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"De la terre à l'aliment, des valeurs aux règles"
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OVERCOMING BARRIERS TO THE IMPLEMENTATION OF THE RIGHT TO FOOD *

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The right to food is not new, yet many are not aware, misunderstand or marginalize this human right. This article aims to contribute to greater awareness, better understanding and policy dialogue on the right to food. Not only by presenting basic legal texts on the right to food but also by highlighting new insights, different approaches and experiences as outlined in recent publications and seminars. The key argument of the article is that a combination of violation-based and dialogue-based approaches is needed to overcome barriers to the implementation of the right to food and to address different obligations of states. This implies networking between and concerted action of policymakers, legal experts and civil society lobbyists. To make the right to food more applicable in court and of greater use for policymakers and non-governmental organisations, inter-professional and interdisciplinary collaboration is needed.

I. Introduction

The right to food was formally recognized since the adoption of the Universal Declaration of Human Rights in 1948 but official reporting on the implementation of this human right is still generally very poor. The observation of the Committee on Economic, Social and Cultural Rights in 1999 is still valid today:

While reporting guidelines are available relating to the right to food, only few States have provided information sufficient and precise enough to enable to

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Committee to determine the prevailing situation in the countries concerned with respect to this right and to identify the obstacles to its realization.²

Experts on the right to food believe that in many countries there is not much to report as the implementation of the right to food at the national level has just started or is yet to start in many countries. How come? A first and general answer to this question is that for the right to food to be implemented, it generally takes two to tango: right-holders and duty-bearers. If one of the two has not been informed about the party or is not capable or willing to take steps, nothing will happen. For this reason and to provide more specific answers to the question who so many ignore or are fed up with the right to food, the article will not so much emphasize the poor recording and the not-so-impressive record with regard to the implementation of the right to food but rather focus on obstacles on the road. From this perspective, it will put together proposals and lessons learnt from attempts to remove such obstacles.

The structure of this article is as follows: section II is about misunderstandings, biases and key notions on the right food. For this purpose, basis legal texts are presented and analyzed. Section III deals with three approaches to the realisation of the right to food. With every approach, different proposals, steps and experiences are described. Section IV puts together conclusions and challenges ahead.

II. The right to food: basic texts and key notions

The basic text of international law on the right to food consists of one article of a declaration, one article of a covenant and a seven-page overview of principle issues in relation to the right to food (see Boxes 1 till 4). Building upon these basic instruments, 19 Voluntary Guidelines were adopted by the FAO council in 2004 to provide practical guidance to member states in their implementation of the right to adequate food in the context of national food security.³

There is a logical relationship between these four sources and their chronological appearance: the sources respectively define (1) right-holders and their rights, (2) the primary duty-bearer, (3) their obligations with regard to the right to food, and provide (4) guidelines for human-rights based policies, strategies and programs directed at realization of the right to food. The four change from general to more specific and from universal principles to implementation at the national level. In one respect, there is something like a discontinuity or reversion in the series: the declaration is non-binding, the covenant is binding law, the seven-page overview is an authoritative interpretation of the right to food, and the guidelines are non-binding again.

One of the common experiences of officials participating in courses or seminars on this relatively thin bundle of legal texts is the realization that the right to food is not the same as the right to be fed by the government.⁴ This is a great relief to them as one of their fears is

² Committee on Economic, Social and Cultural Rights, 1999. Substantive issues arising in the implementation of the International Covenant on Economic, Social and Cultural Rights: General comment 12 - The right to adequate food.

³ FAO. 2005. Voluntary guidelines to support the progressive realization of the right to adequate food in the context of national food security. Rome: FAO.

⁴ See, for instance, Jalloh, A. 2007. The right to food in Sierra Leone, in: Eide, W.B. and Kracht, U. (eds.) 2007. Food and human rights in development. Volume II: evolving issues and emerging applications. Intersentia: Antwerpen, Oxford, p. 254.

that they have to feed all citizens in their country after they have learnt that they are the primary duty-bearers as regards the right to food. A much better and less misleading description of the right to food would be the right to feed oneself (as coined by FIAN and also Van der Meulen, forthcoming). This would help us to get away from a too state-centered perspective on the right to food and from the notion of human beings as beneficiaries slipping through the back-door again.

Box 1: The first text of international law relating to the right to food

Universal Declaration of Human Rights, 1948, article 25: Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, *including food*, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

International law on the right to food divides the world into two categories: right-holders and duty-bearers. Every human being is considered a right-holder and every right-holder a human being, that is, a bundle of capacities to cultivate the earth, to make a living, to take care, to make up her or his mind about politics and economics, and to believe in life after and/or before death. However, human beings are often seen as a bundle of basic needs or a beneficiary instead of a right-holder. Their capacities and claims are ignored or defined away. The rights discourse itself is possibly part of the problem. The result is that any discussion or call for recognition of rights of individuals without discussion or recognition of their capacities remains lop-sided. The limited notion of right-holders as helpless people keeping up their hands will remain. National governments will not feel very much attracted to policy dialogue with right-holders on the right to food. They fear claims and assume that helpless people or victims are unable to discuss causes of hunger and malnutrition in their country.

Box 2: The second text of international law relating to the right to food

International Covenant on Economic, Social and Cultural Rights, 1966, article 11(1): The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, *including adequate food*, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.

National governments have defined themselves as primary duty-bearer of the right to food with regard to their own population. They are the treaty parties of the International Covenant on Economic, Social and Cultural Rights (1966). The making of the ICESCR (and its twin-covenant on Civil and Political Rights) was a logical next step of states after their joint declaration of human rights: defining right-holders and their rights does not make sense when there is no definition and agreement of what party is to recognize human rights and to bear the duty to undertake steps towards realization of these rights. One of the most central but also controversial articles of this covenant is article 2:

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

Whereas it should be emphasized that the vagueness of this piece of international law on human rights clearly served a purpose (which is: to give room to every state to plan what steps will be taken at what time), it was felt that this text remained too general and too unsatisfactory as a terms of reference for policy development and dialogue on the right to food. What steps are envisaged? What is the meaning of full realization of rights in the case of the right to food? What are the obligations of states in this regard? Are these obligations of result or of conduct?

Two requests triggered the Committee on Economic, Social and Cultural Rights (CESCR) to address these principal questions in relation to the right to food. At the 1996 World Food Summit, member states requested a better definition of the rights relating to food in article 11 of the Covenant (see Box 1). At the same time a special request was addressed to the Committee on Economic, Social and Cultural Rights (CESCR) to give particular attention to the Summit Plan of Action in monitoring the implementation of the specific measures provided for in article 11 of the Covenant. In response to these requests for an explanation of article 11, the CESCR drafted General Comment no. 12 on the right to adequate food. The link with this article is not trivial as this means that General Comment no. 12 became an authoritative interpretation of a piece of binding law when it was adopted by the UN Economic and Social Council in 1999.

The authors of General Comment no. 12 begin their set of definitions by defining when the right to food is realized: ‘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’. This is very close to FAO’s definition of food security as a desired situation or goal, except for the typical human rights focus on ‘every man, woman and child’ instead of the aggregate-biased ‘all people’.⁵ The distinctive feature of General Comment no. 12 and a rights-based approach to food is not the definition of the realization of the right to food for every individual, or food security for all for that matter, but the definition of obligations of conduct and steps to be taken by every State party to the Covenant to enable individuals to feed themselves.

