

Food Sovereignty – An Appropriate Approach to Ensure the Right to Food?

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Abstract

The article reviews the food sovereignty concept, comparing it with the legally recognised human right to food. It is found that there are certain elements of Article 11(2) of the International Covenant on Economic, Social and Cultural Rights which have not been properly emphasised in the context of food trade and new technologies in food production. The article argues in favour of strengthening the right to food approach when faced with these challenges. While acknowledging the mobilising potential that the concept food sovereignty has among civil society actors, it is nevertheless argued that the right to food is both more precise, has stronger support among states, and is on a much higher level with regard to legally binding obligations compared to the food sovereignty concept.

Keywords

right to food, food sovereignty, International Covenant on Economic, Social and Cultural Rights, World Trade Organization(WTO), food trade, intellectual property rights

1. Introduction

The potential relevance of the term food sovereignty can be illustrated by reminding ourselves of what caused the breakdown of the talks at the World Trade Organization's (WTO) so-called "July 2008 package", implying consultations among a group of ministers, taking place in Geneva the 21st to 29th of July 2008.¹ As is widely known, the dispute between India and the USA was on the

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¹ The WTO says on its home page that the meetings lasted until the 30th of July, but the ministers' participation in the meeting ended on the 29th.

application of the Special Safeguard Mechanism (SSM), allowing developing country members to increase their tariffs faced with an import surge in agricultural product. As the two States simply could not agree on the conditions for the SSM to apply,² the Conference ended without any approved final text.³ Is this an example that the concept of “food sovereignty” is now exerting considerable influence in international negotiations?

A State’s possibility to protect itself against food imports which distort local markets, hence undermining the local production capacity, is one of the core elements of the concept of food sovereignty. One of the elements that food sovereignty is said to require is: “Ensuring fair prices for farmers, which means the power to protect internal markets from low-priced, dumped imports.”⁴ This would be more difficult to achieve if the conditions for applying the SSM were strict.

Food sovereignty was introduced as a concept for the first time at the 1996 NGO Forum on Food Security, taking place parallel to the World Food Summit.⁵ The concept is, however, not yet endorsed or agreed upon in any inter-governmental forum. A recent assessment on food and technology by international agricultural experts, under the auspices of a bureau consisting of both governmental and non-governmental representatives, and with international organisations as co-sponsors, established a definition: “Food sovereignty is defined as the right of peoples and sovereign states to democratically determine their own agricultural and food policies.”⁶ At the Intergovernmental Plenary Session concluding the assessment, it was observed: “The UK notes that there is no international definition of food sovereignty.”⁷

² Note that while the “Green Room” negotiations were restricted to seven States, the rejection on 27 July 2008 by four groups of States (African Group, ACP, SVE (Small, Vulnerable Economies) and G33 (comprising 45 States including India and China)) of a 25 July 2008 proposal by Patrick Lamy implies that more than two-thirds of the WTO member States expressed their specific position on the SSM and other issues. <www.twinside.org.sg/title2/wto.info/twninfo20080745/LamyText25July2008.pdf>, visited 28 April 2009. For the response, see Third World Network, *Trade: 100 developing countries in show of strength on SP, SSM*, <www.twinside.org.sg/title2/wto.info/twninfo20080748.htm>, visited 28 April 2009.

³ For the words of the Chairman of the Trade Negotiations Committee, see WTO, *Chairman’s opening remarks*, <www.wto.org/english/news_e/news08_e/mect08_chair_29july08_e.htm>, visited 28 April 2009.

⁴ Rome NGO/CSO Forum 2002, *A Right For All: Political Statement of the NGO/CSO Forum for Food Sovereignty*, p. 3, <www.foodsovereignty.org/new/documents.php>, visited 28 April 2009.

⁵ NGO Forum for Food Security 1996, *Food for All not Profit for the Few. A Statement by the NGO FORUM to the World Food Summit*, para. 6, <www.fao.org/regional/america/ong/cuba/pdf/02apoeng.pdf>, visited 28 April 2009.

⁶ The International Assessment of Agricultural Knowledge, Science and Technology for Development 2008, *Summary of the Synthesis Report*, p. 8 (see also *Global Summary for Decision Makers*, p. 18), <www.agassessment.org/index.cfm?Page=About_LAASTD&ItemID=2>, visited 28 April 2009.

⁷ *Ibid.*, note 3.

While this fact should in itself not be a reason for avoiding the term, this article argues that there is an alternative strategy which is based upon a legally binding document which the States have already endorsed. This is the International Covenant on Economic, Social and Cultural Rights (ICESCR), saying: “*In no case may a people be deprived of its own means of subsistence*” (Article 1(2)). Moreover, the ICESCR says that States “*shall take measures to improve methods of production, conservation and distribution of food [...] by developing or reforming agrarian systems*” (Article 11(2)(a)) and “*ensure an equitable distribution of world food supplies in relation to need*” (Article 11(2)(b)). It is by analysing these legally binding but vaguely worded provisions, combined with a detailed understanding of human rights obligations of states,⁸ including both the obligation to respect, protect and fulfil human rights, and the obligations of process and obligations of result,⁹ that one can identify how the right to food can be used as a tool in both local struggles and international negotiations relating to food.

Particularly Article 11(2)(b) has been widely ignored, including in General Comment No. 12, adopted by the Committee on Economic, Social and Cultural Rights in 2000.¹⁰ In the Voluntary Guidelines on the Right to Food in the Context of National Food Security, adopted by the Food and Agriculture Organization (FAO) Conference in 2004, there are five paragraphs on trade in Section III on International Actions, Measures and Commitments, the most substantive paragraph being the one referring to the final document of the 2004 UNCTAD XI Conference.¹¹

⁸ A. Eide, ‘State Obligations Revisited’, in W. Barth Eide and U. Kracht (eds.), *Food and Human Rights in Development: Vol II: Evolving Issues and Emerging Applications* (Intersentia, Antwerpen, 2007) pp. 137–158.

⁹ The present author disagrees with J. Mowbray, ‘The Right to Food and the International Economic System: An Assessment of the Rights-Based Approach to the Problem of World Hunger’, 20 *Leiden Journal of International Law* (2007) p. 545, in her analysis of the right to food vs. food sovereignty, herself preferring the latter. The present author does not find that Mowbray’s article analyses the human rights obligations (respect protect, fulfil; obligations of process and of result; acts of commission and of omission) and the international dimensions of human rights in an appropriate manner. Moreover, the analysis of food sovereignty (said on p. 567 to be a “legal principle”, and on p. 568 claimed to be “more readily accepted into the legal framework”) is not sufficiently accurate to serve as a basis for the current analysis. Her focus is on three documents (2004 Voluntary Guidelines, 2006 UN Special Rapporteur report and 2005 FIAN annual report), but she does not analyse the ICESCR provisions, or the analytical framework for understanding these provisions.

¹⁰ General Comment No. 12: The right to adequate food (Article 11 of the Covenant), UN doc E/2000/22, pp. 102–110. The term “trade” is used only once, in paragraph 39, and there is no reference to the WTO. With regard to resources, paragraphs 25 and 26 address access to resources in the context of production and distribution, and the principles of accessibility and availability are crucial; *see paras.* 8, 12 and 13.

¹¹ Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security, adopted at the 127th Session of the FAO Council, Rome, 22 to 27 November 2004 as CL 127/10-Sup.1, pp. 34–35.

The article is structured in the following manner: First, there will be an analysis of the content of the relevant provisions of the ICESCR. Second, an assessment of the compatibility of food sovereignty and the right to food will be undertaken. Third, the attempts of linking the right to food and food sovereignty will be discussed critically. Fourth, the relevance and weight of food sovereignty concerns in international negotiations will be identified. Fifth, there will be an attempt at predicting if there will be a growing understanding and application of the elements of the ICESCR that have a relationship to the concept of food sovereignty, and how strategies relating to food sovereignty will evolve. Finally, a conclusion is drawn.

The article will not undertake a thorough analysis of the term “sovereignty”. A classical definition of sovereignty is “[a] supreme authority within a territory”.¹² A definition must include the terms “power” and “authority”, and when addressing modern forms of sovereignty, also the term “territoriality” must be included. A paper finds that no less than 13 different definitions or understandings of the concept “sovereignty” have been given.¹³ For the purpose of identifying the substance of food sovereignty, a broad-based conceptual analysis of the concept “sovereignty” is not deemed necessary. More detailed definitions of the term “food sovereignty” will be given in section 3, and whom the term applies to is discussed in section 4. At this early stage of the analysis it seems appropriate to state that food sovereignty is about ensuring that a collective of persons has the authority to formulate and implement policies relating to food production and food trade, having both an internal and an external dimension.

