁹ Thus, countries truly have an obligation, at a minimum, to prevent the deprivation of life and thus at least provide the population with the minimum sustenance to live.

Invariably, chronic hunger also affects other human rights. General Comment 12 makes reference to this notion, stating that the right to adequate food “is indispensable for the fulfilment of other human rights enshrined in the International Bill of Human Rights”.¹⁰⁰ Children who are malnourished and suffer from mental retardation are unable to benefit from an education.¹⁰¹ In addition, chronic hunger affects an individual’s ability to work, to be healthy, to participate effectively in society, to have access to land, to not be discriminated against, and other important human rights most people take for granted. Thus, the right to live a dignified life can never be attained unless all basic necessities of life -work, food, drinking water, housing, health care, education and culture- are adequately and equitably available to everyone.¹⁰² When thinking of the right to food and drinking water in this context, it is difficult to ignore the magnitude of its impact. When poor people are deprived of such entitlements as land and housing, hunger is not far away.

Serious deprivation of food and drinking water may amount to ill treatment or even torture, because of the high degree of physical and mental suffering of hunger victims. There is a growing understanding of the close interdependency between civil and political rights and economic, social and cultural rights such as health or environment. In this connection, the jurisprudence of the European Court on Human Rights (ECHR) on article 3 of the European Convention on Human Rights (European Convention) requires from the States parties to adopt positive measures of protection to avoid cases of torture or ill treatment, including in situations inflicted by non-State actors, such as excessive punishment of children by their parents.¹⁰³ The ECHR also considered a violation of article 3 of the European Convention the deportation of a

⁹⁹ HRC General Comment 6 (1982), paragraph 5.

¹⁰⁰ General Comment 12, paragraph 4.

¹⁰¹ WFP Flash Appeal (July 2002).

¹⁰² OHCHR Fact Sheet No. 16 (Rev.1), section 1, *The Committee on Economic, Social and Cultural Rights*.

¹⁰³ *A. v. United Kingdom*, sentence of 23 September 1998.

foreigner suffering AIDS to St. Kitts, where the victim's treatment against AIDS would have been certainly discontinued, thus exposing him to a real risk of death.¹⁰⁴

Similarly the ECHR recognised that severe environmental and water pollution may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely (article 8 of the European Convention).¹⁰⁵

In addition, the right to adequate food and drinking water has a crucial role to play as a strategic tool in policies aimed at eradicating poverty. A number of important policies concerning the right to adequate food aim at poverty reduction, inter alia, a transparent and accessible land registration system, the protection of indigenous people's right to lands on which they depend for their food and opening access in developed countries for agricultural products of developing countries. Finally, safe and sufficient drinking water is considered as a precondition for the realization of all human rights, and as a precursor to sustainable development, food and poverty reduction.¹⁰⁶

3.2. *Special Rapporteurs*

The Special Rapporteurs carry out very important functions as extra-conventional mechanisms to promote and protect the right to adequate food and drinking water under the United Nations system. As an appointed expert by the Commission on Human Rights, the Special Rapporteur on the Right to Food investigates and gathers information in order to make proposals and suggestion regarding the development of the right to food. In this capacity, the Special Rapporteur has done much to formulate a constant dialogue on the right to food. However, in order to better comply with his mandate, the Special Rapporteur should address individual complaints on violations of the right to food in a more systematic way.

It should be recalled that the resolution establishing the mandate of the Special Rapporteur on the right to food, among other things, enables him to "seek, receive and respond to information on all aspects of the realisation of the right to food, including the urgent necessity of eradicating hunger".¹⁰⁷ This language is similar to language allowing other thematic Special Rapporteurs to receive individual complaints and act on their behalf through the process of urgent appeals. For example, the mandate creating the Special Representative of the Secretary-General on Human Rights Defenders enables her to "seek, receive, examine and respond to information on the situation and the rights of anyone, acting individually or in association with others, to promote and protect human rights and fundamental freedoms".¹⁰⁸ Similar language can also be found in the mandate creating the Special Rapporteur on Torture.¹⁰⁹

The Special Rapporteur on the Right to Food should therefore establish working methods similar to those of other thematic Special Rapporteurs to transmit

¹⁰⁴ *D. v. United Kingdom*, sentence of 21 April 1997.

