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The UN Committee on Economic, Social and Cultural Rights and the Right to Adequate Food

El Comité de Derechos Económicos, Sociales y Culturales y el Derecho a una Alimentación adecuada

RECIBIDO EL 15 DE ABRIL 2011 / ACEPTADO EL 6 DE MAYO DE 2011

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Abstract: General Comment No. 12 was heralded as a turning point for the protection of the right to adequate food under the International Covenant on Economic, Social and Cultural Rights. It helps all public authorities –from local councils to central governments, from social services to tribunals and courts– to act compatibly with this fundamental right enshrined in Art. 11 of the International Covenant on Economic, Social and Cultural Rights and provides States Parties to the Covenant with useful baseline information for their periodic reports to the Committee on Economic, Social and Cultural Rights. Nevertheless, more than ten years after its enactment, there is a notable lack of a positive culture of respect for this right in several Contracting States. Undeniably, in recent times the right to adequate food has been more pilloried than celebrated and General Comment No. 12 itself has suffered at the hands of a range of detractors who have frequently indicated its modest utility. This article considers the impressive ambition of General Comment No. 6 to convert society through the opening of a culture of respect for the right to food. It maintains that the failure to guarantee institutional commitment to positive compliance of the right to adequate food – and translate this fundamental right into practical reality as an integral part of public life– has fostered scepticism of General Comment No. 12 and eventually undermined the acceptance in public consciousness of the right to food as a positive social good.

Key words: social good, the right to food, states' obligations.

Summary: 1. INTRODUCTION. 2. BACKGROUND, STRUCTURE, APPROACHES AND PRINCIPLES OF GENERAL COMMENT NO. 12. 3. SUBSTANTIVE ASPECTS OF GENERAL COMMENT. Nº 12. 4. A CRITICAL APPRAISAL OF GENERAL COMMENT NO. 12. 5. FINAL REMARKS.

Resumen: La Observación general N° 12 pretende ser un elemento crucial para la protección del derecho a una alimentación adecuada en virtud del Pacto Internacional de Derechos Económicos, Sociales y Culturales. Ayudará a todas las autoridades públicas –desde ayuntamientos hasta los gobiernos centrales, pasando por servicios sociales, tribunales y cortes– a actuar de manera compatible con este derecho fundamental consagrado en el art. 11 del Pacto Internacional de Derechos Económicos, Sociales y Culturales. Ofrece a las Partes en el Pacto referencias útiles para sus informes periódicos al Comité de Derechos Económicos, Sociales y Culturales. Sin embargo, más de diez años después de su promulgación, hay una notable falta de una cultura positiva de respeto de este derecho en varios Estados contratantes. Sin lugar a dudas, en los últimos tiempos el derecho a una alimentación adecuada ha sido más menospreciado que celebrado y la Observación general N° 12 ha sufrido críticas a manos de una serie de detractores que se han indicado con frecuencia su modesta utilidad. Este artículo considera la ambición impresionante de Observación general N° 6 para convertir a la sociedad a través de una cultura de respeto por el derecho a la alimentación. Sostiene que la falta de garantía de compromiso institucional para el cumplimiento positivo del derecho a una alimentación adecuada –y de traducir este derecho fundamental a la realidad práctica como una parte integral de la vida pública... ha fomentado el escepticismo frente a la Observación general N° 12 que, finalmente, socava la aceptación de la conciencia pública sobre el derecho a la alimentación como un bien social positivo.

Palabras clave: bien social, derecho a la alimentación, obligaciones de los Estados.

1. INTRODUCTION

On 12 May 1999, the Committee on Economic, Social and Cultural Rights managed to agree on General Comment No. 12 outlining the content of the right, the corresponding obligations, as well as the potential violations of the human right outlined in Art. 11 of the ICESCR. Hence, the Committee has for the first time adopted a general comment on Article 11, which regulates the right to adequate food. Pursuant to Article 11, par. 1 of the Covenant, States parties 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», while pursuant to Article 11, par. 2 they recognize that more immediate and urgent steps may be needed to ensure: «the fundamental right to freedom from hunger and malnutrition»¹.

Though the ICESCR deals more comprehensively than any other international legal instrument with the right to food similar formulations are found in the Universal Declaration of Human Rights, Art. 25, par. 1², and in the Convention on the Rights of the Child, Article 24(2) (c)³, as well as in the CESCR Statement on World Food Crisis⁴. This Statement, adopted in May

¹ See KONG, K., *The Right to Food for All: a Right-Based Approach to Hunger and Social Inequality*, in *Suffolk Transnational Law Review*, 2009, pp. 525-566; HAUGEN, H. M., *Food Sovereignty: an Appropriate Approach to Ensure the Right to Food ?*, in *Nordic Journal of International Law*, 2009, pp. 263-292; NIADA, L., «Hunger and International Law: The Far-Reaching Scope of the Human Right to Food», in *Connecticut Journal of International Law*, 2006, p. 131 ff.