2. Is the ICESCR Implicitly Supporting Food Sovereignty?

In order to assess the degree of compatibility between the overall understanding of food sovereignty as given above, and relevant human rights, there is a need to analyse the wording of certain provisions of the ICESCR. Do the provisions address elements which are less relevant in relation to the urgent issues facing the global, national and local food situation, or is it rather a too vague or indirect wording in the provisions which make them inapplicable for the purpose of mobilising relevant constituencies and directing relevant policies?

Article 1(2) will be analysed before Article 11(2). While Article 2(1) of the ICESCR is obviously relevant for understanding the nature of the obligations

¹² Stanford Encyclopedia of Philosophy, *Sovereignty*, <plato.stanford.edu/entries/sovereignty/>, visited 28 April 2009.

¹³ W. P. Nagan and C. Hammer, *The Changing Character of Sovereignty in International Law and International Relations*, undated, pp. 3–5, <www.law.ufl.edu/faculty/publications/pdf/sov.pdf>, visited 28 April 2009.

under the ICESCR, space does not allow a detailed analysis of this provision.¹⁴ It must be noted, however, that its wording obliges the States to take steps “*to the maximum of its available resources with a view to achieving progressively the full realization of the rights*”.

Article 1 of the ICESCR provides a context for ensuring the realisation of the relevant rights. The International Covenant on Civil and Political Rights (ICCPR) Article 1 has an identical wording, and its realisation has been identified by the Human Rights Committee as “an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights”.¹⁵

The first two paragraphs of the joint ICESCR/ICCPR Article 1 read:

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

The right of self-determination of peoples constitutes a collective human right. Two observations will be made initially. First, the term “peoples” applies only to a small number of collectives. Stated in the simplest terms, “nations” (in United Nations language) and indigenous peoples are recognised as peoples. Other collectives, such as ethnic minorities, will exercise rights under Article 27 of the ICCPR. The right to enjoy one’s culture in accordance with Article 27 of the ICCPR depends on “the use of land resources”.¹⁶

Second, what the right of self-determination actually implies for each of the peoples recognised as having rights in accordance with Article 1, will depend upon the actual situation.

We will now turn to Article 1(2), which recognises rights of peoples over their resources. First, the phrase “natural wealth and resources” of paragraph 2 must be understood in its broadest sense, to include all resources which are crucial for the individuals’ exercise of all the recognised human rights. Second, the phrases “freely dispose of” and “deprived of” must be understood to imply that the peoples’ access to and use of their resources shall not be impeded in any way. Third,

¹⁴ For a detailed analysis of ICESCR Article 2(1), see H. M. Haugen, *The Right to Food and the TRIPS Agreement – With a Particular Emphasis on Developing Countries’ Measures for Food Production and Distribution* (Martinus Nijhoff Publishers, Leiden, 2007) pp. 90–100.

¹⁵ General Comment No. 12: The right to self-determination of peoples (Art. 1), GAOR doc. A/39/40 (1984), pp. 142–143, para. 1.

¹⁶ General Comment No. 23: The rights of minorities (Art. 27), UN doc. CCPR/C/21/Rev.1/Add.5 (1994), para. 7.

the term “subsistence” relates to food and resources which are directly relating to production of food, such as land and water.

Based on this brief analysis of Article 1, it is reasonable to state that peoples’ rights over their natural wealth and resources is explicitly recognised in the ICESCR and the ICCPR, without any qualifications or conditions. Moreover, those collectives which are not recognised in international law as peoples also have rights relating to land resources, as these rights are crucial for the exercise of a minority’s culture.

We will now turn to Article 11. We will first analyse Article 11(2)(a), which reads:

The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed: (a) To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources;

This paragraph, formulated and adopted in 1963, after the then FAO Director-General addressed the General Assembly with the information that there were 500 million hungry persons in the world. He was asked to write a draft for a new paragraph, and his draft included specific measures. Hence, the States – one month later – agreed on a paragraph which is more specific than one would expect to find in an international treaty on economic, social and cultural rights. The decision to include the listing of measures was made by consensus, with one abstention.¹⁷ The abstaining delegation argued that “plans for rural economic development would naturally differ from country to country”.¹⁸ This argument was not given notice by the other delegations. The most appropriate way to present the rationale behind Article 11(2)(a) is that it identifies the “sectors” within which the measures are to be taken, without specifying the exact nature of the measures.

An interpretation of Article 11(2)(a) has to be done based on the principle of intertemporal law. This implies that treaty *interpretation* shall be done in light of the conditions prevailing at the time of the adoption of the treaty. *Application* of the provisions of the treaty can take into account relevant rules of international law that have emerged subsequent to the adoption of the treaty.¹⁹ The principle was first described by Judge Huber, who emphasised that “a juridical fact must

¹⁷ UN doc. A/C.3/SR.1269 (1963), p. 298, para. 2.

¹⁸ UN doc. A/C.3/SR.1264 (1963), p. 271, para. 4 (Pakistan).

¹⁹ International Law Commission, *Yearbook of the International Law Commission 1964, Vol. II* (1964), p. 8.

be appreciated in the light of the law contemporary with it”.²⁰ This is in accordance with the “good faith” principle, acknowledged in Article 31(1) of the Vienna Convention on the Law of Treaties.

Based on this principle of treaty interpretation, there will now be an analysis of the introduction of Article 11(2). Then the analysis turns to three elements of Article 11(2)(a): first, the phrase “improve methods of production”; second, the phrase “developing or reforming agrarian system”; and third, the phrase “efficient development and utilization of natural resources”. These are found to be more relevant in the context of analysing the right to food and food sovereignty. As distribution of food and disseminating knowledge of the principles of nutrition are crucial for the realisation of the human right to food,²¹ improved food production will not enhance realisation of the right to food if it is not followed by improved food distribution. In the context of food security, the emphasis lies more on factors that impact on how peasants are able to continue their production of food without being impeded.

The term “shall” in the introduction of Article 11(2) indicates a strong obligation. There will now be an analysis of the phrase “which are needed” appearing at the end of the introduction of Article 11(2). It will be identified if this phrase can be interpreted to imply that a State can be exempted from adopting relevant measures. In accordance with Article 2(1) of the Covenant, it is only in the rare circumstance when a State has reached “full realization of the rights recognized in the present Covenant” that no further measures are needed. Moreover, there is no State in which no persons are actually suffering from hunger. Finally, the emphasis on international cooperation for the realisation of the right to food, which is unique to Article 11(1) and 11(2) of the ICESCR, implies that a State cannot see its own situation in isolation from the rest of the world. Hence, it is a reasonable conclusion that no State is exempted from complying with Article 11(2), which emphasises the taking of relevant measures.

The analysis will now look into Article 11(2)(a). First, with regard to improved methods of production, there is a general understanding that a massive introduction of the most modern “methods of production” will simply not be appropriate in many local contexts. There is also an acknowledgement of the need to recognise and integrate the existing knowledge, including traditional knowledge, of farming communities, and build upon these when modern technologies are introduced. As stated by Asbjørn Eide, one should not “advocate a *status quo* concerning traditional production systems, but [...] when seeking to promote more effective methods [one] must take traditional knowledge and experience as

²⁰ *Islands of Palmas Arbitration, Netherlands v. US*, 1928.

²¹ For an analysis of Article 11(2)(a), see Haugen, *supra* note 14, pp. 130–142; see also P. Alston, ‘International Law and the Human Right to Food’, in P. Alston and K. Tomasevski (eds.), *The Right to Food* (Martinus Nijhoff Publishers, Dordrecht, 1984), p. 35.

the starting point, and translate it into approaches where modern science and traditionally adapted principles are combined in order to maximize the prospects for adequate food consumption, nutritionally balanced, and in respect of ecological constraints”,²²

This is a valid observation. Changes in agricultural production, including increased productivity, are crucial for the agriculture in many developing countries to cope with a growing number of people. If the changes take place too rapidly, not taking into account local circumstances and the active involvement of the farmers in identifying the challenges and the solutions, the introduction of improved methods of food production might cause harm.

Second, with regard to the reform of agricultural systems, this applies to distribution of land,²³ uncertain or lacking legal entitlements to land²⁴ and lack of recognition of collective ownership. This latter problem is addressed by the High Level Commission on the Legal Empowerment of the Poor: “Many indigenous lands have been and still are declared public or unoccupied because they are held collectively according to conceptions of ownership and access that do not fit well with imported property systems. This lack of status has consequences for indigenous asset holders and society at large and is a critical issue...”²⁵

There is no doubt that agrarian reforms must be understood as encompassing land distribution reforms, but also others reforms seeking to increase access to productive resources must be understood to be included. Therefore, if the general access to seeds is seriously impeded, a State must seek to undertake a reform to ensure that everyone has access to good-quality seed.²⁶ If adequate reforms are undertaken, in order to facilitate the growing of food, there will be less need for the State acting as a provider.

