



HOUSING AND LAND RIGHTS NETWORK

Habitat International Coalition

Contextualizing States' Extraterritorial Obligations toward Ending Food Insecurity and Malnutrition in Protracted Crises

Independent statehood accompanies a bundle of sovereign rights (*vis-à-vis* other states) and corresponding obligations. Toward ending food insecurity and malnutrition in protracted crises, modern international law and world order provide a seminal reference for states in the customary law expression of the human right to food in Article 25 of the Universal Declaration for Human Rights (UDHR), within the context of the human right to an adequate standard of living. Although generally considered to hold the status of customary law, the UDHR is not an operational instrument, nor does it establish obligations on the part of states. Rather, UDHR has provided an early inventory of principles to specify the meaning of Article 55 of the United Nations Charter, which establishes the three essential purposes of the United Nations, its members and its organs: (1) peace and security, (2) forward development and (3) human rights.¹

Essential to know are the four dimensions of states' obligations in the interstate system: (1) individual obligations, (2) collective obligations, (2) domestic obligations and (4) extraterritorial obligations. International law establishes these multiple obligations in the form of various treaties (charters, agreements, pacts, covenants, conventions and their protocols) and declaratory law, as well as through long-established general principles and peremptory norms.

States' Individual Obligations

Individually, states bear obligations to adhere to the general principles of international law applicable to them under Public International Law, including the Law of Nations, which governs states relations to each other, to nations and peoples, as well as to other legal and natural persons. International Humanitarian Law (IHL), including the Law of War and the Law of Occupation, also establish individual state obligations, as all states in the UN System are *de jure* parties to the Four Geneva Conventions and must adhere to applicable general principles.

With specific regard to food security and nutrition in protracted crises, all states are required individually to respect, protect and fulfill the human right to food under customary law, while most states also bear related obligations individually under treaty, in particular the International Covenant on Economic, Social and Cultural Rights (1966).² Pursuant to Article 11.2, states recognize that more-immediate and urgent steps may be needed to ensure "the fundamental right to freedom from hunger and malnutrition." This includes minimum core obligation to take the necessary action to mitigate and alleviate hunger, even in times of natural or other disasters.³

States' Collective Obligations

Collectively, states bear obligations through two principle international law regimes: treaty law and general principles of international law. Besides their individual obligations under treaty, states parties also bear a collective obligation to implement the terms of their treaty along with their fellow treaty parties. Beyond ratified treaties, states also bear a collective obligation to uphold general principles of international law, including peremptory norms such as human rights generally, self-determination of nations and peoples,⁴ the prevention and punishment of war crimes, crimes against humanity and other universally prohibited acts such as genocide; aggression; torture; population transfer, including the implantation of settlers and settlements; and slavery and slavery-like practices. With respect to food security, both the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR) establish further that "In no case may a people be deprived of its own means of subsistence."⁵

In cases where such peremptory norms (*jus cogens*) are breached, all states bear obligations *erga omnes* to take steps to correct the illegal situation.⁶ These require states not to recognize, cooperation with,⁷ benefit from or transact with the illegal situation, and to prosecute, extradite or punish its perpetrators.⁸ These “self-executing obligations” do not require any separate declaration, resolution or legislative act to implement. Other effective measures may also include trade, military and/or diplomatic sanctions as a countermeasure.⁹ High Contracting Parties to the Geneva Conventions are obliged further to exercise domestic and universal jurisdiction, in order to pursue and prosecute or extradite actors that have been, or are involved in grave breaches of IHL¹⁰ and international criminal law such as the denial of access to food and water in the conduct of war.¹¹

States’ Domestic Obligations

Domestic obligations are those duties that naturally apply within the territorial jurisdiction and effective control of any state. The state and its official institutions bear the obligation to respect, protect and fulfill human rights and freedoms uniformly, equally and without discrimination throughout those territories. States are obliged to apply these measures consistent with seven over-riding principles of implementation.

