

(Ed.note: The following article, was written by Sage J. Teton, an officer of the International Food Security Treaty Association, while attending Lewis & Clark/ Northwestern College of Law in Portland, Oregon. It addresses the origin and development of the human right of freedom from hunger as it has evolved since the first intergovernmental recognition of that right arose in the early years of the United Nations and offers a detailed analysis of issues raised by legal instruments which either avoid or require internationally binding protection of that right.)

Realization of the Right to Food in International Law

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I. The Hunger Crisis

At the end of 2008, 963 million people worldwide did not have enough food each day to sustain a healthy life, and this number has increased dramatically since then due to high food prices.¹ This is equal to a staggering 13% of the world's population. Most of these people, over 907 million, live in the developing world.² Broken down by country, 253 million live in Sub-Saharan Africa, 231 million in India, 203 million in Southeast Asia and the Pacific, 133 million in China, 51 million in Latin America 36 million in the Near East and North Africa, and 16 million in developed countries.³ Four out of every five of these people live in rural areas and depend on agriculture to survive.⁴ Children under five make up 153 million of them.⁵ Six million children under five die from hunger and nutritional deficiencies each year.⁶ Most of these deaths are attributable not to hunger itself but to diseases that young children become more susceptible to when they are malnourished. Surprisingly enough, this problem remains despite that for the first time in human history world agriculture has the capacity to feed everyone on earth.⁷ The levels of food consumption remain low because much of the world's population lives in conditions of severe poverty.

¹ Food and Agriculture Organization of the UN Newsroom, *Number of Hungry People Rises to 963 Million*, <http://www.fao.org/news/story/en/item/8836/icode/> (Dec. 9, 2008).

² *Id.*

³ Food and Agriculture Organization of the United Nations, *Briefing Paper: Hunger on the Rise*, <http://www.fao.org/newsroom/common/ecg/1000923/en/hungerfigs.pdf> (Sept. 17, 2008).

⁴ International Fund for Agricultural Development, *Rural Poverty Report 2001* 15 (Oxford U. Press 2001).

⁵ CARE USA, *Hunger Facts: Statistics on Hunger*, <http://www.careusa.org/campaigns/world-hunger/facts.asp> (accessed Apr. 10, 2008).

⁶ *Id.*

⁷ Anthony Paul Kearns III, *The Right to Food Exists Via International Customary Law*, 22 *Suffolk Transnatl. L. Rev.* 223, 223 (1998).

This paper will analyze the content, nature, and enforceability of the right to food. Specifically, it will discuss the possibilities for full realization of the legal right to food in current international laws and policy as well as other avenues that could possibly be influential in solidifying the right if adopted.

II. Content of the right

i. The Right to Food in International Law

The right to food has been mentioned in various treaties recognized in international law. The idea of a human right to be free from hunger was only briefly touched upon in these treaties and there was not much focus given to the concept. In fact, the international community did not begin to examine the right in depth until over 40 years after the Universal Declaration of Human Rights was adopted.

The primary international law document in which the right to food appears is the International Covenant on Economic, Social, and Cultural Rights (ICESCR). Article 11 of the ICESCR states that all nations ratifying the treaty 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.”⁸ It goes on to declare that member states are required to “take appropriate steps” to make sure that the right to an adequate standard of living is eventually realized, but interestingly it emphasizes the importance of the “free consent” of each nation when working together to reach this international goal.⁹ Article 11 then asserts that states must implement programs to improve production, conservation and distribution of food through making use of all technical and scientific knowledge available to them, circulating information about nutrition and reforming agrarian techniques to achieve more efficient utilization of natural resources.¹⁰ It also notes that states should keep in mind the various problems of food-importing and food-exporting countries to ensure an fair distribution of food.¹¹ Article 11 signifies the importance the international community attaches to the right to be free from hunger by referring to it as “the fundamental right of everyone”.¹²

The right to food is mentioned again in Article 12 of the ICESCR. Here the states parties pledge to honor “the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.” Physical and mental health are of course linked

⁸ *International Covenant on Economic, Social and Cultural Rights* pt. III, art. 11, ¶ 1 (entered into force Jan. 3, 1976), 993 U.N.T.S. 3.

⁹ *Id.*

¹⁰ *Id.* at pt. III, art. 11, ¶ 2.

¹¹ *Id.*

¹² *Id.*

inextricably with adequate nutrition, so these two articles work together in affirming the need for an internationally recognized right to food.

Article 2 of the ICESCR also relates to the fulfillment of the right to food. This article imposes upon states the obligation to do something to ensure that their citizens achieve all of the rights contained in the Covenant. Article 2 demands that each state party take economic and technical measures “to the maximum of its available resources” in order to progressively achieve the full realization of each of the rights included in the ICESCR, especially through creation of legislation.¹³ The idea of “progressive realization” of the right to food and the way the United Nations has interpreted that term will be examined further in this paper in Section III, *infra*. The basic idea is that when it comes to any economic rights (such as the right to food), nations will not be required to come up with resources they do not have to ensure that their citizens have basic human rights. Instead, states have the flexibility to realize economic rights progressively according to the extent of their resources.

The Convention on the Rights of the Child (CRC), adopted by the United Nations in 1989, mentions the right to food in the context of children’s rights. Article 27 mandates that “[s]tates Parties recognize the right of every child to a standard of living adequate for the child’s physical, mental, spiritual, moral and social development.”¹⁴ The CRC goes on to say that when parents are unable to provide adequate food for their child the state “shall take appropriate measures to assist parents ... to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition.” The CRC imposes a positive obligation on states to step in and help when children are going hungry and parents have no way to feed them. The CRC’s requirements in regards to the right to food go hand in hand with the requirements of the ICESCR, and even go a step further by singling out nutrition as the highest priority for states in taking measures to ensure that children within their borders have basic human rights. When the right to food is not realized children suffer the most and it makes sense then to provide them with extra safeguards through the CRC.