² Art. 25, par. 1 of the Universal Declaration of Human Rights states: «Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, disability, sickness, old age or other lack of livelihood in circumstances beyond his control». In the International Covenant on Civil and Political Rights the first article says: «In no case may a people be deprived of its own means of subsistence». In addition, Art. 6 states: «Every human being has the inherent right to life». This clearly implies the right to adequate food and other necessities for sustaining life.

³ This provision obligates states parties: «to combat disease and malnutrition, including within the framework of primary health care, through, inter alia, the application of readily available technology and through the provision of adequate nutritious food and clean drinking water, taking into consideration the dangers and risks of environmental pollution.»

⁴ *Amplius* ROEPSTORFF, P., «Economic, Social and Cultural Rights and the Question of Justiciability: International Legal Protection of the Right to Food», in K. HOFFMANN-HOLLAND (ed.), *Ethics and Human Rights in a Globalized World: an Interdisciplinary and International Approach*, Tübingen, 2009, pp. 301-322.

2008, recognizes that all State parties, individually and through international assistance, must ensure for everyone within their jurisdiction physical and economic access to the minimum essential food, which is sufficient, nutritionally adequate and safe, to guarantee freedom from hunger⁵. Furthermore, also the definition of food security most commonly used, that of the 1996 World Food Summit, bears considerable resemblance to the definition of the right to food in Art. 11 of the Covenant. Finally, *mutatis mutandis*, a similar approach to the right to adequate food can also be found in the Additional Protocol to the Geneva Conventions, and Relating to the Protection of Victims of International and Non-International Armed Conflicts⁶. This, in Art. 54, par. 1, declares that starvation of civilians as a method of warfare is prohibited. The following paragraph specifies that attack, destruction, removal or rendering useless objects indispensable to the survival of the civilian population, such as foodstuffs, drinking water installations and supplies and irrigation works, for the specific purpose of denying them for their sustenance value to the civilian population or to the adverse party, whatever the motive, whether in order to starve out civilians, to cause them to move away, or any other motive are prohibited⁷.

This article will therefore not analyse whether the right to adequate food can be considered to be a human right, as the above references and the fact that even if the right to adequate food has not been stated directly in international human rights law this would be implied in other provisions such as those asserting the right to life and health, clearly indicating that it can⁸. Rather the article will emphasize whether General Comment No. 12 and the CESCR Statement on World Food Crisis are of any help in identifying *when* the right to food is legitimately justified as a separate human right⁹. The main element

⁵ CESCR Statement: The World Food Crisis, UN Doc. E/C. 12/2008/1, 2008. See P. ROEPSTORFF, *op. ult. cit.*, p. 301 ff.

⁶ See COTULA, L., VIDAR, M., «The right to adequate food in emergencies, Rome, 2003, p. 52 ff; K. Mechlem, Food, Right to, International Legal Protection», in R. WOLFRUM (ed.), *The Max Planck Encyclopedia of International Law*, Oxford, 2008, also available at: www.mpepil.com

⁷ See SOLLNER, S., «The 'Breakthrough' of the Right to Food: the Meaning of General Comment No. 12 and the Voluntary Guidelines for the Interpretation of the Human Right to Food», in *Max Planck Yearbook of United Nations Law*, 2007, pp. 391 ff.

⁸ See also KENT, G., *The Human Right to Food and Dignity*, in *Human Rights*, 2010, p. 2 ff.

⁹ On the inter-relationship between the right to food and other ESC rights see EBRAHIMGOL, A., «Right to Food, a Prerequisite for Realization of other Rights», in *Mağalla-yi huquqī / Daftar-i kadamāt-i huquqī-yi bayna al-milālī-yi Ğumhūrī-yi Islāmī-yi Irān*, 2009, pp. 221-243.

of this article is consequently an analysis of General Comment No. 12 and the CESCR Statement. First, the background, structure, approaches and principles of General Comment No. 12 will be considered. Second, the substantive content of this specific General Comment will be analysed in the light of the most relevant «jurisprudence» of the CESCR and of the above mentioned Statement on World Food Crisis. Third, a critical appraisal of General Comment No. 12 will be given. Fourth, the section will address the bigger picture by seeking to assess whether General Comment No. 12 identifies principles which are helpful in order to clarify and possibly solve the relationship between the right to adequate food and the other human rights enshrined in the ICESCR that are equally and indivisibly linked to the inherent dignity of the human person such as the rights to life and health. Indeed this is not an easy task because state obligations under the right to health include measures relating to access to food and because States parties must: «ensure access to the minimal essential food which is nutritionally adequate and safe», as better explained below¹⁰. Fifth, some conclusions are drawn.

