

# Right to Adequate Food: National Implementation and Extraterritorial Obligations

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The implementation of human rights standards is imperative if individuals are to enjoy the human rights that international human rights law guarantees. The standards are set through the conventions that states have ratified and through the customs of states' international interaction, and are intended to have effect for individuals within states' territories. Whether or not this implementation is "national" or "international" depends on the perspective taken. If it is an individual that is looking to having his/her human rights implemented, this will by its nature be "national" implementation, as we all operate in a territorial setting: we are citizens or residents<sup>2</sup> of a state in which we have a right to have our human rights respected and protected. However, if the perspective is from a state or a government, the implementation of human rights may not necessarily be national only, or at least not only refer to

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<sup>2</sup> Many of us are residents in a state other than that of our nationality. However, due to the universality of human rights, we are entitled to rights protection both from the state of our nationality and that of our residence.

its own national territory. The question of extraterritorial implementation of human rights is gaining recognition, both as a legitimate concern and a legal obligation of foreign states.<sup>3</sup>

In this article, the author will focus on the right to adequate food as guaranteed by article 25 of the Universal Declaration of Human Rights, and article 11 of the International Covenant on Economic, Social and Cultural Rights.<sup>4</sup> While the obligations of states for the implementation of the right to food within their own territory are firmly established in international human rights law,<sup>5</sup> the question of the obligations beyond the borders of the national state has not received as much attention either in literature or in international practice. Therefore, this article will address some fundamental issues with regard to extraterritorial obligations in Part I. This will include a discussion of the nature of human rights as universal, as well as the consequences of the fundamental principle of non-discrimination in human rights law. Part II. will give a brief overview of the legal foundation of extraterritorial human rights obligations in general, and in relation to the right to food in particular. Furthermore, Part III. will address the practical implications of extraterritorial obligations related to the implementation of the right to food, while the final substantive part (Part IV.) concerns the often difficult question of remedies in case of non-compliance with extraterritorial obligations related to the implementation of the right to food.

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<sup>3</sup> See generally M. Gibney/ K. Tomasevski/ J. Vedsted-Hansen, "Transnational State Responsibility for Violations of Human Rights," *Harv. Int'l L. J.* 40 (1999), 267 et seq.; F. Coomans/ M.T. Kamminga (eds), *Extraterritorial Application of Human Rights*, 2005; S.I. Skogly, *Beyond National Borders: States' Human Rights Obligations in International Cooperation*, 2006; S.I. Skogly/ M. Gibney, "Transnational Human Rights Obligations", *HRQ* 24 (2002), 781 et seq.

<sup>4</sup> Hereinafter the ICESCR.

<sup>5</sup> This obligation is particularly strong for the 155 states that have ratified the International Covenant on Economic, Social and Cultural Rights (ratification status as of [March 2007-for me](#)), while other states will have this obligation in relationship to children based on the provisions in the Convention on the Rights of the Child, ratified by 193 states ([March 2007-for me](#)); it also stems from other international and regional human rights treaties and customary international law.

## I. Foundations for Extraterritorial Obligations

Since the adoption of the Charter of the United Nations in 1945 and the Universal Declaration of Human Rights in 1948, the international human rights discourse has emphasised the universality of human rights – all individuals should enjoy human rights equally everywhere. This is clearly the foundation and inspiration for the Universal Declaration itself, in that it reaffirms in article 1 that, “All human beings are born free and equal in dignity and rights. ..”, and in article 2 that, “Everyone is entitled to all the rights and freedoms set forth in this declaration, without distinction of any kind ...”

The universality of human rights has been the underlying inspiration for all further developments of human rights law and standards over the past sixty years. The possibility of implementing human rights in exactly the same manner and on a completely universal level has been widely debated, not least from the protagonists of cultural relativism.<sup>6</sup> However, the principle of human worth and human dignity which comes with the respect for fundamental rights and freedoms for all is rarely questioned. But in the debate on the universality of human rights, by far the most attention has been given to the content of *rights*. The corresponding universality of the content of *obligations*, and the implications for obligation-holders (in particular states), have not received the same attention.

A key concept in this discussion is the principle of non-discrimination. Non-discrimination is a fundamental part of human rights law, and is a logical extension of the universality principle. It is overarching and deeply penetrates all international human rights treaties and customary international law. The UN Charter, while not defining what human rights are, confirms that,

“The Purposes of the United Nations are: ... (3) To achieve international co-operation in ... promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion ...”<sup>7</sup>

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<sup>6</sup> H. Steiner/ P. Alston, *International Human Rights in Context – Law, Politics, Morals*, 2nd edition, 2000.

