D:53
DOCUMENTING VIOLATIONS OF THE RIGHT TO ADEQUATE FOOD

FIAN INTERNATIONAL
Willy-Brandt-Platz 5
69115 Heidelberg, Germany
Tel.:+49-6221-6530030
Fax:+49-6221-830545
E-mail: fian@fian.org
http://www.fian.org

Authors
Rolf Künnemann, Michael Windfuhr, Sigrun Skogly and Ana María Suárez Franco

Design and layout
Cisu I FIAN, Heidelberg

Printed on recycled paper
Canon iR3570, Heidelberg

Published
September 2007

This document has been produced with the financial support of FAO. The views expressed herein are those of FIAN and do not imply the expression of any opinion whatsoever on the part of FAO, particularly with respect to the legal or development status of any country, territory, city or area or of its authorities, or concerning the delimitation of its frontiers and boundaries

D:53
DOCUMENTING VIOLATIONS OF THE RIGHT TO ADEQUATE FOOD

Table of Content

Preface

"Documenting violations of the right to adequate food" is one in a series of manuals on the human right to food. Other publications in this series are titled ""How to use the Voluntary Guidelines on the right to food", "The Voluntary Guidelines on the right to food as a human rights based monitoring tool", "Access to land and the right to food", and "Parallel reporting to the UN CESCR". The purpose of these publications is to invite civil society organisations to make use of the progress made for food as a human right in the decade after the World Food Summit 1996 – and to equip civil society and other actors with some tools to hold governments accountable.

The human right to food is a central part of economic, social and cultural human rights. Over the past 20 years it has been pioneering the development of these human rights in civil society and at the UN. The Right to Food Guidelines are yet another important step: For the first time in history states have come up with guidelines as to how the realisation of food as a human right can be achieved. These Guidelines will be helpful to the 156 states parties to the International Covenant on Economic, Social and Cultural Rights, who all have obligations under international law to achieve this full realisation as soon as possible. Moreover it is significant that the other remaining states – all of whom consented to the Guidelines – thereby supported the right to food as an individual human right. The series of manuals concentrates on the Guidelines as a practical tool to guide the implementation of the Right to Food. They specify for policy makers at different levels and ministries what governments can do, when they intend to implement the right to food. The Guidelines will – as we will see- also prove useful when it comes to identifying and documenting violations of the human right to food.

Violations of the right to food are breaches of states' obligations which affect the enjoyment of the right to food as a claimable right of nameable persons or groups/communities. Identifying a case involving one or several violations is a two step procedure: It implies identifying causal relations between the states' acts/omissions and the damage suffered by the victims of the alleged violation – and identifying these acts/omissions as breaches of states obligations under the right to food. Documenting violations is not an academic exercise, but a crucial tool for communicating them and for facilitating the action against them. The manual at hand will try to show how the Right to Food Guidelines can be used in documenting violations of the right to adequate food.

The time has come for states to implement those obligations under the right to food which can be implemented immediately – and to progress as quickly as possible with the others. Neither one nor the other will happen unless states develop a culture of human rights and unless civil society uses the tools available to hold states accountable: The International Bill of Human Rights, the General Comments, the Guidelines, the national constitutions and legislation available. Alerting civil society and other relevant actors to apply these tools is the purpose of this series of manuals.

Part One: Documenting violations of the right to adequate food: Background

1. THE HUMAN RIGHT TO ADEQUATE FOOD AND ITS VIOLATIONS

1.1 The basic elements of food as a human right

Food is crucial for human survival. Access to adequate food is linked to human dignity. Human dignity is at stake when people are denied access to food or resources to buy it. All societies based on human dignity, value highly everybody's access to food and to the resources to feed oneself, and such resources are meant to be integrated into the public order guaranteed by the state and the community of states. Human beings are endowed with a human right to adequate food as they are endowed with other human rights.[1]

The human right to food is a fundamental economic, social and cultural right. It is an integral, indivisible and coherent part of human rights altogether upon which the enjoyment of many other human rights depends. The right to food is a subjective right of each individual, which means that the right incorporates a legitimate claim of these rights-holders against the states as the duty-holders under human rights. The claim relates to the enjoyment of the substantive content of the right.

The content of the right to adequate food is first of all access to food that is serving the dietary needs, is free from adverse substances, and culturally acceptable.[2] A precondition for the accessibility of food is its availability. The content, however, contains more than just any kind of access to such food. The right to food is more than the right to be fed. Its content includes economic accessibility of food through the use of natural and other resources in economic activities: The minimum essential level of the right to food, however, is access to essential foodstuffs.[3] The substantive content of the right to food goes further than this minimum essential level and incorporates in its core

> The availability of food in a quantity and quality sufficient to satisfy the dietary needs of individuals, free from adverse substances, and acceptable within a given culture;
> The accessibility of such food in ways that are sustainable and that do not interfere with the enjoyment of other human rights.[4]

The next section will deal with the states' obligations under the right to food. Human Rights have two essential elements, the first being the substance or the content of the right. The second is the corresponding obligations. The obligations in relationship to human rights are normally assumed by the state. If the obligations by the state are breached and damage occurs to the content of a person's right, the right is said to be violated. Hence, a violation is an act or omission of states affecting the enjoyment of the content of the right.

The right to adequate food and obligations concerning its implementation are enshrined in law. Important steps have been taken over the past 60 years since the adoption of the Universal Declaration of Human Rights, which contains the right to food in article 25. Access to a remedy against violations is part of the guarantee of food as a human right, and experience with legal remedy is building up. The right to food has been recognized in international law, most notably in the International Covenant on Economic, Social and Cultural Rights, and in national law, explicitly in a number of constitutions. Moreover there are soft law instruments concerning the right to food, such as the Right to Food Guidelines[5] or the Universal Declaration on the Eradication of Hunger and Malnutrition.[6]

1.2 The obligations

Human rights entail for states compliance with binding legal obligations related to the content of the right. States must also apply human rights principles in its activities towards compliance with these obligations. The understanding of state obligations has been clarified considerably since the World Food Summit (WFS), as a response to the WFS' call, contained in the plan of action of the summit, "to clarify the content of the right to food and the fundamental right to be free from hunger…"[7]. One of the first efforts in this regard was General Comment 12 on the right to adequate food. The basic definitions developed here by the UN Committee on Economic, Social and Cultural Rights were referred to in the Right to Food Guidelines (para. 4 / page 1) and most of them can be found in different parts of its text.

1 The Right to adequate food is codified in a number of international human rights instruments, most prominently in Article 25 of the Universal Declaration of Human Rights (UDHR) from 1948; and Article 11 of the International Covenant on Economic, Social and Cultural Rights, adopted in 1966, with 155 states parties in 2007.

2 The following elements of the core content are taken from UN Committee on Economic, Social and Cultural Rights, hereinafter CESCR, General Comment 12 on the right to adequate food, para. 8-para. 13

3 3 CESCR, General Comment 3, para. 10

4 4 CESCR, General Comment 12 , para. 12

5 Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security, adopted by the FAO Council in November 2004. FAO, Rome, 2005.

6 Adopted on 16 November 1974 by the World Food Conference convened under General Assembly resolution 3180 (XXVIII) of 17 December 1973; and endorsed by General Assembly resolution 3348 (XXIX) of 17 December 1974 available under: http://www.unhchr.ch/html/menu3/b/69.htm

7 World Food Summit Plan of Action (1996), FAO, Rome 1996

1.2.1. Nature of state obligations

States have to respect, protect and fulfil the content of the right. This tripartite typology of specific obligations is fundamental as it confirms negative as well as positive aspects of obligations: states have to refrain from interfering with the enjoyment of the right to food as well as taking positive steps to protect and fulfil the right. The following section will give a short description of the tripartite typology.

The typology of state obligations was first developed by Asbjørn Eide and later taken over by the UN-Committee on Economic, Social and Cultural Rights. This is an extremely useful characterization of what is expected by governments in order to avoid violations of the right to adequate food. Under the obligation to respect the government shall end violations caused through direct policy acts and through *de jure* and/or *de facto* discrimination in national policies. The violations of the right to food through direct policy acts are often linked to forced evictions of people from land on which they could gain a living through agricultural production. Such forms of forced resettlement, often implemented without proper compensation and rehabilitation policies, are often planned or initiated in the name of larger "development projects". The construction of large dams, other infrastructure facilities, the enlargement of cities etc. are typical forms of such projects. While some of these projects could be developed in a different way, minimizing or avoiding the damage by carefully considering alternatives, some of these projects requiring forms of resettlements might be difficult to avoid and have to be realized in all countries. However, it has to be guaranteed that people affected do not lose their source of livelihood. In conclusion, states shall abstain from any kind of illegal interference in realising peoples' right to food, e.g. through discriminatory laws, policies or processes which may lead to violations of the right. Special attention must be paid to the gender dimension of the right.

Under the obligation to protect, states are obliged to adopt measures in order to avoid interference by third parties in the enjoyment of the right to food by right holders. In this regard states shall adopt, implement and monitor laws, policies and processes which effectively prevent private actors from contributing to violations of the right to adequate food.