2. BACKGROUND, STRUCTURE, APPROACHES AND PRINCIPLES OF GENERAL COMMENT NO. 12

No less than 41 paragraphs are contained in General Comment No. 12. While there have been relatively few references to Article 11 in the work of the Committee, the year 1997 represented a change. In December of this year, the CESCR, after having taken into consideration the draft international code of conduct on the human right to adequate food prepared by international non-governmental organizations and the World Food Summit («WFS») Plan of Action in which governments announced that they would make every ef-

¹⁰ See *infra* par. 3. See also the UN Food and Agriculture Organization's 2004 «Right to Food Guidelines» (UN Food and Agriculture Organization (FAO), Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security, adopted by the 127th session of the FAO Council, Nov. 2004, www.fao.org/righttofood) which notes that: «States should address the specific food and nutritional needs of people living with HIV/AIDS or suffering from other epidemics...». *Amplius* ZIEGLER, J., *The fight for the right to food: lessons learned*, Basingstoke [etc.], 2011, p. 10 ff; NOURI-NAEINI, M. S., «The Right to Food and the Voluntary Guidelines in Perspective», in M. BORGHI, L. POSTIGLIONE BLOM-MESTEN (eds.), *The Right to Adequate Food and Access to Justice*, Bruxelles, 2006, p. 293 ff.

fort to implement the provisions of ICESCR Article 11,¹¹ set aside a so-called «Day of general discussion» to elaborate on the content of Art. 11, as well as its drafting. Experts from the United Nations contributed, and various papers are available on the home page of the High Commissioner for Human Rights. However, this day of general discussion did not lead to the adoption of a «Statement» on Art. 11 of the Covenant. Nevertheless, such strategy of a day of discussion on the most relevant issues related to the right to adequate food should be understood to reflect an interest by the Committee in seeking to keep the momentum while elaborating more in depth on the content of Art. 11 of the ICESCR by the means of a general comment. A general day of discussion indeed is less useful to the implementation of the right to food at national level than a general comment but serves to highlight the concerns of the Committee. The participation of the Committee in a symposium on «The substance and politics of a human rights approach to food and nutrition policies and programmes», organized by the Administrative Committee on Co-ordination/Sub-Committee on Nutrition of the United Nations at its twenty-sixth session, in April 1999, in Geneva and hosted by OHCHR, further confirms its concerns on the right to adequate food-related issues. As already stated above, the CESCR finally adopted a «Statement» in 2008. This, nevertheless, does not generically deal with the right to adequate food but specifically with the main impediment to the full realization of the human right to food and to be free from hunger, that is the world food crisis.

The preparation of General Comment No. 12 was facilitated by the information pertaining to the right to adequate food accumulated by the Committee through examination of State parties' reports over the years since 1979¹². This is the case even if only few States parties have provided information sufficient and precise enough to enable the Committee to determine the prevailing situation in the countries concerned with respect to the right to adequate food and to identify the obstacles to its realization¹³. The preparation

¹¹ In the Plan of Action, governments pledged their political will and common and national commitment to achieving food security for all and to an ongoing effort to eradicate hunger in all countries, with an immediate view to reducing the number of undernourished people to half its present level no later than 2015.

¹² See EIDE, A., «Origin and Historical Evolution of the Right to Food», in *Derecho a la alimentación y soberanía alimentaria*, Córdoba, 2008, p. 33 ff.

¹³ See COURTIS, C., «The Right to Food as a Justiciable Right: Challenges and Strategies», in *Max Planck Yearbook of United Nations Law*, 2007, p. 317 ss.

of General Comment No. 12 was triggered by the demand of Member States during the 1996 World Food Summit, for a better definition of the rights relating to adequate food in Article 11 of the Covenant, and by a special request to the CESCR to give special attention to the Summit Plan of Action in monitoring the implementation of the specific measures provided for in article 11 of the ICESCR¹⁴. The drafting of the General Comment was performed in close cooperation with the Food and Agriculture Organization of the United Nations (FAO). FAO has contributed to the increased awareness on the existence and content of Article 11 of the Covenant by co-hosting with the Office of the United Nations High Commissioner for Human Rights (OHCHR) two expert consultations on the right to adequate food as a human right.

