

Research on Extraterritorial Obligations regarding the Right to Food

食料への権利に関する域外義務の研究

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Abstract

This article analyses a theory of extraterritorial obligations regarding the right to food. It examines various studies of the U.N. Special Rapporteurs, relevant treaties concerning the extraterritorial obligations of the right to food, and prospects for the crystallisation of customary international law. It puts forward the perspective of extraterritorial obligations as a positive legal norm.

要旨

本稿は、食料への権利に関する域外義務の理論を分析する。国連特別報



告者の諸研究、食料への権利の域外義務に関する関連条約、慣習国際法の結晶化の見通しを検討する。本稿は、域外義務を実定法規範として捉える視点を提示する。

Keywords

international law - human rights - United Nations - right to food – extraterritorial obligations

キーワード

国際法、人権、国際連合、食料への権利、域外義務

1 Introduction

As Amartya Sen aptly states in his article about obligation, which is a fundamental concept in this article:

“The recognition of human rights is not an insistence that everyone everywhere rises to help prevent every violation of every human right no matter where it occurs. It is, rather, an acknowledgement that if one is in a plausible position to do something effective in preventing the violation of such a right, then one does have an obligation to consider doing just that”¹⁾.

When considering the right to food, a crucial question arises: what does it mean to be in a plausible position? In the 1980s, the international community, united by a shared cause, shifted its focus towards natural disasters such as the droughts that devastated African countries. This collective endeavour led to research on the right to food, with significant contributions from Asbjørn Eide²⁾, Philip Alston³⁾, and Ian Brownlie⁴⁾. Their enduring legacy is reflected today in how international human rights law frames the obligations of States regarding human rights provisions from three perspectives: responsibilities to respect, protect, and fulfil. This framework,

¹⁾ Sen 2022.

²⁾ Eide, Goonatilake, Gussow and Omawale 1984.

³⁾ Alston and Tomaševski 1984.

⁴⁾ Brownlie 1987.

proposed by Eide, has become a cornerstone in the discourse on the right to food⁵⁾.

My journey towards studying the right to food began in 1986 in the heart of Ethiopia. Working for a humanitarian relief organisation amidst severe drought and food insecurity, I was deeply moved. This pivotal experience ignited a lifelong commitment to the right to food, which has become the central focus of my life's work.

A pivotal moment in tracing the historical development of the right to food in international law was the 1996 World Food Summit. Representatives from 185 countries convened at Rome's Food and Agriculture Organization headquarters. They adopted the Rome Declaration on World Food Security⁶⁾ and the World Food Summit Plan of Action⁷⁾. Under Objective 7.4, the Plan of Action emphasised the need to clarify the contents of the right to adequate food and the fundamental right to be free from hunger. It invited the U.N. High Commissioner for Human Rights to define better the rights related to food in Article 11 of the Covenant and propose ways to implement and realise these rights⁸⁾. In response, efforts were made to clarify the scope of the right to food. General Comment No. 12 of the Committee on Economic, Social, and Cultural Rights on the right to food was adopted in 1999⁹⁾. Since 2000, the U.N. Human Rights Committee and the U.N. Human Rights Council have appointed Special Rapporteurs for the right to food¹⁰⁾. To date, four Special Rapporteurs have been set. I will delve into the work of Special Rapporteurs later.

This has been discussed in previous major studies on economic and social rights;

⁵⁾ U.N. Document, E/CN.4/Sub.2/1987/23, 7 July 1987.

⁶⁾ World Food Summit, Rome Declaration on World Food Security, Rome, 13 November 1996, at <https://www.fao.org/3/w3613e/w3613e00.htm?msclid=c464a3bac06c11eca3a12f0ff4a1af6b> (as of February 16, 2024).

⁷⁾ World Food Summit, World Food Summit Plan of Action, Rome, 13 November 1996, at <https://www.fao.org/3/w3613e/w3613e00.htm?msclid=c464a3bac06c11eca3a12f0ff4a1af6b> (as of February 16, 2024).

⁸⁾ Ibid., para.61.

⁹⁾ U. N. Doc. E/C.12/1999/5, 12 May 1999.

¹⁰⁾ For the mandate of the Special Rapporteur, see U. N. Doc. E/CN.4/RES/2000/10, 17 April 2000 and U. N. Doc. A/HRC/RES/6/2, 27 September 2007.

several fundamental issues exist when considering the right to food¹¹⁾ .

The first point is whether the element of time concerning the obligation to implement the right to food is essential since there are cases where an immediate realisation is envisaged, such as famine, and issues where a progressive realisation is contemplated, as in the case of long-term development assistance¹²⁾ .