Nondiscrimination¹² and self-determination¹³ are two closely intertwined principles of statecraft and state obligations. Self-determination is *not* a right held by states, but an obligation of the state to respect, protect and fulfill as an inalienable right of the nations and peoples (the actual right holders), without discrimination, within their jurisdiction and territory of effective control. Nondiscrimination and self-determination form two of the seven over-riding principles of human rights implementation, as provided in the two Human Rights Covenants and repeated through numerous other international instruments. These include states’ obligations also to ensure the enshrined human rights by ensuring gender equality,¹⁴ rule of law,¹⁵ progressive realization (nonretrogression),¹⁶ maximum of available resources¹⁷ and international assistance and cooperation.¹⁸

While these over-arching principles of treaty implementation are standard for performing human rights treaties, ICCPR makes particular reference to the indivisibility of all human rights, including the need to uphold economic, social and cultural rights, the obligations to which are elaborated further in ICESCR.¹⁹ Meanwhile, the same indivisibility principle applies also to economic, social and cultural rights, while ICCPR enshrines more specificity on the rule-of-law principle.²⁰

States’ Extraterritorial Obligations

The extraterritorial dimension of states’ obligations under treaty, in particular human rights treaties, arises from two aspects of implementation:

(1) As a matter of treaty, as well as custom, general principles and peremptory norms of international law, states in the international system bear an obligation to engage in both international assistance, within their means, and international cooperation to uphold the norms and ensure an adequate standard of living. This is common-but-differentiated with the domestic obligations of states to do the same within their jurisdiction and territory of effective control. To engage the appropriate mechanisms of international assistance and cooperation may require states also to take prior measures. With regard to food insecurity and malnutrition in protracted crises, this requisite may entail the domestic government’s declaration of a famine, as well as to permit the necessary international humanitarian interventions.

(2) Inherent, too, is extraterritorial aspect of the obligation to respect, protect and fulfill each of the human rights enshrined in treaties. As rights enshrined in the ICESCR, including the human right to food and nutrition, are *human* rights, they are the entitlement of all human beings (natural persons), without discrimination and without distinction as to nationality, citizenship or immigration status. The treaty-bound state must apply the same standards in its foreign and extraterritorial policies and practices as it is obliged to do domestically. This integrity is especially relevant in the

state's regulation of its agents and domestic actors in their extraterritorial activities of all kinds with respect to food-safety standards, agricultural and food-sector investments, cooperation in sanctions regimes, and the state's performance in multilateral institutions, for example.

The literature on the extraterritorial obligations of states to respect and protect the human right to food has evolved since the World Food Summit Declaration and Plan of Action (1996) and the United Nations Millennium Declaration, by which states have further recognized their collective responsibility and have undertaken to halve, by the year 2015, the proportion of people who suffer from hunger and who are unable to reach or to afford safe drinking water.²¹ The CESCR General Comment No. 12: "the right to food" provides that "States parties should take steps to respect the enjoyment of the right to food in other countries, to protect that right, to facilitate access to food and to provide the necessary aid when required."²² In 2005, the UN Special Rapporteur dedicated his annual report to the subject, including also a typology of extraterritorial obligations.²³

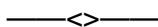
Extraterritorial economic, social and cultural rights obligations also reinforce state sovereignty. They form a further legal basis of human rights norms empowering the state to resist conditions or policies imposed by external parties that risk derogating the human rights of domestic producers and consumers. An example of this assertion is one state's rejection of "free trade" provisions, calling for the removal of all so-called trade distortions in the 4th round of negotiations toward the World Trade Organisation (WTO) agreement on trade in agriculture. That state's assertion of its prior obligations under ICESCR prohibited it from rescinding its protection of small farmers, as that would lead to a violation of Articles 6–8 and 11 of the Covenant.²⁴ The WTO's attempt to over-ride superior international law regimes did not prevail, and an alternative eventually enabled countries to opt out of certain conditions due to extenuating circumstances through the maintenance of human rights protection measures in a system of "blue boxes" and "green boxes."²⁵

While, any state in the international system expected not to apply a double standard in domestic versus extraterritorial performance of an obligation, the aspects of obligation differ domestically from extraterritorial obligations in the important sense that the performance of domestic obligations to respect, protect and fulfill human rights remain wholly within the state's effective control.

In practice, that means that, any state's extraterritorial obligations remain to respect and protect the human right to food and nutrition. Thus, the do-no-harm principle aligns with this legal obligation, such that states must *respect* the rights extraterritorially by, themselves, not violating the rights, and have to *protect* the same human rights, by ensuring that third parties within their jurisdiction and effective control do not violate human rights of others.