This emphasis on obligations of conduct and steps to be taken in a document linked to binding law, can be seen as an attempt to reduce the much-heard excuse or complaint of ‘there is lack of political will to realize food security for all’ to a non-issue. How can state parties to the International Covenant on Economic, Social and Cultural Rights and herewith duty-bearers to the right to food not have the political will to realize food security for all? This means that General comment no. 12 can be considered as a key legal instrument to address and remove lack of political will as one of the three major obstacles to the implementation of the right to food (as distinguished by Asbjørn Eide in his concluding remarks at an

⁵ ‘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’ (World Food Summit Plan of Action 1996).

international seminar held in Heidelberg, September 2006, on ‘speeding up the implementation of the right to food at national level’).

The distinction of three obligations in the General Comment (see Box 3) is meant to address and cope with two other major obstacles to the realization of the right to food (as distinguished by Eide at the just-mentioned seminar): lack of capacity of a state party and lack of (common) understanding of obligations by a state party, individuals and their advocates. As noted earlier, a common misunderstanding of the right to food is that it is synonym to the right to be fed by the government. National policymakers then assume that the implementation of the right to food is too costly. As a result, they either get quite anxious or not at all when reminded of article 2 of the ICESCR, to which they are a signatory. On the one hand, this article does not define what is meant with ‘the *maximum* of its available resources’. On the other hand, states can convincingly argue that their available resources are limited and certainly too limited to feed everyone. In any case, the result is that national policymakers put aside the right to food as a basis for policymaking. The three-fold distinction of obligations in the General Comment is meant to prevent this and to question the use of ‘lack of capacity’ as a valid argument not to take steps towards realization of the right to food.

Box 3: From the third text of international law on the right to food: General Comment no. 12

The right to adequate food, like any other human right, imposes three types or levels of obligations on States parties:

1. The obligation to *respect* existing access to adequate food requires States parties not to take any measures that result in preventing such access.
2. The obligation to *protect* requires measures by the State to ensure that enterprises or individuals do not deprive individuals of their access to adequate food.
3. The obligation to *fulfill (facilitate)* means the State must pro-actively engage in activities intended to strengthen people's access to and utilization of resources and means to ensure their livelihood, including food security. Finally, whenever an individual or group is unable, for reasons beyond their control, to enjoy the right to adequate food by the means at their disposal, States have the obligation to *fulfill (provide)* that right directly. This obligation also applies for persons who are victims of natural or other disasters (article 15)

In inter-governmental policy discussion on food security and the realization of the right to food for that matter, there has been a bias towards what states should do to increase food security, or in human rights discourse, to fulfill the right to adequate food. The authors of General Comment no. 12, however, first put the emphasis on what states should refrain from: they should not take measures that result in preventing existing access to adequate food. They have defined the respect for the right of every individual to feed oneself as the first type or level of obligation, or in other words: the basic obligation. Though it cannot be argued that refraining from or withdrawing measures does not incur (opportunity) costs at all, the argument that no contribution can be made towards realization of the right to food because of lack of resources, is not very convincing here.

Something similar applies to the second type or level of obligation: the obligation of the state to protect individuals against enterprises or individuals that may deprive individuals of their access to adequate food. Again, the emphasis is not on what the state should provide or what activities the state should engage itself in. The second obligation, however, does

require action from the state. Though it cannot be argued that such action is without (opportunity) costs, the argument that nothing can be done because of lack of resources is not very convincing here, too. In reaction to the much heard argument that lack of resources is a key obstacle to the realization of the right to food, General Comment no. 12 can be used to propose a focus on the first two obligations first: the obligation to respect and the obligation to protect. Another but certainly not easier approach to cope with (the argument of) resource constraints is to seek international support and to establish international cooperation. This is referred to in articles 2 and 11 of the ICESCR and proposed in General Comment no. 12, that more or less focuses on food aid in its section on international obligations.

The authors of General Comment no. 12 do not propose that the right to food has to be realized as soon as possible but explain that every state has ‘an obligation to move as expeditiously as possible towards the goal of full realization of the right to food’. This is their definition of ‘progressive realization’ of the right to food, which entails a principle obligation of conduct. Though full realization of the right to food is not defined as a principle obligation, it would be misleading not to distinguish obligations of result. The authors prescribe different steps to be taken by states to implement the right to food at the national level (see Box 4). Every step basically consists of two or three levels. The first level is about the realization of *intermediate* results: the adoption of a national strategy, the adoption of a framework law, the setting of verifiable benchmarks and the incorporation in the domestic legal order of international instruments. The second level is about next, but higher level results: implementation of a national strategy and national and international monitoring. Unlike the first two levels, the third level does not refer to obligations of result but to objectives of a national strategy, framework law or benchmarks: ensuring food and nutrition security for all and providing access to effective judicial or other appropriate remedies at the national level to any victim of a violation of the right to adequate food.

Box 4: Steps to be taken to implement the right to food at the national level

1. The adoption of a national strategy to ensure food and nutrition security for all, based on human rights principles that define the objectives.
2. The adoption of a framework law as a major instrument in the implementation of this national strategy.
3. The setting of verifiable benchmarks for subsequent national and international monitoring.
4. The incorporation in the domestic legal order of international instruments recognizing the right to food, or recognition of their applicability, with a view to provide any person or group who is a victim of a violation of the right to adequate food, access to effective judicial or other appropriate remedies at the national level.

The national strategy should be based on a systematic identification of policy measures and activities relevant to the situation and context and should address critical issues and measures in regard to all aspects of food, entailing coordination between ministries and regional and local authorities. Accountability, transparency and people’s participation are key human rights principles to guide the making of the national strategy.

The framework law should include provisions on its purpose; the targets or goals to be achieved and the time-frame to be set for the achievement of those targets; the means by which the purpose could be achieved in broad terms, in particular the intended collaboration with civil society and the private sector and with international organizations; institutional

responsibility for the process; and the national mechanisms for its monitoring, as well as recourse procedures.

With a view to develop indicators to measure progress in the realization of the right to food, Riedel, vice chair person of the Committee on Economic, Social and Cultural Rights (CESCR) has led a two-year research project on the IBSA procedure as a tool of human rights monitoring. One of the main triggers of this initiative was the qualitatively deficient reporting by State parties under the ICESCR.⁶ Riedel has noted that reports of states ‘(a) are incomplete; (b) evade the direct answer of the Committee questions; (c) only superficially address material issues; and/or (d) are dated as they refer to facts and figures long changed’.⁷ To prevent that the whole burden of reporting remains with State parties, the Committee has proposed to engage in the IBSA procedure (see Box 5).

Box 5: The IBSA procedure

The IBSA procedure is a four-step discussion between States Parties, the Committee, specialized agencies and NGOs of: 1. human rights Indicators; 2. nationally set Benchmarks; 3. Scoping; and 4. Assessments. The first step involves the State Party acceptance of relevant indicators as agreed upon through close cooperation with NGOs and relevant specialized agencies that contribute to the effective mainstreaming of human rights in their respective domains. In the second step national benchmarks are set by States Parties which enable a differentiated approach to the vastly differing situations in which most countries find themselves. The third step involves a discussion with the Committee of the benchmarks established by the State Party, in order to arrive at a consensus about them. The first three steps form the basis for the final assessment step that occurs during the dialogue stage between the State Party and the Committee in preparation for the drafting of the latter’s Concluding Observations.

Source: Riedel, E. 2006.

