

International legal framework on the right to adequate food

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The right to adequate food is enshrined in the International Covenant on Economic, Social and Cultural Rights (ICESCR), to which Zimbabwe is party. It is an important component of the right of everyone to an adequate standard of living. The right to adequate food is fundamental for the enjoyment of all human rights, including those enshrined in the International Covenant on Civil and Political Rights (ICCPR), the African Charter on Human and Peoples’ Rights (ACHPR), the African Charter on the Rights and Welfare of the Child, the UN Convention on the Rights of the Child, and the Convention on the Elimination of all forms of Discrimination Against Women, to all of which Zimbabwe is party. Below are relevant provisions of the ICESCR, and General Comment 12 of the Committee on Economic, Social and Cultural Rights, on the right to adequate food. Also provided below are Statements of the African Commission on Human and Peoples’ Rights, together with more general legal considerations relevant to the right to food.

A. The International Covenant on Economic, Social and Cultural Rights

Article 11: the right to an adequate standard of living including adequate food

Article 11 of the ICESCR establishes “the right of everyone to an adequate standard of living...including adequate food” and recognizes “the fundamental right of everyone to be free from hunger”.

In May 1999 the Committee on Economic, Social and Cultural Rights, which was established by the Economic and Social Council (ECOSOC) to monitor implementation of the Covenant, elaborated on the right to food in its General Comment No.12.

General Comment No. 12, paragraph 6, outlines the normative content of the right to adequate food:

“The right to adequate food is realized when every man, woman and child, alone or in community with others, has physical and economic access at all times to adequate food or means for its procurement. The right to adequate food shall therefore not be interpreted in a narrow or restrictive sense which equates it with a minimum package of calories, proteins and other specific nutrients. The right to adequate food will have to be realized progressively. However, States have a core obligation to take the necessary action to mitigate and alleviate hunger as provided for in paragraph 2 of article 11, even in times of natural or other disasters.”

Paragraph 7 expands on adequacy, and explains that adequacy is a context-specific concept, “determined by prevailing social, economic, cultural, climatic, ecological and other conditions”. Adequacy further encompasses the idea of sustainability, which implies the continuous availability and accessibility of adequate food.

Paragraph 8 states that the core content of the right to adequate food encompasses:

“The availability of food in a quantity and quality sufficient to satisfy the dietary needs of individuals, free from adverse substances, and acceptable within a given culture;

The accessibility of such food in ways that are sustainable and that do not interfere with the enjoyment of other human rights.”

“Availability” consists of the possibilities either for feeding oneself directly from productive land or other natural resources, or from well-functioning distribution, processing and market systems that can move food from the site of production to where it is needed in accordance with demand (para 12).

“Accessibility” includes both economic and physical accessibility (para 13). Economic accessibility means that individuals or communities should be able to access food as a result of their economic activities, for example,

agriculture or wage-labour, within the context of the broader right to an adequate standard of living.¹

Physical accessibility requires that adequate food must be accessible to everyone, including physically vulnerable individuals. The governmental obligation to ensure that food is accessible is essential as food may often be available, or even abundant, but that does not necessarily mean that it is equally accessible to all.²

Nature of obligations to realise the right to adequate food

Article 2 (1) of the ICESCR details the obligations of States Parties in relation to the economic, social and cultural rights guaranteed under the Covenant. Article 2 (1) states:

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

According to the Committee on Economic, Social and Cultural Rights, obligations regarding the right to adequate food have three distinct elements: to respect, protect and fulfil:

1. The obligation to *respect* existing access to adequate food requires States Parties to refrain from measures that result in undermining access or availability.
2. The obligation to *protect* requires States Parties to adopt measures to ensure that other actors do not deprive individuals of their right to adequate food.
3. The obligation to *fulfil* has two elements. Firstly to *facilitate*, meaning to strengthen people's ability to realise their own right to food, through access to and utilization of necessary resources. States are also obliged to *provide* food to those who are unable to realise their right to adequate food through factors beyond their

¹ Künemann, R., *The Right to Adequate Food: Violations of its minimum core content*, 1999

² Drèze, J and Sen, A, *Hunger and Public Action*, Clarendon Press, Oxford, 1989; see also the People's Union for Civil Liberties cases in the Supreme Court of India www.righttofood.com.

control. Even in times of severe resources constraints the right to adequate food of vulnerable members of society must be protected by the adoption of relatively low-cost targeted programmes.³

Some elements of the different types of obligation outlined are of a more immediate nature and reflect the “minimum core obligation to ensure the satisfaction of, at the very least, the minimum essential levels”⁴ of the right to adequate food, which must be guaranteed immediately.