While the legislative part of that endeavour should not be too complicated, the difficulties often start with the implementation of land laws, labour legislation etc. on a daily basis. There are many cases in which activities of powerful economic actors contribute to the consolidation of violations of the right to food. Very often they manage to hide their non-compliance with the law and evade their responsibility concerning these violations. This may, for instance, occur through dividing land properties to new and separate legal entities. Implementing the obligation to protect therefore often requires reforms at the institutional level, which allow for the prevention, prosecution and criminalization of private conduct negatively affecting the right to food and assuring the prevalence of the rule of law - which includes human rights-, in a context of good governance.

The implementation of the obligation to protect is frequently politically difficult because the responsible actors are often powerful actors, be it national or international which today are extremely difficult to control, particularly when it comes to foreign direct investment. Every regulation taken by a government is then in competition with regulations of other governments, which might be more attractive to investors. It is therefore difficult for governments to insist on certain levels of standards if other countries in a similar position do not follow such standards. The obligation to protect requires from governments also a fair and transparent management of processes that affect people and the guarantee of functioning complaint mechanisms. People have the right to be heard in decision making processes that affect them. They should have the possibility to complain if rights are violated and they should also have access to effective recourse mechanisms.

The obligation to fulfil covers government action directed to improve the situation of persons or groups which are currently hungry and malnourished. This covers three different forms of activities:

(1) Governments need to be prepared for normal and regular form of disasters, such as regular draughts.

(2) They have to take special measures (e.g. to design policies) for each vulnerable group. Such policy measures must on the one hand be directed to enable people in the long run to overcome hunger and malnutrition on their own, using own resources and capacities (obligation to fulfil-facilitate).

(3) On the other hand the state must adopt legislative, executive and judicial measures to help all those who need direct support, when they cannot earn a living from their own agricultural work or labour wage (obligation to fulfil-provide). This is the case when they are for example too old or too young (orphans), or long term ill etc. The problems with the obligation to fulfil start when the policy choices of governments have to come under scrutiny. This evaluation has to check whether the policies adopted by the government are the best suited to promote and protect the Right to Adequate Food of vulnerable groups, and whether the government is really using the maximum of available resources in order to supply those in situation of acute hunger.[8] Difficult are also questions of how to adequately measure the effective use of resources through a government. How can the overall effectiveness of

8 Art. 2 of the ICESCR requires from governments to use the "maximum of available resources" to progressively implement all rights enshrined in the Covenant. The clause "available resources" refers to the implementation of all rights in the Covenant. That makes it even more complex to assess, if a government has fulfilled its obligation or not.

policy answers given by government to the problem of hunger and malnutrition be assessed? Answers to these questions are fundamental in the current debate on the right to adequate food.

The Right to Food Guidelines have been formulated to give first answers to these policy issues. A general principle that could be applied in order to tackle these problems should be that the governments have the obligation to prove that the best policy set is chosen and to explain why certain groups are not covered by their programmes or why the programmes chosen serve to help some of the victim groups but not others. Governments must have the burden of proof. This is important for any functioning accountability mechanism. Civil society groups often do not have the capacity to discuss difficult policy choices; however, the government has to explain why hunger and malnutrition still prevails.

Achieve full realization as soon as possible

All levels of state obligations must be implemented following the qualifications of article 2 of the Covenant, by using the maximum of the available resources and by taking immediate steps for the full implementation.

The full realization of the right to food, as the objective of a process, has to be achieved as soon as possible[9]. States shall carry out right to food policies in order to bring about access to food and resources where such access does not exist and to strengthen everybody's access through a facilitating environment. Moreover they shall pass the necessary legislation, and establish programmes and institutions to protect the right to food.

The obligation to protect and fulfil the right to food through the utilisation of available resources is provided for in Article 2(1) of the ICESCR where states shall "take steps to the maximum of available resources with a view to achieving progressively the full realisation of the rights recognized…" While this obligation may seem vague, the Committee on Economic, Social and Cultural Rights have clarified this provision stressing that the progressive realisation implies a continuing improvement, and that the core content of the right shall be implemented immediately. Furthermore, failure to comply with this obligation results in the State having to demonstrate that all available resources have been utilized, and that 'available resources' include the resources internationally available as well as domestic resources.

States are left with different options and levels of discretion to choose different strategies to reach the prescribed result – but "taking steps to the maximum of available resources" is a must. This means that the obligation to fulfil the minimum essential level of the right to food[10] has to be the top priority of each state party when it comes to the allocation of resources.

Identifying a breach of this general obligation requires checking whether the maximum of resources were allocated and whether states did not transgress their permitted level of discretion – i.e. whether the steps taken (policies, programmes) will in fact lead to full realisation of the right to food when applying the maximum of resources available. A state may have a number of policy options which all satisfy these criteria.

Further analysis would have to determine first of all whether the required priority setting was reflected in the allocation of resources in the state's budget – by a human rights based budget analysis including an analysis of the tax system and of the role of international donors. When it comes to the level of discretion, this level would certainly be transgressed, if there are policy options available and none of them have been chosen.

While the question may be disputed whether the pace with which a state moves towards full realisation is the maximum possible, any deliberately retrogressive measure that reduces the extent to which the right to food is guaranteed is *prima facie* seen as a breach. The repercussions of such retrogressive measures are usually immediately felt in the level of compliance with the specific obligations to respect, protect and fulfil, and can therefore be identified as breaches of these obligations. If a home state is unable to comply with the obligations for the realisation of the right to food, due to lack of resources, the general obligation to cooperate internationally makes it obligatory for the home state to seek international cooperation from foreign states and/or the international community. A home state's failure to do so is a violation of the right to food. There is a corresponding obligation of the international community to support home states' fulfilment systems, if a home state cannot be reasonably expected to run such systems on its own.

To monitor whether or not states transgress their levels of policy discretion existing accepted standards may be used – such as the Right to Food Guidelines and (for states parties) the ICESCR as interpreted in General Comment 12. In case of non-compliance the question of resources and appropriate alternative policies needs to be investigated, and a justification be sought from the state – and investigated in the light of the criteria mentioned above.

9 ICESCR Art. 2.1. requires from a state part to take steps "to the maximum of its available resources", which could financial and infrastructural resources. This entails, of course, that the envisaged objective (full realisation) be reached as soon as possible.

10 The right to freedom from hunger is the only right in the International Bill of Human Rights which is termed "fundamental". Indeed, without guaranteed access to food (and water) the enjoyment of all other rights cannot be guaranteed.

1.2.2. General Human Rights Principles

In the national implementation of the right to food, states have to act according to general human rights principles, like participation, accountability, non discrimination, transparency, human dignity, empowerment, rule of law and indivisibility. In the following paragraphs we focus specifically on the principles of non discrimination and accountability. Moreover it should be highlighted that all these principles attempt to ensure that human beings become subjects of the development process and capable of claiming their own rights and are not only objects of public policies

Non-discrimination

States have to implement their specific obligations without discrimination, according to the ICESCR. How does this provision affect the specific obligations? Which are the specific violations? With regard to the obligation to respect, the non-discrimination requirement does not generate additional violations as any destructive act by the state destroying access to food or resources and thereby creating damage to the affected person is a violation anyway. For the obligations to protect- and in particular to fulfil, however, the general obligation of non-discrimination has important implications. As long as protective institutions and fulfilment systems are not yet complete in covering all persons (for example due to lack of resources), states may be tempted to limit coverage in a discriminatory way excluding persons (*de jure* or *de facto*) on the basis of gender, race, colour, religion etc.. This is a violation of the right to food as far as it excludes discriminated persons from accessing food and resources, or denies them protection against destruction of access. Even though the fact of excluding persons from fulfilment or protection systems per se could not be argued in this case as a breach, due to lack of resources for a complete system – the discriminatory use of the limited resources is a breach, unless it can be justified as affirmative action for the most vulnerable.

Recourse and remedies

Human rights as guaranteed in international human rights law are legal rights. This includes the right to food. A key element of legal rights is the access to remedy in case of violation. Normally, such remedies involve access to a court of law.[11] The enforceability of rights through courts is called "justiciability of the right". In practice justiciability of a right implies access to effective judicial remedies against violations. The UN Rapporteur for the right to food describes the justiciability of human rights as "the possibility for a human right, recognized in general and abstract terms, to be invoked before a judicial or quasi-judicial body that can determine if, in the particular concrete case presented before it, the human right has, or has not, been violated, and which can decide on measures to be taken to remedy any such violation.[12]

Full justiciability of the human right to food includes that each person without access to adequate food can sue the state through the court's injunction to be provided with food and/or the means to feed oneself (either through reparation, compensation, satisfaction and/or assurance of non repetition, e.g., a remedy against destruction of one's access to food and resources, as the case may be). Justiciability is necessary, because it brings about the reliability, security and sustainability behind the normative content of the right. Full realization of the right to food is one of the ultimate goals of the International Covenant on Economic, Social and Cultural Rights.[13] For the enjoyment of the legal right to food to be realised, it is necessary to fulfil the substantive content of the right, and additionally to provide effective remedies available in cases of breach of obligations.

1.2.3. Extraterritorial obligations

The human right to food like all other human rights is a universal right: The specific states' obligations in principle refer to any person. Each state and the community of states therefore have obligations towards persons outside their territories - extraterritorial obligations.