The right to food is mentioned in the Universal Declaration of Human Rights (UDHR). The Declaration was written as merely a recommendation of the United Nations General Assembly and was not binding law when it was written.¹⁵ Nevertheless, many of its principles have become binding through international customary law.¹⁶ The UDHR restates in Article 25 the assertion in the ICESCR that every person “has the right to a standard of living adequate for the health and well-being of himself and his family,

¹³ *Id.* at pt. II, art. 2.

¹⁴ *Convention on the Rights of the Child* pt. I, art. 27 (entered into force Sept. 2, 1990), 1577 U.N.T.S. 3.

¹⁵ Henry J. Steiner & Philip Alston, *International Human Rights in Context: Law, Politics, and Morals* 119 (Oxford U. Press 1996).

¹⁶ Louis B. Sohn, *The New International Law: Protection of the Rights of Individuals Rather than States*, 32 *Am. U. L. Rev.* 1, 16 (1982).

including food.”¹⁷ Because certain parts of the UDHR have become legally binding on states, Article 25 is a crucial step towards solidifying the concept of a right to food within the international legal framework. In Section III of this paper, *infra*, I examine the issue of whether or not Article 25 is one of the principles that has become international customary law.

The United Nations Charter also recognizes the responsibility of all member nations to ensure the human right to an adequate standard of living.¹⁸ Although the Charter does not mention food specifically, Article 55 does specify the importance of member nations promoting “higher standards of living” and “solutions of international economic, social, health, and related problems” which would include ensuring that all people get adequate nutrition.¹⁹ It also emphasizes that all nations should strive to create “conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights,”²⁰ and of course the first step to achieving stability and well-being is having enough food to eat.

ii. When Hunger is Used as a Weapon: Current International Law Addressing Genocide

Hunger is often used as a weapon during wartime and civilians are intentionally starved through various tactics including widespread destruction of rural infrastructure and livestock and use of land mines.²¹ When hunger is used to control populations in this way it can easily rise to the level of genocide in many instances. The International Covenant on Civil and Political Rights (ICCPR) addresses this crucial aspect of the right to be free from hunger by stating that everyone has the inherent right to life and references the Convention on the Prevention and Punishment of the Crime of Genocide (CPPG).²² The CPPG defines genocide as “causing serious bodily or mental harm to members of [a national, ethnic, racial or religious] group” or “[d]eliberately inflicting on [a national, ethnic, racial or religious] group conditions of life calculated to bring about its physical destruction in whole or in part.”²³ This encompasses the active participation of warring groups in destroying food sources and infrastructure used to produce food and blocking civilians’ access to food through force to the point where many in the population starve to death.

¹⁷ *Universal Declaration of Human Rights* art. 25 (Dec. 10, 1948), G.A. Res. 217A (III).

¹⁸ *Charter of the United Nations*, ch. IX, art. 55 (June 26, 1945), 59 Stat. 1031.

¹⁹ *Id.*

²⁰ *Id.*

²¹ Slobodanka B. Teodosijević, *Armed Conflicts and Food Security* 17 (FAO Agric. Dev. Econ. Div. Working Paper No. 03-11, June 2003).

²² *International Covenant on Civil and Political Rights*, pt. III, art. 6 (entered into force Mar. 23, 1976), 999 U.N.T.S. 171.

²³ *Convention on the Prevention and Punishment of the Crime of Genocide*, art. 2 (entered into force Jan. 12, 1951), 78 U.N.T.S. 277.

Civilians are also protected from genocide through mass starvation during war through the Geneva Conventions. Convention IV addresses the protection of civilian persons in time of war, and it states that any civilian persons not actively involved in the conflict shall be treated humanely at all times.²⁴ The convention prohibits certain actions by those engaged in the conflict against civilians including “violence to life and person, in particular ... cruel treatment and torture” and “outrages upon personal dignity, in particular humiliating and degrading treatment.”²⁵ Even in cases where hunger is used as a weapon but the problem does not rise to the level of genocide the right to adequate food is still protected through Convention IV’s enumeration of international standards for protection of civilians during war.

In 1977, Additional Protocol I to the Geneva Conventions was issued which specifically mentions starvation of civilians during wartime.²⁶ This additional protocol specifically prohibits “starvation of civilians as a method of warfare” and also proscribes destruction or manipulation of any “objects indispensable to the survival of the civilian population, such as foodstuffs ... for the specific purpose of denying them for their sustenance value to the civilian population ... whether in order to starve out civilians, to cause them to move away, or for any other motive.”²⁷ This additional protocol recognizes the need to address food rights violations during wartime and makes clear that the international community is aware of the practice of starving civilians as a political tool. Starving civilians and destroying agricultural infrastructure has become a popular tactic among warring groups struggling for control of a country, and this Additional Protocol confirms the need for food security during times of war.

Geneva Convention IV and the Additional Protocol, along with the ICCPR and the CPPG protect the right to food under international law in circumstances where hunger is used as a weapon. These treaties can be used as tools in enforcing the right to food when that right is taken by force during war. Many warring groups destroy all resources civilians have and leave them to die from hunger or hunger-related illness, and there are current international laws that can provide some protection against this widespread practice.

²⁴ *Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War*, art. 3 ¶ 1 (Aug. 12, 1949), 75 U.N.T.S. 287.

²⁵ *Id.*

²⁶ *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts*, art. 54 (June 8, 1977), 1125 U.N.T.S. 3.

