

Rights-based approaches to food aid
(with respect to human rights law, humanitarian law and the Voluntary
Guidelines)

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Global Food Situation: Challenges for Humanitarian Assistance

by Michael Windfuhr, Human Rights Director, Diakonie Katastrophenhilfe

1. Human rights based approach: A complementary and very useful approach

Developing or using a rights-based approach (RBA) for development became a quite often used statement in development policies during the last decade. The complete title should “Human Rights based approach” and RBA is used here as an abbreviation of it. The approach refers to a development policy that reflects the legal obligations, which states have under human rights law and try to make use of this in working towards holding state actors accountable. Development policy is today asking for good governance as one of the central pre-conditions to development. The best way probably to define good governance in details – not only reducing it to elections and no corruption - is by using internationally recognized human rights standards.

Using a rights based approach in the context of food aid will therefore start by defining what states should do by looking into their obligations under human rights law. One has to differentiate between national obligations (obligations of the recipient states), e.g. what states have to do at home, and international obligations (obligations of the donor state), e.g. what states have to do abroad. It does not alone refer to food aid, but to the right to food in general. The relevant provisions for food aid are taken up in later in the paper.

At the core of a rights based approach is the idea that people can claim respect of all human rights from their governments. In that sense, human rights create entitlements of persons vis-à-vis their governments. These entitlements can be legally claimed and are therefore a good tool to hold governments accountable. If one looks carefully into the core causes of hunger and malnutrition today one can see how great the importance of the quality of governance is for achieving progress in combating hunger. An empowerment approach on the other hand is focussing on supporting or enhancing people “capabilities”, human resources etc. Both approaches are there complementary. A rights based approach does not replace other forms of development policies, but it is a necessary complement to achieving long term success.

The absolute number of hungry and malnourished worldwide stayed basically constant between the World Food Summit 1996 and 2007 at around 840 million. During that current world food crisis the number increased at least by 75 million people (to 923 Million), according to the latest figures of the FAO. It is important to identify which groups are those most affected by hunger. The most recent endeavour to develop a typology of hunger was undertaken in the UN-system by the Task Force on Hunger of the United Nations Millennium Development Project. Their data show that close to 80 % of the world's hungry live in rural areas. The majority of the people facing hunger and malnutrition are smallholder farmers, depending mainly or partly on agriculture for their livelihoods. In fact, half of the number of hungry people are peasants who live from a small piece of land, lacking adequate access to productive resources such as land, water and seeds. Out of these smallholder peasants two thirds live on marginal soils and under environmentally difficult conditions, such as

mountainous areas or such threatened by droughts or other natural risks, like flooding and mud slides. Additionally 22 % of the ones suffering from hunger and malnutrition are landless families who often survive from income obtained under precarious working conditions as landless labourers. Additionally 8 % can be found in rural communities engaged in fishing, hunting and herding activities. About 20 percent of the hungry are urban – they constitute the fastest growing group.

The key lesson from the brief typology presented is that hunger and malnutrition are deeply entrenched in groups that are politically and geographically marginalized and live in relatively remote areas. Fighting hunger and malnutrition requires tackling the problems of discrimination and marginalization that characterise the situation of those families and persons affected. Small holder farmers on marginal lands often lack access to secure land titles, to credits, agricultural extension services, to local markets and agricultural research. Landless families lack access to jobs or productive resources such as land, seeds or water. The lack of access to productive resources or jobs makes families unable to produce or to buy adequate food. Hunger is therefore less a problem of the total amount of production as often argued, but rather a question of securing access to such productive resources. The role of governments is important, not related to production but in the creation and securing of an enabling environment.

A human rights based approach has to cover both sets of human rights: civil and political (CP-rights) as well as economic, social and cultural rights (ESC-rights). While the ESC-rights seem to be of importance for poverty related problems, CP-rights are also relevant for the overall approach. For example, the guarantee that each person in political trials is treated in a way accepting human rights standards for participation, the right to be informed, freedom of expression, the right to organise, transparency etc. are important civil and political rights. The rights based approach also highlights the rights to participate in complaint and judicial procedures. Human rights institutions, ombudsman systems and judicial procedures must be open to everybody without discrimination. Special provisions for legal aid should be provided to effectively guarantee access to justice for extremely poor people as well. Human rights empower each person to participate in relevant decision making procedures and to have access to legal remedies. These are core conditions for equal treatment of all people according to the law and for a comprehensive understanding of citizenship.