There is a clear extraterritorial obligation to respect, to protect and to support fulfilment of the right to food in other states.[14] This is based in particular on article 2(1) which requires states to take steps 'individually and through international assistance and cooperation' as well as Article 11 of the Covenant that specifies

11 When states ratify international human rights treaties, they are legally bound to comply with all obligations stemming from such treaties. ICESCR Art. 2.1 calls on states to legislate in order to progress towards the full realization of the right to food. See also UDHR Art. 8, ICCPR Art. 2(3), CESCR General Comment 3 para. 5; General Comment 9 paras. 3,5,7,13; General Comment 12. Para 32, UN Committee on the Rights of the Child, General Comment. 5, para.6.

12 E/CN.4/2004/WG.23/CRP.7 Page 2 See also the definition by K. Arambulo: "Ascertaining the justiciability of a right is basically achieved when an independent objective (quasi-) judicial organ or supervisory body actually deals with the merits of a case and produces a decision pertaining to the right concerned". Arambulo, K. (1999): "Strengthening the Supervision of the International Covenant on Economic, Social and Cultural Rights. Theoretical and Procedural Aspects". School of Human Rights Research Series, Volume 3. Intersentia – Hart ; p. 85

13 General Comment 12 para. 6 requires as part of the full realization of the right to food the access to food and resources "at all times".

14 General Comment 12, para. 36

international cooperation for the right to an adequate standard of living, including food.[15] Extraterritorial obligations can be exercised directly by a state towards a person outside its territory or via the state's membership in an international organisation such as the World Bank or IMF.

Important applications for extraterritorial obligations under the right to food can be found in the home state's regulation of transnational corporations affecting the right to food abroad, in the exercise of due diligence of states when governing intergovernmental organisations and their projects destroying people's access to food or resources, bilateral investment treaties with similar effects, or the outright intervention into the enjoyment of the right to food in a foreign state.

1.3 Violations in hard law and soft law

So far the concept of violations was introduced along the structure of states obligations. Many obligations mentioned above have already found their way into national, regional or international regimes of human rights law. The following section will summarise what can be learned about violations in the main documents of international human rights law[16].

The right to food obligations enshrined in hard law are legally binding. If a violation of the right to food is linked to a breach of such legal obligations it is a violation of law. International hard law consists of jus cogens, international customary law and treaty law.

Some obligations are mentioned in soft law (declarations, guidelines issued by a large group in the community of states). They are not legally binding, but can be used as a tool for the development of hard law.

1.3.1. International hard law: The Covenant and international customary human rights law.

The main source of right to food obligations in international treaty law is the International Covenant on Economic, Social and Cultural Rights, which entered into force in 1976. The status of ratification of the Covenant is impressive indeed: There are 156 states parties out of 192 members of the UN. The Covenant was authoritatively interpreted by the UN Committee on Economic Social and Cultural Rights in 1999 in General Comment 12.[17] While the General Comment does not represent hard law as such, it is the tool developed by the Committee on for the interpretation of the content of the substantive elements of the right to food, as well as the corresponding obligations. General Comment 12 is therefore a good tool to use to understand the further legal implications of the provisions in the Covenant, and in particular articles 2(1) and 11.

General Comment 12 paragraph 17 states that "Violations of the Covenant occur when a State fails to ensure the satisfaction of, at the very least, the minimum essential level required to be free from hunger." If the state claims lack of resources "…the State has to demonstrate that every effort has been made to use all the resources at its disposal in an effort to satisfy, as a matter of priority, those minimum obligations." Moreover "A State claiming that it is unable to carry out its obligation for reasons beyond its control therefore has the burden of proving that this is the case and that it has unsuccessfully sought to obtain international support to ensure the availability and accessibility of the necessary food." In light of extraterritorial obligations and the obligation to cooperate internationally this implies an obligation on the part of the international community to support the immediate provision of food – at least when addressed for assistance by a state with proven lack of resources. Moreover the General Comment states that "any discrimination in access to food, as well as to means and entitlements for its procurement, on the grounds of race, colour, sex, language, age, religion, political or other opinion, national or social origin, property, birth or other status with the purpose or effect of nullifying or impairing the equal enjoyment or exercise of economic, social and cultural rights constitutes a violation of the Covenant" (paragraph 18). In paragraph 19 the Comment lists some violations of the right to food: "These include: the formal repeal or suspension of legislation necessary for the continued enjoyment of the right to food; denial of access to food to particular individuals or groups, whether the discrimination is based on legislation or is pro-active; the prevention of access to humanitarian food aid in internal conflicts or other emergency situations; adoption of legislation or policies which are manifestly incompatible with pre-existing legal obligations relating to the right to food" including "the failure of a State to take into account its international legal obligations regarding the right to food when entering into agreements with other States or with international organizations." Other violations are not mentioned directly but are implied by the Comment's standard setting on obligations and normative content of the right to food. The right to food concepts in this publication are based on General Comment 12. The General Comment also provides the conceptual foundation for the Right to Food Guidelines.

In addition to the hard law based on the Covenant, international customary law is also relevant. Most human rights lawyers would see at least the minimum level of the right to food (access to essential foodstuffs) as a part of international customary law making the respective obligations binding for all states, even for those who are not parties to a human rights treaty containing the right to food. A crucial document, of course, is the 1948 Universal Declaration of Human

15 For a systematic treatment of extraterritorial obligations see the articles of Coomans and Künnemann in Coomans, Kamminga (eds.), "The extraterritorial application of human rights treaties", Intersentia 2004.

16 For an important international expert opinion on violations please consult the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, Utrecht 1998.

17 It should be noted, however, that the UN General Comments of the Committee are not binding instruments. Nevertheless states should take them into account: The Committee is the legitimate body for the interpretation of the Covenant and its interpretations should therefore be accepted as a significant authority.

Rights, which carries the right to food as part of Art. 25. Even though this Declaration was not intended as binding law but a declaration of principles, it is now commonly argued that the rights contained in it have gained status as customary international law.[18]

1.3.2. International soft law: the Right to Food Guidelines and the Universal Declaration on the Eradication of Hunger

The first specific soft law document on an essential area of the right to food was the Universal Declaration on the Eradication of Hunger and Malnutrition of the World Food Conference 1974, which solemnly proclaims in paragraph 1: "Every man, woman and child has the inalienable right to be free from hunger and malnutrition, …".

The main specific soft law document on the right to food is a recent one: the Right to Food Guidelines, which are a result of the follow up process to the FAO World Food Summits in 1996 and 2002.

This document gives guidance on right to food policies towards the realisation of the right to food. This is an important instrument for designing and monitoring policies towards the full realisation of the right to food. It does, however, not refers to violations and does not create for any state new binding obligations.[19] What the Guidelines do provide is an interpretative tool in the operationalization of right to food policies to enable states to comply with obligations in international law. This holds in particular for the states parties to the ICESCR, but also the remaining states - at least as far as those levels of the right are affected which are part of international customary law.

The Right to Food Guidelines put a particular emphasis on right to food policies, which deal with the general obligation to implement full realization as soon as possible.

The 19 Guidelines can be seen as consisting of 4 groups:

- Group 1 (guidelines 1-7, 11, 12, 17, 18) deals with the general policy framework (Planning-monitoring-evaluation, institutions, stake holders). The other three guidelines detail key areas of the normative content:
- Group 2 (guidelines 13-16) concerns access to food for vulnerable groups (safety nets).
- Group 3 (guideline 8) sets standards on access to resources (land, water, labour)
- Group 4 (guidelines 9, 10) deals with the health-related quality of food (nutrition, safety).

Even though these guidelines are not per se obligatory and therefore not immediately applicable for the identification of violations, referring to them when documenting violations may nevertheless be helpful for states and right holders and useful to demonstrate links between different policy areas and the right to food. However, we should once more reaffirm that the States´ obligations to respect, protect and fulfil the right to adequate food are binding and the guidelines can be seen as recommendations on how governments could meet their commitments.

2. FORMS OF VIOLATIONS OF THE RIGHT TO FOOD

The case work of human rights organisations such as FIAN show that many different forms of violations of the right to food can occur. While it is possible to detect some standard patterns of violations of the right to food in many situations, a detailed case analysis is nevertheless always needed in order to find out if the right to food is violated or not. The standard patterns of violations include forced evictions and all other forms of destruction of existing access to productive resources, any destruction of access to food or any arbitrary disconnection of drinking water. They also cover all forms of labour relations lacking minimum payment such as bonded or slave labour as well as de jure discrimination in access rights to food or to productive resources.

In most cases that can be attributed to violations of the right to adequate food a careful human rights analysis of the situation is required to identify the violations and to propose adequate changes in national policies. As described above violations of the respect and protect obligations are generally easier to identify. Nevertheless many situations must be analysed in detail in order to see if and why for example a government has not controlled the actions of private actors adequately. During the human rights analysis the violation needs to be shown and if possible also an explanation for the situation has to be given.