It may not always be within the sovereign power of extraterritorial states to *fulfill* that right to food and nutrition within another sovereign state. Nonetheless, the duty still remains to support fulfillment,²⁶ just as states also bear the obligation to seek international assistance and cooperation to uphold the human right to food and nutrition within their territories.²⁷

The *fulfillment* of the right to food and nutrition through sovereign domains such as educational curricula, budgets, policy formulation and legislation are also subject to required alignment²⁸ with an international treaty. However, consistent with the norms of self-determination, international assistance and cooperation in these domains may take place also with the consent of the sovereign authorities only through specific agreement of the concerned state or territory.



All of these measures and means arising from state obligations also should serve purposes that are both preventive and remedial in nature. Thus, states' multiple dimensions of human rights obligation constitute indispensable tools in creating the conditions to work *on* crises, and not merely *in* crisis, with a view toward ending food insecurity and malnutrition that often accompanies them.²⁹

Endnotes:

- ¹ UN General Assembly, "In larger freedom: towards development, security and human rights for all: report of the Secretary-General," A/59/2005, 21 March 2005, at: <http://www.refworld.org/docid/4a54bbfa0.html>.
- ² Botswana, Burma/Myanmar, Marshall Islands, Micronesia (Federated States of), Palau, United States of America are the only states on the planet without an established human right to food by either treaty ratification or domestic law.
- ³ Committee on Economic, Social and Cultural Rights (CESCR), "General comment No. 12: The right to adequate food (art. 11)" twentieth session (1999), para. 6.
- ⁴ Advisory Opinion of the International Court of Justice on the international juridical status of Namibia, adopted 21 June 1971 ICJ Reports, 1971, p. 31, para. 52.
- ⁵ Common Article 1.2.
- ⁶ International Court of Justice, "Case concerning the Barcelona Traction, Power and Light Company, Limited," judgment of 5 February 1970, p. 32, para. 33, at: <http://www.icj-cij.org/docket/files/50/5387.pdf>. Further, Article 41 of the International Law Commission (ILC) Draft Articles on State Responsibility, which reflect customary international law, state that, in case of breaches of peremptory norms of international law, all states are under an obligation not to recognize the situation resulting from the illegal conduct as lawful, not to render aid or assistance in maintaining the illegal situation and to actively cooperate in order to bring it to an end. International Law Commission, "Responsibility of States for Internationally Wrongful Acts, 2001," annex to General Assembly resolution 56/83 of 12 December 2001, and corrected by document A/56/49(Vol. I)/Corr.4, at: http://legal.un.org/ilc/texts/instruments/english/draft%20articles/9_6_2001.pdf.
- ⁷ Notably, the obligation not to render assistance is cited in UN Security Council resolution 465, 1 March 1980, operative para. 7.
- ⁸ Ian Brownlie, *Principles of Public International Law* (London: fifth edition, 1998), p. 515; Theodore Meron, "On a Hierarchy of International Human Rights," *American Journal of International Law*, No. 80 (1986), p. 14.
- ⁹ "The situation in the Middle East," A/37/123, 16 December 1982, para. 13. The WTO regime does not impede this corrective trade measure. Tom Moerenhout, "The Obligation to Withhold from Trading in Order Not to Recognize and Assist Settlements and their Economic Activity in Occupied Territories," *Journal of International Humanitarian Legal Studies*, Vol. 3, Issue 2, pp. 344–85; also Security Council resolution 478 of 20 August 1980.
- ¹⁰ *Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War of 12 August 1949*, Article 147. Specific obligations of states and conflict parties with regard to food and nutrition are also found in Articles 23, 36, 50, 55, 76, 87, 89, 100, 108 and 127.