In terms of the right to food Article 11.2 and the associated commentary in General Comment No. 12 make clear that the minimum core content of includes the state’s obligation “to ensure for everyone under its jurisdiction access to the minimum essential food which is sufficient, nutritionally adequate and safe, to ensure their freedom from hunger.”⁵ Where a state party has failed in this regard, “it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.”⁶ Thus the State must show that it has mobilised all resources available to it (from all sources including private, international, and national) and prioritised the realisation of the right to be free from hunger. Where the State is not able to reach this higher burden of proof, its failure will be considered a human rights violation.

Other elements of the state’s obligations require measures which should be taken progressively, whereby States must take deliberate, concrete and targeted steps within a reasonable time from ratifying the Covenant towards achieving progressively the full realization of the right to food. A state thus has an obligation to move as expeditiously as possible towards the full realization of the right to food. Furthermore, the ICESCR imposes obligations on States Parties to take the course which would achieve fulfilment of the rights in the shortest possible period of time. Since the essence of progress is continuity, any deliberate retrogressive measure would invariably require the most careful consideration.

As the UN Committee on Economic, Social and Cultural Rights has made clear,

³ UN Committee on ESCR, General Comment No. 12 (Right to Adequate Food), E/C.12/1999/5, para 28.

⁴ UN Committee on Economic, Social and Cultural Rights, General Comment No. 3: The Nature of States Parties Obligations, 1990, para 10, contained in E/1991/23.

⁵ UN Committee on ESCR, General Comment No. 12 (Right to Adequate Food), E/C.12/1999/5, para 14.

⁶ *Ibid*, para 17.

“any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources.”⁷

This includes showing that, “it has unsuccessfully sought to obtain international support to ensure the availability and accessibility of the necessary food”.⁸

The minimum core obligations are immediate obligations and failure to fulfil these obligations constitutes a *prima facie* violation of the right to food. General Comment No.12 states:

“Violations of the Covenant occur when a State fails to ensure the satisfaction of, at the very least, the minimum essential level required to be free from hunger. In determining which actions or omissions amount to a violation of the right to food, it is important to distinguish the inability from the unwillingness of a State party to comply.”

Identifying and establishing violations in respect of progressive realisation can be difficult, but the burden of proof rests with the State, which must show that its actions fulfil the requirements of “maximum of available resources”(including resources available from the international community) and “all appropriate means” with the clear aim of achieving full realisation of the right to adequate food.. Violations could include the failure to develop or implement plans in an expeditious manner.

General Comment No. 12 also makes reference to the obligation not to discriminate:

“... any discrimination in access to food, as well as to means and entitlements for its procurement ... with the purpose or effect of nullifying or impairing the equal enjoyment or exercise of economic, social and cultural rights constitutes a violation of the Covenant”.

⁷ UN Committee on Economic, Social and Cultural Rights, General Comment No. 3, The nature of States Parties obligations, 14/12/90, at para 9.

⁸General Comment No. 12, at para 17

Thus discrimination in access to food, employment or productive resources, such as land, or social security programs, would constitute a violation of the ICESCR.

B.The African Charter on Human and Peoples' Rights

The African Commission on Human and Peoples' Rights does not contain the right to adequate food, and freedom from hunger and malnutrition but the mandate of the African Commission under the Charter, including the provisions of Article 60 and 61, is broad enough to accommodate some elements of these rights. In fact, the Commission has read the right to food into the Charter provisions on the right to life guaranteed in Article 4 and the right to health in Article 16.⁹

The African Commission, ruling on violations of human rights in the case of the Ogoni people of Nigeria in 2001, specifically outlined violations of the right to adequate food.

According to the Commission, the right to food is "inseparably linked to the dignity of human beings and is therefore essential for the enjoyment and fulfillment of such other rights such as health, education, work and political participation."¹⁰

The Commission therefore held that the treatment of the Ogoni peoples by the Nigerian government in that case violated the minimum duties that it had towards ensuring the right to food through destroying food sources; allowing private oil companies to destroy food sources, and creating significant obstacles in the ability of the peoples to feed themselves.¹¹

The African Commission has acknowledged four layers of duties with respect to the rights guaranteed under the African Charter: to *respect*,

⁹ The Social and Economic Rights Action Centre (SERAC) and the Center for Economic and Social Rights (CESR) v. Nigeria, Communication 155/96.