<sup>7</sup> UN Charter, Article 1 (3).

Furthermore, the ICJ has held that discriminatory practices, such as *apartheid*, represent a “flagrant violation of the purposes and principles of the United Nations Charter.”<sup>8</sup>

Therefore to treat people differently in relation to the way in which they may enjoy their rights, is a breach not only of human rights treaties, but also of fundamental principles of customary international human rights law. With regard to human rights obligations, this becomes a central point. If states are able to treat individuals in other countries differently from the way they may treat individuals in their own territory, this is discriminatory practice in contravention of the principle of universality of rights enjoyment. We will see in the second part that there are legal provisions that may seemingly limit the geographical reach of human rights obligations, but the interpretation of these provisions should always be carried out with the principles of universality and non-discrimination as the foundation.

## II. Legal Basis

For a right to be a legal right that provides entitlement, the substance of it has to be combined with the identification of an entity or some entities that carry corresponding obligations. This is the case for international human rights law. By becoming parties to international treaties in the field of human rights, states accept legal obligations to respect and promote the enjoyment of human rights for individuals. The primary state obligation is to respect and promote human rights enjoyments for individuals within their territory. However, to the extent that the state affects the enjoyment of human rights for individuals within other states, the obligations also apply to these persons.

Commonly international or regional human rights treaties specify the content and scope of human rights obligations in the early provisions. The UN Charter, although encompassing far more than human rights provisions, provides, as already stated, that one of the purposes of the organisation is to achieve international co-operation “in promoting and encouraging respect for human rights and for fundamental freedoms.”<sup>9</sup> Furthermore, in Arts 55 and 56, it is provided that the Member

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<sup>8</sup> Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) notwithstanding Security Council Resolution 276 (1970), ICJ Reports 1971, 16 et seq., (56, para. 128).

<sup>9</sup> UN Charter, Article 1 (3).

States of the United Nations, “pledge themselves to take joint and separate action in co-operation with the Organization ...”<sup>10</sup> to promote “universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.”<sup>11</sup>

Joint action to promote this universal respect, will logically imply that at least some states will act beyond their own borders – or extraterritorially – to achieve this.<sup>12</sup>

Some international human rights treaties limit the obligations somewhat, such as the International Covenant on Civil and Political Rights (ICCPR), which provides that,

“Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant ...”<sup>13</sup>,

and the European Convention on Human Rights and Fundamental Freedoms states that,

“The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of the Convention.”<sup>14</sup>

However, the interpretation of these articles in the jurisprudence of the UN Human Rights Committee and the European Court of Human Rights, clearly demonstrates that the instruments have reach beyond national borders in certain circumstances,<sup>15</sup> and that the references to territory and jurisdiction by the drafters were included more for practical reasons than to permit human rights violations by states abroad.<sup>16</sup>

However, as the present article deals with the implementation of the right to food, the essential document to analyse is the ICESCR, which was drafted with a different wording in its general obligation article, and also in the specific obligations in the substantive articles.

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<sup>10</sup> UN Charter, Article 56.

<sup>11</sup> UN Charter, Article 55 lit. c.

<sup>12</sup> For further discussion on this reasoning, Skogly, 2006, see note 3, 74-83.

<sup>13</sup> ICCPR, article 2 (1).

<sup>14</sup> ECHR, article 1.

<sup>15</sup> For an in-depth discussion of this jurisprudence, and the practice of other bodies entrusted with the supervision of the implementation of other human rights treaties, Skogly, 2006, see note 3, Chapters 4, 6 and 7.

<sup>16</sup> See individual opinion by Human Rights Committee Member Tomuschat in the *Lopés Burgos v. Uruguay* case, Doc. A/36/40, para. 184.

Article 2 of the ICESCR provides,

“1. 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 realisation of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.”<sup>17</sup>

2. The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be *exercised without discrimination of any kind* as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”<sup>18</sup>

Thus, article 2 of the ICESCR confirms that the way in which states ratifying the Covenant shall ensure the implementation of it, goes beyond national and territorial application, as does the strong reiteration that it shall be done without discrimination, in keeping with the universality principle already discussed.

The provision of “international assistance and co-operation” has not been widely analysed, as the focus on the obligations stemming from article 2 has concentrated on the role of the domestic state. The primary obligation for human rights compliance, quite clearly lies with the territorial state, and will not be questioned by the present author. Nevertheless, the article does refer to actors and activities beyond national borders, and envisages that international cooperation is necessary for the “full realization of the rights recognized in the present Covenant.” Indeed, during the drafting of this article, the views that such international cooperation is necessary are evidenced by the statements by Denmark, which held that “countries with insufficient resources should be able to obtain help under the technical assistance programmes or similar projects”<sup>19</sup> and from Egypt which held that “the available resources of the small countries, even if utilised to the maximum, would be insufficient; [and] as a result, those countries would have to fall back on international cooperation ...”<sup>20</sup>

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<sup>17</sup> Emphasis added.