- ¹¹ Article 7: Crimes against Humanity, para. 2(b) on extermination. See also Thalif Deen, "U.N. Decries Water as Weapon of War in Military Conflicts," *Inter Press Service* (19 May 2014), at: <http://www.ipsnews.net/2014/05/u-n-decries-water-as-weapon-of-war-in-military-conflicts/>; Gilbert Burnham, Riyadh Lafta, Shannon Doocy and Les Roberts, "Mortality after the 2003 invasion of Iraq: a cross-sectional cluster sample survey," *The Lancet*, Vol. 368, No. 9545 (21 October 2006; published online: 12 October 2006), pp. 1421–28.
- ¹² ICESCR, Article 2.2 and ICCPR, Article 4.1.
- ¹³ Common Article 1.
- ¹⁴ ICESCR, Article 3. Also specified in greater detail in the Convention on the Elimination of All Forms of Discrimination against Women (1979).
- ¹⁵ ICCPR, Article 2.3 and ICESCR, Article 2.1, "including through legislative measures."
- ¹⁶ With particular reference to economic, social and cultural rights, ICESCR, Article 2.1.
- ¹⁷ With particular reference to economic, social and cultural rights, ICESCR, Article 2.1.
- ¹⁸ ICESCR, Article 2.1.
- ¹⁹ The ICCPR preamble provides: "Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights,..."
- ²⁰ Article 2.3; also Committee on Economic, Social and Cultural Rights (CESCR), "General Comment No. 3: The nature of States parties' obligations (art. 2, para. 1, of the Covenant)," E/1991/23, fifth session (1990), esp. para. 1.
- ²¹ United Nations Millennium Declaration, paras. 2 and 19.
- ²² General Comment No. 12, para. 36.
- ²³ "The right to food," report of the Special Rapporteur on the right to food, Jean Ziegler [main focus: extraterritorial obligations of states to the right to food], E/CN.4/2005/47, 24 January 2005, at: <http://daccess-ods.un.org/access.nsf/Get?Open&DS=E/CN.4/2005/47&Lang=E>.
- ²⁴ In its contribution, Mauritius pointed out that the AA must be interpreted in conjunction with other obligations, in particular those under ICESCR, explicitly quoting Article 11, and observed at the time that "the text of the WTO Agreement appears to have been...drafted so as to avoid countries having to make commitments which would contradict their obligations under other multilateral frameworks." World Trade Organisation, "Agriculture Negotiations: Background Fact Sheet," at: http://www.wto.org/english/tratop_e/agric_e/agboxes_e.htm.
- ²⁵ WTO, "Domestic support: Amber, Blue and Green Boxes," Agriculture Negotiations: Background, at: https://www.wto.org/english/tratop_e/agric_e/negs_bkgnd13_boxes_e.htm; Surya P. Subedi, "Managing the 'Second Agricultural Revolution' through International Law," in Nico J. Schrijver, Friedl Weiss, *International Law and Sustainable Development: Principles and Practice* (Leiden: Nijhoff, 2004), pp. 161–84; Xiaozhen Li, "WTO Agreement on Agriculture: A Developing Country Perspective," *Journal of Politics and Law*, Vol. 1, No. 2 (June 2008), at: <http://www.ccsenet.org/journal/index.php/jpl/article/viewFile/733/705>.
- ²⁶ Ziegler, op. cit., pp. 17–18.
- ²⁷ General Comment No. 12, para. 17.
- ²⁸ Vienna Convention on the Law of Treaties (1969), provides in Article 27: Internal law and observance of treaties: "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty." Fulfilment of a treaty obligation requires the state to take steps as stated in ICESCR Article 2.1 to include "all appropriate means, including particularly the adoption of legislative measures." CESCR General Comment No. 9: The domestic application of the Covenant (1998) specifies measures necessary to give effect to ICESCR within in the domestic legal order.

Habitat International Coalition • Housing and Land Rights Network

South Asia Office:

G–18/1 Nizamuddin West
New Delhi 110 013, INDIA
Tel:/FAX: +91 (0)11 2435–8492
E-mail: info@hic-sarp.org

Coordination Office:

12 Tiba Street, 2nd Floor
Muhandisin • Cairo, EGYPT
Tel/ FAX: +20 (0)2 3748–6379
E-mail: hln@hln.org;
hic-mena@hic-mena.org

UN Liaison Office:

8, rue Gustave Moynier
1202 Geneva, SWITZERLAND
Tel:/FAX: +41 (0)22 738–8167
E-mail: hln@hln.org

Web: www.hic-net.org; www.hln.org; www.hic-mena.org; www.hic-al.org; www.hic-sarp.org; www.hic-gs.org