¹⁰⁵ *Lopez Ostra v. Spain*, A 303-C (1994). For a complete discussion of these cases see V. Abramovich and C. Courtis, *Los derechos sociales como derechos exigibles*. Madrid, Trotta, 2002 pp. 205-212.

¹⁰⁶ OHCHR: *Human Rights, Poverty Reduction and Sustainable Development: Health, Food and Water- a background paper*, presented to the World Summit on Sustainable Development (Johannesburg 26 August – 4 September 2002).

¹⁰⁷ CHR resolution 2000/10 (2000).

¹⁰⁸ CHR resolution 2000/61 (2000).

¹⁰⁹ CHR resolution 1985/33 (1985).

individual complaints on violations of the right to food to concerned Governments. In addition, urgent action appeals would move States to, at the very least, address the issue of the right to food from a human rights approach, thus raising the general awareness of this right. Therefore, the Special Rapporteur may also contribute to strengthen the international justiciability of the right to food.

Similarly, the mandate of the Special Rapporteur on the promotion of the realization of the right to drinking water and sanitation should also be amended to allow him to transmit individual complaints to Governments. Currently, the mandate of the Special Rapporteur comes from the Sub-Commission on the Promotion and Protection of Human Rights, which does not allow for urgent action and individual complaints mechanisms. On the contrary, the mandate of this Special Rapporteur should be established by the Commission on Human Rights and spelled out in similar terms as the Special Rapporteur's mandate on the Right to Food.

3.3. Optional Protocol to the International Covenant on Economic, Social and Cultural Rights

Unlike other treaty bodies, the Committee on Economic, Social and Cultural Rights is not allowed to receive formal complaints from individuals and groups who feel that their rights (individuals' right to food and drinking water) have been violated under the ICESCR. The non-existence of this procedural mechanism hinders the ability of the Committee to develop economic, social and cultural rights and to contribute to make them justiciable in international law.

The Commission on Human Rights in its resolution 2002/24 decided "[t]o renew, for a period of one year, the mandate of the independent expert to examine the question of a draft optional protocol to the International Covenant on Economic, Social and Cultural Rights ... and to request him to submit a report to the Commission at its fifty-ninth session".¹¹⁰ This should further address "the question of the nature and scope of States parties' obligations under the Covenant; conceptual issues on the justiciability of economic, social and cultural rights, with particular reference to the experience gained in recent years from the application of universal, regional and national human rights instruments and mechanisms, and the question of benefits and the practicability of a complaint mechanism under the Covenant and the issue of complementarity between different mechanisms".¹¹¹

The Commission also requested "States, intergovernmental organizations, including United Nations specialized agencies and non-governmental organizations, to submit their comments and views on the above mentioned questions".¹¹² The Independent Expert in carrying out his mandate should take into account these comments and views, and to draw from the experience gained by these competent bodies and organisations.¹¹³

In furtherance of these ends, it is imperative that the next session of the Commission on Human Rights establish an open-ended working group to start the

¹¹⁰ CHR resolution 2002/24, adopted on 22 April 2002, paragraph 9(c). The expert appointed was H. Kotrane from Tunisia. See his first report in doc. E/CN.4/2002/57.

¹¹¹ *Ibidem*, paragraph 9(c)(vii), (viii) and (ix).

¹¹² CHR resolution 2002/24, paragraph 9(d).

¹¹³ *Ibidem*, paragraph 9(e).

official codification of the Optional Protocol aiming to recognize this key competence to the Committee on Economic, Social and Cultural Rights.¹¹⁴

3.4. National Implementation

In order to comply with their international obligations, States will have to enact appropriate national framework legislation leading to binding laws, as well as an independent body to evaluate their enforcement. Thus, the development of national legislation and implementation is a vital step in the process of translating the right to adequate food and drinking water in international law to domestic law. Under such legislation, the concept of progressive realisation should be interpreted as the eventual obligation of States to provide proper access to food and water and to allow individuals to enforce their right to food when necessary.

Although it is more difficult to conceptualise enforcement obligations of economic, social and cultural rights, there is an increasing trend for States to make these rights justiciable. Twenty countries have adopted constitutions that explicitly refer, directly and indirectly (right to human dignity and life) to the right to food. Unfortunately, only a few of these have implemented national legislation and policies, or even a framework law, to ensure the right to food.