Is it a typical problem related to economic, social and cultural rights that such a detailed analysis is needed before a violation can be detected? Is this not easier under civil and political rights? These are typical arguments used to differentiate between the sets of human rights. By carefully looking into cases in the realm of both sets of human rights, it becomes clear that also for most cases of violations of civil and political human rights cases, a careful human rights analysis is needed. Whether a certain regulation of a government is limiting the freedom of expression or whether the same regulation is needed to protect the dignity of certain groups, can often only be understood in a given historical context and the respective country situation. The same is true for the judgement on legislative, executive or judicial measures under the right to adequate food. If a certain safety net is set up in a discriminatory fashion or the questions whether the government is using the available resources properly, these are typical issues which can only be answered by using a case specific analysis.

18 Which subset of rights from the Universal Declaration can be seen as hard law is a matter of dispute. There are good reasons to argue for the fundamental human right to be free from hunger as belonging to this subset.

19 This approach made it possible on the one hand that the Guidelines were adopted unanimously by the FAO Council in November 2004 – with support of even those states who are not parties to the ICESCR. On the other hand, this approach led sometimes to rather weak formulations.

Economic, social and cultural human rights are specific in the way that the fulfilment obligations have a higher importance for the full realization of these rights as compared to civil and political rights. The case based analysis has therefore often to judge on the availability of resources and on the impact of certain policy choices of governments. It is important to note that this specificity does not limit the justiciability of ESC-Rights. On the contrary: this is regular work of judges in national courts and decisions of that nature are also done regularly in courts. The fact that judges in court cases on ESC-Rights have to deal with policy choices of governments is often used to argue that ESC-Right cannot be seen as fully justiciable, as courts should not deal with policy options. Here it is important to highlight that ESC-Rights do not prescribe certain policy choices (pro or against privatisation for instance), but that it is necessary in specific cases to analyse if a policy chosen is contributing to a violation or not. The understanding of what can be expected from countries needs therefore again to be analysed taking into consideration resources constraints of a government.

What is missing concerning ESC-rights is the jurisprudence. So far only few cases have been judicially dealt with and in these few cases a judgement on availability of resources or other vaguely formulated terms have been possible without major problems. The case work of human rights organisations such as FIAN shows a similar experience: When it comes to concrete cases, the human rights analyses are normally much less complicated than often argued.

3. RELEVANT POLICY AREAS

The policy areas and themes related to the right to food can be manifold depending on vulnerable groups and local circumstances. Which are the most important policy areas relevant for violations of the right to food? While some details have already been presented above, the following short overview shows that the relevant issues are mostly determined by the character of groups affected by violations. The list of issues correlates to a large extent with the vulnerability mapping that has emerged since the World Food Summit among intergovernmental institutions. After the World Food Summit in 2006 several intergovernmental agencies established an interagency working group to identify the main vulnerable groups with respect to food insecurity. The respective secretariat is hosted by FAO and is called the FIVIMS secretariat.[20] Their list of vulnerable groups for food insecurity shows again that most of the vulnerable groups of hunger and malnutrition live in rural areas. Most of the issue areas documented by human rights organisations are relevant issues for the largest group among the hungry and malnourished; the group of marginalized smallholder farmers in rural areas and to potential income possibilities for other persons living in rural areas. Anyway, the policy areas regulated and vulnerable groups mentioned in the Right to Food Guidelines can be helpful in identifying relevant policy areas in specific countries.

Violations of the respect obligation are essentially related to issues such as (1) access to productive resources for both marginalized small holder farmers and landless labourers. Government policies should not lead to forced evictions without adequate compensation. (2) A second relevant area of issues those related to employment and working conditions for rural workers. (3) The respect obligation requires a careful check of existing legislation and the removal of *de jure* discrimination. (4) Government institutions need to be regularly monitored in order to make sure that also *de facto* discrimination of minorities, of women etc. are not taking place.

The protect obligations refer to the control of private actors which is related to several issues: (1) The access to productive resources needs to be secured through provisions guaranteeing security of tenancy and other stable forms of access. Private actors need to be adequately supervised since they are often involved in forced evictions. Pollution of land and water sources can contribute to forms of evictions often without adequate compensation (2) Labour relations and working conditions, including problems of slave and bonded labour, minimum wage etc. are again also of major importance under the protect obligation. (3) Other violations cover the economic/marketing power of the food industry or trading companies etc., which severely affects price of staple food and income generated in agriculture.

Violations of the obligation to fulfil are related to (1) emergency response mechanisms of governments. How far are institutions prepared and equipped to overcome disaster situations, particularly disaster situations that are happening regularly such as draughts or floods etc? (2) They relate secondly to the overall safety net or security net provisions set up in a country to overcome acute forms of hunger and malnutrition. Safety net provisions are also needed on a long term scale for certain groups in society that are unable to provide for themselves. (3) Thirdly they cover issues related to the creation of an enabling environment that helps many people to feed themselves. Related issues for such an enabling environment are e.g. agrarian reform polices creating access to land, measures to increase the access to other productive resources (fishing resources etc.) or mechanisms to support the creating of non farm job opportunities in rural areas as part of an overall strategy to foster rural development. (4) To ensure the existence of complaint mechanisms available to victims of violations of the right to adequate food, which is part of the obligation to fulfil. Without informal and formal complaint mechanisms full realization of rights will never take place.

20 The abbreviation FIVIMS stand for "Food insecurity and vulnerability information and mapping systems". The FIVIMS secretariat has elaborated a list of 54 potential vulnerable groups which are at risk of food insecurity.

Linked to all levels of obligations is the general (generic obligations) for all states party to the Covenant to proper monitor the implementation of the rights enshrined to the covenant and to allow for effective complaint mechanisms.

4. HOW TO DOCUMENT VIOLATIONS OF THE RIGHT TO ADEQUATE FOOD

In order to document violations of the right to adequate food properly, adequate monitoring tools have to be used and applied to the specific situation of the case. Violations related to the obligations to respect and protect are often violating events, as described above, so individuals or group of individuals are forcibly evicted etc. To document such events other tools are needed than to document that a particular government is discriminating certain groups in the legislation of certain policy areas (land policy, water policy etc.) or to document that a government is not regulating adequately or applying the existing law to ensure the realization of the right to food nor is it using the maximum of its available resources in order to guarantee that the minimum essential level of the right – freedom from hunger – is implemented. On the one hand this information can be useful to incite concrete changes in the state's structures and processes, in order to reach better results regarding the realisation of the right to adequate food. On the other hand it can help to justify and strengthen claims of right to adequate food violations to be presented in judicial courts. For the second case knowledge of all vulnerable groups is needed and a careful analysis of the legislation has to be carried out, to ascertain whether some of these groups are discriminated by law. To analyse the use of resources it is necessary to apply an adequate set of indicators that will allow judgement of the use of budgetary resources.

The documentation of violations therefore needs monitoring of state compliance with its human rights obligations. Such monitoring is in itself a human rights obligation and is required both by the International Covenant on Economic, Social and Cultural Rights and the Right to Food Guidelines. The monitoring must be done by the state parties. It can also be done by civil society actors, in an attempt to control their governments from a human rights perspective.

4.1 Human rights based monitoring

The implementation of economic, social and cultural human rights (ESC-Rights) requires from governments dedicated activities to progressively realize the rights. Part of the activities required from governments is monitoring[21]. Rights-based monitoring within a country consists of periodic collection, analysis and interpretation, and dissemination of relevant information to assess the progress of the realisation of the right to adequate food among all members of society, and whether this is achieved in ways compatible with human rights obligations, principles and approaches.[22]

Monitoring is an activity which is essential for any human rights implementation strategy to help achieving results. Rights based monitoring is an important tool to overview and control if the duty bearers are implementing the obligations required from them in the human rights covenants. Monitoring is also a separate obligation in the implementation of the human rights covenants. The government needs to know which segments of the society are particularly affected, in which areas of the country they live, and what the causes are for the suffering from human rights violations or the non-fulfilment of certain rights.

Four different functions of human rights monitoring can de differentiated:

- (1) Identification of marginalized and disadvantaged groups and the causes of the problems: Governments must monitor, which groups are affected from human rights violations or suffer from non implementation of their rights. Through monitoring it should be possible to identify the main causes for the violation or the non-implementation. Without a clear identification of vulnerable and marginalized and disadvantaged groups,[23] it would be impossible to improve or develop the adequate legislation and design meaningful policy strategies.
- (2) Measure progress: Monitoring is also needed to check if the measures taken by governments have the intended effects or not. Such monitoring of progress in the implementation must be done by governments themselves in order to identify areas where corrective action must be taken.
- (3) Process monitoring: Evaluate if the implementation process itself is respecting human rights criteria.
- (4) Monitoring as a precondition for accountability: Monitoring of the problems and the progress in

21 Right to Food Guidelines, Guideline 17.

22 Immink, Maarten, "Methods to Monitor the Human Right to Adequate Food Volume I, Making the Case for Rights-Based Monitoring", Revised Draft, Rome, 30 March 2007, p. 8.

23 Individuals or groups that are facing hunger and malnutrition or which face the risk of becoming malnourished are called "vulnerable" In the context of FAO. After the World Food Summit, several intergovernmental agencies developed the FIVIMS initiative (Food insecurity and vulnerability information and mapping system). In the human rights system "vulnerable groups" are a defined category of certain groups that often face violations of their rights, such as indigenous communities. The Committee on Economic, Social and Cultural Rights has therefore introduced the term "marginalized and disadvantaged groups" in order to characterize those facing violations of one of the ESC-rights or that are at risk.

implementation of a right should also be done by independent (human rights) institutions, such as national human rights commissions, as well as by civil society actors in order to hold governments accountable.