²⁷ *Id.*

III. Current Status of the Right to Food

i. Need for Clarification of the Right to Food in International Law

Despite the presence of the right to food in the ICESCR and the UDHR, the international community came to the conclusion in the mid-1990s that more expansion and clarification of the right to food was necessary. The right to food was only mentioned briefly in a long list of other rights in those documents, and world leaders felt that special attention to the right to food was needed. Although the right to food was described as “fundamental” in the ICESCR, the right was being violated on a daily basis throughout the world and the international community recognized that more needed to be done to secure the right for all.

The Food and Agricultural Organization (FAO) held the World Food Summit in 1996 in Rome, Italy to address the right to food specifically and clarify what needed to be done to stop the hunger crisis. At this meeting, Heads of State from all over the world reaffirmed “the right of everyone to have access to safe and nutritious food, consistent with the right to adequate food and the fundamental right of everyone to be free from hunger.”²⁸ In the World Food Summit Plan of Action governmental leaders identified that their objective at the meeting was “[t]o clarify the content of the ... fundamental right of everyone to be free from hunger, as stated in the [ICESCR] ... and to give particular attention to implementation and full and progressive realization of this right as a means of achieving food security for all.”²⁹ This indicates an international discomfort with the current state of the right to food and a need to evolve the right into a more developed concept that is clearly recognized on a global scale.

At this meeting the heads of state committed to “pledge [their] political will and [their] common and national commitment to ... reducing the number of undernourished people to half their present level no later than 2015.”³⁰ This ambitious goal was reaffirmed at the Millennium Summit in 2000, a second meeting of 189 countries held to discuss the role of the United Nations in the 21st century. The world leaders represented there committed to “halve the proportion of people who suffer from hunger” by 2015.³¹ In June 2002 world leaders met again at a second World Food Summit to revisit the goals set out regarding the right to food and invited “the FAO Council to establish an Intergovernmental Working Group to develop a set of Voluntary Guidelines to support Member States’ efforts to achieve the progressive realization of the right to adequate food

²⁸ *Rome Declaration on World Food Security and World Food Summit Plan of Action*, UN Doc. W3613/E (1998).

²⁹ *Id.* at art. 61, objective 7.4.

³⁰ *Id.*

³¹ FAO, *Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security* 1 (FAO 2005).

in the context of national food security.”³² These “Voluntary Guidelines” have been at the core of the United Nations’ efforts to clarify and strengthen the right to food.

ii. The Principles of the Voluntary Guidelines

The Voluntary Guidelines focus not on what nations *must* do, but what they *could* do to help their populations suffering from malnutrition. The creators of the guidelines stress that “[t]hese Voluntary Guidelines are a human rights-based practical tool addressed to all States. They do not establish legally binding obligations for States.”³³ The Guidelines clearly do not change the current international law relating to the right to food, and instead give states optional suggestions about how to help their citizens who are suffering from hunger.

The Guidelines include suggestions to states on how to implement food security and place emphasis on the concept that the achievement of food security will be accomplished through the “realization” of existing rights.³⁴ They also stress “the need to enable individuals to realize the right to take part in the conduct of public affairs, the right to freedom of expression[,] and the right to seek, receive and impart information, including in relation to decision-making about policies on realizing the right to adequate food” as key principles that will lead to realization.³⁵ This suggests that the creators of the guidelines believe that empowerment at the individual level is the best way to attain food security. In Section IV of this paper, *infra*, I discuss FoodFirst Information and Action Network’s similar view that focusing on empowerment is the best way to accomplish realization of the right. The guidelines take an approach centered around the basic human rights of the individual, and include guidance to states on how to empower groups of people that are living in poverty and cannot produce enough food for their families. Achievement of food security through the voluntary guidelines will be the point where realization of the right to food is complete.

The recommendations included within the guidelines advise countries to “promote and safeguard a free, democratic and just society” and to strive for “broad based economic development that is supportive of their food security policies.”³⁶ States are encouraged to invest in poorer geographical areas by improving rural infrastructure, protecting and facilitating access to natural resources, and putting money into education and research on possible affordable technologies that could help people produce their own food.³⁷ The guidelines also emphasize the importance of improving their agricultural

³² *Id.* at iii.

³³ *Id.* at 2.

³⁴ *Id.* at 6.

³⁵ *Id.*

³⁶ *Id.* at 10.

³⁷ *Id.*

and food markets to promote sustainable development.³⁸ This market regulation would ensure non-discriminatory practices and lead to food security. If a country is a donor of international food aid, the guidelines suggest that the donor state's food aid policy should support any efforts on the part of the recipient country to achieve national food security.³⁹ The guidelines reiterate that "[f]ood should never be used as a tool of economic and political pressure" and stress that mechanisms should be put in place and supplies reserved in case of a natural or human-made disaster.⁴⁰ In addition, countries are advised to review the performance of relevant public institutions with an eye to the full achievement of food security, create laws around the right to food, allocate a portion of their national budgets to food security, identify groups most vulnerable to hunger and design safety nets for them, and educate their populations about nutrition.⁴¹ The guidelines also contain a section on the international community's role in achieving progressive realization of the right to food in general and how the world can get involved with all of the guidelines to be implemented on a national level mentioned above.⁴²

iii. The Meaning of "Progressive Realization" of the Right

Throughout the guidelines there is a primary focus on the idea of countries achieving a "progressive realization" of the right to adequate food. While in the process of creating the voluntary guidelines the drafters asked the Committee on Economic, Social and Cultural Rights of the United Nations for further clarification on Article 11 of the ICESCR. The committee responded with General Comment 12 on the ICESCR, which stated that "[t]he right to adequate food is realized when every [person] has physical and economic access at all times to adequate food or means for its procurement. . . . 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."⁴³ This idea of progressive realization resonates throughout the guidelines, giving states a lot of leeway to recognize the right in their own time. This suggests that the right to food is not a universally recognized right that can be fully achieved immediately, and that countries are not required to provide their citizens with any minimum amount of food at this time.

