



Basic Income: A States' Obligation Under the Human Right to Food

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Abstract

The paper gives an update on the recent development of the human right to food in the United Nations human rights system and international civil society. It describes a systematic approach to fulfilment-bound obligations, the role of minimum income and basic income in the context of fulfilment systems and framework legislation.

1. The right to food in international law

The right to food is firmly rooted in international human rights law such as the Universal Declaration of Human Rights (art.25), the International Covenant on Economic, Social and Cultural Rights (art.11), but also the Declaration of the Rights of the Child (Principle 4), the Declaration on the Protection of Women and Children in Emergency and Armed Conflict (art.6), the Geneva Conventions, the Universal Declaration on the Eradication of Hunger and Malnutrition (art.1).

1.1 Overcoming the marginalization of the right to food

Since the times of the cold war the right to food, along with other ESCR (economic, social and cultural rights, has suffered a de facto marginalization in the United Nations human rights system. This was a result of the separation of the original draft human rights covenant into two covenants, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights (ICESCR) and the subsequent reductionist interpretation of the ICESCR from the early 1950s until the early 1990s.¹ Both covenants came into force in international law in 1976 and form the International Bill of Human Rights.

Since the 1980's the Right to Food has continuously improved its standing in international law. In 1983 the Economic and Social Council of the United Nations commissioned a Report on the Right to Adequate Food as a Human Right, the first study ever undertaken in the United Nations human rights system on a specific right of the International Covenant on Economic, Social and Cultural Rights. In 1984 the International Law Association formed a Right to Food Committee and the Netherlands Human Rights Institute in Utrecht held an

¹ When the Universal Declaration was adopted in 1948 the plan was to expand the Declaration, which contains all types of human rights, into an International Covenant. This plan was dropped by a General Assembly Resolution in 1952 and replaced by the plan to draft two covenants. A landmark in the rehabilitation of ESCR after decades of marginalization was the 1993 World Conference on Human Rights in Vienna, which stressed the indivisibility and equal importance of all human rights and called for an Optional Protocol to the ICESCR to allow for individual complaints.

international conference on the right to food. In 1986 a conference of international legal experts formulated the Limburg Principles, which gave guidance to the further interpretation of the ICESCR. In 1987 the United Nations Human Rights Commission approved the mentioned report.²

The non-governmental human rights community itself was largely focused on civil and political rights. One of the first signs of change was the founding of FIAN in 1986 as an international human rights organization working for the human right to food. In the 1990s, economic, social and cultural rights made important inroads in international civil society and in the human rights community itself. The human rights community (both inside and outside the United Nations) has shown a growing interest in ESCR.

The 1996 World Food Summit was significant in the sense that it did not only refer to the right to food rhetorically, but formulated a commitment (in objective 7.4 of the Plan of Action) towards the clarification of states obligations and the development of guidelines for their implementation.

On the basis of the Rome Declaration and Plan of Action, FIAN, in cooperation with the Jacques Maritain Institute and the World Alliance for Nutrition and Human Rights, produced a Draft Code of Conduct on the Right to Adequate Food in 1997, which was supported by 800 NGOs and welcomed by the High Commissioner on Human Rights. The Office of the High Commissioner organized three fruitful expert consultations (Geneva 1997, Rome 1998, Bonn 2001).

The human right to adequate food and the fundamental right to be free from hunger are enshrined in the ICESCR, article 11. The respective supervisory body to receive the states reports under the ICESCR is CESCR (United Nations Committee on ESCR). The CESCR has developed the practice of producing General Comments as a means towards a better implementation of the ICESCR. In 1999 the CESCR produced a detailed General Comment on the Right to Food.

² Report on the right to adequate food as a human right submitted by Mr. Asbjörn Eide, Special Rapporteur, ECOSOC E/CN.4/Sub.2/1987/23, 7 July 1987

GC 12 (General Comment Nr.12) is the most relevant and authoritative legal interpretation of the right to food in the ICESCR and will be frequently referred to in this section.

In 2000 the Commission on Human Rights decided to raise the profile of the right to food by appointing a Special Rapporteur on the Right to Food, Mr. Jean Ziegler of Switzerland. One of the topics propagated by Mr. Ziegler in his 2001 interim report was the issue of justifiability – the enforceability of the right to food in court.³

The issue of the Code of Conduct on the Right to Food had been one of the most contested issues at the 1996 World Food Summit. It had pitted the Group of 77 and Norway (pro) against the United States of America (against) with the European Union as a silent observer. The result was the call for one-operational “guideline on food security” in the context of the right to food. This situation changed in June 2002 at the World Food Summit – five years later conference in Rome. The European Union came out in favour and the United States was isolated. The conference called upon the FAO to establish an intergovernmental working group for drafting – within two years - guidelines on the right to food.