According to Riedel, ‘The advantage of this four-step procedure lies in the truly cooperative and interactive spirit between States Parties, the Committee, specialized agencies, and NGOs wherein a more focused and meaningful discussion can take place’.⁸

III. Taking stock of approaches and experiences

A few things on food insecurity in the world are widely known and more or less undisputed. First, hunger is a global problem that is stubborn to solve. In the State of Food Insecurity in the World of 2006, FAO reports that, ‘Ten years after the 1996 Rome World Food Summit (WFS), the number of undernourished people in the world remains stubbornly high. In 2001-03, FAO estimates there were still 854 million undernourished people

⁶ To facilitate the preparation of reports by States parties and to contribute to consistency of reporting, the Committee on Economic, Social and Cultural Rights has formulated guidelines: ‘Revised general guidelines regarding the form and contents to be submitted by states parties under articles 16 and 17 of the International Covenant on Economic, Social and Economic Rights as per June 17 of 1991’. The guidelines include specific ones on the right to food (with reference to article 11 of the Covenant).

⁷ Riedel, E. 2006. The IBSA procedure as a tool of human rights monitoring. Paper presented at the expert symposium on ‘Measuring developments in the realization of the right to food by means of indicators: the IBSA-procedure’, May 22-23 2006, Mannheim, Germany, p.62.

⁸ Ibid: Riedel, E. 2006, p. 65.

worldwide: 820 million in the developing countries, 25 million in the transition countries and 9 million in the industrialized countries'.⁹ According to FAO estimates, the number of undernourished people in the developing countries declined with 'a meagre 3 million' from 1990-1992 to 2001-2003.¹⁰

A second common understanding is that there are large differences between regions in the developing world in terms of changes of the number and prevalence of undernourished people: 'Global stagnation in hunger reduction masks significant disparities among regions', with progress in the regions of Asia/the Pacific and Latin America/the Caribbean and setbacks in the Near East/North Africa and in sub-Saharan Africa.¹¹ FAO Director-General Diouf adds that, 'Even within a single country, it is not uncommon to find differences'.¹² A third common understanding is that the world can feed itself. An indicator of this ability is the ration of world cereal stocks to utilization. At the presentation of the State of Food Insecurity in the World of 2006, FAO showed that this ratio fluctuated between about 22 and 32 percent in the period 1992-2003.¹³ A fourth widely shared view is that ending hunger requires 'political commitment'.

There is, however, less of understanding and agreement on the root causes explaining why the absolute number of hungry and malnourished people has remained nearly constant in the period 1990-2003, in spite of the commitment of the international community to reduce this number by half in 2015. Somehow political commitment is no guarantee of effective action. Though different stakeholders acknowledge that an integrated approach is needed, some consider improving food quality or food safety as most important, whereas others think that genetic modification, land reform or removal of international trade restrictions are the keys to ending hunger; some believe that the player that should act first or show most commitment is the national government whereas others think that private companies, civil society organizations or international organization are the key agents of change. Also within the field of human rights, there is no consensus on the approach to be taken, the critical barriers to be addressed and the prime movers. Three human rights-based approaches can be distinguished.

1. Make the right to food practical for policymaking

The first is the most recent one: the provision of policy guidelines to member states in their implementation of the right to adequate food. This approach wants to challenge the view that human rights are not practical enough for policymaking. In 2004 the FAO council adopted 19 voluntary guidelines meant as a practical tool to help member states 'to achieve the progressive realization on the right to adequate food in the context of national food security', hereafter called the 'Right to Food Guidelines'.

⁹ FAO, 2006. The state of food insecurity in the world: eradicating world hunger – taking stock ten years after the World Food Summit. FAO: Rome, p. 8.

¹⁰ Ibid: FAO, 2006, p. 4.

¹¹ Ibid: FAO, 2006, p. 9.

¹² Ibid: FAO, 2006, p. 5.

¹³ Report of FAO council, 131st session, 20-25 November 2006.

Box 6: Right to Food Guidelines for developing policies against hunger and malnutrition

The Right to Food Guidelines consist of a wide range of policy directives and prescriptions. The guidelines can be grouped together in six clusters:

1. *Governing by the government*
Guidelines 1 and 5 call states to promote democratic society, good governance and transparent public institutions.
2. *Economic policies*
Guidelines 2, 4 and 12 propose states to develop economic, market and budget policies that are non-discriminatory, anti-hunger and directed at food security.
3. *Strategies*
Guidelines 3, 6 and 7 recommend states to develop a national human-rights based strategy and a legal framework, based on consultation with all relevant stakeholders.
4. *Access to adequate food*
Guidelines 8, 9 and 10 propose states to facilitate non-discriminatory and secure access to resources and assets and to safe and nutritious food.
5. *Assistance*
Guidelines 13, 14, 15 and 16 call states to help vulnerable groups to feed themselves, to put in place social safety and food safety nets to protect those who cannot provide for themselves, and to provide non-discriminatory support to those in need at times of natural and human-made disasters.
6. *Accountability*
Guidelines 11, 17 and 18 encourage states to strengthen the capacity of individuals and institutions to hold government accountable for their (lack of) conduct: education and awareness raising; monitoring, indicators and benchmarks; and national human rights institutions.

Shortly after the publication of the Right to Food Guidelines in 2005, several meetings were held – all emphasizing the need to implement the right to food at the national level. June 2005, the Federal Ministry of Food, Agriculture and Consumer Protection of Germany hosted an international workshop in Berlin on implementing the Right to Food Guidelines in the fight against hunger. The report of the workshop presents what voluntary guideline can be linked to what Millennium Development Goal and how the right to adequate food can be realized in different policy fields.¹⁴ September 2006 the Food Information and Action Network (FIAN) and the Food and Agriculture Organisation (FAO) held an expert seminar in Heidelberg entitled ‘how to speed up the implementation of the right to food at the national level’.

The recently held seminars on the Right to Food Guidelines report on what should be done, not on what have been the experiences with the use of these guidelines. The seminars do not offer lessons learnt from the use of the guidelines as a tool to implement the right to food. So far, reporting to the Committee on Food Security suggests that countries have not yet used the Right to Food Guidelines as a tool for policy formulation.

FAO members report periodically on the follow up to the World Food Summit. One reporting cycle has passed since the adoption of the Right to Food Guidelines. A review of the 2006

¹⁴ Federal Ministry of Food, Agriculture and Consumer Protection of Germany, 2005. Policies against hunger IV: implementing the Voluntary Guidelines. Report of an international workshop, 14-16 June 2005, Berlin, Germany, p. 25 and pp. 29-44.

reports shows that 53 countries submitted reports to the Committee on Food Security.¹⁵ Of these, only one (Switzerland) mentioned the Right to Food Guidelines at all; none in the context of implementing the Guidelines themselves. Some eight countries mentioned general human rights protection (Burkina Faso, Cameroon, El Salvador, Morocco, Namibia, Thailand, Tunisia, Uganda). Two countries made an explicit reference to the right to food (Brazil, Colombia). One country mentioned human rights-based approaches (Indonesia).

Recognizing that the Right to Food Guidelines represent a voluntary instrument, the reporters of the Berlin workshop hope that these guidelines ‘will help to foster productive dialogues between government and civil society organization as well as between both international and domestic government entities, becoming a source of inspiration for the forceful policy changes needed to realize the Millennium Development Goal to eradicate hunger’.¹⁶ Broad consultations or multi-stakeholder dialogue is important indeed to discuss how guidelines can be implemented in specific country situations and as a stepping stone to make things happen. The decision of the Committee on Economic, Social and Cultural Rights (CESCR) in 2005 to use the Right to Food Guidelines in its review of state reports and also in revising its own guidelines to states on reporting on Article 11 of the ICESCR may invoke a greater and systematic use of the Right to Food Guidelines.