In General Comment 12 on the right to adequate food the Committee on Economic, Social and Cultural rights has recommended monitoring in the following way: "State parties shall develop and maintain mechanisms to monitor progress towards the realization of the right to adequate food for all, to identify the factors and difficulties affecting the degree of implementation of their obligations, and to facilitate the adoption of corrective legislation and administrative measures, including measures to implement their obligations under articles 2.1 and 2.3 of the Covenant"[24] (para. 31). The Right to Food Guidelines contains an extra guideline on "monitoring, indicators and benchmarks". This guideline 17 describes the different functions monitoring can have for the implementation of the right to food:

- Para.17.2: Governments should start to make "right to food impact assessments" in order to identify the impact of domestic policies, programmes and projects on the progressive realization of the right to adequate food.
- Para. 17.3: States are requested to develop a "set of process, impact and outcome indicators… so as to assess the implementation of the progressive realization of the right to adequate food".
- Para. 17.4: Measure the impact of specific policy instruments and interventions through process indicators
- Para. 17.5: "States should, in particular, monitor the food situation of vulnerable groups…"

All functions described at the beginning are taken up in Guideline 17, which requires governments to have adequate monitoring mechanisms in place (17.1) and ensure proper participation (17.6).

The four functions of human rights based monitoring relate to the different elements of a national implementation strategy as recommended by General Comment 12 and by the Right to Food Guidelines. The latter ask governments to implement a national strategy for the implementation of each of the respective rights which cover five steps. (1) The strategies shall start with an analysis and identification of the victims of violations together with an assessment of the causes of the situation. (2) Based on that, the governments shall check and improve their national legislative framework, modify or amend laws and develop legislation when appropriate. (3) Additionally, the governments should design an adequate policy framework for the implementation of each right. The implementation should be guided by the following standards: The policies shall be implemented without discrimination towards improving equity. The progressive realization of the right shall be controlled by set benchmarks. For achieving the benchmarks governments should use the maximum of their available resources. The policy development process should set its priorities in such a way so that particularly vulnerable groups are addressed first. The government should provide social safety nets for vulnerable groups that are not able to feed them selves as well as be prepared for disasters and to have adequate safety nets installed to react to shocks or emergencies. (4) Moreover, governments should monitor effectively the shortcomings and problems and take corrective measures were needed. (5) Finally the government has to develop and allow access to effective recourse mechanism. It becomes obvious how central the different functions of the monitoring are for the full realization of the right to adequate food.

To sum up: Human rights-based monitoring is a process in which the government response to a given situation of implementation of one of the human rights is analysed. By using indicators a human rights based monitoring process will check whether the government response is in line with the state obligations to respect, protect and fulfil the respective human right. By doing so it is necessary to measure both the conduct of the government response - if it is adequate and if it respects general human rights principles - and the result - if the general situation of implementation is improving fast enough to meet the standards for progressive implementation.[25] The indicators used must be specific enough to measure both the conduct as well as the result

4.2. Documenting violations of the right to adequate food

One challenge for human rights based monitoring is to develop a set of indicators that can combine the different information needs for monitoring state action under all three dimensions of human rights obligations. Indicators for the obligation to respect should measure the degree to which states are responsible for violating human rights. Indicators concerning the obligation to protect measure the degree to which states are not able to prevent third parties from violating human rights. Indicators for the obligation to fulfil must measure the degree to which states provide the necessary resources and policies to move as expeditiously as possible toward the full realization of human rights.[26] For these different purposes, different types of indicators are needed, some of them are easier to achieve while others are hardly available.[27]

24 Para 31 of General Comment 12.

25 General standards for measuring the quality of the progressive implementation will be discussed below in Chapter 4. Criteria can be taken from two documents, "The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights" from 1987 and the General Comment No. 3 of the Committee on Economic, Social and Cultural Rights.

26 See Landman, T. (2004): Measuring Human Rights: Principle, Practice, and Policy, in: Human Rights Quarterly, 26: pp. 906-931 and Sano, H-O. and Lindholt, L. (2000): Human Rights Indicators, Country Data and Methodology, 2000. Copenhagen: Danish Institute for Human Rights.

27 Different types of indicators and their availability will be discussed below in Chapter 5.

Another challenge is that the real meaning of state obligations and of measures that contribute to the realization of the right to adequate food is still quite poorly understood by government officials, but also often among civil society actors. One of the biggest achievements of the Right to Food Guidelines is that they are organized around policy areas. This makes it easier for each sector ministry to identify what are elements in the Right to Food Guidelines are of relevance for the ministry. What is needed is a targeted awareness raising activity among all those involved in national food security or right to food monitoring activities, in order to support better conceptual clarity. The historical neglect of ESC-rights and the only recent clarification of the content and the state obligation make it necessary to carry out parallel education work, while starting with monitoring activities.

An additional problem is linked to the complexity of the implementation of the right to adequate food. Due the fact that the Right to Food Guidelines require action by many ministries, and the fact that not all policies can be easily attributed to a certain sector ministry, do not make it easier to set up a good monitoring process. Such a process needs a preparation period in every government in order to work adequately. Particularly, the fragmentation of the institutional responsibility for food security and the right to food is a factor that might lead to uncoordinated monitoring activities. Gathering data in such a complex system is also influenced by many technical monitoring problems. Data on resources that are budgeted nationally or locally might not be disclosed timely or might not become available at all, thus causing difficulties in the interpretation of data and the documentation in the information systems. Many of these technical problems need to be addressed in the process of developing an adequate monitoring system.[28]

The Right to Food Guidelines can therefore be a very useful tool for the tasks of documenting violations of the right to adequate food. Most guidelines contain a list of actions which governments should avoid (do no harm). This can be helpful in documenting violations of the obligation to respect and to protect. Moreover, most guidelines also describe priorities, which governments should follow, when implementing the right to food, or they contain at least proposals for best practices. Both the priorities and the best practice cases can be used as indicators or benchmarks in the monitoring of state policies.

A second advantage of the Right to Food Guidelines is that most of them follow specific policy areas. Due to the fact that monitoring is often related to outcomes in certain policy areas, the Right to Food Guidelines are helpful because they are applying the norms related to the right to adequate food to specific policy areas.

4.2.1. Events based documentation

Documenting violations of the obligation to respect and to protect require in all situations a careful description of each case. The Part II of the text contains hints and proposals how to do it. The cases need to be stored in an events based data base in order to see how often violations are happening in a certain country. Events based data bases are not working with standardized indicators but are very common in the monitoring work of human rights groups around the world. The Right to Food Guidelines will help to make it easier to do such case documentations. The text of most of the Right to Food Guidelines contain explicit request to not do harm to certain actors.

4.2.2. Identifying violations

A violation of the right to adequate food occurs when non-compliance with state obligations related to the right to adequate food interferes with the realisation of the right by a specific person or group of persons. This is normally revealed through concrete damage related to the right to adequate food or a threat of damage.

To document the existence of a violation, different elements have to be identified:

1) The state obligation or obligations, which should be complied with and the state acts of commission or omission.

For example:
a. The obligation to respect the access to resources or to adequate food and the participation of state agents in unlawful evictions and in the destruction of food;

b. The obligation to regulate private activities which could negatively interfere in the realisation of the right and the omission to supervise food quality;

c. The obligation to provide food to people who are not able to feed themselves, such as (orphaned) children or the sick, old or disabled and the omission of the state in implementing non-discriminatory safety nets for these people.

28 During the process of the elaboration of the Voluntary Guidelines the FAO Right to food secretariat commissioned six country case studies. In the studies it was examined to degree to which the right to adequate food has been realised in each country and it was analysed what are major problems in getting a rights based approach on the right to food started in these countries. The studies describe a lot of constraints at the national level to proper implement and monitor these rights. The constraints can be grouped into conceptual, institutional, technical, and political constraints; see: FAO. Implementing the Right to Adequate Food: The Outcome of Six Case Studies: IGWG RTFG Information Paper No. 4. Rome, June 2004.

2) The victim or group of victims. In some cases of ESCR violations not only one individual, but also groups of individuals may suffer damage or the threat of damage, caused by the state omission or commission. In these cases the victims should be at least clearly identified,

For example:
a. All the members belonging to an ethnic community, which has been affected by an unlawful eviction and destruction of harvests. If a list of all community members is not available clear criteria for their identification should be available.

b. The persons threatened or affected by the commercialization of contaminated food.

c. Children suffering from hunger, malnutrition and related disease caused by access to insufficient, inadequate and/or contaminated food and water

3) The identification of the specific actual damage or threat of potential damage, caused by state omission or commission. For example harvest destruction, malnutrition, related diseases, deaths, etc.