1.2 The core content of the right to food: Freedom from hunger and malnutrition

The right to adequate food as a human right obviously entitles each and every human being access to adequate food. When, however, is food adequate? And what kind of access is meant? Specifying the normative content of the right to adequate food means giving answers to these two questions. The minimum answer (and hence the minimum entitlement) that can be identified is not to specify the type of access at all, and to call food adequate if it keeps hunger away. This approach describes what is often called the minimum core content of the right to adequate food: Freedom from hunger.

³ ECOSOC, General, E/CN.4/2002/58

The normative content of "the right of everyone to (an adequate standard of living ... including) adequate food ..." in Article 11.1 of the ICESCR therefore contains as its core content the normative content of the "fundamental right of everyone to be free from hunger" in Article 11.2. The United Nations Human Rights System (and also the Maastricht Guidelines) have referred to the notions of minimum core obligations and minimum essential level when dealing with resource-poor states, the lack of resources and the question whether or not certain obligations are incumbent on such states.⁴

The right to freedom from hunger is the only right in the Covenant termed "fundamental". This coincides with the principle of the CESCR formulated in its General Comment 3 that states must uphold the minimum core content of economic, social and cultural rights for everybody in their territory under all circumstances (if necessary with the assistance of the international community) and that a defective core content *prima facie* indicates a violation of the respective human right by the state and/or the international community.⁵

The normative content of right to adequate food is much more than freedom from hunger: According to GC 12 the right to adequate food is fully 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". Para 6 warns us "The right to 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."

⁴ The 1993 World Conference on Human Rights in UN Doc. A/CONF.157/PC/62/Add.5, Annex I, paragraph 16.

The Committee on Economic, Social and Cultural Rights referred to it for example in UN Doc. E/C.12/1993/11, paragraph 5. The Commission on Human Rights called upon states "to consider identifying special national benchmarks designed to give effect to the minimum core obligations to ensure the satisfaction of minimum essential levels of each of the rights. (Resolution 1993/14, paragraph 7)

⁵ General Comment No.3, UN Doc.E/1991/23, Annex III, paragraph 10

1.3 Adequate access to food

GC 12 specifies not only the adequacy of food but also of access to food: "Accessibility encompasses both economic and physical accessibility: ..." (para 13). Food is economically accessible for a person or community if the person or community has access to food as a result of its economic activities in the widest sense. These economic activities can be direct food production based on resources such as natural means of production (land, water, forest, pastures, fishing grounds), capital resources (tools, funds, technologies) and human resources (skills). Economic activities include work as a self-employed or wage-employed person. Para 12 specifies for the availability of food: "Availability refers to the possibilities either for feeding oneself directly from productive land or other natural resources, or for well-functioning distribution, processing and market systems that can move food from the site of production to where it is needed ..."

"Moreover economic accessibility applies to any acquisition pattern or entitlement through which people procure their food and is a measure of the extent to which it is satisfactory for the enjoyment of the right to adequate food".(para 13) The income generated by such acquisition patterns and entitlements is to be sufficient for an adequate standard of living including food and other basic needs as well: "Economic accessibility implies that personal and household financial cost associated with the acquisition of food for an adequate diet should be at a level that the attainment and satisfaction of other basic needs are not threatened or compromised".(para 13). The normative content containing both economic and physical access to food implies therefore the entitlement to access the means for its procurement: Natural resources and other resources (skills, knowledge, markets, funds etc.).

Contrary to economic accessibility of food, physical accessibility of food ignores whether or not the accessed food is in return to an economic activity. It puts the emphasis on the mere question of immediate access. "Physical accessibility implies that adequate food must be accessible to everyone ..." (para. 13). Physical accessibility of food must therefore make sure that people who may not be able to or willing to make use of resources still have access to food. Physical accessibility of food is unconditional, just as the right to an adequate

standard of living in art.11 is unconditional. Access to food is in particular not conditional on economic activities or specific merits (whether or not people "deserve aid").

GC 12, para 8, puts a particular emphasis on "The accessibility of such food in ways that are sustainable..." This can be seen as an ecological as well as an economic requirement: "The notion of sustainability is intrinsically linked to the notion of adequate food or food security, implying food being accessible for both present and future generations and ...sustainability incorporates the notion of long-term availability and accessibility."(para 7). Whereas long-term availability points to the ecological limitations of food production and distribution, long-term accessibility (of available food) points to the need that the access to food itself must not be risky but continual over time - even over a long period of time.