In fostering or holding such dialogue, the following limitations of the Right to Food Guidelines should be kept in mind:

1. First, the guidelines are non-binding. They do not form obligations of states. The guidelines do not take a violation-based approach. This implies that states can neither be held accountable for not considering the guidelines nor for not adopting human-rights based policies against hunger and malnutrition. Whether or not states wish to seriously consider or to adopt the guidelines, depends on their political will.
2. Second, the guidelines focus on what governments should *do*. They pay very little attention to what government should refrain from. This implies that the voluntary guidelines can hardly be used as a stepping stone towards discussion on the obligation to respect the right to food and what this implies for review and ending of existing policies.
3. Third, the guidelines primarily serve a domestic purpose. The only guideline that addresses the role of donor states is about international food aid. International trade and external debt are treated in an additional part to the guidelines on ‘international measures, actions and commitments’. This section emphasizes that states have the primary responsibility for their own economic and social development. This implies that the possibilities to use the guidelines to review international policies on the basis of extra-territorial obligations of states, are limited.¹⁷ Such review could not only include food aid but also agricultural policies and (lack of) policies by the state to ensure that international or multinational enterprises do not deprive individuals living in other countries of their access to adequate food.

¹⁵ Vidar, M. 2006. State recognition of the right to food at the national level. United Nations University and the World Institute for Development Economics Research. Research paper 2006/61. The reports are available at the CFS website: http://www.fao.org/unfao/bodies/cfs/cfs32/cfs2006_reports.htm. Earlier occasional reports were submitted on the follow up and implementation of Objective 7.4 of the World Food Summit Plan of Action, but these were by no means consistent or universal.

¹⁶ Ibid: Federal Ministry of Food, Agriculture and Consumer Protection of Germany, 2005, p. 17.

¹⁷ Extra-territorial obligations to the right to food are obligations of states to respect, to protect and to fulfil the right to food of individuals in other countries. See: Coomans, F. and Kamminga, M. 2004. Extra-territorial application of human rights treaties. Intersentia: Antwerpen, Oxford.

Inspired by the Right to Food Guidelines and discussing their use for policies against hunger, participants of the international workshop in Berlin distinguished five steps of a successful national human-rights based strategy to realize the right to food. These steps go one step further than the Right to Food Guidelines by proposing review of existing policies and detection of violations of the right to adequate food:

1. A careful analysis of the causes of hunger and malnutrition and the identification of vulnerable groups at the outset of a rights based approach.
2. On this basis, an assessment of the existing legislative and policy framework is conducted in order to identify problematic legislation or areas.
3. All policy measures should be screened to ensure that they do not contribute to violations of the right to adequate food.
4. A functioning monitoring mechanism needs to be installed in order to examine progress of the implementation of the right to food and to detect violations of the right to food.
5. In such cases, effective recourse procedures have to be provided so that individuals can claim their rights and be given access to adequate remedies.

To operationalise Guideline 17 of the Right to Food Guidelines on ‘Monitoring, Indicators and Benchmarks’, researchers of the International Project on the Right to Food in Development prepared practical methods for the FAO to monitor the human right to adequate food. Two volumes were submitted to FAO in March 2006. The first volume offers a framework and the second one lists approaches and tools.¹⁸ To test and further develop the proposed approaches and tools, FAO has organized regional ‘validation workshops’ with member states in Uganda and Guatemala.

2. Make the right to food more applicable in court through legal innovation

The second approach is based on the view that a right is not a right and is rather meaningless if it is not applicable in court. As regards the right to food, there is still much to do in this regard. At the international and European level, there are no options yet for individuals to defend their right to food in court. At country level, only 22 developing countries explicitly mention the right to food in their constitutional provisions as a right that is applicable to the whole population. Not a single OECD-country has done the same.¹⁹

A key challenge is to treat economic and social rights (including the right to food) on an equal footing as civil and political rights. This has not been the case so far in the nearly 50-years of human rights development since the adoption of the Universal Declaration of Human Rights. In fact, these two sets of human rights have been treated in fundamentally different ways at international, European and national level:

1. Four of the seven human rights treaty bodies (committees of independent experts that monitor implementation of the human rights treaties) may, under certain circumstances,

¹⁸ Andreassen, B.A., Eide, W.B., Immink, M. and Oshaug, A. 2006. Practical methods to monitor the human right to adequate food (PMM). Volume I: enhancing the case for monitoring the human right to adequate food: a framework. Volume II: approaches and tools. Reports prepared for FAO by the International Project on the Right to Food in development (IPRFD).

¹⁹ Vidar, M. 2006. State recognition of the right to food at the national level. United Nations University and the World Institute for Development Economics Research. Research paper 2006/61.

consider individual complaints or communications from individuals.²⁰ The Committee on Economic, Social and Cultural Rights (which oversees the International Covenant on Economic, Social and Cultural Rights) lacks such a protocol. A UN Special Rapporteur on the Right to Food has been installed to report on violations of the right to food by UN member states to the General Assembly and (now) the Human Rights Council, not to an international court.²¹

2. The European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) is endorsed by a supra national dispute resolution structure including a European Court of Human Rights where both member states and individuals can bring complaints about infringements on civil and political human rights by members states.²² The European Social Charter (1961) sets out economic and social rights. The European Social Charter has not been brought under the jurisdiction of the European Court of Human Rights. Under a protocol which came into force in 1998, complaints of violations of the Charter may be lodged with the European Committee of Social Rights. This is not an individual complaint procedure but a collective one.
3. In her review of state recognition of the right to food at national level, Vidar concludes that, 'The ICESCR specifies the adoption of legislative measures for the realization of the rights recognized in the ICESCR, yet very few countries have taken legislative steps regarding the right to food beyond simple constitutional provisions, which being important first steps, probably do not suffice for effective action'.²³ For the provisions of the ICESCR to become applicable in states that follow a dualist legal system, specific national legislation to this effect needs to be adopted.²⁴

Generally speaking, those who want to make the right to food applicable in court face three obstacles. The first is the idea that it is not necessary to conceive access to food in terms of human rights. Those who hold this view believe that access to food should be considered as a policy aim, not a right. They also fear that making the right to food applicable in court results into policymaking by judges. The second obstacle points at a deeper layer that may underlie the first obstacle: the expectation or fear that defining access to food in terms of human rights and making the right to food applicable in court, may result into claims of individuals to (immediately) provide food. The third obstacle is the view that states do not avail of (enough) resources to realize the right to food.

Proposals and steps to make the right to food applicable in court are mostly directed to the second and third obstacle. Two proposals can be distinguished. Both deal with the problem of

²⁰ These are the Human Rights Committee (HRC) that monitors implementation of the International Covenant on Civil and Political Rights 1966 and its optional protocols; the Committee on the Elimination of Racial Discrimination (CERD); the Committee Against Torture (CAT); and the Committee on the Elimination of Discrimination Against Women (CEDAW).

²¹ In the period 2002-2007 UN Special Rapporteur Jean Ziegler submitted ten country reports and seven thematic reports to the Commission on Human Rights that reports to the Economic and Social Council. In the same period, the Special Rapporteur also submitted six thematic reports to the General Assembly. These reports can be downloaded at www.righttofood.org.