The damage can affect human life (reduced quality of life, high level of diseases, starvation deaths) – and victims' economies (reduced management capacity, reduced productivity, reduced possibility to defend or acquire resources and skills). These two types of damages are part of a vicious circle. There are studies on human and economic damage relating to under-nutrition and malnutrition on national or global level, which may serve as an inspiration when documenting the case of a community or an individual victimized by a violation.[29]

For example:
a. Harvests destroyed the presence of malnutrition and related illnesses.

b. Number of days that the victims could not work, medical costs, possible secondary effects.

c. Further negative impact on the educational and professional development of under and malnourished children (sickness, medical costs, emotional and psychological damages).

To be condemned to hunger and malnutrition or to live a life in conditions of indignity shall be considered a damage.

4) Identification of the causality nexus between state omission or commission and the damage.

Non compliance with state obligations is considered a prima facie violation. It implies the hard presumption of the existence of causality between state omission or commission and the damage or threat of damage.

Therefore the state has the responsibility to prove the non existence of this causality, for example by proving force majeure or accidental causes, or that the state was not informed of the vulnerability of the victims, or that despite all required measures which were taken the negative impact on the right to food could not have been avoided.

There are as many possibilities of violations of the right to adequate food as there are state obligations derived from the human right. These are related to the attributes and dimensions of the right: Adequacy, availability, accessibility and sustainability. Therefore the violations can occur in regard to the different policy areas addressed in the Right to Food Guidelines. In this regard there are violations possible related to access to productive resources, such as land, seeds, water or labour; related to the quality of food, including access to nutritious and safe food and water; related to priority attention to vulnerable groups; related to food assistance, and much more, which should be analysed in each concrete case.

4.2.3. Documentation of the Violation of Progressive Implementation

For all the documentation work related to the obligation to fulfil indicators and careful monitoring as described above will be useful. The usefulness of the Right to Food Guidelines is particular because they show necessities for priorities in policy choices. While it is helpful for monitoring work to find such priorities, it is often still more complicated to judge violations. Countries often have several policy alternatives to implement certain priority areas. A careful monitoring endeavour must be able to analyse if certain policy choices are the best or not. This will be possible in many cases, in other cases the underlying policy dimension will be very complex. Then a judgement on a specific case cannot be done in a monitoring exercise but needs an in depth case study before a court in order to give due attention to all relevant facts. For the analysis of forms of discrimination it is important to have disaggregated indicators allowing for gender, class or regional differences.

In order to apply the Right to Food Guidelines more specifically as a Monitoring Tool, see the document developed by FIAN-International "The Voluntary Guidelines on the right to food as a human rights based monitoring tool".[30]

29 The State of Food Insecurity in the World (SOFI) 2004, FAO 2004. This report mentions provisional estimates for direct and indirect losses to national economies at the level of hundreds of billions dollars every year. It should be kept in mind, however, that losses are not only incurred by the national economy, but first of all by the hungry and malnourished themselves (many of them victims to violations), and by their family businesses, most of them informal.

30 Available at www.fian.org

Part Two: Documenting violations of the right to adequate food: Practical hints

1. A PRELIMINARY SCREENING FOR VIOLATIONS

As highlighted under the title "identifying violations", violations to the right to adequate food can occur in relation to the different dimensions of the right, for example quality of food, respect of cultural food tradition, consumer practices, food and nutrition related policy and program implementation, in the framework of food assistance, etc, However, it is impossible to cover all these areas in this paper. In this section which deals with practical hints to document violations, we decided to elaborate that dimension in which FIAN has gathered the most experience over the last 20 years: lack of access to food or to resources to produce it. In these cases the identification of a violation requires answers to the following questions:

1.1 Is there a situation of deprivation?

The starting point for a right to food analysis is a situation of threatening or existing deprivation:[31] A person or a group of persons in a certain situation lacks access to food or resources or may lose that access.

Sometimes, breaches of states obligations involved in this situation may be obvious.

In other situations, it may not be clear if there were any incumbent obligations breached. In this case a more detailed analysis needs to be undertaken, where a number of questions may be asked. These are examples of elements in such an analysis:

1. Consider the given situation:

   Is there (a threat of) deprivation? Are people threatened by or suffering from starvation, malnutrition or a lack of resources to feed themselves.

The first step is to consider the content of the right to food. The absence of (or a severe threat to) the enjoyment of the right may trigger further investigation of related states obligations. There may be evidence of hunger or malnutrition. What we want to find out is whether there has there been a violation of the right to food as well.

For this matter further questions need to be asked:

1.2 What is the cause of the deprivation?

2. Is there a recent destruction in the access to food or resources that causes the current (threat of) deprivation?
3. What was the role of states authorities in this destruction? Was the state itself the destructive agent?
4. If state authorities themselves destroyed people's access to food or resources, this is a breach of the obligation to respect and therefore a violation of the human right to food.
5. If the destruction was by a third party, it needs be ascertained whether the State or any particular state authority in a position to prevent this destruction by direct intervention or to greatly reduce its likelihood by precautionary measures failed to do so? If this was the case, the failure of the state represent a breach of the obligation to protect and hence a violation of the right to food.
7. If the state was not in a position to prevent this destruction or greatly reduce its likelihood for lack of resources and infrastructure this situation does not involve a violation of the right to food. It is, however, still an offence [32] of the human right to food by the destructive third party. The word offence here is used in the formal sense of "an act breaking a law". This terminology would be obvious, if there was a law implementing the state's obligation to protect access to food and resources, for example by making such destructive acts punishable then such conduct represents an offence. Every state implementing the human right to food properly should have such laws.[33] If there are no such laws, the state fails to meet implementing its obligation to protect under the right to food.

1.3 Are states perpetuating deprivation?

8. If the situation of deprivation is not the result of a (recent) human act destroying access to food and resources, we have to ask: Are there programmes of a fulfilment system (for example social transfer programmes) in place that address this situation?
9. Did the deprived persons try to access these programmes?

31 Deprivation is short for the non-enjoyment of the right in question, deficiencies in the right's content i.e. lacking access to food or resources

32 Often these human rights offences are called "abuses" – and sometimes they are termed violations. This, however, is improper use of violations terminology, as only states carry obligations under human rights, and can therefore violate them. Inflation of violation terminology should be avoided.

33 There is a dispute in international law and constitutional law over the "horizontal effects" of basic rights or human rights: The contested issue is whether the recognition of these rights (and consequently the recognition of the related protect obligations) automatically create a subjective claim of a victim towards a destructive third party in the same way as the create this claim against a destructive state (breaching its respect obligations).

10. Did the deprived persons not try to access these programmes, because they did not know about them, or because they considered them unacceptable?

12. If people find such a programme unacceptable, there is a need to determine whether the programme is indeed unacceptable, or whether people are not sufficiently motivated to use it.

13. There are three types of programme failures:

    If people do not access such programmes, because these programmes have not been made reasonably known to them, we can talk about a failure of promotion.

    If people do not access such programmes because they consider them unacceptable for valid reasons, this is a fundamental failure of the programme.

    If the programme was accessed (or tried to access), but failed to fulfil access to food due to grossly inadequate implementation of the programme this would be a failure of implementation.

    In all these cases it should be asked whether such failure was due to lack of infrastructure of the state/ community of states.

14. If the state/community of states was endowed with sufficient resources and infrastructure to properly establish, promote and implement acceptable fulfilment programmes, but failed to do so, this failure is a breach of the obligation to fulfil and hence a violation of the human right to food.

15. In a situation of absence or failures of programmes due to lack of domestic resources or infrastructure, although used to the maximum, the situation cannot be considered a case of violation of the human right to food - unless the state had not asked for international assistance.

After having gone through the preliminary screening programme on violations it may appear likely that the case at hand involves violations of the right to adequate food. One or several breaches of states obligations could be involved. At this point a proper analysis and documentation of the case is called for.

The documentation should have a specific format which can be used for all cases with major types of violations. This format should be suitable for a computer-based documentation system, for example an MS-Access based databank system.[34] The advantage of using such databanks is two-fold:

- First of all they greatly facilitate the management of the documents (petitions, photos, legal texts, testimonies) which for some cases can otherwise become difficult to handle.
- Secondly (for persons or organisations working with a considerable number of cases) they allow for easy access to cases through search and filter functions according to different characteristics of the case – and even for a statistical analysis of cases in the databank.

Which characteristics will be singled out and standardized for such functionalities, and how they can be combined in such a databank may depend on the circumstances. Readers are invited to make their own choice. A word of caution may be in order, however: The data-bank should be kept as "simple and stupid" as possible. The following suggestions, based on many years of case-work on the right to food, only provide a list of important elements for documentation and a standard structure for recording them. The titles of the following sections provide the structure of what should be documented. The elements for documentation inside the text flow are underlined to facilitate identification.

2. THE BASICS

2.1 Naming the case

Cases need names by which they can be identified for future reference. Court cases often use the "A versus B" nomenclature. In our case A would be the name of the person or group whose right to food was allegedly violated: the victimized person or community. B would normally be the name of the respective state which breached the obligation. In the current context, however, such a simple approach might create a problem – as we may be dealing not only with a domestic but at the same time with an extraterritorial violation of shared responsibilities among a large number of states and hence a large number of violators.

In order to do justice to such situations the name of the case should be in general "A versus B, C", where A is the family name of the person, or the name of the community (perhaps with a geographical addition which clearly identifies the group – such as the Guaraní, San Vicente). B is the domestic state if this state breached an obligation, C is the foreign state involved in an extraterritorial violations or a group of states or an intergovernmental institution (World Bank, NATO).