Moreover, food is to be accessible in a manner, which does not destroy one's dignity as a human being.⁶ This warning about non-interference with the enjoyment of other human rights reminds us that the right to food is an integral part of human rights, and in particular of the human right to an adequate standard of living. Access to food must therefore not be seen in isolation from the lack of an adequate standard of living. The absence of an adequate standard of living is the embodiment of poverty: Exclusion from the resources of humankind and the services of society.

1.4 The obligations to respect, protect and fulfil

"The right to adequate food, like any other human right, imposes three types or levels of obligations on States parties: the obligations to respect, to protect and to fulfil." (GC12, para 15).

The obligation to respect access to adequate food is the mere states obligation not to act depriving people of their existing access to food or food producing resources.

⁶ Report on the right to adequate food as a human right submitted by Mr. Asbjörn Eide, Special Rapporteur, ECOSOC E/CN.4/Sub.2/1987/23, 7 July 1987, para. 52.

The different acts breaching the respect-bound obligation are:

- § passing a law or administrative measures destroying people's access to food or food producing resources;
- § carrying out activities which directly prevent people from maintaining access to food or productive resources.

The obligation to protect access to adequate food is the states' obligation actively to prevent third parties from depriving people of their existing access to food or food producing resources. The destructive agent in this case is the third party. This makes the obligation to protect somewhat more difficult than the obligation to respect. States cannot regulate everything, they cannot – and should not - put a policeman next to every vulnerable person or group. What can be reasonably expected from states can best be determined on a case-to-case basis.

The first two types of obligations deal with the destruction of access to adequate food. If the destructive agent is a states authority (breach of respect-bound obligation) this act is a violation of the human right to food. If the destructive agent is a third party, this act is a crime against the human right to food. Civil and political rights (such as the right to physical integrity) make the same distinction between destructive acts of states authorities on the one hand (violations) and of third parties on the other (crimes). This difference is due to the fact that human rights are essential a legal relationship between persons/groups as rights-holders and the state as duty-holder rather than moral norms between any two entities. If states authorities could have been reasonably expected to prevent this crime or if they failed to take reasonable precautions, these omissions are breaches of protection-bound states obligations involved that have led to this crime. Such breaches are violations of the right to food. In many cases, unfortunately, states authorities actively collaborate, support or authorize the criminal third party.

The third type of obligations deals with persons or groups who lack access to food or food producing resources: Fulfilment-bound obligations require that the State must take the necessary measures to guarantee deprived groups' access to

adequate food and to food producing resources. Under the right to adequate food, access to food for deprived persons includes access to productive resources including employment - and the sharing of resources and food in systems of social security (based on the state, community or family). GC 12 insists both on physical and economic access to food and hence on sharing resources and income. States have to fulfill the access to adequate food for each and every person. Policies, however important, are insufficient to provide remedies for each individual person or community. What is called for to make the right to food justifiable for persons living in deprivation is a specific system of programmes - a fulfilment system (see section 2).

1.5 The obligation to implement justifiably as quickly as possible

Human rights are a source of states obligations. Violations of a human right are breaches of related obligations. This is true for the right to food as for any other human right. For the states parties to the ICESCR these obligations are legal obligations under international law. The general legal obligation is formulated in ICESCR art.2.1: "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." The nature and the scope of these obligations have been clarified by the CESCR in its General Comment 3 of 1990. The key terms are "progressive achievement" and "maximum of available resources". They are to be interpreted as follows:

The reference to the fact that full realization cannot be expected immediately under all circumstances but has to be achieved progressively recognizes the fact that fulfilment-bound obligations (and to some extent protection-bound obligations) require the deployment of resources. This is nothing particular to the right to food, but holds similarly for civil and political rights (like the right to

political participation or to freedom from slavery) – as soon as one proceeds beyond respect-bound obligations (which are free of cost).

States, however, have to use the maximum of the available resources to protect and fulfil the right to food. Priorities must be given to the core content and hence to the most vulnerable individuals. General Comment No. 3, para. 12, mentions "the duty of States parties to protect the vulnerable members of their societies assumes greater rather than less importance in times of severe resource constraints." More generally, under the provision of maximum available resources, states are expected to use all means in their power and to do their best to meet their obligations under the right to food. "This imposes an obligation to move as expeditiously as possible towards this goal." (GC 12 para.14). For this matter obligations which can be met immediately are immediately incumbent upon the states. This includes all obligations to respect the economic and physical access to adequate food. Taking the steps progressively (rather than immediately) is only permissible due to lack of resources and in such cases, states have the burden of proving that they lack the resources. General Comment 3, para 10, stipulates that the state claiming inability to carry out its obligation for reasons beyond its control has to prove that it has unsuccessfully sought to obtain international support to ensure the availability and accessibility of the necessary food.