²² Van der Meulen, B. forthcoming. The right to feed oneself: food in the struggle for human rights as entitlements.

²³ Ibid: Vidar, M. 2006, p. 13.

²⁴ For a case study of the lack of such national law to form a barrier for the right to food to become enforceable, see Omara, J.M.A. 2007. Promoting a rights-based approach to food and nutrition security in Uganda, in: Eide, W.B. and Kracht, U. (eds.) 2007. Food and human rights in development. Volume II: evolving issues and emerging applications. Intersentia: Antwerpen, Oxford, pp. 161-180. Omara concludes, 'That economic and social rights are not accepted as enforceable against the state, remains a major weakness in the protection of human rights in the country [of Uganda]' (165).

lack of capacity of a state to fulfill the right to food, but in a different way. The first proposal is to accept limited applicability of the right to food in court. To start with, or at the very minimum, courts may accept enforceability of the obligation to respect the right to food (see Box 3), that is, for the state not to interfere with the free enjoyment of this right.²⁵ The obligation to fulfill the right to food is simply left out or not yet included.

The second proposal is to develop a ‘reasonableness test’, following the example of the South African Constitutional Court. The striking feature of this test is that it is not limited to the (‘negative’) obligation to respect but also relates to the (‘positive’) obligation to fulfill. It is meant as a more modest, if not more realistic, version of article 2(1) of the ICESCR that prescribes every state to use ‘the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant’. In a number of cases up to 2004, the South African Constitutional Court tested whether the refusal of the state to provide access to health care, housing or social assistance was *reasonable*. The key issue of the Court was not whether ‘all appropriate means had been adopted to the maximum of available resources’ but whether ‘reasonable measures had been taken given resources available’. In the Grootboom case that concerned a group of squatters who had been evicted from a parcel of land in a village in the Western Cape province, the Court developed criteria or elements of the reasonableness test:

First, a reasonable program must allocate tasks and responsibilities among different spheres of government (national, provincial, and local) and provide them with the necessary financial and human resources to carry out their respective obligations created by (housing) legislation. Secondly, legislation must be complemented by policies and programs that are reasonable in conception and implementation. These should be coordinated, coherent and comprehensive. Such policies and programs must be capable of facilitating the realization of a right. Thirdly, reasonable measures must take into account the social, economic and historical context and background of the situation which the policy aims to address. In addition, a program must be flexible and cater for the alleviation of (housing) needs over the short, medium and long term. A reasonable program must not exclude a significant segment of society. [...] Those, whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril, must not be ignored by the measures aimed at achieving realization of the right.²⁶

The reasonableness test ‘acknowledges that the government is not required to do the impossible’.²⁷ A key feature of the reasonableness review is that it ‘does not grant individual relief, that is, an entitlement to claim immediate access to (housing or health) services’.²⁸ The review is geared towards programs. Though this may not be very helpful to individuals in need of immediate relief, the reasonableness test may be a very useful example and tool to overcome hesitations or objections of national government against making the right to food applicable in court.

²⁵ Two legal scientists, Fons Coomans and Bernd van der Meulen, support this solution. See Coomans, F. (ed.) 2006. *Justiciability of economic and social rights: experiences from domestic systems*. Intersentia: Antwerpen, Oxford; and Van der Meulen, B. forthcoming, *The right to feed oneself: food in the struggle for human rights as entitlements*. This solution may also provide a way-out in the cumbersome discussion about the optional protocol to the International Covenant of Economic, Social and Cultural Rights since 1996.

²⁶ Coomans, F. 2005. Reviewing implementation of social and economic rights: an assessment of the ‘reasonableness’ test as developed by the South African Constitutional Court. *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*. Heidelberg Journal of International Law 65: 175-176.

²⁷ *Ibid*: Coomans, F. 2005, p. 186.

²⁸ *Ibid*: Coomans, F. 2005, p. 195.

3. Make the right to food a tool for social struggles (on behalf) of victims

The third approach to implement the right to food holds that human rights are meaningless if not properly recognized, made useful and actually used as tools by those whose rights have been violated: victims. The main conclusion of FAO staff from recent experience with implementing the right to food is that, 'Legal recognition of the right to food and empowering people to claim that right is vital'.²⁹ Instead of proposing new legal doctrine or 'deductive' development of international law into national policies, constitutions and laws, the strategic view is to strengthen capacities of victims to hold states accountable. An 'inductive' perspective to human rights is adopted based on the view that human rights should come 'from within, not from without'.

Gaay Fortman concludes that, 'Notably, although the whole world appears to have a mouth full of human rights, in terms of implementation one might still speak of a crisis'.³⁰ To address this crisis and hunger and malnutrition in the world, he proposes not to consider policymakers or constitutional legislators as the primary agents of change but those (poor and hungry) whose rights have been violated. He regrets the bias in human rights law towards 'declared rights' (as if declaring rights is a full guarantee of actual recognition of rights). In his view, human rights law often lacks a connection to reality, that is, to the long and enduring struggles of individuals and civil society organizations for implementation. Similarly, Gaay Fortman is skeptical about the development of indicators: 'The issue is that indicators are rather meaningless if not connected to instruments that may be employed in concrete action for the implementation of rights'.³¹

In the view of Gaay Fortman, the struggles of individuals to acquire human rights do not only require the use of legal resources but also political instruments (see Box 7). This is because he and many civil society organizations consider power structures as one of the root causes of hardship of the poor and hungry to co-exist with affluence and abundance of others. From this perspective, the identification, analysis and transformation of power structures is considered of paramount importance for struggles to acquire human rights. According to Gaay Fortman, a key problem in this regard is that the state is important for capacity-building of individuals but can be a violator of human rights at the same time.³² FIAN shows that this is very much reality: 'An important conclusion that can be drawn from the case experiences of FIAN is that the nation state is still both the essential actor to combat hunger and malnutrition and the main institution responsible for violations of that right'.³³ The more fundamental problem and obstacle towards implementation of the right to food here is that, 'Ending hunger and malnutrition, especially with a human rights approach, poses direct threats to privileges and power structures at national and international levels'.³⁴

²⁹ Haen, H. de and Thomas, J. 2006. Putting the right to adequate food into practice: concepts and lessons. *Entwicklung und Ländlicher Raum* 1, p. 17.

³⁰ Gaay Fortman, B. de, 2000. 'Rights-based approaches': any new thing under the sun? IDEA newsletter, p. 2.

³¹ Ibid: Gaay Fortman, B. de, 2000, p. 5.

³² Gaay Fortman, B. de, 2004. In search of a new paradigm: development interventionism from a human dignity perspective. In: Ananta Kumar Giri et alia (eds.). *The development of religion, the religion of development*. Delft: Eburon, p. 8.

³³ Windführ, M. 2007. Experiences from case related right to food work: lessons learned for implementation, in: *Food and Human Rights in Development, volume II: Evolving issues and emerging applications*. Intersentia: Antwerpen, Oxford, p. 350.

³⁴ Valente, F. 2007. The human right to food movement in Brazil, in: Eide, W.B. and Kracht, U. (eds.), *Food and Human Rights in Development, volume II: Evolving issues and emerging applications*. Intersentia: Antwerpen, Oxford, p. 211.