Third, with regard to “efficient development and utilization of natural resources”, this relates to the principle of sustainability. This notion did not exist in relationship to environment when the Covenant was drafted. Therefore, a proper understanding of the phrase “efficient development and utilization of

²² A. Eide, *Report on the right to adequate food as a human right*, E/CN.4/Sub.2/1987/23 (1987), p. 35.

²³ The Catholic Church's Pontifical Council for Justice and Peace issued a study, *Toward a Better Distribution of Land: The Challenge of Agrarian Reform* (1997), in which it condemned the unjust distribution of land as a “scandal”, <www.natcath.com/NCR_Online/archives/040398/040398a.htm>, visited 28 April 2009.

²⁴ See the final report of the United Nation's High Level Commission on the Legal Empowerment of the Poor, *Making the Law Work for Everyone Volume I* (2008), <legalempowerment.undp.org>, visited 28 April 2009.

²⁵ *Ibid.*, p. 79.

²⁶ Note in this context the observation – which is not fully correct in terms of international law, but interesting nevertheless – that “access to the means of food production is as much a human right as access to food”. CGIAR, *Report of the Third System – Wide Review of the Consultative Group on International Agricultural Research* (CGIAR, Washington DC., 1998), Executive Summary, p. ix.

natural resources” must take into account the current understanding of the balance between science, technology and environment, and not the understanding prevailing in the 1960s.

We see that while ICESCR Article 11(2)(a) does not direct specifically which measures the States are to take, the States are nevertheless obliged to undertake a broad range of measures within several sectors in order to comply with the ICESCR. By undertaking the measures identified as particularly relevant in the context of food sovereignty, this will have a positive impact on the access to food producing resources, in such a way that it is relevant to say that Article 11(2)(a) addresses “distribution of food production”.

We will now turn to Article 11(2)(b) of the ICESCR, which reads:

The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed: [...] Taking into account the problems of both food-importing and food-exporting countries, ensure an equitable distribution of world food supplies in relation to need.

This paragraph addresses measures to ship the food across borders when it has already been produced. In this realm, measures taken both individually and through international cooperation are obviously relevant. There will be an analysis of three elements: first, “problems of food-importing and food-exporting countries”; second, “equitable distribution”; and third “needs”. These three elements operate on three distinct levels, namely the national, the global and the local.

First, all States of the world are both food-importing and food-exporting. There are some States, however, which are primarily depending on their food exports to obtain hard currency. There are also States – some of which are also heavy exporters of food – which are net-food-importing countries. If one shall understand the first part of Article 11(2)(b), one must therefore take into consideration the actual problems which are involved in today’s global agricultural trade patterns and policies.²⁷

Why some States are net-food-importing is based on several factors, some of which are: (i) much higher productivity in the industrialised countries’ agriculture; (ii) enormous subsidies in the same countries; (iii) unequal possibilities of transportation; and (iv) selective tariff rates and tariff escalation applying on processed goods. The global market in agricultural goods is hence characterised by heavy subsidising and selective application of tariffs. The measures taken

²⁷ Note in this context the call from UNCTAD XII on “the need to improve dialogue between the food-importing and food-exporting countries to reduce and stabilize world food prices”. UNCTAD, *Report of the United Nations Conference on Trade and Development on its twelfth session*, TD/442, 11 June 2008, para. 79.

individually and through international cooperation must seek to create predictable international trade rules where subsidising which is harmful on farmers in other countries is brought to an end, while measures seeking to secure the basis for subsistence farming are possible to uphold, as the whole purpose of Article 11(2) is to ensure that everyone is free from hunger. The problems referred to in Article 11(2)(b) would therefore be particularly crucial to address in relation to those States which are depending on agriculture in their foreign exports, but which are at the same time net-food-importing.

Second, the phrase “equitable distribution” does not specify if distribution applies strictly to trade, or if equitable distribution can also be undertaken through other means than through trade. The way the paragraph is formulated implies that it cannot be understood to apply to trade only, but also to various forms of food aid. This is explained by the introductory phrase “taking into account”, which must be understood to identify trade as a relevant factor, but not as the only factor. Moreover, the reason for the inclusion of the whole paragraph in the ICESCR was the information by the FAO that 500 million persons were hungry, which cannot be applying only to international measures in the area of trade (Article 11(2)(b)) and improved methods of production of food (Article 11(2)(a)).

Hence, while the term food aid is not used directly, Article 11(2)(b) must be understood to apply to both food trade and food aid. Food aid is controversial, and can have detrimental effects on the local production capacity.²⁸ It is widely held that food delivered as aid should come from a region or country as close as possible to the region where the population in need of food aid resides. While global food aid represents only 4 per cent in volume of global food trade, such aid is nevertheless of crucial importance, both for saving lives and for enhancing the nutritional status of children. The State will initially have a facilitating role with regard to food aid, but if the circumstances so require, the State must also act as a provider.

Third, the term “need” will be analysed. What this term says is that what shall determine both global food aid and global food trade policies are the needs of individual human beings. This cannot imply that trade shall not take place unless there is a situation characterised by needs. Moreover, it is not an adequate basis for making specific trade decisions. A reasonable understanding, however, is that it is the needs of the hungry that shall take precedence over the trade incentives of the mighty. Increased trade cannot be an objective in itself, but merely a tool to achieve other objectives relating to the well-being of human beings.

²⁸ For an analysis of how dumping of surplus production is sent to developing countries as food aid, and its consequences, see Ecumenical Advocacy Alliance, *Trade Policy and Hunger* (EAA, Geneva, 2007), <www.e-alliance.ch/en/s/food/rice/>, visited 28 April 2009.

This analysis of the most relevant provisions of the ICESCR relating to food and access to resources demonstrates that these provisions have a broad coverage. The provisions do not, however, instruct the States exactly which measures to take, as long as these measures are contributing to “achieving progressively the full realization of the rights recognized in the present Covenant”, as is stated in Article 2(1) of the ICESCR. A possible explanation for the lack of awareness of many of the elements of Article 11(2) could be that issues relating to science and trade are perceived to be complex, not being the primary interests among neither the right to food mobilisers (non-governmental organisations, civil society organisations and some governments) or the right to food interpreters (experts, treaty committee members and judges).

It is difficult to conclude definitely on whether the selected elements of the relevant provisions of the ICESCR actually do support food sovereignty without a clear understanding of what the concept of food sovereignty implies. The ICESCR acknowledges at least the following elements which are presumed to be relevant in the context of food sovereignty: control over resources, agricultural reform, and that food trade shall be subject to needs. A more precise understanding of food sovereignty will now be identified.

3. Is There Compatibility between the Right to Food and Food Sovereignty?

There are numerous definitions of food sovereignty. The most quoted is the 2002 Political Statement, which reads:

Food Sovereignty is the Right of peoples, communities, and countries to define their own agricultural, labour, fishing, food and land policies, which are ecologically, socially, economically and culturally appropriate to their unique circumstances. It includes the true right to food and to produce food, which means that all people have the right to safe, nutritious and cultural appropriate food and to food-producing resources and the ability to sustain themselves and their societies.²⁹

An analysis of the definition of right holders, meaning those who have the right to define their own policies, will follow in section 4 below. This section will identify the substantive content of food sovereignty as it has been outlined in different declarations and statements.

We see that the definition reiterates more or less the right of self-determination of peoples as recognised in the ICESCR/ICCPR Article 1, but goes beyond this by introducing the term “community”, which is not a term applied in international

²⁹ See *supra* note 4, p. 2.

law as it is not sufficiently distinct. Moreover, the emphasis on cultural appropriateness both regarding the policies and the food cannot be said to be contrary to ICESCR/ICCPR Article 1 and the right to food as outlined in General Comment No. 12.³⁰ Also the emphasis on food production and the ability to sustain themselves and their families is obviously within the scope of Article 11(2), as the realisation of the right to food must primarily take place through people growing their own food, not the State acting as a provider of food. If the State appropriately facilitates the access to food-producing resources, the State would only in very exceptional circumstances have to act as a food provider.

Later definitions do not deviate in substance from the definition found in the 2002 Political Statement. A 2005 definition does not list the policy areas, and introduces the phrase “sustainable production, distribution and consumption of food, with respect for their own cultures and their own systems of managing natural resources” as a part of the definition.³¹ A later definition places the right to “define their own food and agriculture systems” to the latter part of the definition.³² The compatibility with the right to food of the 2005 Proposal will be analysed below.