The second concerns extraterritorial obligations regarding the right to food. Are states the only ones not wanting to extend their commitments, or are there also market and governance issues? Also, is trade liberalisation conducive to food security or vice versa?¹³⁾

These points are critical and will be discussed further in this paper.

2 Definition

In this paper, I focus on the issue of extraterritorial obligations regarding the right to food. The argument of extraterritorial obligations means that an obligation under international law exists for a State to formulate and implement policies to respect, protect, and fulfil the right to food of people outside the territory of the State. Regarding whether it is possible to derive such an obligation as an interpretation of a treaty or establish it as an obligation under customary international law, a negative view persists, as exemplified by the opinion of the U. S. government¹⁴⁾ , which will be discussed later in this paper.

At an expert meeting convened by Maastricht University and the International Commission of Jurists in 2011, the Maastricht Principles on extraterritorial obligations of States in the area of economic, social, and cultural rights were

¹¹⁾ This article was prepared for the research presentation on March 1, 2024 at the Institute for International Law and Humanity, the University of Melbourne Law School. While preparing the paper, Professor Margaret Young and Professor Sundhya Pahuja gave me some essential suggestions. I want to express my gratitude to both professors.

¹²⁾ Young 2019, pp.658-669.

¹³⁾ Cohen and Jackson 2019, pp. 415-421.

¹⁴⁾ U. N. Doc. A/C.3/74/SR.49, 15 February 2020, para.86.

adopted¹⁵⁾. The Maastricht Principles are an academic achievement that is not legally binding. Instead, they were drafted as a progressive development of the law based on existing international human rights laws.

The Maastricht Principles define extraterritorial obligations as follows. “For the purposes of these Principles, extraterritorial obligations encompass obligations relating to the acts and omissions of a State, within or beyond its territory, that have effects on the enjoyment of human rights outside of that State's territory and obligations of a global character that are set out in the Charter of the United Nations and human rights instruments to take action, separately and jointly through international cooperation, to realise human rights universally,”¹⁶⁾

The Maastricht Principles also define extraterritorial obligations from three perspectives: respect, protect, and fulfil. Regarding the element of time for implementing extraterritorial obligations, it can be argued that the obligation to respect and protect requires immediate implementation in terms of content. In contrast, the obligation to fulfil should be realised progressively.

Principles 19 to 22 refer to the obligations to respect. Principles 20 and 21 provide that all States have an obligation to refrain from conduct which nullifies or impairs the enjoyment and exercise of economic, social, and cultural rights of persons outside their territories and that States must refrain from any conduct that impairs the ability of another State or international organisation to comply with that State or international organisation's obligations regarding economic, social, and cultural rights¹⁷⁾.

Principles 23 to 27 refer to the State's obligations to protect. Principle 24 provides that all States must take necessary measures to ensure that non-state actors, which they are in a position to regulate, such as private individuals and organisations, transnational corporations, and other business enterprises, do not nullify or impair

¹⁵⁾ Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, 28 September 2011, at <https://www.icj.org/wp-content/uploads/2012/05/Maastricht-Principles-analysis-brief-2011.pdf> (as of February 16, 2024).

¹⁶⁾ Ibid., para.8.

¹⁷⁾ Ibid., paras.20-21.

the enjoyment of economic, social, and cultural rights¹⁸⁾ .

Principles 28 to 35 refer to the obligations to fulfil. Principle 29 provides that States must take deliberate, concrete, and targeted steps, separately and jointly through international cooperation, to create an internationally enabling environment conducive to the universal fulfilment of economic, social, and cultural rights, including in matters relating to bilateral and multilateral trade, investment, taxation, finance, environmental protection, and development cooperation¹⁹⁾ .

3. Development of the Theory of Extraterritorial Obligations regarding the Right to Food

In this section, I will examine the works of the U.N. Special Rapporteurs on the right to food to discuss the development of the theory of extraterritorial obligations regarding the right to food.

Jean Ziegler discussed the issue of extraterritorial obligations in his report to the Human Rights Commission in 2005. He referred to Articles 55 and 56 of the UN Charter, Articles 22 and 28 of the Universal Declaration on Human Rights, Articles 2(1) and 11 of the ICESCR, and Articles 4 and 24(4) of the Convention on the Rights of the Child as the legal basis for extraterritorial obligations. He argued that States that can support other States must provide assistance and pointed out that States should respect the enjoyment of the right to food in different countries, protect that right, promote access to food, and, where necessary, provide assistance confirming extraterritorial obligations²⁰⁾ .