The Committee goes on to state that progressive realization of the right to adequate food imposes three levels of obligations upon state parties: to respect, protect,

³⁸ *Id.*

³⁹ *Id.* at 27.

⁴⁰ *Id.* at 33.

⁴¹ *Id.* at 14-26.

⁴² *Id.* at 33.

⁴³ UN Committee on Economic, Social, and Cultural Rights, *Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights: General Comment 12*, UN Doc. E/C.12/1999/5, ¶ 6 (1999) (emphasis added).

and fulfill.⁴⁴ In order to comply with the obligation to respect, States parties must not take any measures that result in preventing access to existing food sources that are available.⁴⁵ The obligation to protect requires the State to take measures to ensure that enterprises or individuals do not deprive individuals of their access to adequate food.⁴⁶ The obligation to fulfill the right places an obligation on the state to proactively initiate activities aimed at strengthening “people's access to and utilization of resources and means to ensure their livelihood, including food security.”⁴⁷ The Committee stresses that some measures states will take to achieve these three obligations imposed are “of a more immediate nature, while other measures are more of a long-term character”.⁴⁸ Progressive realization will be achieved when all states are able to fulfill their obligations to respect, protect and facilitate the right to food. The Committee is hesitant to put any kind of timetable on when states will have to be accountable for all three obligations, but the Voluntary Guidelines were written to try to give states suggestions on how to achieve the three goals.

The Committee mentions that some measures states will need to take “are of a more immediate nature”, which implies that states will be expected to take action right away in certain situations where food is not getting to their citizens. Immediate measures probably encompass the obligation to respect, which does not impose any positive obligations on states but instead merely asks states *not* to take any actions which result in preventing access to food. Many measures taken under the obligation to protect category could also become immediately necessary in times of war where there are rebel groups keeping civilians from food and states must “ensure that enterprises or individuals do not deprive individuals of their access to adequate food.”⁴⁹ The obligations to protect and respect would encompass all instances in which food is used as a weapon. More long-term measures likely fall into the category of the obligation to facilitate, which requires states to “... pro-actively engage in activities intended to strengthen people's access to and utilization of resources and means to ensure their livelihood, including food security.”⁵⁰ This obligation appears to be the reason for the Committee’s inclusion of the progressive realization concept: the right to food must be progressively realized because states with few resources will be unable to achieve the things necessary to fulfill the obligation to facilitate. The Voluntary Guidelines were written to help states gradually realize the right to food in the hopes that eventually states will be able to achieve full food security for all of their people.

⁴⁴ *Id.* at ¶ 15.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

Progressive realization as a concept was introduced in relation to fulfillment of rights in the ICESCR long before the United Nations decided on the Voluntary Guidelines approach. In the Committee's General Comment 3 on Article 2 of the ICESCR, they noted that although the ICESCR allows for progressive realization and recognizes the constraints due to the limits of available resources, it also imposes immediate obligations and some steps must be taken within a reasonably short time after the Covenant's entry into force.⁵¹ This comment was written in 1990, so the idea of progressive realization clearly did not originate with the adoption of the Voluntary Guidelines in 2004. Many of the rights protected in the ICESCR are rights that require state intervention and resources to be fulfilled. The Committee recognized this, and the idea of progressive realization was born.

The Committee expands further on what progressive realization means, and addresses the question of whether the ICESCR actually imposes any obligations at all on state parties. The Committee compares the ICESCR's progressive realization framework with the ICCPR's requirement of immediate recognition of all rights contained in the Covenant and asserts that unlike civil and political rights, social and cultural rights will take a much longer time to be realized.⁵² The Committee reassures the reader, however, that the fact that social and economic rights must be realized over a longer period does not deprive the obligations under the ICESCR "of all meaningful content."⁵³ The Committee explains that "the phrase ["progressive realization"] must be read in the light of the overall objective ... of the Covenant ... [i]t thus imposes an obligation to move as expeditiously and effectively as possible towards that goal."⁵⁴

This quote is the Committee's most complete explanation of what progressive realization means in terms of real obligations imposed on states. The Committee clarifies that although economic and social rights are very different from civil and political rights and cannot be imposed immediately due to real world constraints on countries that have few resources, the obligations in the ICESCR are still real obligations that countries will be held accountable for at some point. However, the Committee again is reluctant to say when these obligations will need to come into effect and whether richer countries that do have the means to facilitate the right to food right now have an enforceable obligation to immediately and fully realize the right and complete the "progressive realization" process.

The Committee insists that "[the ICESCR] also imposes various obligations which are of immediate effect."⁵⁵ Both of the General Comments I have quoted mention that there are some obligations in the ICESCR that cannot wait and are theoretically

⁵¹ UN Committee on Economic, Social, and Cultural Rights, *The Nature of State's Parties Obligations: General Comment 3*, UN Doc. E/1991/23, ¶ 1 (1990).

