
Right to Food, Food Security and Food Aid Under International Law, or the Limits of a right-based approach

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Abstract

The right to food has become a pillar of international humanitarian and human rights law. The increasing number of food-related emergencies and the evolution of the international order brought the more precise notion of food security and made a potential right to receive food aid emerge. Despite this apparent centrality, recent statistics show that a life free from hunger is for many people all over the world still a utopian idea. The paper will explore nature and content of the right to food, food security and food aid under international law in order to understand the reasons behind the substantial failure of this right-centred approach, emphasising the lack of legal effects of many food-related provisions because of excessive moral connotations of the right to be free from hunger. Bearing in mind the three-dimensional nature of food security, the paper will also suggest that all attention has been focused on the availability of food, while real difficulties arise in terms of accessibility and adequacy. Emergency situations provide an excellent example of this unbalance, as the emerging right to receive food aid focus itself on the availability of food, without improving local production and adequacy. Looking at other evolving sectors of international law, such as the protection of the environment, and particularly the safeguard of biological diversity, alternative solutions will be envisaged in order to “feed” the right to food.

Keywords: *Right to food; Food security; Food aid; International law; Human rights; Biological diversity*

Introduction

Commenting the results of the State of World Food Insecurity 2013 report, José Graziano da Silva, Kanayo F. Nwanze and Ertharin Cousin - leaders of the Food and Agriculture Organisation, the International Food for Agricultural Development and the World Food Programme - made an “appeal to the international community to make extra efforts to assist the poorest in realising their basic human right to adequate food. The world has the knowledge and

the means to eliminate all forms of food insecurity and malnutrition” (FAO-IFAD-WFP, 2013). This *prima facie* innocent statement is an excellent introduction to present the aim of the paper that is to emphasise the weaknesses of international efforts aimed at stemming malnutrition. Is it acceptable that after more than 60 years from the consecration of the right to food at the international level, attention is still focused on “extra” efforts?

Before embarking in its critical part, the paper will outline a clear definition of the nature and content of the right to food and a projection of the evolution of the legal concept from right to food to food security. A first, partial conclusion will emphasise how the legal implications of the right to be free from hunger are still overwhelmed by moral – if not openly moralistic – considerations. The focus will shift, then, on the right to food in emergency situations and on the existence of a possible right to receive food aid in case of inability or unwillingness of the state to directly grant the right to food to its population. Even in this case, the right-centered approach is not sufficient, since the accent is put on the dimension of availability, without taking measures aimed at granting accessibility and adequacy. In that sense, the paper will suggest as a partial solution to overcome the right-based approach in order to embrace a greater complexity in which international environmental law, and in particular the protection of biological diversity, could play a pivotal role in the achievement of the aim of a world free from hunger.

Right to food: nature, content, limits of the international regime

a) The Universal Declaration of Human Rights

The conventional biography of the right to food has a traditional act of birth in the famous “Four Freedom Speech”, delivered by the U.S. President Franklyn D. Roosevelt to the Congress on January 6, 1941. In this speech, he announced the fundamental freedoms all human beings ought to enjoy: freedom of speech and expression, freedom of worship and believe, freedom from fear and freedom from want (Crowell, 1955:266). It is, however, only after World War II that the march of the right to food towards an

international legal recognition began. At first, the right to food made its entry in the international legal framework through the rather vague notions of freedom from want and right to an adequate standard of living, incorporated in the preamble and in Article 25 of the 1948 Universal Declaration of Human Rights, respectively.

Initially deprived of any legal effect (Sohn, 1967), as it was intended to be a “common standard of achievement for all people of all nations” (Whiteman, 1965:243), a part of this document has been interpreted as customary international law by many scholars (D’Amato, 1986; Kamminga, 1992) following a series of judgements delivered by the International Court of Justice (ICJ) between 1970 and 1986. In the Barcelona Traction case, the International Court of Justice stated that the principles and rules concerning the basic rights of the human person “*have entered into the body of general international law*” (ICJ, 1970). In the following years, two judgements explicitly mentioned the UDHR: in the Hostages case the ICJ affirmed that some principles of the UDHR are a proof of the existence of universal human rights (ICJ, 1979), while in the Nicaragua case the judges deemed the UDHR, together with other important resolutions of the UN General Assembly, valuable to contribute to the formation of a solid *opinio iuris* in the creation of customary law in the field of human rights (ICJ, 1986). Those judgements, however, can not be simplistically interpreted as a “customisation” of the UDHR *tout court*, as being merely quoted in the Declaration is not sufficient for a right to be recognised as part of general international law (Hannum, 1998:). As far as the right to food is concerned, it is possible to suggest that Article 25 of the UDHR has put the basis for the existence of an *opinio iuris* which allows everybody to enjoy a minimum entitlement to food, as well as to clothing and housing (Alfredsson - Eide,