The Special Rapporteur in his interim report has put great emphasis on justifiability – a topic referred in GC 12 (para. 32) and other General Comments (see.1.1). Full justifiability of the human right to food includes that each person without access to adequate food can sue the state (or the community of states) and through the court's injunction be provided food and/or the means to feed herself immediately. Equality before the law implies the existence of programmes applicable to this person and any other person in a similar situation. Besides immediate remedy the courts may have to rectify irregularities in fulfilment-bound programmes, provide compensation for the victim's sufferings, and punish persons responsible for severe irregularities. Implementation is the process of establishing (and enforcing) laws, regulations, programmes and policies which serve as tools for the justifiability of the human right to food.

Full realization of the human right to food means that it has been made fully justifiable and that victims and their support groups have in fact been making successful use of the related tools. Full realization will imply, of course, the absence of long term or widespread malnutrition, since the courts now can enforce the states' obligation to fulfil access to food for each person. Why is the emphasis here put on justifiability rather than the absence of under nutrition? Justifiability is necessary, because it brings about the reliability, security and sustainability behind the absence of malnutrition, which is the typical sign of a right realized: Without justifiability, malnutrition may be absent this year, but if it can happen next year without legal remedy for the hungry - then we cannot say today that the right to food has been fully realized, even if there is no malnutrition around now.

Full realization requires a system of legal and administrative measures fulfilling guaranteed access to food and food-producing resources for deprived persons. The necessary system of programmes (and policies backing up these programmes) is the state's "fulfilment system" for the right to food. It contains a complete set of tools ("implements") for the victims, so that they can immediately realize their right to food. States have to establish the fulfilment system as quickly as possible: In the ICESCR art 2.1 states have undertaken to move expeditiously "to the maximum of available resources" towards the full realization of the right to food.

GC 12 stipulates that this process should be governed by a framework law: "[I]n this connection, States should consider the adoption of a framework law as a major instrument in the implementation of the national strategy concerning the right to food. The framework law should include provisions on its purpose; the targets or goals to be achieved and the time-frame to be set for the achievement of those targets; the means by which the purpose could be achieved described in broad terms, in particular the intended collaboration with civil society and the private sector and with international organizations; institutional responsibility for the process; and the national mechanisms for its monitoring; as well as possible recourse procedures." A first step in direction of a framework law will be to assess the current state of legal implementation (and actual enforcement) of respect-, protection- and fulfilment-bound obligations and to compare with the

required legal implementation under the right to food. The implementation of fulfilment-bound obligations can be formulated in terms of a fulfilment system. with related backup policies.

2. The fulfilment system

2.1 Key elements of a fulfilment system

The fulfilment system consists of programmes which share resources and income - together with backup policies which make the success of these programmes sustainable. The fulfilment system has to be complete in the sense of finding a place for each man, woman and child to have access to food and resources to feed themselves. Such fulfilment systems have to be established expeditiously on the basis of the resources existing today - and not with a view to economic growth.⁷ Full employment policies and redistribution policies have often been based on economic growth. This cannot be justified on the grounds of human rights. Moreover, in recent years the experience of jobless growth along with growth-triggered ecological destruction has reduced enthusiasm for this kind of approach.

Therefore economic access to food for deprived people requires society's sharing of current resources; physical access (in particular) requires the sharing of income. Therefore fulfilment systems have a two-fold structure reflecting both: deprived people's "right to feed oneself" and their "right to get food": The right to get food regulates the simple physical access to food. In order to be able to consume some basic food, a certain minimum income is a prerequisite. Sometimes this income is just the money value of the crop in the subsistence farmer's field, or of the food shared by the family or community. The right to feed oneself on the other hand regulates (usually on the level of the family or community, or individually) that the income is an income from economic activities feeding oneself, rather than income sharing only. In order to feed

⁷ The Limburg Principles of 1986, one of the most influential expert documents on ESCR, states in para 23: "The obligation of progressive achievement exists independently of the increase in resources; it requires effective use of resources available."

oneself, one needs resources: land, technologies, skills, funds, and employment. The two sets of programmes within the fulfilment system carry the following elements:

a. Resource sharing programmes

- § Natural resource programmes (such as redistributive agrarian reform);
- § Capital resource programmes (such as basic capital programmes);
- § Human resources programmes (education and training programmes);
- § Employment programmes (such as employment guarantee).

b. Income sharing programmes

- § Basic income, guaranteed minimum income programmes, social security, pension schemes;
- § Minimum wage programmes;⁸
- § Food stamps and food subsidies;
- § Emergency Food Aid

Every deprived person will need to participate first of all in income sharing programmes. In addition, however, the person needs guaranteed access to resource sharing programmes making sure that she can feed herself.