⁵² *Id.* at ¶ 9.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

imposed immediately on states. General Comment 12 specifies the obligations of states pertaining to the right to food in Article 11 as obligations to respect, protect, and facilitate but the Committee does not make clear which of these obligations are “of immediate effect.” Given that the Committee does confirm that “the obligation [to fulfill economic rights under Article 2 of the ICESCR] differs significantly from that contained in article 2 of the International Covenant on Civil and Political Rights which embodies an immediate obligation to respect and ensure all of the relevant rights” one would assume that the rights under the ICESCR that must be fulfilled immediately are those rights which do not require states to take any action. In relation to the three obligations imposed on states to progressively realize the right to food, measures taken to fulfill the obligation to respect would definitely be considered “of an immediate nature” since all the state has to do is not take action that would keep people from food. The obligation to facilitate the right requires states to take some positive action to solve the problem, and so this obligation would not be considered of an immediate nature. The obligation to protect the right to food falls somewhere in between the other two obligations since it requires countries to make sure that no people are denied food by any outside groups, and this could in some situations require positive action on the part of the states.

The Committee also notes that the idea of progressive realization does not mean that countries can take no action whatsoever. Even though the obligation to facilitate the right to food is a daunting task for many poor countries who do not have the resources to facilitate food security, the Committee insists that the ICESCR imposes “a minimum core obligation” upon each state party and a nation that fails to provide a significant number of its citizens with the bare minimum of food is “*prima facie* failing to discharge its obligations under the Covenant.”⁵⁶ The Committee points out that without this bare minimum requirement the ICESCR would no longer serve its main purpose.⁵⁷ Even if a state has demonstrated that it lacks resources, the ICESCR still directs that the state “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.”⁵⁸ Thus the right to food must be addressed to some extent by even the poorest states.

The Committee also clarifies language included in Article 2 of the ICESCR which obligates states parties to take necessary steps “to the maximum of its available resources” by saying that the term “available resources” includes any aid available from the international community to help countries secure food rights for their citizens.⁵⁹ Any state who has ratified the Covenant is responsible for either achieving minimum core obligations or demonstrating that it has attempted to achieve the minimum progress towards full realization of the right to food. This comment suggests that the obligation to facilitate the right to food actually is to some extent an immediate obligation in that states must take some positive steps to alleviate the problem. However, as long as a country is

⁵⁶ *Id.* at ¶ 10.

⁵⁷ *Id.* at ¶ 10.

⁵⁸ *Id.* at ¶ 10.

⁵⁹ *Id.* at ¶ 13.

able to demonstrate that they attempted to satisfy the minimum obligations and were unsuccessful they are not required to do anything more.

The idea of progressive realization of the right implies that the right to food is a newly recognized human right. Since there was not much discussion about the right to food before the World Food Summit 12 years ago, progressive realization is a way for the international community to give countries some time to adjust to the new stance taken on the right to food as a basic human right. This adjustment seems to be taking longer than the 1996 World Food Summit attendees would have hoped: their goal of halving the number of hungry people by 2015 has been thwarted by rising food prices, and the number of malnourished people worldwide actually increased between 1995-1997 as well as 2001-2003.⁶⁰

iii. The Right to Food as International Customary Law

The UDHR was written in 1948 as a non-binding declaration that served solely as a recommendation to states.⁶¹ Although United Nations General Assembly Resolutions are not in themselves legally binding, many of the provisions in the UDHR have become incorporated into international customary law, which is binding upon all states.⁶² Unlike most of international law which depends on the consent of assenting states, norms that have achieved the status of customary law are binding on all states regardless of whether they have assented.⁶³ States cannot dissent or avoid the obligations of these international customary law norms.

Article 25 is arguably one of the provisions of the UDHR that has achieved this status. The prevalence of the right to food in the United Nations Charter, the UDHR, the ICCPR, the ICESCR and World Food Summit Declaration as discussed above all point toward the international community's acceptance of the right as customary law.⁶⁴ Some scholars argue that the UDHR is effectively an authoritative interpretation of the U.N. Charter articles 1(3), 55 and 56.⁶⁵ States also consistently refer to the UDHR as if it has binding effect, and this adds strength to the proposition that the right to food has achieved the status of international customary law.⁶⁶

However, it is not accepted by all that the right to food exists as international customary law. One scholar notes that because the United States has not ratified the

⁶⁰ UN, *The Millenium Development Goals Report 2006* 5 (UN Dept. of Econ. and Soc. Affairs 2006).

⁶¹ Steiner & Alston, *supra* n. 15, at 119.

⁶² Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 Ga. J. Intl & Comp. L. 287, 325 (1996).

⁶³ Steiner & Alston, *supra* n. 15, at 40.

⁶⁴ Donald E. Buckingham, *A Recipe for Change: Towards an Integrated Approach to Food Under International Law*, 6 Pace Intl. L. Rev. 285, 293 (1994).

⁶⁵ Steiner & Alston, *supra* n. 15, at 40.

⁶⁶ *Id.*

ICESCR or the ICCPR the establishment of the right to food lacks the consent of one of the main contributors to any effort to guarantee a minimum standard of nutrition for every person, and even if the United States did ratify the treaties the obligations under Article 11 of the ICESCR do not amount to a legally cognizable right to food.⁶⁷ He argues that no right to food has been accepted explicitly by an adequate number of states as a binding rule to be established by the customary process of international law.⁶⁸ Furthermore, the rich nations of the world have been reluctant to accept any formal economic obligations to the poorest states to the point that this has become the existing international political order.⁶⁹

IV. Enforceability of the Right to Food

i. Current International Covenants Are Not Enforceable

The ICESCR and the ICCPR are not enforceable treaties. The nature of international law makes it difficult for the United Nations to impose the will of the global community on individual states with regard to human rights due to the absence of supranational authority and the presence of intense and discordant power politics among states.⁷⁰ This suggests that the right to be free from hunger is not an enforceable right at the international level. This is evidenced by the fact that even in developed countries hunger persists among large segments of the population. For example, in America today, 12.5% of people live in poverty.⁷¹ This statistic indicates that the US does not comply with Article 11's right of everyone to an adequate standard of living, and by simply not ratifying the ICESCR the United States has had no obligation to do anything to aid the millions of citizens that are suffering from malnutrition.