Box 7: Typology of action to protect right-holders and to address structural injustice

Instrumental \ Functional	Protective	Transformational
Legal resources	Judicial action (case by case)	Legal literacy programs aiming at awareness building
Political instruments	Dissent and protest against policies and actions violating human dignity	Collective action addressing power relations embodying structural injustice

Source: Gaay Fortman, B. de, 2006. in: Clark, D. (ed.), *The Elgar Companion to Development Studies*. Cheltenham Glos, UK: Edward Elgar Publishing, p. 264.

All four types of action (see Box 7) typically refer to methods or activities of civil society movements or organizations, not of bilateral and multilateral organizations, that generally find it difficult to adopt a violation-based approach. The only type of action that is not only conducted by civil society organizations, concerns legal literacy and awareness building. The FAO unit on the right to food has embarked on a number of activities geared towards legal literacy and awareness building through e-learning modules and a virtual library.³⁵ Kent (Hawai'i University) has developed an on-line course on the right to food. His publication of 'Freedom from Want: The Human Right to Adequate Food' (2005) serves as the core text. In-class academic courses linking food, nutrition and human rights are offered by University of Oslo, University of Hawai'i, University of Minnesota and more recently Wageningen University and Research Centre (WUR) in the Netherlands.³⁶

The two types of protective action (see Box 7) much resemble two main methods of civil society organizations to hold states accountable for alleged violations of their obligations: naming-and-shaming and justiciability (see section III, part 2). Naming-and-shaming takes place via publication of cases, letter campaigns and public demonstrations. Seeking justiciability involves the use of legal recourse mechanisms, which so far are basically available at national level, or quasi-judicial mechanism at the national level (such as independent human rights institutions, ombudspersons, truth commissions) or the regional or international human rights system level (such as human rights treaty bodies).

To understand the enormous variety of approaches of NGOs to implementation of the right to food, it is important to differentiate those national and international NGOs and movements that explicitly use a rights approach in their daily work from those that use more development or 'implicit' approaches, while working with issues strongly related to the right to food, like: defending land rights, demarcation of indigenous territories, guaranteed access to water or fishing grounds and preserving biological diversity.³⁷

³⁵ See www.fao.org/righttofood.

³⁶ For an overview of the development of academic courses linking food, nutrition and human rights, see Eide, W.B. and Kracht, U. (eds.) 2007. *Food and human rights in development. Volume II: evolving issues and emerging applications*. Intersentia: Antwerpen, Oxford, p. 523-534.

³⁷ Windführ, M. 1998. NGOs and the right to adequate food, in: FAO, *The right to food in theory and practice*. Rome: FAO.

Another major differentiation is between (traditional) human rights organizations and development NGOs. The first type used to be traditionally biased towards civil and political rights whereas the second type did not take a rights-based approach at all.³⁸ An interesting trend is that human rights organizations gradually give up their bias towards civil and political rights and start to report on economic, social and cultural rights as well. At the same time, development NGOs are increasingly using economic, social and cultural rights as a reference or starting point for their work. Coalitions of donor NGOs are developing joint proposals, for instance, on how to include the costs of implementation of human rights in the national budget cycle.³⁹

Finally, a distinction can be made between NGOs who focus on the right to food and NGOs that try to use a rights-based approach to look how violations of different economic, social and cultural rights relate to each other and possibly with violations of civil and political rights as well. A recent overview of rights-based approaches of 24 counterparts of Oxfam Novib shows that ‘a majority focuses its work on more than one right’ but also that ‘human rights treaties do not seem to be used extensively’ and ‘unlike a classical human rights approach, in which blaming-and-shaming is an often used tool, many counterparts seek a non-confrontational type of relationship with the government’.⁴⁰

At a seminar on the Right to Food held in Wageningen in March 2006, Michael Windführ (in his capacity of Secretary-General of FIAN at that time) proposed a step-wise and inductive approach for civil society organizations to promote the implementation of the right to food:

1. Documentation and publication of violations on a case-to-case basis.
2. Education and training of right-holders and duty-bearers on rights-based approaches to food.
3. Mobilization of right-holders and civil society organizations for concerted action (in seeking access to court, naming-and-shaming or transforming power structures).
4. Follow up of concrete human rights cases and monitoring of government performance.
5. Lobby and advocacy work directed at legislators and policymakers at national and international level.

FIAN is the international NGO that has the longest record in supporting victim groups to collect reliable data on violations of the right to food. Via its country sections and local groups, it has been involved in about 400 cases in more than 60 countries in the last 20 years.

Jonsén notes that this number may very well refer to the tip of the iceberg. ‘Important to point out is that not all victims of violations of the right to food claim their rights; in fact most violations of the right to food take place in silence’.⁴¹ She explains that FIAN responds

³⁸ These biases and limitations very much reflect the separated and differently paced development of civil and political rights on the one hand and economic, social and cultural rights on the other. See: Eide, A. 1996. Human rights requirements to social and economic development. *Food Policy* 21(1): 23-39. Elsevier Science; and Van der Meulen, B. forthcoming. The right to feed oneself: food in the struggle for human rights as entitlements.

³⁹ APRODEV rights and development group. 2007. Budgeting human rights.

⁴⁰ Oxfam Novib. 2006. How and RBA works in practice: exploring how Oxfam Novib and its counterparts apply and RBA. The Hague: Oxfam Novib, p. 18-19.

⁴¹ Jonsén, J. 2006. Developing indicators for the right to food: lessons learned from the case work of FIAN International. Paper presented at the expert symposium on ‘Measuring developments in the realization of the right to food by means of indicators: the IBSA-procedure’, May 22-23 of 2006, Mannheim, Germany, p. 36.

to requests from victim groups or civil society organizations speaking on their behalf. This means that most victim groups addressed by human rights organizations are often organized or to a certain extent already aware of their rights. Many victims or victim groups are, however, ‘marginalized populations that are normally not organized, meaning that they might not be aware, or able to claim their rights’.⁴² She particularly refers to children under five years old, people living in slums and city outskirts, urban unemployed workers, migrant workers (and particularly recently arrived migrants), homeless people, orphans, street children, school dropouts, people living alone on small incomes or without support, vulnerable groups (like nursing and single mothers as well as women headed households), victims of conflict (war invalids, war orphans, war widows), internally displaced people, and people with HIV/AIDS.

On the basis of its work with those victim groups that do reach FIAN, this organization has experienced that, many victim groups do not have adequate capacities, firstly, to monitor the impact of certain government policies on their situation, and secondly to document the often complex chains of causalities’.⁴³ Another experience of FIAN is that violations of the obligation to respect and to protect are better documented than violations of the fulfillment-bound obligations.⁴⁴ Most of FIAN’s support has been biased towards violations of the obligation to respect and to protect. ‘The proof of a violation of fulfillment-bound obligations is more difficult, as it involves potentially complicated resource- and policy discussions, including, for example, the burden of proof that the government could in fact spend more resources for these groups than it actually does’.⁴⁵ These experiences re-affirmed FIAN’s view that careful case-specific analysis is needed for judging violations of human rights. Any (lack of) government action has to be understood in terms of a given historical context and country situation.

Experiences of victim groups and civil society organizations have hardly been put together for a country as a whole – such with a view to give insights in their struggles against hunger and malnutrition and the different obstacles that they have been facing through time. One of the exceptions is the account of Valente of the Brazilian experience during the last three decades. He puts this struggle in a historical context and has drawn lessons learnt (see Box 8), based on experiences of victim groups, civil society organizations and his own work as National Rapporteur for Brazil on the human right to food.

⁴² Ibid: Jonsén, J. 2006, p. 36.