At this stage of the analysis, it seems that all three definitions deviate somewhat from the right to food in their explicit wordings. At the same time, it can be argued that they actually bring in elements which must be considered to be a part of the right to food as recognised in the ICESCR, but which are not explicitly formulated in the ICESCR, such as access to food-producing resources.

We will now look into the different elements that are said to be a part of the concept of food sovereignty. Relevant parts of three documents will be analysed. First, the 2002 Political Statement’s requirements for food sovereignty. Second, the four pillars of the 2004 Summary Report from regional consultations. Third, the 2005 Proposal to the FAO Committee on World Food Security.

The seven requirements of food sovereignty as identified in the Political Statement are (extracts): (i) priority on food production for domestic and local markets; (ii) ensuring fair prices for farmers, including protecting internal markets; (iii) access to land, water, forests, fishing areas and other productive resources through genuine redistribution; (iv) recognition and promotion of women’s role

³⁰ See *supra* note 10, para. 11.

³¹ The IPC’s 2005 Proposal to the FAO Committee on World Food Security defines food sovereignty as “the right of Peoples to define their own policies and strategies for the sustainable production, distribution and consumption of food, with respect for their own cultures and their own systems of managing natural resources and rural areas, and a precondition for food security”.

³² The definition given in the 2007 Declaration of the Forum for Food Sovereignty reads: “Food sovereignty is the right of peoples to healthy and culturally appropriate food produced through ecologically sound and sustainable methods, and their right to define their own food and agriculture systems.” See <www.foodsovereignty.org/public/new_attached/49_Declaration_of_Nyeleni.pdf>, visited 28 April 2009.

in food production; (v) community control over productive resources, as opposed to corporate ownership; (vi) protecting seeds for the free exchange and use of farmers, implying a no to genetically modified organisms and patents on life; and (viii) public investment in support of the productive activities of families and communities.

Space does not allow a detailed analysis of all these requirements. Some general observations will be made, however. On the one hand, all these requirements are somehow within the scope of human rights provisions. The two requirements relating to trade, namely (i) and (ii), must also be understood to fall within the scope of ICESCR Article 1(2) and Article 11(2)(b). As was identified above, the emphasis on food-producing resources, as identified in requirements (iii), (v) and (vi), is highly relevant. Moreover, the empowerment of women, as covered in requirement (iv), is obviously compatible with any reading of human rights. Finally, the last requirement, (vii), must be understood to fall within the scope of ICESCR Article 2(1).

We will now analyse requirements (v) and (vi), starting with the former. While the ICESCR is not explicitly regulating the activities of corporate actors, except from the general principle recognised in the preamble to the ICESCR/ICCPR that all individuals have duties to other individuals, the right to food must be interpreted by including the context of private actors. First, the States' obligation to protect the right to food includes appropriate regulation of third parties. Second, the Voluntary Guidelines address "corporate social responsibility and commitment of all market players" in the context of the realisation of the right to adequate food.³³ Third, General Comment No. 12 says that States "should take appropriate steps to ensure that activities of the private business sector and civil society are in conformity with the right to food"³⁴ and that "the private business sector [...] have responsibilities in the realization of the right to adequate food".³⁵ Fourth, the second principle that members of the UN Global Compact must adhere to reads: "Businesses should make sure they are not complicit in human rights abuses."³⁶ This implies that an appropriate regulation of corporate actors is within the scope of State obligations, but the precise scope of the obligations of States or the responsibilities of corporate actors is not easy to determine in abstract.

If we analyse the wording of requirement (v) of the Political Statement on "community control over productive resources, as opposed to corporate ownership", it seems initially that this requirement is relatively wide. If this requirement

³³ See *supra* note 11, Guideline 4.3.

³⁴ See *supra* note 10, para. 27.

³⁵ *Ibid.*, para. 20.

³⁶ The Global Compact's second principle can be found at <www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/Principle2.html>, visited 28 April 2009.

shall always be observed, there is no situation where a corporate ownership is justifiable. This premise can be criticised. To determine that a situation where a corporate actor has obtained property rights through purchasing a defined piece of land is unjustifiable, one must have detailed information on the process of the purchase. While philosopher Robert Nozick cannot be expected to be highly regarded in the food sovereignty movement, he actually has defined two principles for determining when property rights can be said to be obtained in a justifiable manner. These two principles are justice in acquisition and justice in transfer.³⁷ Insufficient information or insufficient participation by all affected households, or if the person signing the contract on behalf of a community claims falsely to have support of the whole community, must be said to be a process without justice in acquisition or in transfer. It must be observed that Nozick recognises collective property holders as being equal to private property holders if they belong to a clearly defined region.³⁸

While community control of productive resources is obviously crucial for the realisation of human rights, as expressed also in ICESCR Article 1(2), this cannot be interpreted so widely as to imply that corporate ownership is always unjustified. If the corporate ownership is exercised so that it undermines the natural wealth and resources of the affected peoples in such a grave manner that peoples must be said to be deprived of their resources, it automatically becomes a human rights issue. Therefore, while requirement (v) raises important and relevant concerns, it cannot be said to be in accordance with human rights to categorically give corporate ownership a subordinate status, as is done by requirement (v). There might be situations where corporate ownership is not undermining the realisation of human rights, even if such ownership impacts on community control over productive resources.

Regarding requirement (vi), the ICESCR cannot be understood to be categorically against patents, including patents on life. While the wording of Article 15(1)(c) of the ICESCR cannot be said to justify a position saying that intellectual property rights are human rights,³⁹ “the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author” is recognised as a human right. Article 15(1)(c) must be understood in relation to all other human rights recognised by the ICESCR, implying that the relationship between this paragraph and the other paragraphs of Article 15 must be “mutually reinforcing and reciprocally limitative”.⁴⁰ Moreover, States are

³⁷ R. Nozick, *Anarchy, State and Utopia* (Basil Blackwell, Oxford, 1974) p. 151.

³⁸ *Ibid.*, p. 178.

³⁹ See (then) Director General of WIPO, Kamil Idris, *Intellectual Property: A Power Tool for Economic Growth*, WIPO Publication 888 (World Intellectual Property Organisation, Geneva, 2004), p. 241.

⁴⁰ General Comment No. 17 (2005): The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author (article 15, paragraph 1 (c), of the Covenant), E/C.12/GC/17, para. 4.

“obliged to strike an adequate balance between their obligations under article 15, paragraph 1 (c), on one hand, and under the other provisions of the Covenant, on the other hand”.⁴¹ Finally, it is beyond doubt that ICESCR Article 15(1)(c) does not give rights to corporate entities, but rather “safeguards the personal link between authors and their creations and between peoples, communities, or other groups and their collective cultural heritage, as well as their basic material interests”.⁴² These important clarifications would exclude all potential situations of abuse or aggressive enforcement of a patent *vis-à-vis* for instance indigenous peoples or local communities, but these clarifications do not, however, represent a full rejection of patents on life.

Second, a 2004 Summary Report from regional consultations defined four pillars of food sovereignty:⁴³ (i) the right to food and food sovereignty; (ii) access to, and management and local control of resources: land, water and agrobiodiversity; (iii) small-scale and family-based agro-ecological food production; and (iv) the priority of food sovereignty over trade.

We see that the linkage between the right to food and food sovereignty is made explicit. It must be asked whether this is a strategy for using a legal right recognised in international law to build legitimacy to a political concept which is not recognised in international law, or whether it is rather a strategy to make explicit some of the elements of the right to food which are currently only implicitly recognised within the ICESCR, such as the emphasis on food producing resources, including water. Nevertheless, both pillars 1 and 2 must be said to fall within the scope of a right to food strategy, except from the elements of food sovereignty which were found above to be beyond the scope of the ICESCR, namely ownership by corporate actors and the issue of patents. The fourth pillar must also be considered to fall within the scope of Article 11(2)(b) of the ICESCR, as outlined in section 2 above.

With regard to pillar 3, this pillar seems initially to come closest to being a political strategy, even a form of trade union strategy. It will now be analysed whether this pillar can also be a part of the right to food. To answer this, ICESCR Article 6 on the right to work, “*which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts*” (Article 6(1)), needs attention. The phrase “gain his living” is complex. In ordinary circumstances in most developing countries, the term “his” is simply too narrow, since one salary in many instances is the sole income basis for a large family of eight or ten persons. In this context it is also crucial to note that even those who are producing food themselves, either by being farmers themselves or through various forms of

⁴¹ *Ibid.*, para. 35.

⁴² *Ibid.*, para. 2.

⁴³ International NGO/CSO Planning Committee for Food Sovereignty, *Summary Report on the Results of the Regional NGO/CSO Consultation* (2004), p. 1, <www.foodsovereignty.org/new/documents.php>, visited 28 April 2009.

work on another's holdings, including through forced and bonded labor, are constituting 70 percent of the hungry people in the world.