<sup>18</sup> Emphasis added.

<sup>19</sup> Doc. E/CN.4/SR.236.

<sup>20</sup> Doc. E/CN.4/SR.236. For further accounts on the drafting history of this passage in the Covenant, Skogly, 2006, see note 3, 84 et seq.

In General Comment No. 3 on the nature of States parties obligations, from 1990, the UN Committee on Economic, Social and Cultural Rights held that,

“international cooperation for development and thus for the realization of economic, social and cultural rights is an obligation of all States,”<sup>21</sup>

and that,

“the phrase ‘to the maximum of its available resources’ was intended by the drafters of the Covenant to refer to both the resources existing within a State and those available from the international community through international cooperation and assistance.”<sup>22</sup>

Furthermore, as a result of the wording of article 11 of the Covenant, which *inter alia* provides for the right to adequate food, States Parties to the Covenant,

“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.”<sup>23</sup>

Additionally, para. 2 of the said article states that,

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

- a) to improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge ...;
- b) taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need.”

In General Comment No. 12, on The Right to Adequate Food, the Committee held that,

“States parties should recognize the essential role of international cooperation and comply with their commitment to take joint and separate action to achieve the full realization of the right to adequate food. In implementing this commitment, States parties should take

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<sup>21</sup> UN Committee on Economic, Social and Cultural Rights, General Comment No. 3 (1990), para. 14, Doc. E/1991/23 of 1 January 1991.

<sup>22</sup> Ibid., para. 13.

<sup>23</sup> For a discussion on the background on the passage “based on free consent”, Skogly, 2006, see note 3, 89-93.

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. States parties should, in international agreements whenever relevant, ensure that the right to adequate food is given due attention and consider the development of further international legal instruments to that end.”<sup>24</sup>

Furthermore the Committee emphasised that,

“States parties should refrain at all times from food embargoes or similar measures which endanger conditions for food production and access to food in other countries. Food should never be used as an instrument of political and economic pressure.”<sup>25</sup>

While other articles in the Covenant contain references to international cooperation,<sup>26</sup> the provisions in article 11 seen in conjunction with article 2 (1) provide a firm legal basis for extraterritorial obligations in relation to the right to food, and its implementation. This is further confirmed on the basis of the provisions in the Convention on the Rights of the Child,<sup>27</sup> which in article 24 (2) calls for the combat of malnutrition, combined with the provisions in article 4 that ensure that,

“with regard to economic, social and cultural rights, States Parties shall undertake [...] measures to the maximum extent of their available resources and, where needed, within the framework of international cooperation.”<sup>28</sup>

### III. Practical Implications for the Right to Food

It has now been established that states have obligations beyond their own borders, and that the way in which they carry out their foreign

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<sup>24</sup> UN Committee on Economic, Social and Cultural Rights, General Comment No. 12 (1999), para. 36, Doc. E/C.12/1999/5 of 12 May 1999.

<sup>25</sup> *Ibid.*, para. 37.

<sup>26</sup> In particular arts 15 (4), 22 and 23.

<sup>27</sup> The Convention on the Rights of the Child, as ratified by 193 (for me) states, thus binding for virtually all states in the world, should provide protection for the vast majority of children.

<sup>28</sup> For an in-depth discussion on these provisions in the Convention on the Rights of the Child, see W. Vandenhoe, “Economic, Social and Cultural Rights in the CRC: Is There a Legal Obligation to Cooperate Internationally for Development?”, forthcoming, *International Journal of Children’s Rights* 15 (2007), XXX. I will put it in

policy and international cooperation may have implications for the compliance with their obligations stemming from human rights law. The time has therefore come to address the practical implications of the national implementation of the right to food in an extraterritorial perspective. In the introduction, it was held that implementation is, from the perspective of the individual, always national. However, the way in which states act through their foreign policy and their international cooperation, may have significant impact on how this national implementation is carried out, and whether the right to food is respected, promoted, or violated. It should be clarified that “international assistance and cooperation” is a broad concept that encompasses international development assistance, but which also goes wider and includes other aspects of foreign policy that may have effect on human rights enjoyment in third countries. This will include areas such as trade relations, financial cooperation, military and security cooperation, as well as activities carried out by private parties internationally. In this understanding, the concept of “international assistance and cooperation” shall qualitatively be carried out in a manner that is conducive to the realisation of the right in the ICESCR, as well as a quantity concept, requiring further assistance when needed.<sup>29</sup>