⁴³ Windführ, M. 2007. Experiences from case related right to food work: lessons learned for implementation, in: Food and Human Rights in Development, volume II: Evolving issues and emerging applications. Intersentia: Antwerpen, Oxford, pp. 353-354.

⁴⁴ Ibid: Windführ, M. 2007, p. 341.

⁴⁵ Ibid: Windführ, M. 2007, p. 341.

Box 8: The Brazilian experience: lessons learnt from struggles of civil society organizations

1. Social mobilization:
 - Committed social mobilization activities can be effective in raising awareness in the general population about hunger and malnutrition problems, as well as about the human right to food.
 - National civil society mobilization is fundamental.
2. Government-civil society partnerships:
 - A strong government-civil society partnership is essential for a human rights approach to food and nutritional security.
 - Multi-stakeholder public policy councils can play a relevant role in allowing for a greater say of the population at large on the elaboration, implementation and monitoring of the policies and program.
 - Strong civil society mobilization and different social movements can always find important allies in different sectors of government.
3. Alternative accountability mechanisms at the national level:
 - The existence of a law guaranteeing a specific human right does not assure that this right is realized, or even that it is judicially or culturally accepted as a right, and that specific recourse mechanisms are in place. The National Rapporteurship Project demonstrated to be an extremely powerful tool to inform the population of their human rights, to demand information from different levels of government on public policies and programs related to alleged human right violations, to mediate the resolution of conflicts related to the human right to food, to receive violations claims from individuals and social movements, to independently investigate violations claims and to present recommendations to governmental authorities, to establish partnerships with existing human rights institutions to promote the human rights based approach, and to contribute to the human rights debate at the societal level, with an emphasis on the economic, social and cultural human rights.
 - Making administrative and quasi-judicial instruments (to claim the human right to food) operational in a participatory way, can be an extremely powerful tool towards empowerment of the rights-holders and increased commitment of duty-bearers to fulfill their human rights obligations.
4. Multi-level networking and lobbying:
 - Broad civil society mobilization and the political will of national governments is not enough to reverse priorities in the highly internationalized economic system we live in today. Foreign, trade and economic policies are to a large extent responsible for violations of the human right to food. National civil society mobilization needs to be complemented with international civil society mobilization, the building of intergovernmental alliances and the establishment of stronger multilateral mechanism to curb human rights violations imposed by rich countries, transnational corporations and intergovernmental financial agencies.

Source: adapted from Valente, F. 2007. The human right to food movement in Brazil, in: Eide, W.B. and Kracht, U. (eds.), *Food and Human Rights in Development*, volume II: *Evolving issues and emerging applications*. Intersentia: Antwerpen, Oxford, pp. 181-214.

Valente hopes that his account ‘will contribute to a rich exchange of national experiences’ (p. 182), which could very well be a way to strengthen civil society organizations in their struggle together with and on behalf of victims.

To help individuals or organisations to write parallel or shadow reports on the right to food before the UN committee on Economic, Social and Cultural Rights, FIAN International has developed a practical tool.⁴⁶ It is designed to give an indication of the sort of information that such a report should include and how it should be presented.

IV. Conclusions and challenges ahead

The right to food is a human right. Every human being is a right-holder. A common misunderstanding of the right to food is that it is similar to the right to be fed by the government. A much better and less misleading description of the right to food is the right to feed oneself. Another common misunderstanding is that right-holders have no responsibilities or capacities to access food and simply have to keep up their hands for their rights to materialize. The human right to food, however, implicitly takes capacities of individuals to access food as its point of departure. The definition of obligations of states reflects this.

Three obligations connecting individuals, companies and states

Defining right-holders and their human rights does not make sense when there is no definition of the party to recognize these rights and to take measures accordingly. As per 19 April of 2007, 156 states have defined themselves as primary duty-bearer of the right to food as treaty parties of the International Covenant on Economic and Social Rights. The seven-page General Comment no. 12 of the right to adequate food of the UN Committee on Economic, Social and Cultural Rights (1999) is a must-read for everyone who would like to get a basic understanding of the right to food and the three types of conduct that are required from every state party to recognize this right. These three types of conduct follow from three levels of obligations that the right to food, like any other human right, imposes on states parties: the obligation to respect, to protect and to fulfill.

1. The obligation to respect existing access to adequate food requires States parties not to take any measures that result in preventing such access.
2. The obligation to protect requires measures by the State to ensure that enterprises or individuals do not deprive individuals of their access to adequate food.
3. The obligation to fulfill (facilitate) means the State must pro-actively engage in activities intended to strengthen people's access to and utilization of resources and means to ensure their livelihood, including food security. Finally, whenever an individual or group is unable, for reasons beyond their control, to enjoy the right to adequate food by the means at their disposal, States have the obligation to fulfill (provide) that right directly (ICESCR 1999, article 15).

Based on the key notion of the right to food as the right to feed oneself and the obligations of states, three key actors can be distinguished to make hunger and malnutrition history for every woman, man and child: individuals, enterprises and states. Together they can be conceived as a set of concentric circles. Individuals are situated at the inner circle. They (want to) directly or indirectly access food. The core obligation of the state is to keep distance and to do no-harm, that is, to refrain from action that undermines access to food of

⁴⁶ Epal, S. 2003. Parallel reporting before the UN Committee on Economic, Social and Cultural Rights. Heidelberg, FIAN International.

individuals. The private sector and other individuals are situated at the second circle. They can play an important role for every individual to get access to food (as employer, land owner, etc.). The obligation of the state is to protect individuals against other individuals and enterprises that may deprive them of their access to food. The state itself is situated at the outer circle. The obligation of the state is to create an enabling, non-discriminatory policy environment and to build food stocks and social safety nets for those who cannot feed themselves.

Two approaches to address obligations of states

Two approaches can be distinguished to keep states to their obligations of conduct: the violation-based approach and the dialogue-based approach. Generally speaking, human rights lobbyists and organizations take a violation-based approach, whereas multilateral and bilateral agencies prefer the dialogue-based approach. The violation-based approach seeks to document violations of obligations and make the right to food applicable in (inter)national court. The dialogue-based approach is not approaching the state as a potential violator but as a policymaker and potential provider of services to marginalized people. It does not seek meetings in court but at seminars, offices, corridors.

Both approaches have their strengths and limitations. If made applicable in court, the right to food can become a legal entitlement to those whose rights have not been recognized. However, mapping of violations and seeking applicability in court may also be embarrassing to authorities and pose direct threats to privileges and power structures. State authorities will marginalize the right to food and consider it not appropriate as a basis for policy formulation and change. A dialogue-based approach is less threatening to state authorities and may lead to concrete policy proposals. However, this approach lacks teeth and is dependent on the political will of government as declarations and guidelines that result from dialogue, are not binding.

The challenge would be to combine the best of two worlds. To this end, it is useful to consider the three obligations as part of a continuum. At the one end of the continuum the obligation to respect is situated. The proposal is to focus the violation-based approach on this obligation and to seek limited applicability in court for the right to food. Country-specific ways to address violations of obligations to protect and to fulfill may then be developed through case law. The ‘reasonableness test’ of the South African Constitutional Court is an example of creative case law that may be replicable in other countries.⁴⁷

The other element of the proposal is to use the dialogue-based approach to address the other end of the continuum of obligations: the obligation to fulfill, or what pro-active activities should be undertaken by government. The dialogue-based approach does not take violations but non-realization of the right to food as the starting point. Investigation and discussion could focus on the question to what extent non-realization can be attributed to government policies and programs. In second instance, broad-based consultation or multi-stakeholder dialogue at country level on the Right to Food Guidelines can be held to discuss what positive action can be taken by the government in a specific country situation to fulfill the right to food.