When analysing small-scale farming, the right to food and the right to work, there is no doubt that structural reforms are crucial in the agriculture in most countries. Using the formulation of ICESCR Article 6(2), the steps taken by a State Party shall include "*policies and techniques to achieve steady economic, social and cultural development*". However, if structural reforms imply that people quit their farming activities without finding alternative income possibilities, such reforms are highly problematic from a human rights point of view. The dramatic growth of the slum-dwelling population in developing countries, implying that hundreds of millions cannot enjoy the right to adequate housing in accordance with ICESCR Article 11(1), can be halted primarily by creating incentives for people to continue to live in the countryside. Therefore, there is a need for considerable higher investments in small-scale farming, so that it becomes more productive, profitable and diversified.⁴⁴

Such investments are also justified by the fact that smaller holdings tend to be more productive than larger ones,⁴⁵ and use limited resources more efficiently.⁴⁶ Both ICESCR Article 2(1) stating "*maximum of its available resources*" and Article 11(2)(a) saying "*improve methods of production, conservation and distribution of food*" imply that the States must give more priority to small-scale farming. The two provisions in themselves do not say anything about small-scale farming, but when the different measures are to be implemented, the authorities must take into account what is generally known about lack of resources, asymmetrical power relations and the general marginal situations of many small-scale farmers.

At the same time the States must undertake policies to achieve economic development, as stated in ICESCR Article 6(2). That such policies should aim at diversifying the economy and reducing gradually the proportion of people working as peasants is natural. No country has industrialised while keeping more than half of their active working force in agriculture.

Therefore, while the ICESCR contains several provisions which implies that States must invest more in small-scale farming, the ICESCR cannot be interpreted to imply that there is no other option than to prioritise small-scale farming if the State is to comply with the relevant provisions of the ICESCR. Therefore, pillar

⁴⁴ See *Global Summary for Decision Makers*, *supra* note 6, Recommendations 12 through 14, pp. 11–12.

⁴⁵ FAO, *People and Water* (FAO, Rome, undated), <www.fao.org/docrep/005/y3918e/y3918e08.htm>, visited 28 April 2009.

⁴⁶ This more efficient use of resources is one of the main justifications for the findings at the FAO's International Conference on Organic Agriculture and Food Security, Rome, 3–5 May 2007 that so-called organic agriculture is able to feed the world sufficiently, while using less resources than more resource- and input-dependent agriculture, <www.fao.org/organicag/ofs/index_en.htm>, visited 28 April 2009.

3 from the 2004 Summary Report can be said to be within the scope of the right to food, but measures for better small-scale farming have to go together with measures for diversification and other employment opportunities.

Third, the IPC's 2005 Proposal to the FAO Committee on World Food Security seems to be a document from the International Planning Committee on food sovereignty (IPC), while the other two documents from 2002 and 2004 come from the food sovereignty "movement". This document is chosen, however, because it refers to human rights provisions more explicitly.⁴⁷ Three of these formulations will be analysed.

First, the document quotes parts of Article 1(1) and 1(2) of the ICESCR/ICCPR, stating that this implies that peoples can "implement their own development strategies". While this is not a formulation found in Article 1 of the ICESCR/ICCPR, it must be said to fall within the scope of this Article.

Second, the phrase "sustainable production, distribution and consumption of food" is used in the 2005 Proposal. This formulation draws upon Article 11(2) (a), but the phrase "improve methods of" is replaced by the term "sustainable" in the 2005 Proposal.

Finally, the 2005 Proposal refers to peoples' "own systems of managing natural resources and rural areas". This formulation is interesting as it highlights the potential conflict between national and international law. Most indigenous peoples would argue that international law gives them more rights as peoples compared to national law. Since most agree that indigenous peoples have rights under Article 1 of the ICESCR/ICCPR, this will give them a right to "freely determine their political status and freely pursue their economic, social and cultural development", as stated in Article 1(1), and also rights over natural resources, as recognised in Article 1(2). Not all States of the world would be accepting such a broad range of rights as applying to indigenous peoples. As said in section 2 above, the precise content of self-determination must be determined in each single case depending on the circumstances.

Therefore, an understanding that indigenous peoples have rights also with regard to their natural resources cannot be said to be incompatible with Article 1 of the ICESCR/ICCPR. The formulation of the 2005 Proposal, however, is not appropriately in line with the ICESCR. The formulation "managing rural areas" in the 2005 Proposal is very wide. If it applies to issues such as involving indigenous peoples' organisations or institutions in granting permissions relating to natural resources, it cannot be considered to be outside of the scope of Article 1 of the ICESCR/ICCPR. If it, on the other hand, applies to what is usually associated with management, such as issues relating to granting individual or collective

⁴⁷ See *supra* note 31.

ownership rights, it would be outside of the scope of Article 1 of the ICESCR/ICCPR as understood by most States.

In conclusion with regard to all three documents, they contain several references, both implicitly and explicitly, to Articles 1 and 11 of the ICESCR. Concerning Article 1, there is no common understanding on the actual scope of this provision, in particular as concerns the rights of indigenous peoples. Concerning Article 11, the stronger emphasis on sustainable production and access to food-producing resources currently implies that particularly the measures listed in Article 11(2) must be understood in this new context, as compared with the situation in the 1960s. Hence, with regard to control over resources and emphasis on sustainable production, the formulations applied in the documents on food sovereignty analysed above cannot be said to be beyond the scope of the right to food. Concerning the attitudes on corporate actors and patents that are expressed in the documents, these formulations cannot be said to be within the scope of the ICESCR, as there is no basis in the ICESCR to say no to corporate ownership or to patents on life.

4. Are There Any Risks in Linking the Right to Food and Food Sovereignty?

In a report on food sovereignty written by two experts on the right to food, the following observation is made: “The right to food and the concept of food sovereignty merges rights that are already recognized in binding international law such as the right to adequate food, with rights that so far do not exist formally.” Therefore, “[t]he two levels of rights language must be differentiated in order not to lower the standards of recognition that the right to adequate food has already reached in international law”.⁴⁸

This concern is very well taken. After a decade where actors concerned with issues relating to food and hunger can report of notable positive results in the understanding, acknowledgement and reconfirmation of the right to food, the food sovereignty movement is building upon these achievements. This movement has a more broad-sweeping and more confrontational approach, being less concerned with operating in accordance with international established agreements. Rather, the concept of food sovereignty can be seen as an attempt of turning back many of these established agreements.

There will now be an analysis of four possible concerns relating to the primary concern identified above: first, the concern that the political agenda of food sovereignty undermines the legal agenda of the right to food; second, the concern

⁴⁸⁾ M. Windfuhr, and J. Jonsén, *Food Sovereignty: Towards democracy in localized food systems* (ITDG Publishing, Bourton-on-Dunsmore, UK, 2005) p. 13.

that the right to food is understood as merely a tool for achieving food sovereignty; third, the concern that the right to food mobilisers turn their attention towards the more dynamic concept of food sovereignty and do not adequately assess how already established international agreements in the form of legally binding texts can be a basis for directing policies; and fourth, that the emphasis of food sovereignty focuses too much on the international dimensions, while the right to food primarily identifies the corresponding State obligations on the national level, while also acknowledging that international measures are important for the realisation of the right to food. The substance and weight of each of these concerns will be identified.

The right to food as a legal concept cannot be interpreted or applied beyond what the wording of the relevant provisions allows for, but – as argued in section 2 above – these provisions include broad dimensions within which measures are to be taken. Food sovereignty as a political tool can be understood as a “framework to change the broad range of agricultural policies”.⁴⁹ As was seen in section 3 above, food sovereignty states relatively detailed objectives.

A potential problem of the concept of food sovereignty is that it is always subject to change as a result of pressure from certain segments, implying that the concept will lose consistency. Moreover, there is actually no clear agreement regarding whom the concept applies to. From the first definition in 1996, where “peoples” were identified, an expanded scope was given in the definition agreed upon in 2002, as “peoples, communities, and countries” were now said to have the right to define their own policies.⁵⁰ Then, in 2004 there was a meeting in the International NGO/CSO Planning Committee where “individuals” was listed first, and “communities” appeared before “peoples” in the listing.⁵¹ This is not applied in any consistent manner, however.⁵² There are also organisations operating with definitions which have left “peoples” out of the definition.⁵³

Which individuals or communities to whom the food sovereignty concept applies to also differs. In the 2002 Political Statement, farmers – once termed “family farmers” – and urban poor are listed, together with women, indigenous peoples, workers and fisherfolk. In the 2004 “Summary Report on the Results of the Regional NGO/CSO Consultations”, “farmers” are replaced by “peasants”, urban poor are not included, while pastoralists are, and it is specified that

⁴⁹ *Ibid.*, p. 16.