Even countries that *have* ratified the ICESCR are not required to do anything to help those that are hungry within their borders. The ICESCR only requires member states to submit periodic reports on steps they have taken to combat hunger, and then gives each country feedback on what they could do better if they were so inclined. The latest periodic report submitted by Sudan, for example, was considered by the Committee on Economic, Social and Cultural Rights and then Sudan was provided with a formal document from the Committee summarizing their concluding observations. The Committee states that “some of the written and oral information given by the State party

⁶⁷ Robert L. Bard, *The Right to Food*, 70 Iowa L. Rev. 1279, 1289 (1985).

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ Burns H. Weston, *Human Rights*, in *Encyclopedia Britannica* vol. 20, 713 (15th ed., Encyclopedia Britannica 1990).

⁷¹ Carmen DeNavas-Walt, Bernadette D. Proctor & Jessica C. Smith, U.S. Census Bureau, *Income, Poverty, and Health Insurance Coverage in the United States: 2007* 12 (U.S. Govt. Printing Off. 2008).

was at times unsatisfactory”, but this is as far as the Committee goes in enforcing the rights of the people of Sudan.⁷²

As the world now knows, civilians in Sudan have been suffering from grave human rights abuses at the hands of the *janjaweed* militia forces for over two decades.⁷³ These barbaric forces have succeeded over many years in using hunger as a weapon as they have driven millions from their homes, creating a refugee crisis on the border of neighboring Chad.⁷⁴ Children are dying daily due to malnutrition in these refugee camps.⁷⁵ The Committee “expresses its concern about the reported resort to the weapon of deprivation of food and the creation of a man-made famine as an instrument of war, coupled with the diversion of food aid supplies from groups of the population in need,” and yet the Committee merely “urges the state party to address the root causes of the problem of internally displaced persons ... in order to provide for adequate measures ensuring the basic needs of this group ... such as adequate food.”⁷⁶

Interestingly, the Committee also expresses concern about the legal status of the ICESCR in the Sudanese domestic legal order despite the fact that the key provisions of the Covenant have been incorporated into Sudan’s constitution.⁷⁷ Sudan completely disregards the ICESCR and even its own constitution as it continues to sponsor the *janjaweed* and allow them to use hunger as a weapon against innocent civilians. The Committee wrote this report in 2000, and despite worldwide outrage over the increasing crisis the United Nations has watched silently as the Sudanese people have suffered for another nine years. If the Committee’s treatment of Sudan is any indication of the overall role of the ICESCR on the international stage, it is safe to say that the right to food is not enforced through the Covenant’s provisions.

ii. Is the Right Enforceable?

The argument has been made that the right to food is the type of right that is not controllable by legal rules and therefore cannot be enforced by the United Nations.⁷⁸ Because rich countries have all the power, the argument goes, if they don’t choose to share their wealth with poorer countries they cannot be forced to do so.⁷⁹ Even if the rich countries are required by international “law” to aid those that are hungry, they will not

⁷² UN Committee on Economic, Social, and Cultural Rights, *Concluding Observations of the Committee on Economic, Social, Cultural Rights: Sudan*, UN Doc. E/C.12/1/Add.48, ¶ 4 (Sept. 1, 2000) [hereinafter *Sudan Report*].

⁷³ Report of Congressman Frank R. Wolf, *Sudan*, <http://wolf.house.gov/?sectionid=228> (accessed April 17, 2009).

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Sudan Report*, *supra* n. 72, at ¶ 37.

⁷⁷ *Id.* at ¶ 17.

⁷⁸ Bard, *supra* n. 67, at 1290.

⁷⁹ *Id.*

comply if they wish to reject the law and there is no international body powerful enough to compel them to follow it.

When the Human Rights Commission of the United Nations was drafting the international covenants, the drafters were unsure of how to strike a balance between creating an effective implementation procedure to protect human rights while also ensuring that the Covenants were greeted with wide acceptance by states.⁸⁰ Because the drafters had immense difficulties reaching any sort of a consensus on how implementation of the treaties would be carried out, they ended up choosing the option that imposed the least amount of restraint on the conduct of states.⁸¹ Even the idea of giving individual citizens of states parties the power to petition the Committee on Economic, Social and Cultural Rights if they felt their country was violating their human rights was considered too radical for inclusion in the original ICESCR.⁸² It was decided that individual petitions would be included in an Optional Protocol to the ICESCR so as not to jeopardize the Covenant's entry into force. They feared that too few countries would ratify the convention with the individual petition provision included, which indicates that states are extremely reluctant to enter into any agreement that would require them to enforce the rights of the people living within their borders. Only the reporting system illustrated by the Sudan example, *infra*, made it into the original covenant; it was the most flexible implementation technique discussed that imposed virtually no requirements on states.⁸³

Some scholars argue that it is impossible to impose obligations on states due to the current international landscape. The modern state of international life is marked by a decentralized political order that makes it close to impossible to compel nations to act in a certain way.⁸⁴ States have chosen to delegate only a limited amount of their decision-making power to supranational authority, and this strong current of individual sovereignty makes it hard to imagine that states would be open to a shift in the political order as a means to guaranteeing universal human rights.⁸⁵ This political order has some limits due to military, economic, cultural and moral forces restraining states from acting in whatever way they please, but cooperation in order to avoid negatively affecting the interests of other nations is a far cry from recognizing and enforcing a universal legal right to food.⁸⁶

⁸⁰ Hurst Hannum & Dana D. Fischer, *The Political Framework*, in *U.S. Ratification of the International Covenants on Human Rights* 3, 8 (Hurst Hannum & Dana D. Fischer, eds., Transnational Publishers, Inc. 1993).