Concerning the structure, General Comment No. 12 has five sections: introduction and basic premises (1-5); normative context (6-13); state parties' obligations and violations (14-20); implementation at the national and international levels (21-41). This structure has been followed by other subsequent General Comments such as General Comment No. 14 on the right to the highest attainable standard of health and General Comment No. 15 on the right to water. It must be noted, however, that only the most recently adopted general comments have one full section on violations. As in General Comment No. 13 on the right to education violations in General Comment No. 12 are outlined just in few paragraphs.

Regarding the approach, those sections in General Comment No. 12 addressing implementation and violations apply the recognized framework on respect, protect and fulfil, where the fulfil obligation comprises both the obligation to facilitate and the obligation to provide. This is a framework that may be applied with regard to all categories of human rights: civil, cultural, economic, political and social. At the same time, the merits of applying this framework on the human right recognized in accordance with Art. 11 of the Covenant are partially self-evident, and also partially misleading. As mentioned below in this section, the identification of the obligations and violations at the level of fulfil present challenges. Initially, it is sufficient to say that General Comment No. 12 is not always clear regarding how States parties should strengthen people's access to and utilization of resources and means to ensure their livelihood. Paragraph 5 of this Comment which stresses that:

¹⁴ See EIDE, A., *supra*, n. 12.

«... the roots of the problem of hunger and malnutrition are not lack of food but lack of access to available food, inter alia, because of poverty, by large segments of the world's population» is self evident, but, at the same time too generic, because it does not clarify whether the term «access» means that individuals can make a claim on available food. Again, this paragraph would have been less generic if the phrase «lack of food» had been followed by «in the community». Thus, introducing this level of obligation in this latter context does not add so much to the other levels of duties.

Concerning the overall interpretative principles of General Comment No. 12, these can be summarized in four main points. First, paragraph 6 very explicitly emphasizes that the right to adequate food, like other elements of the human rights to an adequate livelihood, should not be understood simply in terms of the delivery of objects. All human rights work must be based on clear recognition of and respect for human dignity, not about meeting physiological needs. This is because dignity does not come from being fed. It comes from providing for oneself. It follows then that the right to food «must not be interpreted in a narrow or restrictive sense which equates it with a minimum package of calories, proteins and other specific nutrients». In other terms, simply delivering pre-package meals in the way one can deliver feed pellets to livestock cannot fulfil the right, as fulfilling one's need for food in the biological sense is radically different from fulfilling one's human right to food. A corresponding approach is found in the definition of the right to food by the UN Special Rapporteur as the rights given to human to have normal, permanent and unlimited access, either directly or by acquisition, to qualitatively and quantitatively sufficient and adequate food equal to the cultural societies of the people to which he belongs, and which ensures a dignified life free of fear.

Second, paragraph 4 of General Comment No. 12 points out that the human right to food is indispensable for the realization of other human rights. Several paragraphs of General Comment No. 12 confirm both the relationship between the realization of Art. 11 and the enjoyment of other human rights, as well as the balancing of Art. 11 in order to achieve the realization of other recognized human rights. This is most explicitly spelled out in paragraphs 7 and 15, the latter of which outlines the «core obligations». At the same time, paragraph 17 of General Comment No. 12 establishes a high threshold for introducing deliberately retrogressive measures, for the purpose of restricting the enjoyment of the human rights recognized under Art. 11, paragraphs 1 and 2. Moreover, the fact that the articulation of the right to adequate food

in contemporary international human rights law arises in the context of the broader human right to an adequate standard of living is indeed a further proof of this assertion.

Third, various paragraphs of the General Comment firmly differentiate the broad concern with food supplies from the immediate need to deal with malnutrition and hunger. This is mainly spelled out in paragraph 5 that deals with the fundamental distinction between availability and access to adequate food.

Fourth, paragraph 18, by underlying that the principle of non-discrimination is particularly important for the right to food, stresses that any discrimination in access to food, as well as to means and entitlements for its procurement, on the grounds of race, colour, sex, language, age, religion, political or other opinion, national or social origin, property, birth or other status with the purpose or effect of nullifying or impairing the equal enjoyment or exercise of the right to adequate food constitutes a violation of the ICESCR. Thus state's obligations mentioned in Art. 11 must be implemented and enforced without discrimination, for example, on the basis of gender or generation. Non-discrimination on the basis of generation has to encompass children, and the aged as well as future generations. As far as children and future generations are concerned, the principle of non-discrimination calls for sustainability of access to food, according to the same paragraph of General Comment No. 12. This, again according to par. 18 of this General Comment, includes concerns about future food production, as many current agricultural production practices are not sustainable,

Based on this structure, approach and interpretative principles, a more in-depth analysis of the actual content of General Comment No. 12 will now be undertaken.