2. Relevant legal provisions and the Voluntary Guidelines:

The Relevant legal provisions for the issue of Food Aid can be found in two bodies of International Law (1) the international humanitarian law and (2) the international human rights law. It would go beyond the scope of the paper to discuss their interrelationship in details but the most important legal sources shall be mentioned here.

The relevant legal sources in the International Humanitarian Law (IHL) are the four Geneva Conventions from 1949 and the two additional protocols to it adopted in 1977. The Geneva Convention are concerned with the treatment of victims of war. The first additional protocol is related to the humanitarian needs of civilian population, including their access to food in situations of armed conflict and occupation. It regulates that starvation of civilians is prohibited as a method of warfar. It prohibits to “attack, destroy, remove or render useless objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works.....”. In situations of occupation, the international humanitarian

law provides, inter alia “that the fullest extent to it, the Occupying Power has the duty of ensuring the food and medical supplies of the population;... “

These relevant provision are also quoted and taken up in the Voluntary Guidelines on the right to adequate food in Guidelines 16 (para 2 and 3).

Moreover the IHL contains provisions that access to emergency deliveries should always be given and the that security of humanitarian personal must be guaranteed. These provision are also reflected in the Voluntary Guidelines in VG 15.3 and 16.4.

The relevant treaty in international human rights law for the right to adequate food (which is also recognized in the Universal Declaration of Human Rights from 1948 is the International Covenant on Economic, Social and Cultural Rights, which came into force in 1976.

Human rights create entitlements of persons vis-à-vis their government. These entitlements can be legally claimed and are therefore a good tool to hold governments accountable. Putting government action under human rights scrutiny is therefore a core element of every rights based framework and allows governments to be held accountable to all people living on its territory. Complaint procedures need to be accessible for everyone. They can cover different formats and different legal qualities from arbitration procedures to quasi judicial and to judicial procedures. The justiciability of human rights is the core element for holding governments accountable. These complaint procedures are normally accessible at the national level, but also exist at the international level, for example in the existing regional human rights instruments or at the international level for most of the core human right treaties if the state being responsible for a violation has ratified the specific optional protocols.

Human rights treaties give a rough description of state obligations, e.g. as to what citizens can expect from their government. The final scrutiny defining which types of policies are acceptable and which action or omission constitutes a human rights violation is normally given by court decisions. A rights based framework, therefore, allows us to describe government obligations in a better way and to develop criteria for designing and evaluating policy processes. In the area of ESC-rights only few court decisions have been taken, other documents also have importance in describing the content and the state obligations linked to ESC-rights. Of particular importance are the General Comments of the CESCR.

For the right to food are also important the Voluntary Guidelines on the right to adequate food, which have the long title: “Voluntary guidelines to support the progressive realization of the right to adequate food in the context of national food security”. The process initiated by the World Food Summit to develop voluntary guidelines on the right to adequate food has allowed a mainstreaming of the rights-based approach to hunger and malnutrition among governments and within the FAO. The mainstreaming process has started and is far from being completed. A rights based approach can be particularly strong as it will allow people who are affected by governmental policies to access judicial or quasi judicial procedures and to seek remedies.

Right to Food and Food Security?

The right to food and food security are not contradictory or conflicting concepts. The right to food strengthens food security initiatives and adds the dimensions of obligations, recourse, non-discrimination and rule of law. The access to sufficient, adequate and safe food of all people has to be realized at all times. For this to happen, the Government, as the primary duty bearer, is obliged to create an environment which allows everyone to feed himself, either by producing food or by earning a living. For those who are unable to care for themselves because of age or sickness or in times of crises, Government should provide support directly.

A human rights approach to food and nutrition

- Putting people into the center of development;
- Recognizing food as a human right – not charity;
- All individuals are rights holders – and not mere beneficiaries;
- Progressive realization of the right to food is a duty – and not a matter of choice;
- Duty bearers should not do harm, in violating the right to adequate food in respecting and protecting that right of individuals.
- Duty bearers in turn need to be aware of their responsibilities, enacted with authority, provided with sufficient resources and be adequately trained;
- Prioritizing the fight against hunger at national level;
- Applying human rights principles
 - Non-discrimination & Equity
 - Transparency & Participation
 - Accountability & Rule of Law
- Recognize that all human rights are universal, indivisible and interdependent and interrelated¹.
- Adding complaint and redress mechanisms in case of alleged violations of the right;
- Ensuring that duty bearers can be held accountable for their actions and omissions.