⁸¹ *Id.*

⁸² *Id.* at 10.

⁸³ *Id.*

⁸⁴ Bard, *supra* n. 67, at 1283.

⁸⁵ *Id.*

⁸⁶ *Id.*

It is plausible that the right to food will only become realized if a majority of international actors consent to the right.⁸⁷ Voluntary compliance (as the Voluntary Guidelines encourage) does not negate the possibility of establishing a right to food but instead requires that the right fall within the acceptable standards of limitations on national autonomy of states.⁸⁸ In order for the right to food to take hold, therefore, all participants in the system must be confident that everyone else will voluntarily comply with the rules that are set out. Nations basically have no reason to accept norms unless they conclude that it will be in their best interest in the long run to submit to rule-based restrictions.⁸⁹ Unlike individuals that submit to rules because they produce a more beneficial society in which to live, states can more easily resist demands to conform because there are not as many benefits to states that flow from rule compliance.⁹⁰

Because world society is largely unorganized and nations rely on themselves for protection, they have no motivation to limit their freedom of action in the absence of some individual benefit.⁹¹ In addition, the nature of the right to food makes it even more difficult since unlike the recognition of political rights, recognizing the right to food requires governments to provide a substantial amount of goods to their citizens and possibly citizens of other countries.⁹² The bottom line is that this consent must be voluntary because there is no international power strong enough to compel countries to recognize the right. Along that line of reasoning, the Voluntary Guidelines that the FAO is promulgating is the best chance the international community has to eventually achieve the full realization of the right to food.

ii. Proposed Methods of Enforcing the Right to Food

Some believe, however, that the best way to address the right to food is through immediate enforcement of the right rather than voluntary and progressive realization, specifically when hunger is used as a weapon in situations similar to the current conflict in Sudan. One proposed idea is the International Food Security Treaty (IFST), which is based on the current covenants and has found support among leading figures in the United Nations, the United States Congress, and leading anti-hunger and human rights organizations.⁹³

The IFST centers around four simple principles in keeping with the obligations inherent in the International Bill of Rights. It requires each signatory to commit itself to 1) provide access to a minimum standard of nutrition to all people within its borders, 2)

⁸⁷ *Id.* at 1285.

⁸⁸ *Id.*

⁸⁹ *Id.* at 1286.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.* at 1287.

⁹³ International Food Security Treaty Campaign, *Support for the International Food Security Treaty*, <http://www.treaty.org/MainFrame.html>; *select* Support (accessed Apr. 18, 2009).

contribute to a World Food Reserve and Resource Center to help states that cannot provide access to food due to lack of resources, 3) establish and enforce law prohibiting activities denying the minimum standard of nutrition to any person within its borders, and 4) support United Nations Food Security Enforcement actions in states whose governments are unable to enforce such law or are unwilling to do so.⁹⁴

The establishment and enforcement of law prohibiting hunger with the help of United Nations Food Security Enforcement is a novel concept in the field of international law. The United Nations has been reluctant to impose these kinds of restrictions in any of the current treaties because it lacks the authority to compel nations to accept these strict requirements. However, if enough powerful countries consent to the principles in this treaty enforcement of the right to food could become a reality.

A current example will illustrate how the IFST could make a difference in situations where hunger is used as a weapon. In early March 2009 the Sudanese government expelled all international aid workers representing thirteen organizations that were based in the United States or Europe from the Darfur region.⁹⁵ The International Criminal Court (ICC) had recently indicted President Omar al-Bashir with five counts of crimes against humanity for the atrocities committed against the people of Sudan, and this expulsion was a calculated retaliation for the workers' cooperation with the ICC's investigation.⁹⁶ The workers who were expelled had been providing crucial food, water and health care supplies to over one million refugees there.⁹⁷ The ICC has no police force or military, and the United Nations peacekeeping forces in the region have no jurisdiction to detain war crimes suspects.⁹⁸

This issue illustrates the gaps that exist in the current covenants. Because there is no recognized enforceable right to food, the people of Sudan are starving due to hunger being used as a weapon. If the IFST were enacted by a majority of states, principle four of the Treaty would give jurisdiction to United Nations Food Security Enforcement Forces to step in to replenish the aid and supplies lost after banishment of the aid workers, using force if necessary. Their obligation would be to make sure that the refugees were able to continue getting the food aid that they have been depending on, and the Sudanese people would not be facing starvation due to military tactics of their leader.

⁹⁴ *Id.*; *select Principles*.

⁹⁵ Yahoo World News, *Ejected From Darfur, Aid Workers Fear for People There*, http://news.yahoo.com/s/mcclatchy/20090311/wl_mcclatchy/3186306 (Mar. 11, 2009).

⁹⁶ Financial Times, *Fears for Darfur as Aid Workers Barred*, <http://www.ft.com/cms/s/0/9696695e-09ef-11de-add8-0000779fd2ac.html> (Mar. 6, 2009).

⁹⁷ New York Times, *Breaking World Sudan News*, <http://topics.nytimes.com/top/news/international/countriesandterritories/sudan/index.html?scp=1-spot&sq=Darfur&st=cse> (updated Mar. 6, 2009).

⁹⁸ Marlise Simons & Neil MacFarquhar, *Court Issues Arrest Warrant for Sudan's Leader*, N.Y. Times A6 (Mar. 5, 2009).