In this section, the FAO *Voluntary Guidelines to Support the Progressive Realisation of the Right to Adequate Food in the Context of National Food Security*<sup>30</sup> will be used as a point of reference for ways in which states may implement the right to food nationally, taking steps both “individually and through international assistance and co-operation.”<sup>31</sup>

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<sup>29</sup> For a discussion of the concept of “international assistance and co-operation” as provided in article 2 (1) of the ICESCR, see P. Hunt/ J. Bueno de Mesquita, *Draft Guidelines on the ‘International Covenant on Economic, Social and Cultural Rights: International Obligations’*, prepared for the UN Committee on Economic, Social and Cultural Rights, 2003, (on file with author).

<sup>30</sup> Drafted by the Intergovernmental Working Group for the Elaboration of a Set of Voluntary Guidelines to Support the Progressive Realisation of the Right to Adequate Food in the Context of National Food Security (IGWG), which is a subsidiary body of the Committee on World Food Security, both bodies were established by the Council of FAO. The Voluntary Guidelines were adopted by acclamation in November 2004. Hereinafter: the Voluntary Guidelines. Compare also Courtis, in this Volume, footnote 4.

<sup>31</sup> Article 2 (1), ICESCR.

The Voluntary Guidelines consist of three sections, the first being Preface and Introduction, the second covering “Enabling Environment, Assistance and Accountability” containing nineteen guidelines, and the third section concerning “International Measures, Actions and Commitments”. In Guideline 19, it is confirmed that states,

“should fulfil those measures, actions and commitments on the international dimension, as described in Section III below, in support of the implementation of the Voluntary Guidelines, which assist States in their national efforts in the progressive realisation of the right to adequate food in the context of national food security ...”

Therefore, the Voluntary Guidelines themselves confirm the strong and direct relationship between the national “measures, actions and commitments” for the implementation of the right to food, with the “international dimension”.

The third section covers issues such as international cooperation and unilateral measures, the role of the international community, technical cooperation, international trade, external debt, official development assistance, international food aid, and partnerships with NGOs/CSOs (Civil Society Organisations)/Private Sector. This listing of relevant issues for national implementation through an international dimension, is important as it confirms that “international assistance and cooperation” in article 2 (1) of the Covenant covers more than international development cooperation, which is often taken as the full content of that article.

In discussing how extraterritorial obligations may have a practical impact upon the national implementation of the right to food, it is important to consider ways in which measures taken in accordance with section III. may have a positive or negative effect on the realisation of the right to adequate food, as approached by the Guidelines in section II. It is not possible within the confines of this article to carry out an exhaustive analysis as to how section III. measures may impact up on all the issues covered in the 19 Guidelines in section II. Therefore only a few examples as illustrations of how “international assistance and cooperation” may affect national implementation will be given.

Guideline 2 covers economic development policies, and calls for states to “promote broad-based economic development that is supportive of their food security policies,”<sup>32</sup> to “assess ... the degree of food

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<sup>32</sup> Guideline 2, Sub-Section 2.1.

insecurity and its causes, the nutrition situation and food safety,”<sup>33</sup> and to “promote adequate and stable supplies of safe food through a combination of domestic production, trade, storage and distribution.”<sup>34</sup>

Likewise, Guideline 4 covers “market systems”, and provides that states should,

“in accordance with their national law and priorities, as well as their international commitments, improve the functioning of their markets, in particular their agricultural and food markets, ...”<sup>35</sup>

and that they,

“should strive to ensure that food, agricultural trade and overall trade policies are conducive to fostering food security for all through a non-discriminatory and market-oriented local, regional, national and world trade system.”<sup>36</sup>

Furthermore, Guideline 8 on “Access to Resources and Assets”, confirms that states,

“should facilitate sustainable, non-discriminatory and secure access and utilization of resources consistent with their national law and with international law and protect the assets that are important for people’s livelihoods. States should respect and protect the rights of individuals with respect to resources such as land, water, forests, fisheries and livestock without any discrimination ...”<sup>37</sup>,

and,

“promote agricultural research and development, in particular promote basic food production with its positive effects on basic income and its benefits to small and women farmers, as well as poor consumers.”<sup>38</sup>

If these measures (and others not brought in as examples) are considered in conjunction with section III., and its call for states and relevant international organisations to actively support the progressive realisation of the right to adequate food at the national level,<sup>39</sup> it is evident

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<sup>33</sup> Guideline 2, Sub-Section 2.2.