If there is no extraterritorial breach involved, then the name would be "A versus B".

If the domestic state did not breach - not even a protect obligation against the foreign state(s) the name would be "A versus C".

It should be obvious that a prior human rights analysis is necessary before documenting the case - in order to even be able to give the case a name.

In addition to giving the case a name, it may also be useful to give it a "signature", i.e. a string of symbols which captures certain features of the case, for example IND-17, the 17th case in the databank or documentation system concerning violations with victims in India.

34 For 2008 FIAN International prepares a databank "CASEDATA" for use by NGOs and other actors in the field of the human right to food. Persons interested should get in touch with FIAN International.

2.2 The narrative

The entry into the case should, of course, be a short narrative of the case. But what is it that needs to be narrated? The answer to this question depends on the nature of the case. In a certain sense the narration should introduce the case from a chronological perspective describing who did (or failed to do) what and when, who are the victims and where do they live - and include those elements of human rights analysis which have been relevant for forming the opinion that the case at hand is a case of violation. These elements as well as references to pertinent legal instruments, to the political, legal or quasi-legal action taken, and to the response of the respective authorities would then be further detailed outside the narration in later sections of the documentation.

2.3 The sources of information

The sources of information used for the case should be noted and specified: Have the victims themselves been involved in providing information? Is the source a support group or CBO/NGO? Are there other researchers, journalists? Have lawyers provided information? If possible, the names (and perhaps addresses) of the key organisations/persons should be documented.

2.4 The geographical area

It should be documented where exactly the damage occurred (community, village/city, municipality, province/state, country). If important for the understanding of the violation, some characteristics of the area should be mentioned. (distance to coastline, density of forest cover, availability of water etc.)

2.5 The number and characteristics of the victims

A first element here is the number of persons affected by the violation.

An important point for understanding the violation is the economic classification of victims, such as peasants, landless, agricultural workers, urban workers, nomads, hunters/gatherers slum dwellers, un(der)employed or others.

The ethnic or cultural classification of the victims – such as indigenous people, landless peasants, dalits – should also be documented.

It should also be noted in what sense men and women are victimized differently.

Information should best be disaggregated on the basis of gender. The number of the children and the elderly should be recorded as well.

Some first information on the nutritional status of the victim group can be documented under this heading. Detailed documentation of damage incurred by the victims, however, will be recorded in chapter 3.

Assessing the number of victims and the extent of the damage may be difficult – in particular in the case of fulfil obligations. Nevertheless an attempt should be made to document at least the basic elements. These issues may be crucial when it comes to the issue of compensation, rehabilitation or other forms of remedy to which victims of violations are entitled. The following two sections will provide some background on the assessment of damage.

2.6 Violence involved

Violations of the right to food can be accompanied by physical violence.

The destruction of access to food or resources such as forced land evictions, blocking food transports from an area, etc are by their very nature violent.

Moreover there is sometimes violence against right to food defenders: Usually people do not just stand by when the human right to food gets violated (their own right or the right of others) – but try to resist and/or obtain remedy. In doing so they may meet with different degrees of escalating violence: Criminalisation/defamation, harassment/threats, violence against housing/belongings, detention, attempted injuries, beatings/torture, killings and massacres.

These types of violence related to the violation should be documented – along with the perpetrators of violence (police, military, paramilitary, insurgents, security staff or other workers of firms, thugs, killers) and the instigators of violence.

2.7 The violating states authorities and details on third parties

The violating states and authorities should already be clear while giving a name to the case, as they are the key adversaries in the case. It is recommended, however, to document specifics on the violator: Which state authority of which branch (executive, judicative, legislative) and at which level (national, regional, local). Names of responsible persons in these authorities would be useful.

> Mentioning national laws or administrative acts assigning specific legal competences to the concrete authority, related to the documented violation could be of relevance for the argumentation of the case. For example, if a specific agrarian authority has the competence to draw up land titles under specific circumstances under agrarian reform procedures, and there is an omission of this legal duty, this will facilitate the proof of state liability.

If an extraterritorial violation was also involved or even prevalent, the violator may be a foreign state directly or indirectly through international states authorities (World Bank, IMF etc.) Details on the respective authorities should be documented.

If a protect obligation is breached, the destructive third party should be named and details be given (key persons, lawyers). These third parties could be natural or juridical persons such as landlords, private employers, national or transnational corporations in the fields of agribusiness, forestry, fishery, flowers, dam building, extractive industries etc.

Sometimes states are not only failing to prevent destructive acts by third parties (thus breaching their obligation to protect), but carry out destructive acts "on behalf" of third parties – sometimes related to some form of corruption. This may be difficult to prove. If there is evidence, however, the names of such instigators of human rights violations should be recorded along with the documentation of the violation.

If there are supportive third parties to the case (civil society organisations etc.) this should be documented.

3. THE VIOLATIONS

A thorough description of the levels of state obligations has been given above in Part I. For an act or omission of a state to be a violation of the right to food, the state must have damaged the some rights holder's access to food and resources. Both the breach and the damage need to be documented. The documentation of the breach depends on the type of breach as will be detailed below. Usually there is one key violation. Under this heading the documentation should note the type of the related breach behind the key violation.

4. THE DAMAGE

For an act or omission of a state authority to be a violation of the right to food, these authorities must have damaged a rights holder's access to food and resources by breaching states obligations under the human right to food.

The nature and extent of the damage should be documented. Given the twofold nature of the content of the right to food, both the damage to food access and to resource access should be documented separately. If only the access to resources was affected, the access to food may be likely to be damaged as well, and this should be estimated: In some situations, damage to food access has not yet (or only partially) happened - for example in a recent forced eviction (without rehabilitation) which has taken away people's agricultural land, but not (yet) their access to food – as they still have supplies or received some government hand outs. The situation will still most likely lead to severe reduction in the access to food and represent an imminent threat to the right to food. Even if such an impact on access to food should be unlikely (for example because the state provides adequate food for the people who lost their resources), damage to resources should be documented.

There are different types of damage involved in violations of the right to food:

- Physical damage related to the physical health of persons. In the worst case this would relate to the loss of life (starvation death). There are a number of diseases and disabilities resulting from chronic undernutrition and (if this is caused by a violation of the right to food) by the violation involved.
- Mental damage related to the mental health of persons. This could result from physical damage, the loss or illness of family members, or the material damage incurred or emerging.
- Material damage incurred, for example the loss of property (crops, animals or houses in a forced eviction), or the loss of income generating capacity due to the physical or mental damage incurred by a violation.
- Emerging Damage refers to physical, mental or material damage which are likely to be incurred in future due to a violation of the right to food.

The damage situation might differ depending on the type of obligations breached. Sometimes there are multiple breaches involved in a case (in particular in the field of respect- and protect-bound obligations). Damage should be attributable fully or in part to the different breaches. In doing so a fair assessment of causality and the size of damage (including the number of victims) is necessary and should be documented.

A preliminary first numerical picture of damage caused by a violation can be obtained from answering the following questions:

- How many persons are affected by the violation?
- What is the value of the annual income which was (could have been) gained from livelihood resources destroyed or alienated (not provided)?
- What is the value of the property destroyed (crops etc.) or not provided?
- How many days have persons lived without access to adequate food or water?
- How many persons died due to the lacking access to food or water?
- What is the value of treatment necessary to restore the health of the persons affected?

The next question is on how to attribute the damage and document it:

- Regarding the obligation to respect, if state action takes away people's access to adequate food directly - the question of causality is easily solved. What remains to be done is the documentation of the extent and (likely) impact of such measures. How many persons' access to food or resources is affected by this breach and to what extent?
- Regarding the obligation to protect if access to food is destroyed by a third party, the damage should be recorded as above. How much of this damage is attributable to the breach of the protect obligation? If the human rights analysis has come to the result that there has been a breach of a protect obligation, then – by definition - the state has failed to take due diligence in precautionary measures or in direct intervention that could have been expected to prevent such destructive act. In the latter case, even though the damage was created by the third party, the omission of the state allowed the destruction to take place and the damage should be attributed to the state to same extent as it is attributed to the third party. In the other case – when a state failed to take precautionary measures (general ones such as protective legislation and punishment of perpetrators or individual precautions with a view to the case at hand), but could not have been expected to prevent the destruction through direct intervention, an assessment has to be made how likely it would have been that a precautionary measure in place would have prevented the destruction. The extent of damage attributable to the state would depend on the outcome of such an assessment. If it turned out that the precautionary measure would have had no impact at all on the third party's act, then we cannot attribute damage to the state and hence not determine a violation.
- Regarding the obligation to fulfil-provide access to food, if a person for reasons beyond her control lacks adequate food and the state failed to provide such food directly, even though this would have been possible within the limits of resources available to the state (including resources made available by the international community), the damage attributable to the state is the loss of income (in cash or kind, such as food), the suffering from hunger-borne diseases and ultimately the starvation death of such a person. All of these have to be compensated to the person and/or her family. Should the state be able to prove lack of resources, but the international community denied assistance even though this was possible; the damage is partially attributable to those actors within the international community which prevented the availability of resources. The size of the damage should be documented
- Regarding the obligation to fulfil-provide access to resources for deprived persons, it is to be considered that this obligation applies only to a person which – for reasons beyond her control – has no access to resources to feed herself. Even if the person happens to have access to food, she may nevertheless suffer damage due to lack of access to productive resources like exclusion from community life or at least insecurity of economic and social status, all of which may affect a person's physical and mental health. It should remain clear that the damage incurred by persons victimized by breaches in this category will be less than the damage incurred by victims which lack access to food and are not provided with it, but will still be considerable. It should be estimated and documented, perhaps using as an indicator (to be documented as well) a certain percentage of the damage incurred if in this situation the person lacked access to food.
- Regarding the obligation to fulfil-facilitate access to resources. It shall considered that the damage suffered by breaches of the obligation to fulfil-facilitate may affect persons who do have access to food and to resources to feed themselves – but whose access to (and use of) resources is threatened. The damage they suffer is insecurity of economic and social status, which may affect a person's physical and mental health. The damage incurred by victims in such a situation will be less again than the damage incurred by deprived persons lacking access to resources. It should be estimated and documented, perhaps using as an indicator (to be documented as well) a certain percentage of the damage incurred, if in this situation the person would lack access to food. The percentage here would have to be clearly smaller than the indicator used in the case explained in the paragraph before.