1999:523). Nevertheless, the absence of a uniform and constant practice by states makes the existence of a customary rule of international law related to the right to food difficult to be proven.

b) The International Covenant on Economic, Social and Cultural Rights

A legally binding provision for the right to food has however been reached at the level of treaty law after the approval of the International Covenant on Economic, Social and Cultural Rights (ICESCR) (UN, 1966). In particular, Article 11 of the ICESCR gives the right to an adequate standard of living a food-oriented interpretation, as the second paragraph literally states that *"the State Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take individually and through international cooperation, the measures including specific programs"* which are needed to improve methods of production, conservation and distribution of food by making use of technical and scientific knowledge. (UN, 1966)

The content of this obligation was further clarified by General Comment (GC) n.12 of the Committee on Economic, Social and Cultural Rights (CESCR): the right to food is realised when *"every man, woman and child, alone and in community with others, has physical and economic access at all times to adequate food or means for its procurement"* (CESCR, 1999). Furthermore, the GC n. 12 identified three main dimensions of the right to food: availability in production and selling of alimentary goods; accessibility, which requires the guarantee of economic and physical access in a way that food is affordable and reachable for every category of people in every place, even if remote; adequacy to the dietary needs and living conditions (CESCR, 1999). The

realisation of the right to food thus requires on the one hand the availability of food in a sufficient quantity and quality, and on the other the accessibility to adequate food in economic and physical terms. Further indications come from a study on the interrelation between malnutrition and health diseases by the Advisory Committee of the Human Rights Council. In particular, right to food was further specified as

"the right to have regular, permanent and unrestricted access, either directly or by means of financial purchases, to quantitatively and qualitatively adequate and sufficient food corresponding to the cultural traditions of the people to which the consumer belongs, and which ensures a physical and mental, individual and collective, fulfilling and dignified life free of fear" (Ziegler, 2011).

As for state obligations, the right to food as announced in this universal instrument which entails three specific types of provision at the domestic level: the obligation to *prevent*, which requires governments exercising their domestic sovereignty not to take measures which can end up with arbitrarily deprive people of their right to food; the obligation to *protect*, which requires governments in the exercise of both domestic and external sovereignty to hinder third parties (states, individuals, corporations) from violating the right to food to others; the obligation to *fulfil*, which requires governments to provide pro-active measures aimed at strengthen people's access to resources and facilitate their utilisation in order to eradicate hunger and malnutrition (Ziegler, 2012).

Those three obligations are, in a certain sense, an exception to what the ICESC

States at Article 2, which announces the principle of progressive development (CESCR, 1999). Together with the prohibition of discrimination in the exercise and enjoyment of all rights recognised under the Covenant (Article 2, paragraphs 2 and 3), the obligation to pursue the realisation of the scopes of the Covenant to the maximum of their available resources and by all the appropriate means and the prohibition of retrogressive measures which would end up in deteriorating the level of fulfilment of the right to food, the obligations to respect, protect and fulfil are of immediate effects. However, the existence of the immediate obligations to respect, protect and fulfil does not make of the right to food an automatic right to be fed and not even an utopian right to meet individual preferences (FAO, 2010).

Evolution of a concept: from right to food to food security

The approval of the ICESCR, far from being the starting point of a progressive realisation of the right to be free from hunger, became the origin of a stasis. In that way, the right to food – as a part of the broader concept of freedom from want – disappeared from the agenda of priorities of the international community to finally reappear at the end of the Cold War, following the constantly growing number of emergencies related to food scarcity (FAO, 1998). The World Food Summit (1996) and later on the Millennium Assembly (2000) saw a renewed commitment by States in order to eradicate hunger and malnutrition.