⁵⁰ See *supra* note 4, p. 2.

⁵¹ Windfuhr and Jonsén, *supra* note 48, p. 12. Neither this document nor any subsequent documents which use this definition appear on the IPC’s homepage; see <www.foodsovereignty.org/new/documents.php>.

⁵² In the 2007 Declaration, *supra* note 30, the definition refers only to “peoples”.

⁵³ See Rainforest Action Network, *Peoples Rights vs Agribusiness: The Case of Food Sovereignty* (2007), <ran.org/campaigns/rainforest_agribusiness/resources/fact_sheets/peoples_rights_vs_agribusiness_the_case_of_food_sovereignty/>, visited 28 April 2009.

“workers” means “agricultural workers”.⁵⁴ The 2004 Summary Report hence has a much more rural approach than the 2002 Political Statement. In the 2007 Declaration of the Forum for Food Sovereignty, there is no listing of whom the concept applies to, but now the approach once again seems wider in the listing of the participating organisations, which include “migrants”, “consumers” and “urban movements”.

The distinction between farmer and peasant is not necessarily clear, as it is similarly not necessarily clear who is actually enjoying protection under the 2006 UN Convention on the Rights of Persons with Disabilities. The aim of making a legally binding convention on peasants’ rights necessitates, however, much more stringency.

Second, there is concern that the right to food is understood as merely a tool for achieving food sovereignty. While it must be acknowledged that human rights can be seen as a tool for achieving an objective, such as a reduction in the number of hungry persons, human rights realisation is first and foremost and objective in itself, or as stated in the Final Declaration of the Second UN Conference on Human Rights that human rights promotion and protection “is first responsibility of Governments”.⁵⁵

The most dramatic expression of the misconception that human rights is somehow subordinate to food sovereignty is done most clearly by the (then) UN Special Rapporteur on the Right to Adequate Food. In a report to the (then) Commission on Human Rights he concludes his chapter on food sovereignty in the following way: “The right to food therefore provides an important legal basis for the fight for food sovereignty.”⁵⁶ It is not totally clear what this sentence implies. On the one hand, this statement must be understood to imply that the (then) Special Rapporteur saw a legally binding norm to be merely a tool to be applied for a particular political strategy. On the other hand, the Special Rapporteur implied that those elements relating to the realisation of the right to food recognised in Article 11 of the ICESCR are compatible with the concerns raised in the various understandings of food sovereignty. The formulation is open to diverse interpretations, but must at least be interpreted to imply that there is no conflict between realisation of the right to food and the right to be free from hunger, on the one hand, and food sovereignty, on the other hand.

The (then) Special Rapporteur was also explicitly identifying which States that were in favour of the political strategy of food sovereignty, saying that “States such as Germany, Norway, Switzerland and others [...] are calling for a new focus

⁵⁴ See *supra* note 43, p. 1.

⁵⁵ Vienna Declaration and Programme of Action, A/CONF.157/23, 12 July 1993, para. 1.

⁵⁶ Report by Special Rapporteur on the Right to Food, E/CN.4/2004/10, para. 34.

on ‘food sovereignty’.⁵⁷ A reference to his 2004 report is made, but the 2004 report only briefly mentions Norway, and the report “Multifunctional Agriculture: The Case of Norway”.⁵⁸

To interpret a strategy for better understanding of the different roles of modern agriculture through the term “multifunctionality” as an endorsement of food sovereignty is not correct, even if the term “multifunctionality” points in the same direction as the term “food sovereignty”. The attempts of the former Special Rapporteur on the right to adequate food to integrate food sovereignty and the right to food in the manner that he did cannot be seen as constructive. Through his lack of legal and terminological clarity, he risks playing into the hands of those who hold that the right to food can only be political demands, and not an integral element of international law that allows individuals to hold their governments accountable to a legally binding standard that (now 160) States have accepted to comply with.

Third, there is a concern that the right to food mobilisers turn their attention away from finding a common ground for the realisation of human rights and focus their attention on the concept of food sovereignty. The effects of this are potentially both positive and negative. On the one hand, a focus on food sovereignty could actually increase the awareness of the elements of the ICESCR that are analysed in section 2 above. The frequent references to human rights in general and the quoting of specific provisions of the ICESCR in the statements and declarations of the food sovereignty movement will enhance the awareness of the right to food among different segments of the population.

On the other hand, it must be asked whether the recent widespread support for the right to food as seen for instance in the unanimous adoption in 2004 of the Voluntary Guidelines is at risk of being undermined if food sovereignty and the right to food are closely associated. Food sovereignty is a blend of recognised international law and evolving concepts, where many States would be reluctant to consider these as being on the same level.

The right to food, however, has witnessed an important reconfirmation in the last years, but still with too few States actually amending their policies in order to fully comply with its human rights obligations. The wide ratification of the ICESCR is remarkable, and States are regularly reminded of their legal obligations. Among the explanations for this high number of ratifications is the margin of discretion for individual States in understanding how the ICESCR is to be implemented. This margin of discretion does not apply, however, to three areas:

⁵⁷⁾ *Report of the Special Rapporteur on the right to food, Jean Ziegler, A/HRC/7/5*, para. 71.

⁵⁸⁾ See *supra* note 56, para. 27, note 21. The 2002 report from the Norwegian Ministry of Agriculture is available at <www.regjeringen.no/upload/kilde/ld/bro/2002/0001/ddd/pdfv/179755-multifunc_1.pdf>, visited 28 April 2009. On pp. 9 and 10 of the Norwegian report, ICESCR Article 11(2)(b) is quoted, but without any attempts at clarifying its content.

first, the ending of discrimination *de facto* and *de jure* in the enjoyment of the recognised rights; second, to the taking of appropriate measures; and third, to cooperating internationally for the realisation of the rights.⁵⁹

This brings us over to the fourth concern, namely that the States' own policies are too shallowly addressed within a food sovereignty strategy. The concern is expressed by two right to food campaigners, saying that even if food sovereignty recognises national agricultural policy areas, "they are not fully addressed, particularly when it comes to concrete policy proposals. The [food sovereignty] framework first and foremost aims to create policy space for the nation state in international forums..."⁶⁰

Can this be said to be a too categorical observation? We saw in section 3 that the 2002 Political Statement addressed seven "requirements", of which the first two are formulated in the context of food trade, giving relatively general directions for national policies in a globalising world. The 2002 Political Statement has other elements, however, including what is needed to achieve food sovereignty. These elements are more specific, and might as a consequence be used in such a way that international organisations and agreements are used as an excuse for not implementing the appropriate national policies.

The following section will analyse whether food sovereignty concerns are likely to influence international negotiations. Hence, at this stage of the analysis it seems that the concerns expressed by Windfuhr and Jonsén above are appropriate, but it must also be acknowledged that food sovereignty has an explicit emphasis on national food policy measures. Based on this analysis, it must be considered that certain risks are involved in identifying a too close association between the right to food and food sovereignty. At the same time, the potential for conscientisation and mobilisation of the food sovereignty movement cannot be underestimated.

5. Relevance and Weight of Food Sovereignty Concerns in International Negotiations

The initial example of the World Trade Organization is not to be taken as implying that the exact concept of food sovereignty was ever on the mind of the person who spoke on behalf of the developing countries in the "Green Room" negotiations at the WTO in July 2008, the Indian Commerce Minister, Kamal Nath. The trade policies of India and other developing countries have been made with

⁵⁹ See Charter of the United Nations, Articles 1(3) and 56; see also ICESCR Article 2(1) and the Optional Protocol to the ICESCR, A/RES/63/117, Annex, Article 14(2).

⁶⁰ Windfuhr and Jonsén, *supra* note 48, p. 29.

the concern of the peasants who are producing for their own subsistence or for the local markets in mind, irrespective of the potential influence of the concept of food sovereignty.

Only one document from States has been found which explicitly applies and endorses the concept “food sovereignty” in the context of international negotiations.⁶¹ Three concerns were said to be within the term “food sovereignty”: (i) national self-determination on what was produced and how it was produced; (ii) a guarantee of sufficient supply at adequate prices and availability; and (iii) incentives to rural and national development on the basis of increasing production, consumption and the income of producers. We see that there is no emphasis on peasants, unlike the definitions put forth by the food sovereignty movement, and we see also that the focus is only on the national level, as terms like “peoples” and “communities” are not applied.