3. SUBSTANTIVE ASPECTS OF GENERAL COMMENT. NO. 12

From the wording of Art. 11 of the Covenant, everyone has the right to food, clothing and housing; thus the reference in Article 11, paragraph 1 to «himself and his family» does not imply any limitation upon the applicability of this right to individuals or to female-headed households. Indeed the right to adequate food is realized only 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 procurement¹⁵. This is the case even if, undoubtedly, food is largely a women's issue because, at least in most families, it is women who prepare the meals and who work in the fields¹⁶. Having stated this, it is worth stressing that the terms «food, clothing and housing» indicate that food constitutes just one dimension of adequate livelihood, and it would be inappropriate to argue that it is more important than, say, housing or education. All aspects of livelihood should be kept in balance. While there have been occasional attempts to interpret the right to adequate food under Art. 11 of the Covenant in a narrow or restrictive sense which equates it with a minimum package of calories or proteins, the Committee does not take such a restrictive approach in General Comment No. 12. While this is only explicit about food, clothing and housing, as Art. 11 of the ICESCR, the right to other requirements addressed in other parts of the covenant and other human rights instruments cannot be categorically excluded from the scope of General Comment No. 12. At the same time, it must be noted that the primary concern of the drafters, working in the 1990s, was to identify some of the principal issues the Committee considers to be important in relation to the right to food. Furthermore, it is worth observing that the aim of this General Comment was to protect the fundamental right to freedom from hunger and malnutrition.

As has been argued in the entry «The Right to Food and Adequate Standard of Living» of the *Encyclopaedia of Human Rights*¹⁷ and confirmed by the FAO's «Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security»¹⁸, food security does *not* necessarily fall outwith the scope of Art. 11 of the ICESCR. This is because the right to adequate food, often dealt with in relation to health issues in the ICESCR reporting procedure, should, indeed, be considered in the context of national food security¹⁹. Yet a right-to-food based approach to food security is distinct from other approaches to reducing hunger and malnutrition

¹⁵ See COTULA, L., VIDAR, M., *supra*, n. 6, at p. 21.

¹⁶ *Ibidem*.

¹⁷ See KENT, G., «The Right to Food and Adequate Standard of Living», in D. P. FORSYTHE (ed.), *Encyclopaedia of Human Rights*, 2009, II, p. 225 ff.

¹⁸ In 2004, the Right to Food Guidelines (available at: <http://www.fao.org/docrep/meeting/009/y9825e/y9825e00.HTM>) were adopted by FAO members to help achieve this fundamental right in their countries.

¹⁹ See e. g. CESCR, UN Doc. E/2003/22 (2002) 60 at para.430.

and complements food security considerations with dignity, rights acknowledgment, transparency, accountability, and empowerment concerns. It is based on an *a priori* commitment to the value of human dignity and makes the individual an agent of change in a way that enables him or her to hold governments accountable and to seek redress for violations of his or her rights.

The most comprehensive analysis of the core contents of Art. 11 undertaken in General Comment No. 12 is on the three phrases «adequacy and sustainability of food availability», «free from adverse substances» and «cultural or consumer acceptability». Eight paragraphs seek to clarify their content. Paragraph 1 of General Comment No. 12 states that: «International Covenant on Economic, Social and Cultural Rights deals more comprehensively than any other instrument with *the right to adequate food*»(emphasis added). Hence, it is not surprising that the Committee, in subsequent paragraphs, makes clear that even state obligations under the right to health include measures relating to access to food. Though the right to food is not included in Art. 12 ICESCR food is often dealt with in relation to health issues in the ICESCR reporting procedure. It may, therefore, be concluded that access to adequate nutritious foods is considered to fall under the protection of the right to health. It can also be concluded that in addition to the existing separate human right to adequate food, the right to health includes a right to access to adequate food. Within the context of health, access to food will involve the quality of foods and the health effects of inadequate foods, rather than their mere availability. Contracting states must: «ensure access to the minimal essential food which is nutritionally adequate and safe.»²⁰ Thus economic accessibility implies that personal or household financial costs associated with the acquisition of food for an adequate diet should be at a level such that the attainment and satisfaction of other basic needs are not threatened or compromised, according to paragraph 13 of the General Comment No. 12.