<sup>34</sup> Guideline 2, Sub-Section 2.3.

<sup>35</sup> Guideline 4, Sub-Section 4.1.

<sup>36</sup> Guideline 4, Sub-Section, 4.7.

<sup>37</sup> Guideline 8, Sub-Section 8.1.

<sup>38</sup> Guideline 8, Sub-Section 8.4.

<sup>39</sup> Section III., para. 4.

that issues of technical cooperation,<sup>40</sup> international trade,<sup>41</sup> external debt,<sup>42</sup> official development assistance,<sup>43</sup> and international food aid<sup>44</sup> are of immense importance, particularly for poorer countries that have difficulties in realising the right to food for all individuals within their national borders. Two issues should be brought forward here. First, in an integrated world, the measures taken by one state in its relationship to another may have significant impact on the possibility for the second state to progressively realise the right to food for its population; and also measures taken by states collaboratively through intergovernmental organisations (such as FAO, the World Bank, the IMF) may have even greater impact upon the receiving state's abilities in this regard.

For instance, take a state that decides to export chicken meat which, due to subsidies to farmers in their own state, is cheaper than the locally produced chicken meat in the importing state. In this case, the effect of export may be that a.) domestic poultry production in the importing state collapses; and b.) that the quality of the imported meat is substandard due to lack of adequate storage and treatment facilities in the importing state.<sup>45</sup> Such effects would clearly impact upon "food safety" and "stable food supplies"<sup>46</sup> have been negatively affected by the actions (i.e. giving export licence for such export or omissions i.e. failing to regulate the export industry to ensure that "the functioning of the markets, in particular ... food markets"<sup>47</sup> is not negatively affected, to the extent, that the right to adequate food is put in jeopardy).

Second, when the guidelines talk about "international commitments" or "in accordance with international law", this reaches beyond the national implementation policies, in that international commitments in accordance with international law, refer to extraterritorial obligations as well. Therefore, any state that is bound by the provisions of the UN Charter, and more particularly the ICESCR, should ensure that their

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<sup>40</sup> Section III., para. 5.

<sup>41</sup> Section III., paras 6-10.

<sup>42</sup> Section III. para. 11.

<sup>43</sup> Section III. para. 12.

<sup>44</sup> Section III., para. 12.

<sup>45</sup> This example is taken from the case related to Cameroon, and the export of chicken parts from the European Union. For details, see Brot für die Welt/ FIAN (ed.), *Germany's Extraterritorial Human Rights Obligations: Introduction and Six Case Studies*, 2006.

<sup>46</sup> Guidelines 2, Sub-Section 2.3.

<sup>47</sup> Guideline 4, Sub-Section 4.1.

international commitments with regard to the right to adequate food, and more specifically the issues identified by the Voluntary Guidelines are honoured when engaging in international cooperation.

More specifically, when states aim to implement the right to food, and are challenged by the economic development policies of external actors such as developed states considering granting official development assistance or support from international financial institutions, such as the World Bank and the IMF, and these institutions propose certain policy measures, it may be difficult for the receiving state to withstand pressure for specific policy measures even if they work against food security strategies.

While the relationship between national and international policies and commitments seems evident and important, the way in which this represents an interaction in terms of human rights obligations is not quite as straight forward. The legal basis for extraterritorial obligations was summarised above. However, the content of these obligations was not detailed. What the obligations amount to will, of course, have great bearing on how the “international measures, actions and commitments” should be considered in this context.

As with national or domestic human rights obligations, extraterritorial human rights obligations may be divided into three categories: *respect, protect and fulfil* (which includes *promote and/or facilitate*).<sup>48</sup> This is confirmed by the Committee when providing that,

“States parties 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.”<sup>49</sup>

And while assessing the implications of this categorisation, the recognition that “international assistance and co-operation” as provided in article 2 (1) of the ICESCR relates to more than development assistance and a duty to “provide”, is essential. This recognition is captured in section III. of the Voluntary Guidelines, in that it deals with a variety of activities that states engage in through their foreign policy or international cooperation, broadly defined.

Therefore, with regard to the obligation to *respect* the right to adequate food in other countries, it is necessary that foreign states ensure that their actions do not lead to the violation of the right to food for individuals in third states, whose right to adequate food was previously

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<sup>48</sup> Skogly, 2006, see note 3, 66-73.