¹⁰ Ibid, see para. 64.

¹¹ Ibid, see para. 66.

protect, promote, and fulfill them.¹² These obligations entail a combination of negative and positive duties.¹³

Obligation to respect entails refraining from interference with the enjoyment of all fundamental rights, including economic and social rights.¹⁴ Accordingly, a state is obliged to respect the free use of resources owned or at the disposal of the individual alone or in any form of association with others, including the household or the family, for the purpose of rights-related needs.¹⁵ This obligation also implies that the resources belonging to a collective group should be respected, as it has to use the same resources to satisfy its needs.¹⁶ Furthermore, the obligation entails largely non-interventionist conduct from the state, for example, not carrying out, sponsoring or tolerating any practice, policy or legal measures violating integrity of the individual.¹⁷

The obligation to protect obligates the state to protect right-holders against other subjects by legislation and provision of effective remedies.¹⁸ This obligation requires the state to take measures to protect beneficiaries of the protected rights against political, economic and social interference.¹⁹ According to the African Commission, “protection generally entails the creation and maintenance of an atmosphere or framework by an effective interplay of laws and regulations so that individuals will be able to freely realize their rights and freedoms.”²⁰

The obligation to promote includes the obligation to build infrastructure necessary for the enjoyment of individual economic and social rights, as well as promoting tolerance and raising awareness.²¹

¹² See Decision regarding Communication 155/196, Social and Economic Rights Action Center/Center for Economic and Social Rights v. Nigeria, Case No. ACHPR/COMM/A044.

¹³ *Ibid.* para. 44.

¹⁴ *Ibid.* para. 45.

¹⁵ *Ibid.*

¹⁶ *Ibid.*

¹⁷ *Ibid.*, para 52.

¹⁸ *Ibid.*, para. 46.

¹⁹ *Ibid.*

²⁰ *Ibid.*

²¹ *Ibid.*

Finally, obligation to fulfill requires the state to achieve the rights and freedoms it freely undertook under the African Charter by moving its machinery towards their actual realization.²²

C. Other legal considerations relevant to the right to food

Non-discrimination and equal protection

Freedom from discrimination is enshrined in, *inter alia*, the ICESCR (Article 2(2)) which provides:

“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.”

This obligation in the Covenant is not subject to the progressive realization standard, and is considered capable of immediate application.²³ In order to satisfy the obligation, States are required not only to prohibit discrimination in law, but to monitor and address any discrimination in fact. This implies the need for disaggregated data collection and policies which actively seek to eliminate discrimination where it is found.

Further, in its General Comment No.18 on the subject of Non-Discrimination, the UN Human Rights Committee found that:

“Non-discrimination, together with equality before the law and equal protection of the law without any discrimination, constitute a basic and general principle relating to the protection of human rights.”²⁴

Article 26 of the International Covenant on Civil and Political Rights provides that all persons are equal before the law and are entitled to equal protection of the law without discrimination. It is concerned with domestic law, which must not be discriminatory in its content and in its application.

²² Ibid, para. 47.

²³ UN Committee on Economic, Social and Cultural Rights, General Comment No. 3: The Nature of States Parties Obligations, 1990, para 5, contained in E/1991/23.

²⁴ UN Human Rights Committee, General Comment No. 18 (Non-Discrimination), 10/11/89, para 1.

This principle extends to legislation which would impact on the right to food.²⁵

Any differentiation in treatment must be based on reasonable and objective criteria and based on an aim which is in accordance with human rights standards. Thus, special measures to correct historical discrimination would not *per se* violate non-discrimination standards, although States would have to demonstrate the potential negative impact of such measures on the rights of others had been fully considered and all necessary steps taken to alleviate such negative consequences. Addressing historical discrimination cannot be justification for violation of the rights of others.

Vulnerable populations and the right to adequate food

A number of human rights instruments also recognize the particular problems of vulnerability of different groups, and place specific obligations on States to combat discrimination against such groups.

The CESCR underlines the fact that even in times of severe resources constraints whether caused by a process of adjustment, of economic recession, or by other factors the right to adequate food of vulnerable members of society can and indeed must be protected by the adoption of relatively low-cost targeted programmes.²⁶

Socially vulnerable groups such as landless persons and other particularly impoverished segments of the population may need attention through special programmes. Victims of natural disasters, people living in disaster-prone areas and other specially disadvantaged groups may need special attention and sometimes priority consideration with respect to accessibility of food.