2.2 Levels of fulfilment systems

A minimum income is an income in cash or kind necessary to secure at least a certain essential basket of goods and services and consumption. Different understandings of essential consumption give rise to different levels of minimum income. The level of minimum income guaranteed by a fulfilment system is an important parameter of the system. Moreover it is crucial when it comes to

⁸ A minimum wage programme ensures that the income generated by work is fairly shared with the workers and therefore establishes a minimum wage. It is an income-sharing programme although it is linked to economic activities.

estimating the scope and cost of fulfilment systems - and of related national and international financial obligations

There are basically four types of minimum incomes:

- § the minimum food income for which a person will be free from hunger and malnutrition;
- § the minimum needs income for which a person will have access to basic needs; and
- § the relative minimum income which people need to be free from relative poverty;
- § the (general) minimum income, securing (B) and (C), whatever is bigger.

Each of the different minimum incomes gives rise to a certain level of the Fulfilment System: Hence we have Food Fulfilment Systems (A), Needs Fulfilment Systems (B), Relative Fulfilment Systems (C) and General Fulfilment Systems (D) depending on the type of minimum income which they guarantee.

Minimum incomes are often identified with poverty lines which are to be avoided by guaranteeing this income level. International poverty lines are calculated in terms of purchasing power parity (\$PPP). 1 \$PPP is the purchasing power of 1 US\$. In order to calculate the minimum food income (at the extreme poverty line), it is not enough to calculate the purchasing power necessary to buy basic intake requirements (say 2350 calories per day). Even the poorest people do not spend more than a certain share of their income on food even if food is by far their most essential expenditure. The World Development Report 2000/2001 offers two international poverty lines corresponding to a daily consumption below 1 \$PPP or 2 \$PPP respectively. The lower poverty line corresponds (in the Indian context) to a food share of 70% where the type of food is the cheapest (very low quality). Empirical data show that in rural India only families above this line can

be assumed to be free of hunger and malnutrition.⁹ There are estimates that some 1.1 billion people in the world don't reach this minimum food income.¹⁰

Even from the point of view of the right to adequate food alone, this poverty line is extremely low: It does not consider whether food is really adequate. Moreover it neglects other basic needs (housing, health, education). A more specific basket of goods covering basic needs leads to a minimum needs income which corresponds to the second international poverty line of 2 \$PPP (absolute poverty line). Both these minimum incomes are very low. It should be kept in mind, however, that in many countries a considerable percentage of the population has to survive on less. The percentages of the population below the minimum food income resp. minimum needs income are estimated (for 1997) at: Brazil 5 resp. 17, India 44 resp. 86, and Nigeria 70.2 resp. 90.8.¹¹

Needs depend on the availability of opportunities and the overall resources of the society in which they are formulated (even basic needs do to some extent): Human dignity needs sharing and an understanding of justice. The EU used to define a relative poverty line at 50 per cent of the country's average disposable income.¹² Keeping this background in mind the general minimum income in a country should be taken as 50 per cent of the average disposable income - or 2 \$PPP, whatever is larger.

Each state should be obligated to guarantee in its fulfilment system at least the relative poverty line as a minimum income, as this is independent of the total volume of resources. In resource-poor states where this poverty line happens to fall below 2 \$PPP one would expect the subsidiary international obligation to cover the rest.

⁹ Swaminathan, M.2000, "Weakening Welfare" (Delhi, LeftWord Books)

¹⁰ The FAO estimates under nourishment at 0.818 billion, Committee on World Food Security, Rome 2001

¹¹ World Development Report 200/2001, World Bank, Washington 2001

¹² For a few years now ECOSTAT has favoured a relative poverty line at 50 per cent of the median, which corresponds rather to 45 per cent of the average.

Practical experience with minimum income programmes shows that the level of the minimum income may often be less important than the fact that all interested and vulnerable persons are served, and that they can rely on this guaranteed availability of a minimum income.¹³ This will avoid the rationing and exclusion, the corruption and mistargeting that can beset those programmes, which may provide a higher level of income but will not be available for each deprived person. Guaranteed availability and its justifiability are basic for the human right to food. Such a straightforward and transparent approach will also promote the political mobilization of the deprived people to insist on the functioning of the system.

2.3 Are fulfilment systems beyond "the maximum of available resources"?

States without a food fulfilment system violate the ICESCR unless they prove that such a system is beyond their available resources and that the steps they have taken towards the fulfilment system have already used the maximum of available resources. Economic modelling shows that such proofs will not be easy, as the very opposite may be the case.¹⁴ Most local economies and (ultimately) the global economy are big enough for the right to food of the current population, and will be big enough for the expected stable population of 12 billions in the year 2075, but would be too small for the greed of the rich.