There are, moreover, no frequent rejections of the concept “food sovereignty” in documents from States. Commentators have identified the position and the reasons behind the position, such as in the case of Brazil.⁶² It is therefore reasonable to state that the concept “food sovereignty” is not used frequently, as compared to the concept “food security”. On the national level the concept “food sovereignty” is applied, *inter alia*, in the Ecuadorian Constitution adopted in 2008.

There are other examples of policy statements by State representatives which address the core of the food sovereignty concept – without using the concept directly. Speaking on behalf of India, Minister of Commerce, Kamil Nath, has said: “For millions of India’s farmers, it is a question of subsistence, not a subsidy. And subsistence can never be put on the table for negotiation. Subsidies should be discussed and negotiated and even phased out, but not when it involves the basic survival of the farming communities.”⁶³ This must be understood to be an expression of a real and legitimate concern.

Somewhat weaker, the relevant paragraph, paragraph 13, on agricultural negotiations in the Doha Ministerial Declaration acknowledges elements of food sovereignty, reading: “special and differential treatment for developing countries

⁶¹ *Communication from Egypt, Jamaica, Mexico and Peru, MTG.GN/ING5/W/74* (1988), quoted from Windfuhr and Jonsén, *supra* note 48, p. 35.

⁶² See E. Vigna and Marcio Pontual, ‘The Brazilian position on Special Products’, in Food, Trade and Nutrition Coalition, *Protecting Local Markets in Developing Countries for Food Security Discussion Paper of the FTN Coalition* (FTN Coalition, Amsterdam, 2005), saying on p. 14, note 8: “The Brazilian government avoids using the term Food Sovereignty to prevent having it used as an argument against itself. An example would be the use of the Food Sovereignty concept to defend subsidies for European farmers.” See <www.ftn-coalition.org/files/R20060620135338.pdf>, visited 28 April 2009. Marcio Pontual works at the Instituto de Estudos Socioeconômicos in Brazil.

⁶³ ‘Indian Food Policy’, <www.foodpolicy.in/>, visited 28 April 2009 (original source of quote not given).

shall be an integral part of all elements of the negotiations [...] enable developing countries to effectively take account of their development needs, including food security and rural development. We take note of the non-trade concerns reflected in the negotiating proposals submitted by Members and confirm that non-trade concerns will be taken into account...⁶⁴

In order to understand the extent to which these principles have been reflected in the negotiations, there will be a brief presentation of the most recent proposal for amendments in the Agreement on Agriculture.⁶⁵ Domestic support and market access constitute the main chapters in the document. Since market access must be considered to be most relevant in the context of protecting peasants in developing countries, the emphasis will be on market access, more specifically special and differential treatment, of which the Special Safeguard Mechanism is also a separate section. The principle behind the SSM is explained in the introduction of the article, and is hence not repeated here. The emphasis will rather be on the so-called “Special Products”.

The paragraph introducing the section on special and differential treatment starts: “Developing country Members shall be entitled to self-designate Special Products guided by indicators based on the criteria of *food security, livelihood security and rural development. There shall be 10-18 percent of tariff lines available for self-designation as Special Products.*”⁶⁶ This implies that only a limited number of products can be categorised as special products.

The illustrative list of indicators for identifying Special Products is found in Annex F. These indicators emphasise production for domestic consumption, and not for export. A full listing of these 12 indicators is not possible, but the following extracts are illustrative: “product contributes significantly to the nutritional or caloric intake of the population” (1); “A significant proportion of the total agricultural population or rural labour force, in a particular region or at the national level, is employed in the production of the product” (5); and “The productivity per worker or per hectare of the product [...] is relatively low...” (12). It must be considered obvious that agricultural products produced under such circumstances would have difficulties to compete with imports from highly effective and subsidised agriculture in industrialised countries.

A later section in the chapter on market access regulates least-developed countries which are members of the WTO, reading in the first paragraph: “Least-developed country Members are not required to undertake reductions in bound duties.”⁶⁷ The 32 least-developed countries that are members of the WTO are

⁶⁴ *Doha Ministerial Declaration, WT/MIN(01)/DEC/1* (WTO, Geneva, 2001), para. 13.

⁶⁵ Revised Draft Modalities for Agriculture, TN/AG/W/4/Rev.3, presented 10 July 2008 (WTO, Geneva 2001).

⁶⁶ *Ibid.*, para. 120 (footnotes omitted; italics added).

⁶⁷ *Ibid.*, para. 142.

hence exempted from obligations with which other developing countries are obliged to comply.⁶⁸

The negotiations on agriculture in the WTO are extremely complex, involving all kinds of exceptions, many of which apply only to developed countries. The positions of developed countries must be considered to be less flexible than the positions of developing countries.⁶⁹ Most WTO member States are concerned with protecting their own farmers, but developed States are simply more able to do so, due to their institutional and financial means. The strongest group of *demandeurs* in the agricultural negotiations is the so-called G20, consisting of 23 member States, including China, India, Mexico and Brazil.⁷⁰

The position of the food sovereignty movement therefore seems very difficult to reconcile with the position that the strongest developing countries express at the WTO. Even if there are issues of concern implicit in the 2001 Doha Ministerial Declaration and the 2008 Revised Draft Modalities for Agriculture which are similar to the concerns that are expressed by the food sovereignty movement, these issues of concern are neither expressed nor regulated in the way the food sovereignty movement would see them regulated. Actually, one of the objectives of the large majority in the food sovereignty movement is to have agriculture taken out of the WTO negotiations. In the 2002 Political Statement, it is said: "To achieve Food Sovereignty [...] [w]e demand the removal of agriculture from the WTO."⁷¹ In this broad statement, there is no acknowledgement of what could be possible to achieve at the WTO regarding dumping of surplus production and subsidised exports. Other documents from the food sovereignty movement state their objectives with regard to trade in agriculture in more detail.⁷²

⁶⁸ The least-developed countries are listed at: <www.wto.org/english/thewto_e/whatis_e/tif_e/org7_e.htm>, visited 28 April 2009.

⁶⁹ The present author agrees with Martin Khor of the Third World Network, who says that that the last issue that never came to the negotiating table at the WTO negotiations in July 2008, namely cotton, would result in a deadlock, if the SSM negotiations had not been stalled. The 2008 US Farm Bill says that US cotton subsidies will be kept or increased, which is impossible to reconcile with a 70 per cent reduction in subsidies, as is demanded by the WTO. See M. Khor: 'Why the Talks Collapsed', first printed in *The Star*, 4 August 2008, <www.twinside.org.sg/title2/wto.info/rwninfo20080805.htm>, visited 28 April 2009.

⁷⁰ More information about G20 can be obtained from <www.g-20.mre.gov.br>, visited 28 April 2009.

⁷¹ See *supra* note 4, p. 3.

⁷² "Profit for Few or Food for All" Revisited Five Years Later, 2002: listing on p. 6 the following demands: (i) end of dumping; (ii) trade rules must be changed to allow vulnerable groups in rural areas to prosper and produce food; (iii) WTO should not interfere with the internal policies; and (iv) convention on food security in traded and untraded food emphasising food sovereignty, available as '8 June: CSO/NGO Forum Draft Position Paper on Food Sovereignty, Right to Food and Agroecological Models for Agriculture – the key elements for any strategy toward ending hunger and malnutrition', <www.ukabc.org/wfs5+.htm>, visited 28 April 2009.

In conclusion, it seems that the food sovereignty concept will not be easy to apply directly in the WTO agricultural negotiations. It is still an open question if it will be applied in other intergovernmental endeavours, such as the FAO. No documents from the FAO Committee on World Food Security have until now applied the term “food sovereignty”, but this is the international forum where further elaborations of the concept is most likely. It seems that the concept “food security” will still prevail among States. This is a widely used concept, presumably free of the “biased” political dimensions that food sovereignty is believed to imply. Also the concept “food safety” is more frequently used than food sovereignty. All these concepts are encompassed by the term “right to adequate food”.

6. A Growing Understanding and Application of the Ignored Food-related Elements of the ICESCR?

As was said at the end of section 3 above, the most positive aspects of the food sovereignty concept are those elements which emphasise certain policies relating to the right to food which are not explicitly recognised in the ICESCR, but which nevertheless must be part of a strategy seeking to realise this human right. More specifically, food sovereignty emphasises access to resources, more specifically food-producing resources. No strategy seeking to improve the realisation of the right to food can avoid focusing on how to ensure appropriate access to resources such as water and seed, and address the factors which impede such access.

If this access to food-producing resources is secured, this would increase the overall agricultural production, and there would be much less need for the State to be involved in fulfilling the right to food through food distribution. In other words, the most resource-effective way through which the State can ensure the realisation of the right to food is by facilitating the access to the food-producing resources, and other means to enhance food production.⁷³ Increased production of food would in most – but not all⁷⁴ – instances be an effective guarantee that the right to food is more fully realised. There is thus a need for an increased focus on distribution of food production, not only distribution of the edible food.