5. ENFORCEABILITY AND JUSTICIABILITY MECHANISMS AND INSTITUTIONS

The ultimate purpose of analysing and documenting violations, of course, is to address these violations and achieve remedy for the victims. Documenting action is therefore a key activity when documenting violations. The first point when moving from analysis to action is to look at legal (or quasi-legal) provisions which establish procedures of complaint or to claim violations, which could constitute an adequate tool in order to support the victims in the case at hand, even if the strategy will not (or not yet) include action in court. The purpose then of documenting violations is to provide some background for the enforceability and justiciability strategy and of the action to be taken.

The documentation should take into account administrative enforceability mechanisms, and quasi judicial and judicial justiciability mechanisms at national, regional and international levels.

At the international level the justiciability of ESC rights is recognized, nevertheless there are no institutions in

charge of implementing these standards. There is hope that an optional protocol to the covenant will soon allow for complaints against violations of the right to food – and that an international court adjudicating Economic, Social and Cultural Rights will eventually be established. Some regional human rights system, however, for example in the Americas, provide court procedures which can be used for the right to food in an indirect manner, using the inter-linkages between the right to food and some civil and political rights as the right to life or due process.

There are several legal sources to fundament a claim or complaint of violations to the right to adequate food: national legislation, case-law, constitutional law, regional and international standards of human rights, including hard law and soft law. These should be interpreted in a systematic and evolutionary way.

The legal sources are the human rights regimes themselves: legislation covering all or part of the right to adequate food or legislations covering other human rights which can sometimes also be affected in connection with the right to food, for example the right to life. Some other legal instruments such as environmental law, social security law, labour law, consumer protection law, may sometimes be even more useful, even if they do not explicitly mention the right to adequate food.

What should be documented are the respective legal sources from hard law. Major jurisprudence – including cases decides by judges in other countries - and comparative law can be useful to support the argumentation.

5.1 Administrative Mechanisms

National legal systems usually provide administrative procedures for the solution of conflicts between citizens and executive authorities (petition, appeal, etc). The procedure of this kind of resources is usually faster, more affordable and more effective than a judicial process. In many countries the admission of a claim by the judicial courts demands the exhaustion of all available administrative recourse mechanisms.

A first step to enforce the right to adequate food is to establish whether there are any available effective administrative procedures to investigate and remedy the specific violation and which are the administrative authorities competent to address right to food violations or threats, for example, agrarian reform national institutions, consumer institutions, development ministries.

5.2 Quasi-judicial Mechanisms

Complaints about violation can also be addressed by quasi-judicial mechanisms. This could be either a processor to a court proceeding or instead of going to court, especially if that would not be a promising approach. These institutions include national human rights institutions, regional human rights commissions, national, regional and UN rapporteurs on the right to food. These institutions could be approached through reports and complaints. There may be informal or formal ways that these quasi-legal institutions can use to deal with such complaints, like recommendations to the violating authorities or even addressing violations as claims to judicial courts.

At the international level, once an Optional Protocol on complaints under the ICESCR is available, the respective body could be approached with a complaint of a violation under certain circumstances. Even though the reporting procedure before the UN Committee on Economic, Social and Cultural Rights is largely meant for monitoring rather than addressing individual violations, such violations could be highlighted in the context of a parallel report to the Committee. Fact finding missions of quasi-legal institutions to investigate the case at hand and/or talks of the institution with authorities, victims and third parties can help to find a remedy for violations.

Relevant available quasi-legal institutions should be mentioned in the documentation together with an assessment of options how they could address the violations at hand. Making use of such options can be called a "quasi-legal action" against the violations at hand.

5.3 Judicial Mechanisms

Victims of violations should be able to address claims of violations to judicial institutions: judges, courts and Tribunals. Judicial procedures exist at national level and could be available at the regional (for example Inter-American Human Rights Court, European Human Rights Court) and international levels (International Court of Justice).

National judges are the primary judicial authority competent to address violations, but if domestic mechanisms are not effective to give judicial protection to the victims, the regional or international complaint mechanisms could be used as a subsidiary recourse mechanism.

Victims of violations or their representatives - in order to bring a case to the judicial branch - must assess the opportunities and risks in their specific judicial system and define legal, political and media strategies in order to ensure the success of the claim and to minimize possible security risks for victims and human rights defenders.

6. ACTION TAKEN

Remedy for the victims is the ultimate purpose of documenting violations. The previous chapter has provided a background for legal and quasi-legal action to be taken. There are other types of action as well, which approach the executive and/or legislative powers of the state (political action) or turning to the national and international public directly (public action) or through the media (media action). Hence there is a need for a strategy how to address the violation.

Each case has a history - a history of violations and a history of action taken and remedy obtained. Using a chronological approach is often a very useful way of managing the information available on the case. Any documentation system for violations should therefore include such instruments as key elements.

6.1. The chronology of events

In a violation action is taken by different sides. For breaches of respect- or protect obligations the chronology of events starts with the destructive action taken by the states authorities or third parties. For breaches of fulfil obligations – which is marked by the inaction or failure of states' action - the starting point for the chronology of events would be the first action taken by the victims of such neglect or by their support groups.

The documentation should include all relevant events in chronological order. This chronology of events is a diary both of the violations in the case at hand, the implementation of the victims' strategy, the response of the authorities, of the legal and quasi-legal institutions, the keeping or breaking of promises by authorities and the implementation of court orders.

If the chronology of events is computer-based it can be used as a managing tool for documents (letters, orders, press releases, legal texts, photos, testimonies etc.) related to the case: There can be links from each event to the event-related documents in the different subdirectories of the case.

Each event should be documented with a short narrative. Moreover there should be a possibility to generate consolidated reports from the chronology of events by extracting specific events and their related narratives – covering for example a specific time period, or specific institutions. Criteria of interest for filtering events from the documentation system should therefore be included when documenting the event: Date, type of event, and perhaps categories for the main actors.

A chronological summary of events should document the following practical points

- Talks with responsible authorities (if possible with dates and names)
- Submission of complaints to the respective authorities (administration, human rights bodies (with date and name of the persons who received the complaint.).
- Administrative action taken at administrative head quarters.
- Court action taken at the national level.
- Decisions obtained through administrative or judicial procedures at the national level.
- Action taken at a regional or international level.
- Decisions obtained at regional or international level.
- Indicators for the state of execution of these decisions or judgments at the national, regional or international levels.
- Presentation of reports before international authorities.
- Recommendations obtained from international authorities
- Activities undertaken to make the state comply with the recommendations of international authorities.

6.2. Who takes action?

A specific part of the documentation should list important actors in the case (including those mentioned in 1.7) and their addresses, including telephone and email: The victims and their support groups, relevant state authorities, corporations, civil society groups involved, persons in national and international governmental and non-governmental organisations, important sources of information, lawyers and consultants, journalists and other relevant actors.

7. ETHICAL AND SECURITY DIMENSIONS

In all human rights monitoring and documenting, the security and confidentiality of victims of violations are paramount. Therefore, close collaboration with victims in the documenting of the cases shall be ensured. To the extent possible the victims must participate in the process, and also be informed and consent to all steps taken. Civil society organisations involved in monitoring of violations of the right to food shall take every possible step to ensure the security of individuals involved in the cases, both the victims and those carrying out the case-documentation. Full participation of the affected population must be sought in order to secure a process of inclusion, expression and convent, which is essential for the respect of all human rights.

Bibliography of texts not noted above:

– Aaas/Huridocs (ed.): The Right to Food: A Resource Manual for NGOs,

– Versoix, Washington, 2005

– Van Boven, Flinterman, Westendorp (ed.), The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, SIM-Netherlands Institute of Human Rights, 1998

FIAN INTERNATIONAL
Willy-Brandt-Platz 5
69115 Heidelberg, Germany
Tel.:+49-6221-6530030
Fax:+49-6221-830545
E-mail: fian@fian.org
http://www.fian.org