A back-of-the-envelope calculation will show that income sharing programmes as a subsystem of the fulfilment system can be financed within the limits of maximum available resources (falling back, if necessary, on international resources): Every state, rich or poor, is obliged (and able) to finance at least a relative fulfilment system as this is merely a question of redistributing existing resources. This approach is fair because a country's wealth and its public

¹³ v.Braun (ed.)1995 "Employment for Poverty Reduction and Food Security" (IFPRI, Washington)

¹⁴ Economic modelling of a national employment guarantee programme for India can be found in Fischer et al.1991 "Hunger: Beyond the Reach of the Invisible Hand" (IIASA, Laxenburg)

expenditure ratios are not necessarily correlated.¹⁵ If the relative minimum income happens to fall below the minimum food income, the international community would have to step in with a subsidiary obligation. In all countries minimum food incomes are at 365 \$PPP per capita per year (pcpy), and the needs minimum income at 730 \$PPP pcpy. The relative minimum income at half the disposable average income varies, of course. For India it would be 716 \$PPP pcpy (taking as a rule of thumb the disposable income as two thirds of the GNP of 2,149 \$PPP pcpy). Hence India would be expected to finance the food fulfilment system on her own. For the 0.442 billion extremely poor people in India (and with administrative costs estimated at 20 per cent of the total volume) this back-of-the-envelope-calculation would estimate the annual cost of the food fulfilment system at 202 billion \$PPP. Counting this against India's GNP of 2,144 billion \$PPP we see that this amounts to 9.4 per cent. Spending more than 10 per cent of the GNP for central government social services is not unusual: Sri Lanka and the United States of America provide 13 per cent, and France 33 per cent (Data: World Development Reports 1997, 2000). Resource constraints can therefore not be identified for India. The income sharing subsystem of the food fulfilment system would therefore be seen as an incumbent obligation for India under international law.

There are states, however, mostly in Africa, which cannot be expected to finance food fulfilment systems on their own. Taking the number of malnourished people in Africa at around 200 million, the related financial obligation does not go beyond what can be reasonably expected from the international community, as can be seen by a similar "back of the envelop" calculation as in the case of India: If each of the 200 million malnourished persons gets 365 \$PPP per year, and if administrative cost are included at 20 per cent of the total volume, the necessary funds would amount to 91 billion \$PPP. If the co-financing would just come from the high income countries (with a combined GNP of 21,763 billion \$PPP), the total cost amounts to some 0.4 per cent of the high income countries' GNPs.¹⁶

¹⁵ UNDP Human Development Report 1991, p.41-44

¹⁶ All data from World Development Report 2000/2001.

Assuming that half of it would be covered by the African countries' relative fulfilment systems, the remaining financial demand is at 0.2 per cent of Northern GNP. If this fund is added as a new component to current Northern official development aid (ODA) the total ODA would still fall short of its official benchmark of 0.7 per cent of Northern GNP, let alone the maximum of available resources.

2.4 Types of violations of the right to food in the context of the fulfilment system

In the context of the fulfilment system a state violates the human right to food of a hungry or malnourished person, if the person is denied access to an income-sharing programme or suffers severe irregularities in the realization of one of the programmes.

A state systematically violates the human right to food of a hungry or malnourished person, if the person cannot reasonably be expected to access the resource or income sharing programmes, either because they do not operate in her region or because her access is difficult by the nature of the programme, and if the state does not prove having taken steps to the maximum of resources available in order to establish proper programmes and secure access. If a state without a fulfilment system can prove to have taken such steps, but has failed to turn to the international community for assistance in establishing/maintaining a fulfilment system, the state systematically violates the right to food.

Whether "access is difficult by the nature of the programme" and hence whether there are systematic mechanisms of exclusion needs to be checked under the respective circumstances. In any event, fulfilment systems must allow for effective redress mechanisms including judicial scrutiny. Every hungry or malnourished person (claiming violations of her or his human right to food) must have standing before the courts. As a matter of immediate remedy the court has to grant relief by an injunction ordering the state to provide food and/or the minimum food income to this person – and take protective measures – if necessary - such as cancelling debt or extending the terms of payment to avoid extraction of minimum food income by third parties. Once the court identified the

exact nature of the violation of the right to food the court should order the state to rectify this breach of obligations in a reasonable period of time. Until then the payments to the person continue. This procedure is an immediate consequence of a provision in GC 12, para.15: “Finally, whenever an individual or group is unable, for reasons beyond their control, to enjoy the right to adequate food by the means at their disposal, States have the obligation to fulfil (provide) that right directly.”