In General Comment No. 14 on the right to the highest attainable standard of health the CESCR makes even far-reaching links between the right to

²⁰ CESCR, General Comment No. 14 on the Right to the Highest Attainable Standard of Health, U.N. Doc. E/C 2000 (Dec. 4, 2000), paras. 4, 11, 43. The UN Food and Agriculture Organization's 2004 «Right to Food Guidelines» notes that «States should address the specific food and nutritional needs of people living with HIV/AIDS or suffering from other epidemics...» UN Food and Agriculture Organization (FAO), Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security, adopted by the 127th session of the FAO Council, Nov. 2004, www.fao.org/righttofood

health, in Article 12 of the ICESCR, and the right to food, in Article 11 of the same covenant. A corresponding approach can be found in General Comment No. 15 on the right to water. In this General Comment the Committee emphasizes that: «the right to water is a prerequisite for the realization of other human rights» (par. 1). The intrinsic link between the right to water and the right to adequate food is self evident in the case of disadvantaged and marginalized farmers, including women farmers, according to paragraph 7 of General Comment No. 14. Here, again according to the same paragraph, it is crucial to ensure sustainable access to water resources for agriculture in order to realize the right to adequate food.

The sixth paragraph of General Comment No. 14 ends with the wording: «the right to adequate food will have to be realized progressively». The same paragraph makes clear that States, however, have a core obligation to take the necessary action to mitigate and alleviate hunger as provided for in paragraph 2 of Art. 11, even in times of natural or other disasters.

Paragraph 13 of the General Comment No. 14 throws a spotlight on access to adequate food – regardless of the form that such access takes. It tersely suggests that the right to food may be exercised through income-generating activities that enable procurement of food or through combinations of both. This approach also emerges from the statement that the right to food is realized when individuals or groups have «physical or economic access... to adequate food *or means for its procurement*».²¹ This applies to both food availability and accessibility. The availability of food may be assured through either direct food production or «well functioning distribution, processing and market systems that can move food from the site of production to where it is needed». Accessibility of food may be achieved through «any acquisition pattern or entitlement through which people procure their food; this would include both food production and procurement. Of note, a similar approach is taken in the Right to Food Guidelines. These Guidelines explain that the right to adequate food is realized when every man, woman and child, alone or in community with others, has physical and economic access at all times to adequate food or means for its procurement. They also clarify that adequate food may also refer to socioeconomic and cultural circumstances. Similar to an adequate standard of living, adequate food means different things under

²¹ Paragraph 6 of the General Comment No. 12 (emphasis added).

different cultural circumstances. Nevertheless, there is a minimum universal standard underlying all (cultural and other) circumstances. This minimum has even been spelled out in article 11(2) of ICESCR as the fundamental right to freedom from hunger.

The most noteworthy aspect of the sub-section on the normative content of Art. 11, paragraphs 1 and 2 of the Covenant is that paragraph 6 of General Comment No. 12 provides a concept of «adequacy» in relation to the right to adequate food as encompassing a number of different factors, that should be taken into account in determining whether particular foods or diets which are accessible can be considered the most appropriate under given circumstances for the purposes of the ICESCR. The precise meaning of «adequacy» is to a large extent determined by prevailing social, economic, cultural, climatic, ecological and other conditions, according to paragraph 6 of this General Comment.

Another key issue of General Comment No. 12 is the notion of «sustainability». This notion, which incorporating the concept of long-term availability and accessibility, is intrinsically linked to the notion of adequate food or food security, implying food being accessible for both present and future generations, as the right to adequate food is inseparable from social justice, requiring the adoption of appropriate economic, environmental and social policies, at both the national and international levels, and oriented to the eradication of poverty and the fulfilment of all human rights for all.

General Comment No. 12, by identifying the scope of the right to food under Art. 11 of the Covenant, has made a distinction between the right to adequate food and the right to be free from hunger. The right to be free from hunger ensures a minimum daily nutritional intake and the bare survival of the person. The right to adequate food goes beyond freedom from hunger to include also an «adequacy» standard (in terms of quality, quantity and cultural acceptability).

4. A CRITICAL APPRAISAL OF GENERAL COMMENT NO. 12

As mentioned initially, the application of a comprehensive framework of respect, protect and fulfil poses particular challenges in the context of the rights recognized in Art. 11 of the Covenant²². These three levels of state

²² See COURTIS, C., *supra*, n. 13, p. 324 ff.

duties are also applied in order to identify violations. By this in-depth clarification, the right to adequate food is elaborated upon in more detail than several other rights recognized in the ICESCR, and hence given a certain prominence.

On the one hand, the application of a framework of respect, protect and fulfil might imply that States are becoming more aware of the means available to ensure the realization of the human rights recognized in Art. 11. On the other hand, the application of such a comprehensive framework on one of the paragraphs that has been given relatively limited attention by the CESCR must be noted. General Comment No. 12 is, to a limited extent, based on information provided in the state parties' reports, or in the CESCR's examination of these reports. The CESCR hence indicates that they are more concerned about the right to adequate food than what is reflected in the examination of state reports²³. Thus, States and international financial institutions, notably the International Monetary Fund (IMF) and the World Bank, might be more attentive to all dimension of this human rights²⁴.