In particular, during the 1996 World Food Summit, the notion of right to food underwent a further specification, as the new notion of “food security” was introduced. The expression came to indicate the situation in which “*all people at all times have access to sufficient, safe,*

nutritious food to maintain a healthy and active life” (FAO, 1996). Three pillars are called to sustain food security (WHO, 2013): availability, accessibility and use. The first refers to the supply of food through production, distribution and exchange (Gregory – Ingram – Brklaich, 2005). The second comes to mean economic affordability and allocation of food in response to the preferences of individuals and households (Gregory – Ingram – Brklaich, 2005). The third refers to the quantity and quality of food, which must be safe and enough to meet physiological requirements of each individual (Ecker – Breisinger, 2012). To those pillars, the FAO added a fourth pillar that is the stability of availability, accessibility and use over time (FAO, 2006).

Together with those notions, the summit produced two documents: the Rome Declaration on Food Security, which called member states of the United Nations to work to halve the number of chronically undernourished people by 2015, and the Plan of Action, which sets a number of targets for government and NGOs in order to achieve food security and overcome the serious challenges to achieving food security (such as water scarcity, failed agriculture market regulation, spike of commodity prices, population growth, climate change, loss of agricultural land). This plurality of factors made it clear the necessity of a multidimensional approach (De Schutter, 2010).

One of the main tools of this multidimensional approach is the identification of eight UN Millennium Development Goals (MDG), elaborated by the Millennium Assembly at the UN headquarters (UN, 2000): through the first MDG, states committed themselves to the eradication of extreme poverty and hunger, with as a first aim to halve by

2015 the number of people suffering from hunger.

Food security and Millennium Development Goals; numbers and reasons of a failure

Looking at recent statistics, however, the number of countries in which the ambitious target set by the Millennium Development Goal n. 1 will not be achieved is dramatically high: many nations in sub-Saharan Africa and in South-East Asia present no progress and, in some cases, the situation even deteriorated (FAOSTAT, 2010). A recent report issued by the Food and Agriculture Organisation, the International Fund for Agricultural Development and the World Food Programme reveals that one in eight people in the world is suffering from chronic undernourishment (FAO-IFAD-WFP, 2013). This means 867 million human beings, among which 1 out of 9 is a child under five years. This statistic hides an even more dramatic reality: after almost two decades of slow yet progressive decline, in which the global percentage of hungry people dropped from 18.6 to 12.5 (FAO-IFAD-WFP, 2013), the number of undernourished people is stagnating because of the global economic recession. By the way, the phenomenon is not confined to developing countries: 16 million people are suffering from hunger in the developed world. (FAO-IFAD-WFP, 2013). This means that since the global economic crisis broke out, the progress in reducing hunger has leveled off, while the Millennium Development Goal target of 11.6 percent of undernourished people by 2015 is far from being achieved. In this context of actual stagnation, it is surprising that FAO, IFAD, and WFP, crucial players in the fight against world hunger, are satisfied with getting closer than what expected to the target (FAO, 2012). Talking about statistics, in fact, the 0.9 percent gap in the achievement of the

MDG will leave 63 million people suffering from malnutrition even after 2015.

The reasons of those substantial failures rest mainly in the lack of binding effects of those agreements reached at the international level. As in a negative replica of the internal system of “checks-and-balances”, the ambitiousness and firmness of those statements made by states is counterbalanced by the almost total lack of legal value: the declaration issued from the World Food Summit, as an example, reaffirms the right to have access to safe and nutritious food (FAO, 1996), while at the same time pledging political will and commitment to achieving food security for all through a Plan of Action, which is unfortunately non binding. Equally deprived of legal obligation are the Millennium Development Goals, which are a striking example of soft law: even if it would seem relatively easy to assume that the obligation to achieve those aims could have become a part of customary international law because of a wide acceptance in practice (Alston, 2004:18), and following the reiterated commitment expressed by States in the context of the Millennium Assembly (2000), the Johannesburg World Summit on Sustainable Development (2002) and the Monterrey Consensus (2002), there is no substantial evidence of a solid *opinion iuris* that governments made those commitments with the requisite intent to be bound (Alston, 2004:21). Even worse, the potential mandatory legal nature is overwhelmed by moral considerations when approaching the issue of the right to have access to food: it seems thus important to stress that the debate “is not about charity, but about ensuring that all people have the capacity to feed themselves in dignity” (Ziegler, 2012). In other words, until the right to have a safe access to food will be seen as a “courtesy” rather than a genuine obligation imposed on states, the protection and promotion of

the possibility for all human beings to live in dignity and free from malnutrition will be put at stake.