3. Is basic income a states obligation under the human right to food?

3.1 Universal programmes or means tested programmes?

What the fulfilment system does (among many other things) is to transform for each person an economic income (input) into a social income (output). The social income has to be at least the minimum income (not matter what the economic income had been). There are basically two types of transfers: Means tested systems (sometimes called targeted systems) and universal systems.¹⁷ Means tested systems are restricted to a certain target group with certain limited means, whereas universal systems apply to everybody. Basic income is the most straightforward universal programme: An unconditional cash payment to everybody. Its amount is not specified and could be higher or lower than the minimum income.

States have an obligation to fulfil access to food for deprived persons. A straightforward way to do so is by providing each person with a basic income above the minimum food income. From the non-poor there would be claw backs via taxes, so that this type of programme requires a certain viable tax structure. Universal systems have some advantages over means tested programmes: Means

¹⁷ Means tested systems are targeted systems. Even universal programmes, however, can be considered “targeted” - not through an ex ante prior means-test, but through an ex post “claw back” taxation afterwards - reversing the transfers to the rich and middle classes. This paper uses the term targeted in the usual sense of ex ante targeting.

testing is often faulty and many eligible people are not covered. Universal transfers will not stifle people's incentive to gain additional income through work: Sharp targeting would subtract from the income programme all (or at least a lot) of the money earned. Universal transfers do not carry social stigma, whereas means testing can be demeaning and encourage oppressive attitudes of authorities. Targeting (especially sharp targeting) can impoverish vulnerable groups just outside the target if beneficiaries competing for the same jobs can work for less. Targeting carries considerable administrative cost.

Should there be direct income transfers (in cash or kind) or subsidized food prices - or food stamps? In order to benefit from food subsidies a person must have at least enough cash in hand to buy food at the reduced rate. This requirement currently excludes many of the poorest of the poor. The experience of the PDS (the country-wide Public Distribution System of fair price shops in India) shows that it works well if the coverage is nearly universal and it's functioning is heavily monitored by civil society and states authorities.¹⁸

Means testing and targeting often refer to households and not to individuals. Transfers are handed over to one person in the households (usually men) assuming appropriate income sharing within the household: This assumption, however, may be false, and the programme then violates the right to food of women and children. Transfer payments (means tested or not) should therefore go to individuals (above a certain age) rather than households, in order to rule out gender discrimination and discrimination of children.

3.2 Is basic income a necessary element in every fulfilment system?

Under international right to food law states have to guarantee everybody's access to adequate food. By failing to do so a state (or the community of state) violates the respective person's human right to food. The respective victim must have access to legal recourse procedures including compensation, rehabilitation and guarantee of non-repetition. This implies in particular that everybody at all

¹⁸ Swaminathan, M., op.cit.

times must have access to minimum income guaranteeing at least access to food. In order to implement such a justifiable guarantee, states must provide a functioning food fulfilment system.

What are the options for states to implement and enforce minimum income programmes guaranteeing access to food for persons deprived of it? The minimum income programmes would consist of a cash transfer (sometimes tied to food purchases) supplemented (if necessary) by a public distribution system (PDS) making sure that deprived persons can indeed spend the cash received on sufficient food (possibly at subsidized rates). The PDS may be superfluous if there are other measures in place which secure the availability of food. On the other hand PDSs alone will miss out on those who even lack the money to buy subsidized food. This shows that (as food is usually not provided directly by the state) one of the programme components obligatory under international law is cash transfer: A guaranteed payment which will allow vulnerable people to survive in the markets and/or in the public distribution system.

States may find a way to implement the minimum food income by targeting these programmes to the deprived. Targeting, however, leads to two kinds of problems:

- § Exclusion: States failing to implement a programme for eligible persons.
- § Inefficiency: States implementing a programme for a non-eligible person.

These two types of problems are of a very different nature: The first one is a violation of the human right to food and a matter of life and death for the victim. The second is an inefficiency of the programme making the programme cost more. The first problem is of the most serious nature: There is no programme that can bring a person back to life who died as a consequence of hunger and malnutrition. The second problem can be addressed by modifying the programme.

As the right to food has to be implemented to the maximum of available resources (ICESCR art.2), the main concern is violations of the human right to

food, which states have to avoid at all cost. The redress procedures mentioned in 2.4 may be sufficient to ensure realization of the right to food even in means tested income programmes. Whether or not this is the case will depend on the difficulty of access to the programme and to redress procedures. Moreover, redress procedures can only do the job if the exclusion problems of the programme are more the exception than the rule. Violations of the right to food – and in particular the right to freedom from hunger – due to exclusion situations have such serious consequences for the victim, that she is, for most practical purposes, not in a position to make use of redress procedures: Persistent hunger and malnutrition as a consequence of a malfunctioning food fulfilment system (for example due to inadequate targeting) incapacitate the victims and tend to prevent them from using redress mechanisms – even if such mechanisms are available in theory. States are therefore under an obligation to implement programmes which minimize exclusion problems: Basic income is such a programme. It should provide the minimum food income to everybody, perhaps by channelling the payment to a personal account given (or to be established) by a bank in the next major village or town close to the person’s residence.