<sup>49</sup> General Comment No. 12, see note 24, para. 36.

enjoyed by them. For instance, states should “refrain at all times from food embargoes or similar measures which endanger conditions for food production and access to food in other countries.”<sup>50</sup> Similarly, states should not give support to another state that uses food as a political tool, or blockades food deliveries for political reasons.<sup>51</sup> Furthermore, food aid that is provided by a foreign state should not be discriminatory and benefit only certain groups. Finally, measures taken by foreign states in terms of subsidies and market access, should not be done in a manner that endangers the livelihood of people in third countries. This is particularly important for individuals in poor countries, where alternative livelihoods may be more limited than in richer countries, and also where the national government’s ability to provide financial assistance to those negatively affected may be restricted. An example of such a situation may be used as illustration.

The organisation 3D (3D- Trade, Human Rights and Equitable Economy) reported in 2004 on the situation for cotton producers in West and Central Africa, and in particular in Benin and Mali.<sup>52</sup> The report documented a reduction in cotton prices due to significant overproduction of cotton worldwide, and that subsidies had been paid to farmers in the United States and the EU (the United States paid out US\$ 1.68 billion to 285 cotton farmers between 1995 and 2002; the EU gave subsidies to Spanish and Greek cotton farmers at 160-180 per cent of world prices).<sup>53</sup> This led to sharp price falls for African cotton producers, which again undermined national efforts by the West African countries to protect the rights to life, to adequate food and to the highest attainable standard of health, and contributed to retrogression from achieving protection of these rights.<sup>54</sup> The United States and the EU also provided international assistance to Benin and Mali. In 2001, for example the United States assistance amounted to US\$ 37.7 million for Mali and US\$ 16 million for Benin.<sup>55</sup> “At the same time, however, due in large part to its price-depressing production and export policies relat-

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<sup>50</sup> Ibid., para. 37.

<sup>51</sup> Ibid.

<sup>52</sup> 3D (ed.), *US and EU Cotton Production and Export Policies and Their Impact on West and Central Africa: Coming to Grips with International Human Rights Obligations*, Report 2004, available at <[http://www.3dthree.org/pdf\\_3D/1404-EGICottonBrief\\_FINAL.pdf](http://www.3dthree.org/pdf_3D/1404-EGICottonBrief_FINAL.pdf)>.

<sup>53</sup> 3D, see above, 2.

<sup>54</sup> Ibid., 4.

<sup>55</sup> Ibid.

ing to cotton, the US contributed to losses in export revenue of \$43 million that year to Mali and \$33 million to Benin, with the consequent harm for livelihoods.”<sup>56</sup>

3D concluded that,

“by flooding WCA [West and Central Africa] markets with cheap cotton, US agribusiness contributes to depressing prices and undermining the market share for small scale farmers in WCA. This reduces the income both of WCA farmers and governments – income that is vital to food security and health care and to protecting the right to life.”<sup>57</sup>

What this example illustrates is that if states are to take their “international commitments” and human rights obligations seriously in terms of not contributing to violations of the right to food in other countries, the effects of market oriented and subsidies policies need to be assessed from a human rights effects’ perspective. This view has also been confirmed in research carried out by Wouter Vandenhoe, who finds that,

“subsidies – both direct ones and cross-subsidies – for structural overproduction of sugar, which is then exported to the South at dumping prices to the detriment of local farmers, are in violation of the third state obligation to respect the right to an adequate standard of living.”<sup>58</sup>

The next level of extraterritorial obligations concerns the obligation to *protect* individuals from human rights violations committed by third parties – often referred to as private parties. These parties may be national or international private parties over which the foreign state exercises control. Commonly, the activities of transnational corporations (TNCs) are addressed in this regard. However, there is no reason why it should be limited to private business; there may be other actors who are capable of causing harm in foreign states, such as non-governmental organisations (NGOs) engaged in activities in third states.<sup>59</sup> Obligations to protect perspective states are required to ensure, through regulation or other means, that private entities over which they have control, do not cause harm to individuals’ human rights in third states. This may

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<sup>56</sup> Ibid.

<sup>57</sup> Ibid.

<sup>58</sup> W. Vandenhoe, “Third State Obligations under the ICESCR: A Case Study of EU Sugar Policy”, *Nord. J. Int’l L.* 76 (2007), 73 et seq.

<sup>59</sup> Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, 1997, para. 18, *NQHR* 15 (1997), 244 et seq.

entail regulating for certain human rights compliance by these entities, and that accountability structures are set up in the home state of the private party to establish responsibility for potential violations of the right to food standards. For instance, if a TNC establishes a plantation for export crops in an area previously used for subsistence farming, they should be regulated in a manner that secures the affected population adequate compensation and safeguards against suffering from violations of the right to food (and other human rights).