FoodFirst Information and Action Network (FIAN) has also promoted the realization of the right to food through enforcement. FIAN recognizes that “[w]ithout the possibility of being enforced, rights lose their reason to be and can be seen as what is commonly referred to as sharks without teeth.”⁹⁹ FIAN emphasizes the need to enforce the right to food through promoting the justiciability of the right at the state level.¹⁰⁰ Although the Optional Protocol to the ICESCR allows individuals to make formal complaints against states who are violating their right to food, FIAN suggests that this procedure is not effective enough and that there should be procedural mechanisms in place in each state to allow victims of violations access to judicial review.¹⁰¹ Judges are in the unique position of being able to enforce international standards of human rights when the national system has not received them yet.¹⁰² In order to achieve this goal it is imperative that human rights activists, lawyers and law students are informed about the justiciability of the ICESCR as a right of the victims so they can bring these cases to the courts.¹⁰³ In addition, judicial decisions concerning the right to food must be released to serve as new precedents and victims need to be able to demand the realization of their right.¹⁰⁴

The IFST and the FIAN proposal are both aimed at finding a way to actually enforce the right to food. Although there is a lot of resistance to this concept, enforcement may become a feasible way to realize the right to food as the world is becoming increasingly interconnected. Nations are no longer isolated from the international community, and in the future countries might be more receptive to a system that truly enforces the right to food.

iii. The Right to Food and International Economic Law

The right to food has also largely been addressed in the context of international economic law, which has not been influenced at all by human rights considerations contained in the UN Charter and subsequent treaties.¹⁰⁵ The best way to combat hunger is to stimulate economic growth, so the right to food is closely connected to the economic state of a country.¹⁰⁶ Despite this fact, economic law has shaped food policies only through creating rules which ensure the smooth functioning of international commerce and has not incorporated human rights goals into these rules.¹⁰⁷ Whereas human rights

⁹⁹ Ana Marie Suarez Franco, *How to Promote the Justiciability of the Right to Food: A Multidimensional Strategic Proposal* 7 (FIAN International 2008).

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.* at 8.

¹⁰³ *Id.* at 9.

¹⁰⁴ *Id.*

¹⁰⁵ Philip Alston, *International Law and the Human Right to Food*, in *The Right to Food* 9, 14 (Philip Alston & Katarina Tomaševski eds., Martinus Nijhoff Publishers 1984).

¹⁰⁶ Smita Narula, *The Right to Food: Holding Global Actors Accountable Under International Law* 44 Colum. J. Transnat'l L. 691, 694 (2006).

¹⁰⁷ Alston, *supra* n. 105, at 14.

laws are dependent upon government action, traditional economic theory emphasizes limited government interference into the market under the “free market” theory. Economic policies, therefore, have centered around removal of barriers to trade, privatization of state-owned enterprises, and limitations on government spending,¹⁰⁸ and human rights considerations have largely been thought of as needless complications to inflexible international economic negotiations.¹⁰⁹

For example, the International Monetary Fund (mandated by the international financial institutions) has come under attack for the drastic impact its policies have had on the social and economic rights of borrowing countries.¹¹⁰ In the 1980s and 1990s, the International Monetary Fund imposed forced liberalization of developing country markets through “structural adjustment” programs supposedly designed to promote the efficiency of the free market that often included eliminating price controls and state subsidies.¹¹¹ According to the World Bank, the net effects of structural adjustment resulted in more severe poverty and marginalization of local communities throughout sub-Saharan Africa, Bangladesh, Ecuador, Hungary Mexico and the Phillipines.¹¹² These disastrous consequences resulted from an overemphasis on macroeconomic policies and without addressing the effect of these policies on human rights, especially the right to food.¹¹³

The ICESCR is drafted in terms of the relationships between states and the individuals they govern, but with economic globalization advancing so rapidly it makes sense to look at the effect economic actors such as transnational corporations and international financial institutions are having on the hunger problem.¹¹⁴

Although the human rights goal of more governmental intervention seems completely in contradiction with free-market policies, in recent years economic thought has been more receptive to government intervention to address market failure, and the human rights arena has come to realize that the human right to food will only be achieved through working with international economic policies instead of trying to circumvent them.¹¹⁵ The human rights-based approach actually requires economic reform because it calls on governments to pursue reorganization which will improve food production, conservation and distribution.¹¹⁶ Economic and social rights are in this sense both ends of economic development.¹¹⁷

¹⁰⁸ Narula, *supra* n. 106, at 701.

¹⁰⁹ Alston, *supra* n. 105, at 15.

¹¹⁰ Narula, *supra* n. 106, at 712.

¹¹¹ *Id.* at 713.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.* at 699.

¹¹⁵ *Id.* at 701.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

V. Conclusion

The right to food is the only right listed in the ICCPR or the ICESCR that is described as ‘fundamental.’¹¹⁸ The Committee on Economic, Social, and Cultural Rights has stated that “the right to adequate food is indivisibly linked to the inherent dignity of the human person and is *indispensable for the fulfilment of other human rights* ... [i]t is also inseparable from social justice, requiring the adoption of appropriate ... policies ... oriented to the eradication of poverty and the fulfillment [sic] of all human rights for all.”¹¹⁹ This powerful affirmation signifies that the international community considers the right to food of the utmost importance, and yet the problem persists worldwide. The international covenants that are currently in force are well-intentioned, but something more must be done to ensure that the right to food, the most essential and basic human right, is respected and recognized throughout the world.

¹¹⁸ Alston, *supra* n. 105, at 32 (emphasis added).

¹¹⁹ *General Comment 12*, *supra* n. 43, at ¶ 4 (emphasis added).