⁷³ See M. Crawen, *The International Covenant on Economic, Social and Cultural Rights – A Perspective on its Development* (Oxford University Press, Oxford, 1995), listing on pp. 317–318 the following ways food production can be increased and improved: improving access to agricultural inputs, increasing arable land, providing incentives, undertaking soil conservation, and increasing agricultural research and the transfer of technology.

⁷⁴ For an example of a situation where the people were starving while food storages were packed with grain, see C. Gonsalves, ‘From International to Domestic Law: The Case of the Indian Supreme Court in Response to ESC Rights and the Right to Food’, in Eide and Kracht, *supra* note 8, pp. 215–236.

Therefore, while the access to food-producing inputs and resources are not explicitly recognised in the ICESCR, the formulation in ICESCR Article 11(2) (a) saying “*improve methods of production, conservation and distribution of food*” must be understood to refer to the taking of appropriate measures in all these areas. As it must be presumed that the richest farmers will have better possibilities to have access to agricultural inputs at market prices, the States should in particular ensure that also farmers who are more vulnerable are able to access such inputs and resources.

Moreover, the guidance of Article 11(2)(b) on world food supplies, applying both to food trade and food aid, is one of the few provisions of international law where the term “need” is explicitly said to provide a guiding basis for any international endeavours in the areas of food aid and food trade. While the paragraph has a vague wording, it provides nevertheless a basis for an operationalisation of the term “needs”. This operationalisation might then be used to develop consequence analysis or human rights impact assessments to be applied within both food aid and food trade.

Based on a reasonable interpretation of the relevant parts of Article 11(2) of the ICESCR, it must therefore be said that measures within the most relevant areas of national and international policy measures are already formulated. Moreover, these are recognised by the means of a legally binding treaty which has been ratified by 160 States, and which has been the basis for adopting non-binding documents which have also been endorsed by non-parties to the ICESCR.⁷⁵ Moreover, the ICESCR can also guide policies in the area of intellectual property in order to balance the rights of the producers (Article 15(1)(c) of the ICESCR) and users (Article 15(1)(b) of the ICESCR) of scientific productions. Hence, while it is recognised that the provisions have a vague wording, they can at least be applied to a much greater extent than what has been the situation until today, and hence contribute to better international governance in the areas of food production and distribution, including in the context of trade and intellectual property rights negotiations.⁷⁶ The problems relating to international governance will not disappear by basing international negotiations more clearly on human rights,

⁷⁵ See the 2004 Voluntary Guidelines, *supra* note 11.

⁷⁶ M. Footer, ‘Biotechnology, Food Security and Human Rights’, in F. Francioni and T. Scovazzi (eds.), *Biotechnology and International Law* (Hart Publishing, Oxford and Portland, 2006) pp. 257–284, concludes by an observation on p. 283 that “there is an emerging problem of international governance in the overlapping fields of agricultural biotechnology, food security and human rights...” and that “agricultural trade reform and overlapping property regimes appear to have attracted little attention in the discussion of these issues”. For a more cautious view on which role human rights can play in the intellectual property regime, see T. Cottier, ‘Genetic Engineering, Trade and Human Rights’, in F. Francioni (ed.), *Biotechnologies and International Human Rights* (Hart Publishing, Oxford and Portland, 2007), pp. 275–313, at p. 303. See also T. Cottier, ‘Genetic Engineering and Human Rights’, in D. Wüger and T. Cottier (eds.), *Genetic Engineering and the*

but it is argued that a stronger emphasis on those human rights provisions highlighted in this article will benefit these negotiations.

Hence, the present author would disagree with the former Special Rapporteur on the right to adequate food, saying that food sovereignty is an “alternative means that could better ensure the right to food”.⁷⁷ The means that are sought are already recognised within the ICESCR itself. The identification and specification of the means could come through non-binding resolutions, declarations and guidelines, but the most important is comprehensive efforts for making the objectives, measures and terms of the ICESCR more operational and applicable. The present Special Rapporteur on the right to adequate food, Olivier de Schutter, has made proposals both on how the procedural dimension and the substantive dimension of the right to food can be strengthened in the context of trade negotiations, and encourages conducting transparent, independent and participatory human rights impact assessments in the context of WTO negotiations to ensure compatibility with right to food obligations.⁷⁸ This is a strategy that the present author finds more relevant.

The 2004 Voluntary Guidelines on the Right to Food, which represent the first inter-governmental clarification on how one of the ICESCR-recognised human rights should be realised, imply that any inter-governmental process on the clarification of those elements of the right to food which have been analysed in this article cannot be expected anytime soon. There are, however, other possible avenues. One of these avenues is for the Committee on Economic, Social and Cultural Rights to adopt a general comment on Article 11(2). As found in section 2 above, with the exception of only a few paragraphs, which apply terms such as “production” and “trade”, the content of Article 11(2) was not addressed in General Comment No. 12. In light of recent developments, such a general comment would be both relevant and useful.

In addition, every sincere effort seeking to contribute to a stronger awareness of the content of the ICESCR should be encouraged. In this context, initiatives to draft both declarations and conventions on the rights of peasants and other vulnerable groups should be given support. On the other hand, any attempt to amend the ICESCR or interpret the ICESCR beyond what its wording provides for would be futile and counterproductive.

As the wording of Article 11(2) of the ICESCR allows for a relatively wide margin of discretion on how to implement these rights, one cannot expect an agreement between States on an all too high level of specificity. At the same time,

World Trade System (Cambridge University Press, Cambridge, 2008) pp. 17–55, finding on p. 32 and p. 54 that human rights cannot be a foundation of regulation in the realm of intellectual property rights.

⁷⁷ See *supra* note 57, para. 75.

⁷⁸ A/HRC/10/5, *Report of the Special Rapporteur on the right to food, Olivier de Schutter*, Addendum: Mission to the World Trade Organization, paras. 50(a) and 50(b).

the fact that all the policy sectors are addressed by Article 11(2) must be acknowledged by State authorities themselves and by everyone who takes an interest in the right to food and rural development.

7. Conclusion

The article has by interpreting certain provisions of the ICESCR, which are rarely applied, Article 1(2) and Article 11(2)(a) and (b), identified the still underutilised potential of these provisions of international law in guiding food policy, including by emphasising distribution of food production. This approach has been found to be preferable to seeking to build an international agreement on food sovereignty, which is not used by governments. Rather, food sovereignty is avoided in WTO negotiations as it is too protectionist, which is not in the interests of most influential developing countries. Any future elaboration of the food sovereignty concept cannot be excluded, but calls for “policy space” and acknowledgement of the “multifunctional roles of agriculture” cannot be considered as expressions of or are endorsements of food sovereignty.

There is another risk associated with the appearance of the term “rights” in the definition of food sovereignty. When the term “rights” appears in various statements on food sovereignty it is applied interchangeably as referring both to the internationally recognised human right to food and to those rights which merely express political ambitions. This can create confusion on what has already been achieved through several decades of hard work in international negotiations. It is obvious, however, that the right to food struggle cannot be measured on what is achieved in these negotiations, but on how the right is actually realised, in particular for the most vulnerable all around the world. Moreover, the article has found that most elements of food sovereignty are falling within the human right to food, as the realisation of the right to food needs a comprehensive understanding concerning what measures that are needed for its realisation. This is most clear particularly from the wording of Article 11(2).

This clarification of the relationship between the right to food and food sovereignty acknowledges that the human right to adequate food should not be developed in clinical isolation from the movements and actors who are struggling all over the world with securing their subsistence and livelihood. However, as has been made clear, one should not create confusion over what has already been achieved, but rather build on these achievements in holding the States and the other actors accountable within their respective mandates or their spheres of influence.⁷⁹

⁷⁹ On the phrase “respective mandates”, see E/CN.4/RES/2004/19, para. 7, and E/CN.4/RES/2005, para. 8; on the phrase “sphere of influence”, see E/CN.4/RES/2005/69, para. 1(c).

The mobilising potential of food sovereignty cannot be underestimated. Therefore, the observation made in a recently published book on the right to food is correct: “One [...] theme that deserves more attention is the relationship between food sovereignty and the right to adequate food, and the need for a closer association between the actors in the two constituencies.”⁸⁰ This article has approached the relationship from a legal point of view, analysing food sovereignty from a human rights perspective. A human rights perspective is believed to be the most fruitful approach when analysing both the strengths, weaknesses and usefulness of promoting food sovereignty in the context of national policy making and international negotiations.

⁸⁰⁾ See ‘Editorial Introduction’, in Eide and Kracht, *supra* note 8, p. xlii.