The main difference between the right to food and food security is the legal dimension. Under the new paradigm, food is acknowledged as a right and cannot be treated as mere charity. It's not a matter of choice for Governments to care for the hungry and vulnerable, it's a mandatory priority. Individuals are right holders as opposed to “beneficiaries”, who have a right to actively engage in policies that concern them. Individuals are no longer perceived as objects of government policies, but as subjects who legitimately claim a responsible government response to their situation. In case their right to food is violated, appropriate judicial and quasi-judicial mechanisms have to be in place, to hold the responsible person or duty bearer accountable. In a rights-based approach to food security human rights standards and principles should guide all programming and implementation. Human rights, such as freedom of expression, opinion, assembly and association and non-discrimination, have to be respected at all times.

What has changed with the Voluntary Guidelines?

With the voluntary guidelines, the FAO has now a clear mandate to start a substantial rights based work. Governments have at the same time a clear tool-box how to realize the right to adequate food nationally and in their international work. For civil society organisations, the voluntary guidelines are a useful instrument to challenge governments who are inactive in fighting hunger. Let us be more specific, by answering the question: What has changed with the adoption of the Voluntary Guidelines:

The voluntary guidelines are a new legal instrument to guide the implementation of the right to adequate food. They describe what governments can and should do within several policy

¹ Vienna Declaration of Human Rights, UN Doc. A/Conf/157/23, para 5.
[http://www.unhchr.ch/huridocda/huridoca.nsf/\(Symbol\)/A.CONF.157.23.En?OpenDocument](http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/A.CONF.157.23.En?OpenDocument)

areas when they begin to orient their policies towards a rights based approach to implement the right to adequate food. The first achievement is that the text strengthens the legal interpretation of the right to food which was developed in the course of the last ten years by international law experts and civil society organizations. The definition of the right to adequate food used in the VG reflects that the content of the right to adequate food is broader than simple access to food, but contains the access of individuals and groups to productive resources. It is clear in the voluntary guidelines that states have various obligations vis-à-vis people living in their territory. The text of the guidelines refers to the triads of obligations developed over the years and also used in the General Comment No. 12, to respect, protect and fulfil (see below in chapter 3). Governments have to respect existing access to food and to productive resources, protect people from being deprived by economically more powerful actors and to invest the maximum of the available resources to progressively achieve the full realization of the right to food, by taking immediate and courageous steps to do so.

An essential element of the Voluntary Guidelines requires that governments need to have a national strategy for the implementation in place, be it an overall right to food strategy, be it via integration of right to food aspects in already existing poverty or food security strategies. The VG are specific in describing the five necessary elements of such a national strategy, which are a precondition for an effective implementation of the right to adequate food. Such a strategy has to start (1) with a careful analysis of the causes of hunger and be followed by (2) an assessment of the existing legislative and policy framework and identification of problematic legislation or areas in which adequate legislation is missing. A third element of the national strategy is that (3) all policy measures taken by governments need to be screened in order to make sure that they do not contribute to violations of the right to adequate food and ensure that the state is using the maximum of available resources to progressively implement the right and to direct its implementation particularly to those groups, which are extremely marginalized in the country. The fourth element (4) is that governments install a functioning monitoring mechanism which will help to identify victims of violations as well as progress over time. Finally (5) governments have to have in place effective recourse procedures which allow victims of violations of the right to adequate food to claim their rights and ask for meaningful remedies. The VG contain many provisions in different parts of the text that explain in details how these elements could be part of an integrated national right to food strategy. Governments are not asked to do business as usual but to do the necessary changes at all five stages of the implementation strategy.

In cases of failing states, where a national rule of law no longer exists, people lose access to justice procedures and can no longer claim their rights. The direct accountability mechanisms do not work any longer. Nevertheless, human rights present an internationally recognized standard and thus build a reference base even lawless states can be checked on. It can be a source of strength and orientation for people struggling against oppression that a universally recognized binding framework with the human rights treaties exists and even with formal legal procedures that governments can be held accountable for their action. The human rights standards are more detailed at the national level in constitutions and court decisions.