As an example, in the context of violations, paragraph 17 of General Comment No. 12 identifies a violation where there is:

«... failure to ensure the satisfaction of, at the very least, the minimum essential level required to be free from hunger».

Paragraph 19 lists among the examples of violations the «failure to regulate activities of individuals or groups so as to prevent them from violating the right to food of others». The same paragraph clarifies that in conflict situations, for instance, the obligation to protect entails that the State must take appropriate steps to prevent armed groups and other non-State actors from looting foodstuffs and depriving civilians of access to food.

Moreover, there are other paragraphs that afford relatively high levels of protection to the right to adequate food. First, in the context of the term

²³ See DENNIS, M., STEWART, D. P., «Justiciability of Economic, Social and Cultural Rights: Should There be an International Complaints Mechanism to Adjudicate the Right to Food, Water, Housing and Health?», in *American Journal of International Law*, 2004, p. 462, available at: http://www.escr.net.org/resources_more/resources_more_show.htm?doc_id=431329

²⁴ See SKOGLY, S., *The human rights obligations of the World Bank and the International Monetary Fund*, London, 2001, p. 156 ff. See also GIANVITI, F., «Economic, Social and Cultural Rights and the International Monetary Fund», in *Current Developments in Monetary and Financial Law*, 2005, p. 3 ff.

«violation of the right to food», General Comment No. 12 states a violation exists if there is a failure of a: «State party to take the necessary steps to the maximum of its available resources, as previously pointed out by the Committee in its General Comment No. 3, paragraph 10»²⁵. Second, the burden on a State claiming to be unable to carry out its obligation for reasons beyond its control of proving that this is the case and that it has unsuccessfully sought to obtain international support to ensure the availability and accessibility of the necessary food» indirectly shows a level of protection which might at least be as high as the level of protection under other existing human rights treaties, especially when seen in relation to the fact that no restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society. The same conclusion stems from par. 19 of the General Comment No. 12 which provides that the obligation to take steps to realize the right to adequate food also entails that the State cannot arbitrarily withhold its consent when it is unable or unwilling to provide necessary humanitarian assistance. A State arbitrarily denying its consent to humanitarian assistance in such circumstances would violate its obligations under Art. 11 of the ICESCR, particularly the obligation to respect, again according to par. 9 of General Comment No. 12. Indeed this paragraph includes among the violations of the right to adequate food: «the prevention of access to humanitarian food aid in internal conflicts or other emergency situations». However, where the denial would threaten the lives of the affected population, the State would violate the right to life. Third, General Comment No. 12 is not elaborating in detail on the application of alternative measures than those found under national legislations dealing with the right to adequate food. Two examples that could be encouraged as alternatives are legislation against denial of access to food to particular individuals or groups, and legislation ensuring access to humanitarian food aid in internal conflicts or other emergency situations.

To avoid acting in violation of the ICESCR, the States parties need to have mechanisms and institutions in place to determine what is «unauthorized», what is «unreasonable prejudice» and what is «compensation»²⁶. This phrase implies that the distinction between the right to food as recognized in

²⁵ On the same line of reasoning see CESCR, UN Doc. E/1994/23 (1993), para. 105.

²⁶ See accordingly CESCR, UN Doc. E/2002/22 (2001) 130 at para. 938.

Art. 11 of the Covenant and the fundamental right to freedom from hunger and malnutrition is difficult to draw²⁷. No State has yet provided these mechanisms and institutions as part of their human rights regimes, and therefore they need to rely upon existing socio-economic rights legislation to ensure that 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.

Another objection relating to the application of the three levels of state duties is that General Comment No. 12 does not make a logical distinction between the obligations on the level of protect and the obligations on the level of fulfil. The main reason for this is that while General Comment No. 12 acknowledges the various means by which Art. 11 can be given effect, the emphasis –also with regard to the obligations on the level of fulfil– is on the legal measures. These measures are more appropriately placed on the level of protect, but are reiterated on the level of provide. The additional duties on the level of facilitate are, according to par. 36, to: «facilitate access to food and to provide the necessary aid when required». This means that governments must pro-actively engage in activities intended to strengthen people's access to and utilization of resources so as to facilitate their ability to feed themselves. As a last resort, whenever an individual or group is unable to enjoy the right to adequate food for reasons beyond their control, states have the obligation to fulfil that right directly. Moreover, the following paragraph defines the duties of the States parties on the level of fulfil (facilitate and provide) as to ensure that food aid should be based on the needs of the intended beneficiaries. The same paragraph also states that products included in international food trade or aid programmes must be safe and culturally acceptable to the recipient population. Finally, it stresses 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». In this regard, the Committee recalls its position, stated in its General Comment No. 8, on the relationship between economic sanctions and respect for economic, social and cultural rights.