Olivier de Schutter has made an active academic contribution to conceptualising extraterritorial obligations. He was one of the principal drafters of the Maastricht Principles. Moreover, he also drafted a "General Comment on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of Business Activities." In his 2013 report, he stated that despite the

¹⁸⁾ Ibid., para.24.

¹⁹⁾ Ibid., para.29.

²⁰⁾ U. N. Doc. E/CN.4/2005/47, 24 January 2005, paras.34-59.

significant progress made in recent years, some dimensions of the right to food still need to be developed. This is especially the case with regard to its extraterritorial dimensions. According to the Committee on Economic, Social, and Cultural Rights, the obligations associated with the right to food extend to all situations, whether located on a State's national territory or abroad, over which a State may exercise influence without infringing on the sovereignty of the territorial State. This is reaffirmed in the Maastricht Principles. However, the mechanisms allowing victims of violations of the right to food in extraterritorial situations are often non-existent or hardly accessible²¹⁾ .

Hilal Elver discussed extraterritorial obligations concerning the right to food in her report submitted in 2014. She noted that State parties should ensure that their policies and practices do not directly or indirectly infringe upon the right to food of people living in other States, and the obligation to respect this is an expanded form of the obligation not to harm other States under international law. General Comment 12 of the Committee on Economic, Social, and Cultural Rights also states that food should not be used to exert political or economic pressure. Thus, the State shall not implement food embargoes or other measures that jeopardise the access to goods and services to ensure the right to food. IFCs should not make decisions that can lead to infringing on the right to food in other countries²²⁾ .

The Current special rapporteur, Michael Fakhri, discusses the right to food from the standpoint of the third-world approach to international law (TWA). Unlike the three previous Special Rapporteurs, he does not explicitly use the concept of extraterritorial obligations. He is focusing on four thematic areas: (a) COVID-19 and the looming hunger crisis, (b) food systems and global governance, (c) seeds and farmers' rights, and (d) the right to food in armed conflicts and protracted crises²³⁾ . In his recent report, he argues that the practice of human rights is not only about identifying violations and naming and shaming perpetrators. Human rights also provide a language of action that identifies shared values and enhances people's dignity. During the pandemic, Member States adopted policies in response

²¹⁾ U. N. Doc. A/68/288, 7 August 2013, para.19.

²²⁾ U. N. Doc. A/HRC/28/65, 12 January 2014, paras.38-47.

²³⁾ U. N. Doc. A/HRC/46/33, 24 December 2020.

to the food crisis to realise the right to food. Member States should not end these policies but instead, convert them into permanent programs. He insists there is an urgent need to realise the right to food through a coordinated and sustained effort, using the advantages and synergies of international cooperation and solidarity to find comprehensive solutions to the common current and future problems facing humanity²⁴⁾. Thus, he has not explicitly referred to extraterritorial obligations but implied their content.

4. Extraterritorial obligations and treaty provisions on the right to food

In section 4, I will examine treaty provisions concerning the extraterritorial obligations on the right to food.

4.1 International Covenant on Economic, Social and Cultural Rights

The first treaty provision that can be pointed out as relevant to extraterritorial obligations concerning the right to food is the ICESCR. Article 2, paragraph 1 of the Covenant explicitly refers to international assistance and cooperation. However, states have traditionally viewed their human rights obligations as limited to those of the people within their territory. In globalisation, foreign states, transnational corporations, and international organisations increasingly impact people's enjoyment of economic, social, and cultural rights. In other words, the focus on the extraterritorial obligations of states is aimed at holding foreign states accountable for their illegal acts or omissions that adversely affect the human rights situation outside their borders.

Article 11 of the ICESCR stipulates the right to food. Paragraph 1 provides that States Parties will take appropriate steps to ensure the realisation of this right, recognising to this effect the essential importance of international cooperation based on free consent.

Paragraph 2 provides that States Parties shall take the measures needed to ensure

²⁴⁾ U. N. Doc. A/78/202, 18 July 2023, paras.109-111.

an equitable distribution of world food supplies, considering the problems of both food-importing and food-exporting countries.

General Comment 12 elaborated on extraterritorial obligations using international obligations. It states that state parties should take steps to respect the enjoyment of the right to food in other countries, to protect that right, to facilitate access to food, and to provide the necessary aid when required. As the obligations of states and international organisations, states have a joint and individual responsibility to cooperate in providing disaster relief and humanitarian assistance in times of emergency, including assistance to refugees and internally displaced persons²⁵⁾. However, for the opponents of extraterritorial obligations, these are regarded as nothing more than policy recommendations.

I would also like to discuss General Comment 24 of the CESCR on State Obligations under the ICESCR in the context of business activities. De Schutter, the former special rapporteur on the right to food, has long worked on the issue of extraterritorial obligations and, as I mentioned before, played a central role in drafting this general comment. It does not limit itself to the right to food but discusses extraterritorial obligations in detail.