3. Obligations of states nationally (obligations of recipient states)

The normative content of the right to adequate food was described by the UN-Committee on Economic, Social and Cultural Rights (CESCR) in its “General Comment No. 12” (GC 12) as a follow up work to the World Food Summit Plan of Action that was demanding a such a clarification from the member states. In General Comment No. 12 the right to adequate food

is described “as the right of every man, woman and child alone and in community with others to have physical and economic access at all times to adequate food or means for its procurement in ways consistent with human dignity”. The definition used in GC 12 also highlights the requirement to ensure access to an income-base of each individual either through access to productive resources (land, water, seeds, livestock breeds, fish stocks etc.) or through work, or, if neither of these is possible, through adequate social safety net policies. Each of these terms is described in more detail in the text of the Comment (GC 12). Not only must the food to which access is made possible be sufficient in quantity, but the form of access itself has to have certain qualities: access must be possible by participating in economic life using resources and other means of procurement. Moreover, this form of access must be sustainable. The standard provisions and definitions of the GC 12 have been taken up in Part I (Preface and Introduction) of the Voluntary Guidelines on the right to food.

The state has to *respect, protect* and *fulfil* this standard for each person in its jurisdiction. The crucial issue then is to determine the related state obligations to make sure that laws and programmes exist through which people can make their entitlement a reality. The obligations are best explained in General Comment No. 12.²

“The right to adequate food, like any other human right, imposes three types or levels of obligations on state parties: the obligations to respect, protect and to fulfil... The obligations to respect, as existing access to adequate food, requires that state parties do not take any measure resulting in preventing such access. The obligation to protect requires measures by the state to ensure that enterprises or individuals do not deprive [other] individuals of their access to adequate food. The obligation to fulfil (facilitate) means that states must pro-actively engage in activities with the intention to strengthen people’s access to, and utilisation of, resources and means to ensure their livelihood, including food security. Finally, whenever an individual or group is unable to enjoy the right to adequate food by the means at their disposal, states have the obligation to fulfil (provide) that right directly.” State parties also have external obligations with respect to individuals or groups living in other countries.

While the principal obligation under article 2 of the Covenant is to take steps to achieve the full realisation of the right to adequate food, the GC 12 clarifies that (a) each state has the obligation to proceed as expeditiously as possible towards that goal, and (b) every state has the core obligation in order to ensure that everyone under its jurisdiction has access to the minimum essential food, to ensure freedom from hunger. While only states are parties to the Covenant and are thus ultimately accountable for compliance with it, all members of society – individuals, families, local communities, non-governmental organisations, civil society organisations, as well as the private business sector – have responsibilities in the realisation of the right to adequate food. The state should provide an environment that facilitates implementation of these responsibilities.

Concerning international assistance and food aid one provision from the GC 12 is of particular importance. In para 17 it describes the obligations to seek assistance in situation when it cannot provide enough food to those actually hungry. The obligations of states only ends if it can prove that it has unsuccessfully sought to obtain international support. The

² . The general Comment No. 12 is an interpretative note for the right to food adopted in May 1999 by the UN-Committee on Economic, Social and Cultural Rights. These types of comments are drafted by all human rights treaty bodies that monitor state compliance with the central UN-human rights treaties. General Comment No. 12 is referenced as UN Doc. E/C.12/1999/5. For the right to food also relevant is General Comment 15 of the same Committee on the “right to water”, UN Doc. E/C.12/2002/11, adopted in 2002, which contains the right to drinking water as part of the right to food.

government has the obligation to seek international support and have to make sure that the support can reach the people affected.

4. Obligations of states internationally (obligations of donor states)

The International Covenant on Economic, Social and Cultural Rights is explicitly stating in Art 2 of the covenant that the rights of the covenant have to be implemented by using national resources but also by using international cooperation and assistance. This is reiterated in Art. 11 of the Covenant which contains the right to adequate food.

Following the developed typology of state obligations at the national level, the international obligations can be summarized similarly: The tripartite classification of state obligations also applies to extraterritorial obligations.

The UN Committee on Economic, Social and Cultural Rights has emphasised in its General Comment on the right to food that states parties should “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”. The UN Special Rapporteur on the Right to Food in his report to the UN Commission for Human Rights in 2005 discussed this tripartite classification. He describes the obligations in the following way:

The obligation to respect requires States to ensure that their policies and practices do not lead to violations of the right to food in other countries.

The obligation to protect requires States to ensure that their own citizens and companies, as well as other third parties subject to their jurisdiction, including transnational corporations, do not violate the right to food in other countries.