²⁷ See in KUNNEMANN, R., «The Right to Adequate Food: Violations Related to Its Minimum Core Contents», in A. CHAPMAN, S. RUSSELL (eds), *Core obligations: building a framework for economic, social and cultural rights*, Antwerp, 2002, p. 165 ff.

General Comment No. 12 limits, however, the list of violations on the fulfil level. In addition to failure to provide effective remedies against the actions of powerful others that might violate the right to food, which is, arguably, an obligation on the level of protect, General Comment No. 12, at par. 39, identifies as a violation on the level of fulfil the failure to provide: «Food aid... in ways which do not adversely affect local producers and local markets».

It is therefore arguable that the list of state parties' violation of human rights obligations could have been made shorter. General Comment No. 12 contains three long paragraphs on violations. However, there is no clear distinction between the enforcement of the right to adequate food and the human rights-based «opportunities» and «remedies».

Before ending this critical appraisal of General Comment No. 12, two more issues will be brought up. First, while the acknowledgment that any person or group who is a victim of a violation of the right to adequate food should have access to effective judicial or other appropriate remedies at both national and international levels according to this General Comment has already been commented upon, it must be observed that issues relating to collective enjoyment of the effective right to food are not examined in detail. Paragraph 6 of General Comment No. 12 states that the right to adequate food recognized in Art. 11 of the Covenant can also be enjoyed by groups of individuals or by communities. However, this paragraph does not supply any outcome indicator to register the results of the right to food measures in terms of collective enjoyment of such fundamental right.

Finally, in several paragraphs General Comment No. 12 addresses legal mechanisms which involve financial resources. First, par. 32 emphasizes the need to provide: «... effective judicial or other appropriate remedies at both national and international levels». *Mutatis mutandis*, the same line of reasoning is found in par. 29 which provides that: «States should consider the adoption of a framework law as a major instrument in the implementation of the national strategy concerning the right to food»²⁸. Second, after having recalled that the incorporation in the domestic legal order of international instruments recognizing the right to adequate food can significantly enhance the scope and effectiveness of remedial measures, par. 33 states that: «courts would then be empowered to adjudicate violations of the core content of the right to food by

²⁸ See also, *a contrario*, CESCR, UN Doc. E/1995/22 (1994) 37 at para. 178.

direct reference to obligations under the Covenant». Third, par. 21 says that states are required to «identify the resources available to meet the objectives (that everyone is free from hunger and as soon as possible can enjoy the right to adequate food) and the most cost-effective way of using them». The phrase «available resources» is different from the standard formulation of «*maximum* of its available resources» as found in Art. 2, par. 1 of the ICESCR. By avoiding the term «maximum», the CESCR somewhat modifies the pressure for providing costly and comprehensive judicial and administrative remedies. It is a burden on many states to introduce and manage appropriate means for ensuring the right to adequate food. In conclusion, General Comment No. 12 should be understood to establish relatively high standards for ensuring the enjoyment of this fundamental right.

5. FINAL REMARKS

The initial question being raised was whether General Comment No. 12 is of any help in identifying when the right to adequate food is legitimately justified as a human right. Based on the analysis undertaken, it is concluded that General Comment makes an important distinction between the right to adequate food and the right to be free from hunger and malnutrition. This clear distinction will most likely reduce the likelihood of general statements saying that «the right to food and the right to be free from hunger» are human rights.

General Comment No. 12, however, does not introduce a principle to make a clear distinction between those two rights, on the one hand, and the other ESC rights recognized in the Covenant which, as the right to adequate food, are indivisibly linked to the inherent dignity of the human person. There is a fundamental core of the right to adequate food that gives rise to human rights protection. Does General Comment No. 12 define this core? It does not do so explicitly. To identify the criteria for determining the minimum core of the right to adequate food, one possibility is to apply the subtitles in the section on normative content in General Comment No. 12. These are: «Adequacy and sustainability», «Accessibility» and «Availability». Should a test be undertaken on whether supplying the right kind of food falls within the scope of human rights obligations, it should also be supplemented with a criterion of whether the rationale for the protection is embedded in human dignity.

Thus, General Comment No. 12 does not provide the full answer to distinguish between «the right to the minimal essential food which is nutritionally adequate and safe» that might qualify under human rights protection in accordance with Art. 11 of the Covenant, and efforts for food security programs qualifying under legal protection, but are outwith the human rights realm. The reason for this is also to be found in the wording of Art. 11 of the Covenant, which is both ambiguous and complex.