⁴⁷ For an overview of progressive development of good practices and creative case law coming from a number of domestic systems, including South Africa but also India, Colombia and the Philippines, see Coomans, F. (ed.) 2006. *Justiciability of economic and social rights: experiences from domestic systems*. Intersentia: Antwerpen, Oxford.

A major pre-condition for the implementation of the right to food at national level on the basis of this two-fold proposal is that the state party involved recognizes that it is both a potential violator of the right to food and potential provider of services that can enable individuals to feed themselves, understand their rights, make themselves heard, etc. This does not only apply to developing countries but also to OECD and other rich countries in their capacity of donor states and international trade partners.

Roles of civil society organizations

Implementation of the right to food at the national level not only requires action of policymakers and legislators or judges but also of civil society organizations. In fact, reputed legal experts on the right to food consider these organizations as the most critical players, with their ears turned to victim groups and their mouths to policymakers and legislators.

The first and foremost step for civil society organizations is to help victim groups to document their case. The Food and Information Action Network (FIAN) has been involved in about 400 cases in more than 60 countries in the last 20 years. According to FIAN, many victim groups do not start to document their case because they are not organized and not aware of the obligations of states. To address this, legal literacy programs and mobilization can be important. Those victim groups that have started to document their case and have sought support from FIAN, have been biased towards violations of the obligations to respect and to protect. They do not have adequate capacities to monitor the impact of certain government policies on their situation and to document the often complex chains of causalities. Human rights and development organizations find such monitoring and analysis difficult themselves too, but agree that non-realization of the right to food and any relationship with government action has to be understood in terms of a given historical context and country situation. From academic circles there is strong support for this view. Van Genugten, for instance, states that, ‘To prevent that the call for realization of human rights in specific situations turns into an empty shell, studies are needed of local situations, backgrounds of violations, views and voices of governmental and opposition parties’.⁴⁸

To make them heard at the national level with government, a major challenge for civil society organizations that work in the field of human rights, nutrition and/or development is to get their act together. Broad civil society mobilization is needed. A very important joint activity is the writing of a report on the right to food in their country before the UN committee on Economic, Social and Cultural Rights. This report is to be written parallel to the writing of the official report that is very often incomplete, superficial and outdated. FIAN has developed a practical tool for such parallel or shadow reporting.

The experience of civil society organizations in Brazil shows, however, that this not enough. Developing (personal and institutional) relationships at the interface of state and civil society is critical. The challenges are:

1. To find important allies in different sectors of government.
2. To develop a strong government-civil society partnership for a human rights approach to food and nutritional security directed at integration of public policies.

⁴⁸ Genugten, W.J.M. van, 2005. Mensenrechten te belangrijk om louter aan juristen over te laten: over mensenrechten en economie, taken, kansen en actoren. Rede uitgesproken bij gelegenheid van de 78^e dies natalis van de Universiteit van Tilburg. Universiteit van Tilburg, p. 39 (my translation).

3. To organize multi-stakeholder public policy councils.
4. To enable civil society organization to participate in the making of operational administrative and quasi-administrative instruments.

Two other major lessons can be distilled from the Brazilian experience. One is about the installation of system of national rapporteurs. This system proved an effective tool to educate citizens and civil servants, to demand information from different levels of government, to independently investigate alleged violations, and to mediate resolutions of conflicts related to the human right to food. The other lesson is that civil society organizations and their partnerships with government should not only develop a national agenda but also an international one directed at obligations of third party states and international organizations.

Challenges for governments of rich countries

The challenges ahead for governments of OECD and other rich countries with regard to the implementation of the right to food at the national level are manifold. As said before, the pre-condition that the state party should recognize that it is both a potential violator and potential provider of services that can enable individuals to feed themselves, however, also applies to them. There is both a domestic and extra-territorial dimension to this.

Generally speaking, the role of governments of rich countries as provider of services is difficult but not controversial, certainly not in the domestic sphere. Through official development assistance, these governments can support various initiatives (via bilateral, multilateral and/or civil society-based channels) in other countries to support the implementation of the right to food. Based on my review of three approaches to promote the implementation of the right to food, the following, more or less concrete activities can be listed:

1. Organization of broad-based multi-stakeholder consultation at country level on the 19 Right to Food Guidelines on to support the progressive realization of the right to adequate food in the context of national food security and on tools to monitor this realization;
2. Development of and national exchanges on creative case law, for instance, directed at limited applicability of the right to food and reasonable tests of government programs;
3. Studies of non-realization of the right to food and relationships with government policies;
4. The writing of parallel reports as a joint activity of human rights and development organizations at the national level;
5. Building of government-civil society partnerships in the field of human rights, food and nutrition security;
6. Supporting the development and activities of national rapporteurs on human rights, food and nutrition security;
7. Facilitation of international exchanges of national experiences of civil society organizations in documentation, mobilization and lobbying.

The task ahead of governments of rich countries that accept their status as potential violator of the right to food, is even more challenging. This applies to the domestic and even more to the extra-territorial domain. Not a single OECD country makes a reference to the right to food in their constitution as a right that applies to the whole population. Many governments of rich countries think it is not necessary to formulate access to adequate food in terms of human rights, ignoring that adequate food is not only about food quantity but also food safety and nutritional value. Internationally, the challenge would be to apply the

obligations to respect, to protect and to fulfill the right to food to extra-territorial obligations and to investigate to what extent non-realization of the right to food in third countries can be attributed to agricultural, economic and financial policies of (groups of) OECD countries.

A concrete step is to develop interdepartmental collaboration at country level and to define policy coherence with a specific focus on human rights, food and nutrition security. Another step is to conduct a number of case studies, following the example of a recent report of Germany's extra-territorial obligations and the involvement of multilateral institutions in the promotion and protection of economic, social and cultural rights.⁴⁹

Quiet revolutions

In several of his speeches and publications, former Secretary-General of the United Nations, Kofi Annan, called for a quiet revolution: the gradual transformation of UN agencies into network players, seeking partnerships with academia, civil society and the private sector to address the challenges of the new global era.⁵⁰ One of his major conclusions has been that underdevelopment, violations of human rights and insecurity have become increasingly interrelated and cannot be solved by states alone. In this light, the implementation of the human right to food forms one of the greatest challenges for signatories to the International Covenant on Economic, Social and Cultural Rights. Nearly all of these states committed themselves in 2000 to halving the proportion of people suffering from hunger in 2015.

The implementation of the right to food also calls for a quiet revolution: to overcome barriers to the implementation of the right to food, neither government officials, nor legal experts or civil society lobbyists should work alone. More or less institutionalized networks or alliances are needed of government officials, legal experts and civil society lobbyists to find creative and context-specific solutions and to implement the right to food at the national level on a step-by-step basis.

⁴⁹ See: Hausman, U. and Künnemann, R. 2006. Germany's extra-territorial human rights obligations: introduction and six case studies. Brot für die Welt, FIAN and EED. Windführ, M. (ed.) 2006, Beyond the nation state: human rights in times of globalization. Uppsala: Global Publication Foundation.

⁵⁰ Annan, K. 2005. In larger freedom: towards security, development and human rights for all. Report of the Secretary-General of the United Nations for decision by Heads of State and Government in September 2005.