The obligation to support the fulfilment of the right to food requires States, depending on the availability of resources, to facilitate the realization of the right to food in other countries and to provide the necessary aid when required.

It is important to see that the obligation to fulfil has been changed to an obligation to support the fulfilment. This recognizes the fact that there is no unlimited obligation to support all those whose right to food are not met. But it is an obligation to support endeavours of national governments. The commitment of the FAC can be seen as one of the possibilities to implement such an obligation to support the fulfilment, by guaranteeing a minimum amount of support.

The UN Committee has employed the threefold typology of extraterritorial state obligations also in General Comments on rights other than the right to food. Much needs to be done, however, to concretise and to operationalise these obligations. A first good operationalization was achieved in the Voluntary Guidelines related to the issue of food aid as the following table will show. The Voluntary Guidelines take up these international (or extraterritorial) obligations of states in Part III of the text. Here the VG makes clear that the primary responsibility with implementing human rights rests with the state, but it is recognized that the international community has taken up “its readiness to support national governments in their efforts to combat hunger and malnutrition ...” (para 1 in Part III of the VG)

5. Relevant provisions from the Voluntary Guidelines

The following relevant provisions can be found in the Voluntary Guidelines. Those related to national obligations are together in left column and those related international obligations are in the right column.

National level provision (recipient states)	International level (donor states)
<p>Guidelines 13. Support for vulnerable groups (all para)</p> <p>Guideline 14: Safety nets (all para)</p> <p>Guidelines 15: International food aid 15.3: guarantee the unimpeded access to the population in need as well as to international needs assessment and by humanitarian agencies</p> <p>Guideline 16: Natural and human made disasters 16.4: guarantee safety of humanitarian personal 16.6: unimpeded access to assistance 16.7: early warning 16.8: do nutritional impact assessments and support coping strategies of affected households</p>	<p>Guideline 15: International food aid 15.1. Food safety, clear exit strategy, sound needs assessment, targeting to especially poor etc. 15.2. respect International standards such as WTO, CSSD, food safety standards, respect dietary provisions etc. 15.4</p> <p>Guideline 16: Natural and human made disasters 16.1: Do not use food as a means of political or economic pressure 16. 2/ 3: Obligations from international humanitarian law</p>

6. Value added of a rights based approach.

The central question is whether the reference to ESC-rights will help national and international co-operation to gain more importance and political strength in the struggle for poverty reduction. A Rights based approach is not replacing other approaches – but has an important value added – an essential motivation for CSOs to demand such an approach. It is important to note that not all persons suffering from non-implementation of one of the rights are automatically victims of violations through government policies. The example of hunger shows that not all forms of hunger or malnutrition are a result of government activities and therefore cannot be judged as violations.

Let us sum up the value added of a rights based approach in 9 arguments:

1. A human rights based approach covers both sets of human rights: civil and political (CP-rights) as well as economic, social and cultural rights (ESC-rights) and therefore give guidance to government actions in all these fields.
2. Human rights create entitlements of persons vis-à-vis their government. These entitlements can be legally claimed and are therefore a good tool to hold governments accountable:
3. State obligations become clearer when checked in recourse procedures (court decision, investigations etc.) A rights based framework, therefore, allows to describe government

obligations in a better way and to develop criteria for designing and evaluating policy processes.

4. The implementation needs a clearly defined national strategy for the implementation of each of the respective rights (demanded in each General Comment but also in the Voluntary Guidelines).

5. It is required that governments use the maximum of their available resources. The policy development process should set its priorities in such a way so that particularly vulnerable groups are addressed first.

6. Human rights are individual entitlements. They set limits on the restrictions and deprivations that individuals can permissibly be allowed to bear even in the promotion of noble social goals or overall development objectives, such as economic growth.

7. General achievements in human development are not always accompanied by achievements in human rights fulfilment. Certain development processes may go hand in hand with a deterioration of the livelihood and the human rights fulfilment of particular vulnerable groups.

8. The development way of thinking seldom asks “how” results were achieved, while within a human rights framework the quality of the process of policy development and implementation is of importance.

9. A rights based assessment and framework must only look into the obligations and responsibilities of national governments, it should also assess the potential impact of policy measures or effects of one country on persons living in another country, the extraterritorial obligations.

To sum up: A rights based framework can therefore help to mobilize more political will to change vested interest and bad policies. It will also be helpful to be taken up as a central guidance for the reform of the food aid regime.

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