South Africa has developed quite an extensive mechanism for the adjudication of certain economic, social and cultural rights. The 1996 South African Constitution makes clear reference to the right to food in its section 27 which says: “Everyone has the right to have access to ... sufficient food and water. The State must take reasonable legislative and other measures, within its available resources, to achieve the progressive development of these rights”¹¹⁵ The right to life and human dignity, which incorporates the right to food and minimum sustenance is non-derogable.¹¹⁶ Furthermore, all economic and social rights have been declared justiciable. Similar to the obligations discussed in General Comment 12, the Constitution requires that the State respect, protect and fulfil the realization of all the rights in the Bill of Rights, including socio-economic rights.¹¹⁷

In the case of *Government of the Republic of South Africa v. Irene Grootboom and others*, concerning the right of access to adequate housing, the Constitutional Court rendered a decision that allowed the country’s judicial body to evaluate Government policies regarding a cluster of economic and social rights enumerated in the Constitution.¹¹⁸ The case involved a group of families who were constructively forced to leave their squatter settlement due to its deplorable living conditions. The respondents left to squat on private land and were soon forcibly evicted. Their old space in the squatter settlement had been filled, thus they were left effectively homeless.

The Court, addressing the South African Constitution and the ICESCR, found that the State had made provisions in its Constitution that would allow for the justiciability of socio-economic rights. The State is obliged to take: “reasonable

¹¹⁴ *Ibidem*, paragraph 9(d).

¹¹⁵ South African Constitution, section 27, paragraph 1(b) and 2.

¹¹⁶ *Ibidem*, section 37, paragraph (5).

¹¹⁷ *Ibidem*, section 7, paragraph 2.

¹¹⁸ CCT 11/00, 4 October 2000. For a detailed discussion on the South African Constitution and the *Grootboom* case see Sandra Liebenberg, “The Right to Social Assistance: The Implication of *Grootboom* for Policy Reform in South Africa”, (2001) 17 *South African Journal on Human Rights*.

legislative and other measures within its available resources to achieve the progressive realisation of this right”. Human dignity would be denied to those who have no food, clothing or shelter. Thus, socio-economic rights must all be read together in the setting of the Constitution as a whole obliging the State to take positive action to meet the needs of the most vulnerable members of society.¹¹⁹

The Court then evaluated the Government’s housing program through a test of “reasonableness”. It found that such a program needed to address all different socio-economic levels of society, concluding that the poor were the most vulnerable and required special attention. Furthermore, a “reasonable” programme would need to be balanced and flexible and make appropriate provisions to housing crises to short, medium and long term needs. Reasonableness must be understood in the context of the Bill of Rights as a whole and entrench the fundamental values of human dignity, equality and freedom. Finally, a reasonable program must be “progressively realised”. The Court, quoting General Comment 3 of the Committee on Economic, Social and Cultural Rights agreed that this “imposes an obligation to move as expeditiously and effectively as possible towards that goal”.¹²⁰

Ultimately, under this “reasonableness” matrix, the Court held that the Government housing programme was aimed at achieving the progressive realisation of the right of access to adequate housing, but that it was not sufficiently flexible to respond to those in desperate need and to cater to immediate and short term requirements. The existence of a programme in itself is only a starting point. The State must take reasonable steps to implement it and to sustain it. The Constitutional Court is thus an appropriate venue to evaluate the reasonableness of Government policies concerned with economic and social rights. Accordingly, “the bottom line of the *Grootboom* decision is that the [S]tate is obliged directly to assist persons who are living in crisis situation or intolerable conditions.”¹²¹ The Government has also reacted to the *Grootboom* decision by drafting framework legislation on the right to food.¹²²

Similarly, in Switzerland there has been constitutional jurisprudence developed regarding the right food. In a 1996 case, the Swiss Federal Tribunal addressed the right to minimum basic conditions of life, including food, clothing and housing.¹²³ The case involved Czech refugees, who were living in Switzerland without any food or money. They were unable to work because they had no permit and did not have the necessary papers to leave the country. The Government refused to provide them with any assistance. The Tribunal held that the refugees were entitled to the right to minimum basic conditions of life which obligated the State to provide the minimum sustenance to prevent, at the very least, acts of beggary. A later 1998 case reaffirmed this decision.¹²⁴ The legislature soon responded to these judicial decisions and incorporated the right to minimum basic conditions of life into the 1999 Swiss Constitution.