Finally, the third level refers to the obligation to *fulfil*. A far more positive obligation where states shall take positive steps to facilitate or promote human rights enjoyment.<sup>60</sup> This is perhaps the most contentious level from a political perspective, and the most difficult to prove legally.<sup>61</sup> This has also had the tendency to receive most attention when discussing extraterritorial obligations.<sup>62</sup> There is no doubt that positive action on part of foreign states for the fulfilment of the right to adequate food is imperative. This is also reflected in the wording in article 11 (1) and (2), as previously mentioned. The drafters of the Covenant considered such positive international cooperation a necessity for the implementation of the right to food (as well as other rights in article 11).<sup>63</sup>

Seeing this level of obligation in light of the Voluntary Guidelines, it is clear that the FAO considered that much of what states engage in as part of their international cooperation may have beneficial impact on the fulfilment of the right to food in foreign states. However, the Voluntary Guidelines do not add new legal obligations apart from those that already stem from international treaty and customary law. Nevertheless, what the Voluntary Guidelines do is to indicate policy measures possible for states to take through international cooperation to fulfil their already existing obligations.

These already existing obligations have been discussed by different bodies. The Committee holds that the references in article 2 (1) of the Covenant to “the maximum of its available resources” and “international assistance and co-operation”, imply that states shall seek interna-

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<sup>60</sup> A. Eide, *Report Updating the Study on the Right to Food*, Doc. E/CN.4/Sub.2/1998/9, para. 9.

<sup>61</sup> Vandenhole, see note 28.

<sup>62</sup> Vandenhole, see note 28; see also J. Bueno de Mesquita, *International Covenant on Economic, Social and Cultural Rights: International Assistance and Co-operation*, 2002; Skogly, 2006, see note 3, 71.

<sup>63</sup> Skogly, 2006, see note 3, 89-95.

tional assistance for the realisation of the rights in the Covenant.<sup>64</sup> Furthermore, where states have the resources available to assist other states in creating the conditions for progressive realisation of the right to food, this should be done. The Special Rapporteur on the Right to Food labels this an obligation to support fulfilment. He explains,

“Governments also have a duty to support the fulfilment of the right to food in poorer countries. Developing States that do not possess the necessary resources for the full realization of the right to food are obliged to actively seek international assistance, and wealthier States have a responsibility to help. This requires States, depending on the availability of their resources, to cooperate with other countries to support their fulfilment of the right to food.”<sup>65</sup>

Consequently, the positive obligations to take steps “to the maximum of its available resources” is also applicable for states in their foreign policy. The extent of resources available to support other states in their national implementation of the right to adequate food, will vary from state to state. However, the public commitments to provide development assistance (and the 0.7 per cent of GDP goal) that states have made on numerous and consistent basis in a variety of institutional settings, including the UN Millennium Summit, should warrant a claim on such resources to support fulfilment of the right to adequate food.<sup>66</sup>

#### IV. Remedies

Much of what has been discussed in this article are issues related to food security and food security policies of states and their international interaction in implementing such policies. However, rights are not im-

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<sup>64</sup> General Comment No. 3, see note 21, para. 13.

<sup>65</sup> *Economic, Social and Cultural Rights. The Right to Food*, Report of the Special Rapporteur on the Right to Food, Jean Ziegler, Doc. E/CN.4/2005/47 of 24 January 2005, para. 56.

<sup>66</sup> In a thought provoking article, Alston argues that there may be an emerging legal obligation to implement the Millennium Development Goals, which would imply assistance to states that lack the means to implement these, including the commitment to reduce the number of people suffering from hunger by half by 2015 (for details on the Millennium Development Goals, <<http://www.un.org/millenniumgoals/index.html>>). See P. Alston, “Ships Passing in the Night: The Current State of the Human Rights and Development Debate seen through the Lens of the Millennium Development Goals”, *HRQ* 27 (2005), 778 et seq.

plemented through policies alone. There is a clear requirement that obligations are complied with, and in case of non-compliance, the availability of remedies to challenge the non-compliance is imperative. The right to a remedy is considered a separate human right<sup>67</sup> that should be available in case of breaches of obligations pertaining to all human rights.<sup>68</sup> However, remedies for violations of economic, social and cultural rights have been less developed than those for civil and political rights, and this is, in particular, the case for judicial remedies which are sought in courts of law.<sup>69</sup> This does not, however, imply that judicial remedies are not possible for violations of economic, social and cultural rights, and recent research has demonstrated that in a number of situations and in a number of countries, such remedies are available and effective.<sup>70</sup> Nevertheless, such situations have generally implied the possibility of bringing violations committed by the territorial state before the national courts. The remedies available for individuals whose economic, social and cultural rights are violated by actions committed by foreign states are theoretical at best. It is here that significant improvements need to be made for the right to food (as well as other economic, social and cultural rights) to be protected from violations committed by foreign actors (as well as domestic ones). While the Committee reviews reports from states that have ratified the ICESCR,<sup>71</sup> the Committee does not (yet) have a mandate to receive individual petitions for violations of the rights in the Covenant.<sup>72</sup> It is also unclear whether such a right to individual petition would be conceived to include violations committed by ratifying states other than the territorial state of the individual.