Emergency situations and right to food: towards a right to receive food aid?

The need for a paradigmatic change, in which the logic of dependency has to be abandoned in order to embrace a fully legal point of view is well exemplified by emergency situations, such as armed conflicts, natural catastrophes, and man-made disasters. Emergencies were defined by the Council of Europe as those situations which *“affect the whole population and constitute a threat to the organised life of the community of which the state is composed”* (Council of Europe, 2009).

Integrating the issue of the right to food in an emergency context implies an attempt to grant to an increasing number of people the tools to get the food they need even in situations in which that right is threatened. Since late 1970s to 1997 the share of global food aid dedicated to emergency situations (both natural and man-caused) rose from 10% to roughly 42%. In the same period of time, the total amount of World Food Programme's global resources devoted to supporting people in emergency situations rose from approximately 10-15% to nearly 70% (FAO, 2002). This increase in numbers reflects the dramatic change both in the nature and the dimensions of the emergencies related to the protection and promotion of food security international community witnesses since the end of the Second World War. Inter-state and, more recently, intra-state conflicts became the first source of hunger (FAO, 2002) while droughts and other natural disasters are amplified in their proportions by the consequences of climate change as the terrible typhoon Haiyan in the Philippines recently came to demonstrate. In those

contexts, the obligations of states may be seen on a different level: while in normal situations states have the obligation to respect, promote and fulfil the right to food in relation to available resources, in emergencies the needs of the victims may exceed the capacity or, in some cases, the will of States to respond (FAO, 2002). In those cases, there is an obligation to accept assistance from other sources in order to protect the lives and fundamental rights of all affected people (FAO, 2002).

It is precisely in emergency situations that one of the main limits of the rights-based approach emerge, as the accent is always put in the dimension of availability of food. On the contrary, the right to adequate food in emergency situations should not be solely identified as a “distributive” issue: in case of drought and other types of recurring or sudden natural disasters, the international community should support states not only by supplying emergency food aid, but also by helping them to strengthen their preparedness, prevention and management capacities (WHO, 1999) while state authorities should pay more attention to the elaboration of effective early warning systems, on the one hand, and ensure a *“peaceful, stable and enabling political, social and economic environment”* (UNHRC, 1998). When crises occur international organisations and national governments should coordinate their efforts in order to meet the needs of affected people in terms of assistance and protection in a way that facilitates recovery from crisis through access to land, market reactivations and other initiatives aimed at fostering integration and consolidating security (FAO, 2002).

The emerging right to food aid: availability is not enough

Those remarks risk, however, to remain a “wishful thinking” look at the evolution of the international legal framework: when states are unable or unwilling to ensure the enjoyment of the right to food to their own population because of natural disasters or conflicts, it is debated if a “more-than-moral” duty to provide food aid exists for the international community. At the moment, a binding obligation to provide international food aid has not yet been widely recognised by states (Clay, 1998). This emerging right has a number of already existing legal consequences, which have been analysed by an extensive literature in international law. States unable to directly fulfil their duty to provide people with an adequate access to food or, in case of emergency, to grant food aid to those who are affected by an armed conflict or a natural disaster, should request assistance to the international community: in its GC n. 12, the CESCR affirms that “*a state claiming that it is unable to carry out its obligation for reasons beyond its control [...] has the burden of proving that [...] it has unsuccessfully sought to obtain international support to ensure the availability and accessibility of the necessary food*” (CESCR, 1999:17). However, in the respect of state sovereignty as described in Article 2.1 of the UN Charter, external food assistance in case of emergency shall be subjected to a request by the affected State or, at least, to its consent. Furthermore, there are limits to the possibility of refusal, as the lack of acceptance cannot be due to “*arbitrary or capricious*” reasons (ICRC, 1989) given the high stakes in terms of survival of the population. Furthermore, a refusal could be a violation of human rights as the obligations stemming from Article 2 and 11 of the ICESCR entail that the state cannot arbitrarily withhold its

consent in case of inability or unwillingness to provide assistance without infringing its obligation to respect (CESCR, 1999). Following this same logic in cases in which it is impossible to determine which authority has the power to give a valid and legitimate consent, this consent is to be presumed in the view of the fact that assistance for the victims is of paramount importance (FAO, 2002). On the other side, the supply of certain amounts of food aid by the so-called “donor countries” is regulated by international legal instruments: as an example, the 1995 International Grains Agreement, composed by the Grains Trade Conventions and the Food Aid Convention has as its main objectives “*to contribute to world food security and to improve the ability of the international community to respond to emergency food situations and other food needs of developing countries*” (Food Aid Committee, 2010) through quantitative commitments for states to supply food to countries affected by emergencies.