Many national Constitutions also explicitly refer to the right of people to a healthy environment, thus indirectly implicating access to safe and sanitary water supply. Such countries include Belgium, Brazil, Chile, Colombia, Ecuador, Hungary, Indonesia, Korea, Netherlands, Nicaragua, Peru, Poland, Portugal, South Africa,

¹¹⁹ *Ibidem*, page 17.

¹²⁰ CCT 11/00, page 21, citing paragraph 9 of General Comment 3, 1990.

¹²¹ S. Liebenberg, page 257, Doc. Cit., see note 55.

¹²² National Food Security Draft Bill (Jan.2002).

¹²³ ATF 121 I 367, 371 V. = JT 1996 389.

¹²⁴ ATF 122 II 193 B = JT 1998 562.

Spain, Turkey, and Viet Nam.¹²⁵ Furthermore, in some countries the right to water is enshrined in national law. For example, according to article 3 of the decree of 20 December 1996 of the Flemish community of Belgium, every subscriber is entitled to a minimum, uninterrupted supply of electricity, gas and water for household use in order to live according to the prevailing standard.¹²⁶ The French Water Act of 3 January 1992 also stipulates that the use of water belongs to everyone.¹²⁷

The right to adequate food and drinking water, if ever to be realized, must be developed through national implementation. However, the justiciability of this right should not be restricted to the jurisdiction of the constitutional courts. Appropriate national legislation should empower tribunals at all levels, including at the municipal and provincial levels, to adjudicate the right to food.

National jurisprudence regarding economic and social rights is an important step forward in developing right to food and drinking water. It serves an important function by demonstrating how the right to food and other economic and social rights can be enforced. As more and more countries develop national legislation and jurisprudence in this area, the justiciability of economic, social and cultural rights and particularly the right to food and drinking water will gain more clarity.

V. Conclusion: A Treaty on the Right to Adequate Food and Drinking Water

It seems likely that the next step in the development of the right to adequate food and drinking water in the international agenda will be the formulation of voluntary guidelines within a period of two years. Doing that, it is imperative that the development of these rights should not regress. In this regard, the voluntary guidelines to be drafted by the IGWG within the FAO framework should incorporate and expand on the inadequacies of General Comments No. 12 and 15 in further defining the right to adequate food and drinking water.

Political will is vital to effectively advance on the realization of the right to adequate food and drinking water at both national and international levels. After the 1996 WFS, States seemed to gain momentum developing mechanisms to eradicate world hunger. Unfortunately, five years later in Rome, it has been recognized that these achievements have not been enough and that political will has remained stagnant. Only with full international political support can the right to adequate food and drinking water become a reality.

The States' policy goal of halving the number of undernourished people in the world in the context of substantially improving the terms of national food security needs to be reactivated. In legal terms, this would entail two sets of measures: First, at the domestic level, the development of national legislation to enable courts and tribunals to adjudicate the right to food and drinking water; Second, at the international level, expanding individual complaints procedures on violations of the right to food and drinking water along with both conventional (Optional Protocol to ICESCR) and extra-conventional mechanisms (individual complaints before the Special Rapporteurs of the Commission on Human Rights).

To accelerate both achievements, States should also commit themselves in drafting a concise international treaty spelling out, and making it definitively binding

¹²⁵ E/CN.4/Sub.2/2002/10, paragraph 28.

¹²⁶ *Ibidem*, paragraph 31.

¹²⁷ *Ibidem*, paragraph 28.

through international law, the minimum core contents of the adequate right to food and drinking water. Such a future treaty should also establish monitoring mechanisms to make justiciable under international law the right to adequate food and drinking water. The urgency of this task should be commensurate with the urgency of ending the scourge of hunger of 840 million people, a figure that amounts to 1.1 billion persons in the world lacking access to clean drinking water.

Geneva, 10 December 2002
Human Rights Day