It is therefore necessary to develop remedy structures that could effectively deal with violations of human rights, including the right to adequate food, in a comprehensive manner. There have been some suggestions in this regard, and in particular the creation of a World Court

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<sup>67</sup> Article 8 of the Universal Declaration of Human Rights.

<sup>68</sup> F. Coomans (ed.), *Justiciability of Economic and Social Rights: Experiences from Domestic Systems*, 2006, 2.

<sup>69</sup> *Ibid.*

<sup>70</sup> See generally Coomans, see note 68.

<sup>71</sup> In accordance with article 16 of the Covenant and Economic and Social Council resolution 1985/17, para. (f).

<sup>72</sup> The mandate of the Open Ended Working Group to draft an Optional Protocol was extended by the Human Rights Council for another two years in June 2006, Doc. A/HRC/1/L.4/Rev.1 of 28 June 2006.

of Human Rights.<sup>73</sup> While these proposals are still very much in their infancy, this may be one way of addressing the need to take a comprehensive view of remedy provision for human rights violations in light of the increasing international interaction, both among states and among private parties.

It should, however, be noted that while formal, judicial remedy structures are essential for the full protection of human rights, more informal structures may also be applied. The exposure of negative effects of actions taken by foreign states in regard to the enjoyment of the right to food is one way of ensuring further accountability. Such exposure can effectively be done through the work of NGOs and their fact-finding and documentation of violations of the right to food. FIAN International has, in recent publications, demonstrated how this may be done, and how foreign governments may be held accountable for their acts and omissions that lead to breaches of the right to food.<sup>74</sup> Gaining expertise in this field, NGOs may also be able to assist states in identifying human rights problems stemming from activities by foreign actors and provide advice as how to eliminate the risk of such adverse effect in the future.

## V. Concluding Remarks

The national implementation of the right to adequate food is affected by actions taken by a variety of actors, including the national government, national private parties, foreign private entities and foreign states. While the primary obligation for the fulfilment of the right to adequate food lies with the national government as a result of the ratification of the relevant international treaties, and in particular the ICESCR, the fo-

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<sup>73</sup> See *inter alia*, M. Nowak, "The Need for a World Court of Human Rights", *Human Rights Law Review* 7 (2007), 251 et seq.; M. Scheinin, "The Proposed Optional Protocol to the Covenant on Economic, Social and Cultural Rights: A Blueprint for UN Human Rights Treaty Body Reform Without Amending the Existing Treaties", *Human Rights Law Review* 6 (2006), 142 et seq.

<sup>74</sup> See *inter alia*, FIAN International Reports, *Germany's Extraterritorial Human Rights Obligations in Multilateral Development Banks: Introduction and Case Study of Three Projects in Chad, Ghana and Pakistan*, Heidelberg, 2006; *Germany's Extraterritorial Human Rights Obligations, Introduction and Six Case Studies*, Heidelberg 2006; *Parallel Report Norway – Extraterritorial Obligations*, 2005.

cus on such obligations solely does not adequately reflect the complex situation for the implementation of this right. There are strong legal foundations for the wider scope of obligations, not least in article 2 (1) of the Covenant itself.

This article has demonstrated that while approaching implementation from a national perspective, the activities of foreign actors may have a considerable impact, both from a positive and negative approach. Positively, it is clear that international actors may support the fulfilment of the right to adequate food in other states, and that this is an obligation based on the wording of the Covenant. This should be considered a human rights mandate for positive international cooperation for the aim of providing an enabling environment for the full enjoyment of this right. However, it has also been demonstrated that acts and omissions on the part of foreign actors (states) may have a negative impact on such enjoyment, and that this represents a breach of an obligation. Nevertheless, the accountability and remedy structures to hold such foreign obligation-holders accountable have not been sufficiently developed. This is a challenge to the development of international human rights law in the future, as the lack of remedy structures, both formal and informal, for holding such actors to account, severely hampers the efforts to ensure global enjoyment of the right to adequate food.