Are basic income programmes within a state’s “maximum of available resources” (ICESCR 2.1)? Over a two or three year period allowing *ex post* targeting of claw back, the net transfer in basic income programmes need not be much higher than in means-tested programmes. The back-of-the-envelope calculations in 2.3 therefore apply to the costs of basic income programmes as well. Costs will increase, however, if the *ex-post* targeting through claw back taxation ran into problems: Personal income taxes are relatively insignificant in low-income countries (10 percent of total tax revenue compared to 30 percent in high income countries).¹⁹ On the other hand, low-income countries rely more on indirect taxation (in particular sales tax), which also lends itself to claw back by excluding the products bought by the poor.

¹⁹ UNDP Human Development Report 1991, p.44

3.3 How about BMI-targeting of the undernourished?

Redress procedures in food fulfilment systems would have to include court injunctions providing an undernourished person with an emergency food or income programme – until the case has been investigated, the court has passed a judgement and the breach has been rectified. In order to settle questions of standing, courts can make use of anthropometric indicators for under nutrition such as the BMI (body mass index) - the ratio of weight (in kilogram's) to the square of height (in meters). A BMI below 18.5 is seen as under nutrition, below 16 as severe under nutrition.

A BMI-targeted programme in the food fulfilment system could emulate this procedure and make payments of minimum food income conditional on anthropometric measures. To avoid the all-or-nothing decision at the threshold of 18.5, payments could increase gradually from 0 at a BMI of say 19.5 (and above) to the full minimum food income at 18.5.

What would be the exclusion problems in this BMI-programme – and the possibilities for redress? First of all there may be a need to bribe the administrative officer who knows that the payment is linked to a State programme for a deprived person (contrary to the withdrawals from a normal bank account supplied with basic income transfers and perhaps other income). The officer could introduce a “commission” reducing the paid amount below the minimum food income thereby violating the right to food. Secondly, even straightforward measurements can lead to cheating and falsification of records: The administrator measures a BMI of 18, which he also reports to the authorities, but tells the person that the value was 19 thereby reducing the payment - and then pockets the difference. A third problem is that the programme can introduce pressures to stay malnourished or even to reduce weight in order to increase programme payment: Such pressures could be exerted by local oppressors (landlords, husbands) on their dependents (bonded labourers, women) to remain (or become) undernourished – as this would allow the oppressor to extract the related minimum food income from the victim. Such crimes and violations, unfortunately, are part of the reality of oppression suffered by many of the hungry and undernourished – and can be a

matter of life and death for them. Experience shows that due to their state of deprivation victims are not in a position to go to court or otherwise address these matters. If such a case is addressed it is often because of the benevolence of an intervening third party (such as a social action group). For fulfilling a human right such contingencies are unacceptable.

Targeted programmes must not put up with violations of the human right to food. Even if the reason is to avoid inefficiencies. Therefore fulfilment programmes must be chosen which minimize crimes and violations. An infrastructural problem for basic income programmes could be the lack of cash outlets – such as banks - in every town, so that basic income would have to be disbursed through local public administration. Basic income also carries risks of corruption. These risks, however, are greatly reduced – simply because people now know exactly what they are entitled to since everybody is entitled to the same.

3.4 Conclusion

Many states commit massive and systematic violations of the human right to food through inappropriate social security systems. They are therefore duty-bound under international law to reform these systems expeditiously and to the maximum of available resources in order to secure guaranteed minimum food income. This obligation includes a subsidiary international obligation of the community of states. Basic income programmes are a states obligation in this context unless there are other minimum food income programmes which almost surely avoid exclusion problems.

This argument for basic income as a states obligation under the right to food depends on the decapacitating effect of exclusion problems in means tested minimum income programmes. This effect is strong in food fulfilment systems: Victims are usually not in a position to get redress for targeting problems. There would be no effective remedy for major exclusion problems.

A similar argument could be made for higher-level fulfilment systems in the wider context of the human right to an adequate standard of living (ICESCR

art.11). To what extent the argument can be generalized depends on the question to what extent the victims can successfully address exclusion problems in such systems.

A state failing to implement a basic income programme should *prima facie* be seen in violation of the human right to food. Such a state carries the burden of proof that there are targeted minimum food income programmes which almost surely avoid exclusion problems or that such problems can be easily addressed or that the basic income is beyond its maximum of available resources and that international support is not available.