International cooperation

Articles 55 and 56 of the United Nations Charter oblige all UN member States to take joint and separate action for the purposes of achieving universal respect for and observance of human rights and fundamental freedoms for all without distinction. This is reiterated in the ICESCR, Article 2(1) of which obligates States to take steps, individually and

²⁵ “the application of the principle of non-discrimination contained in article 26 is not limited to those rights which are provided for in the [ICCPR]”, UN Human Rights Committee, General Comment No. 18 (Non-Discrimination), 10/11/89, para 12.

²⁶ General Comment No. 3, para 12; General Comment No. 12, para 28.

through international assistance and cooperation, according to the maximum of available resources towards the full realisation of economic, social and cultural rights.

The CESCR has expanded, in its General Comment No.3, on the scope of the obligation to offer and receive international assistance. It has determined that the “maximum of available resources” includes those “existing within a State and those available from the international community through international cooperation and assistance”. According to the CESCR, “it is particularly incumbent on those States which are in a position to assist others in this regard...in the absence of an active programme of international assistance and cooperation on the part of all those States that are in a position to undertake one, the full realisation of economic, social and cultural rights will remain an unfulfilled aspiration in many countries.”²⁷

With respect to the right to food, the CESCR has indicated that such international cooperation includes taking 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.²⁸ The CESCR has also emphasised that “Food should never be used as an instrument of political and economic pressure.”²⁹

Humanitarian assistance

States have a joint and individual responsibility, in accordance with the United Nations Charter, to cooperate in providing disaster relief and humanitarian assistance in times of emergency. Each state should contribute to this task according to its ability. States which offer humanitarian assistance, either directly or through international organisations, must do so on the basis of non-discrimination, and should actively target the most vulnerable groups.³⁰ As the Committee on Economic, Social and Cultural Rights has stated, “Priority in the provision of international medical aid, distribution and management of resources, such as safe and potable water, food and medical supplies, and financial aid should be given to the most vulnerable or marginalized groups of the population.”³¹

²⁷ UN Committee on ESCR, General Comment No. 3 (State Obligations) 1990, paras 13 and 14.

²⁸ UN Committee on ESCR, General Comment No. 12 (Right to Adequate Food), E/C.12/1999/5, para 36.

²⁹ *Ibid*, para 37.

³⁰ *Ibid*, para 38.

³¹ UN Committee on ESCR, General Comment No.14 (Right to Health), E/C.12/2000/4, para 40.

Offers of humanitarian assistance from impartial humanitarian agencies are not to be considered unfriendly acts, and are therefore not contrary to Article 2(7) of the UN Charter (non-interference in the domestic affairs of a member state). This was affirmed by the International Court of Justice in the Nicaragua Case.³²

Also, Amnesty International considers that a State which *arbitrarily* denies its consent to humanitarian assistance, when it is unable or unwilling to provide necessary humanitarian assistance in order to ensure the right to be free from hunger, the refusal itself constitutes a violation of the state's obligation to respect the right to food and ensure that everyone is free from hunger under Article 11 of the ICESCR.³³

The right to a remedy

The Universal Declaration on Human Rights provides that,

*“everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or law”.*³⁴

Furthermore, the ICCPR provides that there is a right to a remedy for a violation of the human rights protected in the ICCPR, and that such remedies shall be determined by a competent judicial, administrative or legislative authority, and that the competent authorities will enforce such remedies when granted.³⁵

The CESCR recommends access to remedies in respect of rights which may, in accordance with the national legal system, be considered justiciable³⁶, and, specifically on the right to food, states:

“Any person who is a victim of a violation of the right to adequate food should have access to effective judicial and other appropriate remedies at both national and international levels... All victims of

³² Case Concerning the Military and Paramilitary Activities in and against Nicaragua (Nicaragua v USA) (Merits), 27 June 1986, ICJ Reports 1986, p 14, paras 239-245.

³³ This view is supported by the Food and Agriculture Organisation, *The right to adequate food in emergencies*, FAO Legislative Study 77 Rome, 2003, page 35, and the UN Committee on ESCR, General Comment No. 12 (Right to Adequate Food), E/C.12/1999/5, para 19.

³⁴ UDHR, Article 8.

³⁵ ICCPR, Article 2(3).

³⁶ General Comment 3; UN Committee on Economic, Social and Cultural Rights, General Comment 9, 1998, *The Domestic Application of the Covenant*, para 10.

*such violations are entitled to adequate reparation, which may take the form of restitution, compensation, satisfaction or guarantees of non-repetition.”*³⁷

³⁷ General Comment No. 12, at para 32.