Article 3 of this agreement obliges the parties (namely Argentina, Australia, Canada, the European Community and its Member States, Japan, Norway, Switzerland and the United States) to “*provide food aid [...] or the cash equivalent thereof*” to least-developed countries, low-income countries, lower-middle income countries and other countries included in the WTO List of the Net Food-Importing Developing Countries. This convention contains an extensive interpretation of what food aid is: grants of food, cash, sales of food for the non-transferable and non-convertible currencies, sales of food on concessional credit. In any case grants of food have to represent no less than 80% of the total food aid (Food Aid Committee, 1999).

Unfortunately, the analysis of those provisions confirms that attention is

devoted mainly to the question of availability, and particularly under the conventional scheme of a “charitable donation” from rich to poor states. What is totally ignored is the dimension of access to food, while adequacy to dietary needs is completely out of reach. International community must embrace a new vision, in order to face global challenges and dramatic needs: most of the time, food is available. But the issue does not end with food production: measures must be taken in the field of the economic and physical accessibility. If for the latter question the solution could be an improvement in the infrastructural and transport network, the economic access to food represents the real challenge for the years to come.

Conclusion

In order to overcome the emphasised weaknesses of the international right-based approach in relation to the protection and promotion of the right to food, international community should refuse to continue to feed the paradigm of dependency and charity, of which the emerging right to food aid – focused on the dimension of distribution and availability – is just the last example. To do that, an all-encompassing legal framework should be put in place, as food accessibility cannot be efficiently reached only by means of humanitarian law. The possibility to provide safe and equitable access to food is indeed closely linked to other – and often ignored – branches of international law, such as trade and environmental law.

In GC n. 12, the CESCR considered sustainable access to food as a core element of such a right: this concept of sustainability has multiple dimensions, since it has to be intended in social, economic and environmental terms and

has not to interfere with other fundamental human rights. From an environmental point of view, this means that production of food has not to endanger the protection of the environment. This limitation finds a sort of temperament in emergency situations, since in such delicate moments the right to life, of which the right to be free from hunger is part, is of primary importance. There are, however, a number of norms of international environmental law which could be relevant in the horizon of the right to food and of food aid. Some of them relate to the protection of plant and animal health from pesticides and other dangerous materials but the majority of these norms deals however with the issue of biodiversity, as distributing seeds of alien species in emergency-affected countries could produce a negative impact on local environment: in that sense, Article 6 of the 1992 Convention on Biological Diversity (CBD) contains a provision for sectorial and/or cross-sectorial plans, programmes and policies aimed at promoting biodiversity, while Article 8 prohibits the introduction of “*alien species which threaten ecosystems, habitats or species*”. As a matter of fact, biodiversity significantly contributes to food security, nutrition and well-being as it provides foods from both plant and animal sources while serving at the same time as a “natural warehouse” during crisis. CBD is an intergovernmental agreement and its provisions are not binding *per se* (if not by an ethical point of view) upon UN agencies in case of relief or food aid programmes and thus require an action by the recipient state which has to monitor the respect of biodiversity.

All those considerations help to draw a conclusion that echoes the outcome of the 2005 Brasilia consultations on the cross-cutting initiatives in the framework of the CBD, which underlined how

“Biodiversity is essential for food security and nutrition and offers key options for sustainable livelihoods. Environmental integrity is critical for maintaining and building positive options for human well-being. Existing knowledge warrants immediate action to promote the sustainable use of biodiversity in food security and nutrition programmes, as a contribution to the achievement of the Millennium Development Goals”.

For this reason, the protection of biological diversity could become a key issue in the promotion of food accessibility and adequacy, as a variety of plant and animal sources is vital for human diet and nutrition while at the same time sustaining agricultural

production and sustainability through the provision of genetically diverse seed which could better be adapted to existing conditions (ex. drought-resistant seed). Furthermore, wild harvested food species could prove to be particularly significant to poor and landless in times of famine or when food supply mechanisms are disrupted (CBD, 2013).

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