The essential recognition of General Comment 24 is that the activities of transnational corporations and the growth of international investment and trade have created global supply chains and that development projects are increasingly carried out through public-private partnerships between states and foreign private investors so that the perspective of the extraterritorial obligations of the State has become increasingly important. States Parties must take the necessary measures to prevent extraterritorial human rights violations by legal persons within their territory and under their jurisdiction²⁶⁾.

Regarding the obligation to respect, it states that the extraterritorial commitment requires States parties to refrain from interfering directly or indirectly with the enjoyment of the Covenant rights by persons outside their territories. As part of that obligation, States parties must ensure that they do not obstruct another State from

²⁵⁾ U. N. Doc. E/C.12/1999/5, *supra* note 9, paras.36-38.

²⁶⁾ U. N. Doc. E/C.12/GC/24, 10 August 2017, para.27.

complying with its obligations under the Covenant²⁷⁾ .

Regarding the obligation to protect, it states that the extraterritorial obligations require the State's parties to take steps to prevent and redress infringements of Covenant rights that occur outside their territories due to the activities of business entities over which they can exercise control²⁸⁾ .

The obligation to fulfil requires state parties to contribute to creating an international environment that meets the Covenant's rights. To that end, state parties must take the necessary steps in their legislation and policies, including diplomatic and foreign relations measures, to promote and help create such an environment²⁹⁾ .

4.2 Food Assistance Convention

I also would like to examine the Food Assistance Convention adopted in 2012 and entered into force in 2013³⁰⁾ . Fifteen countries and the European Union ratified the Convention so far. It aims to improve the food security and nutritional status of people in developing countries facing food insecurity. It requires each Party to determine its annual food assistance and commit to providing it according to its laws and regulations. It places food security at the core of the obligations. Article 5, Paragraph 1 provides that each Party agrees to make an annual commitment to food assistance. Paragraph 13 provides that each Party shall make every effort to meet its minimum annual commitment. The Food Assistance Convention must provide for treaty obligations to a certain extent while maintaining the core of voluntary commitments by the parties.

I want to examine the contentious market, governance, and trade liberalisation issues here. When considering treaty obligations, it is the state that the treaty directly obligates. However, when considering extraterritorial obligations to protect, the state must ensure that non-state actors, such as corporations and individuals,

²⁷⁾ Ibid., para.29.

²⁸⁾ Ibid., para.30.

²⁹⁾ Ibid., para.37.

³⁰⁾ Food Assistance Convention, opened for signature June 11, 2012 (entered into force Jan. 1, 2013) at http://treaties.un.org/doc/source/signature/2012/CTC_XIX-48.pdf (as of February 16, 2024).

comply with human rights. In other words, the treaty obligation is a state obligation, but it requires compliance with human rights by corporations and individuals. If market principles regulate the behaviour of corporations and individuals, it is essential to control the market in an appropriate international manner. This requires some form of global governance, and the international community is fragile. Moreover, history has shown that trade liberalisation alone does not contribute to the universal realisation of the right to food. However, there is still no answer to what kind of international control is possible.

5. Prospects for Customary International Law of Extraterritorial Obligations on the Right to Food

In this section, I would like to discuss prospects for the customary international law of extraterritorial obligations on the right to food.

5.1 Resolutions of International Organizations

As resolutions of international organisations, I would like to examine General Assembly Resolutions, Human Rights Council Resolutions, and FAO Voluntary Guidelines.

General Assembly Resolutions on the right to food, adopted continuously since 2001, are long resolutions with 53 operational paragraphs. First, I would like to point to the operative paragraph 30 as it refers to extraterritorial obligations. It provides that all States should make all efforts to ensure that their international policies of a political and economic nature, including international trade agreements, do not hurt the right to food in other countries³¹⁾. In addition, operative paragraph 11 provides that the international community should provide international cooperation in support of national and regional efforts³²⁾.

Operative paragraph 28 stresses the need to mobilise and optimise the allocation and utilisation of technical and financial resources from all sources, including

³¹⁾ U. N. Doc. A/RES/78/198, 22 December 2023, para. 30.

³²⁾ Ibid., para.11.

external debt relief for developing countries³³⁾. Operative paragraph 34 urges States to prioritise their development strategies and expenditures to realise the right to food. Operative paragraph 41 invites all relevant international organisations to continue promoting policies and projects that positively impact the right to food³⁴⁾.

Thus, such resolutions play a specific role in forming customary international law as *opinio juris*. However, at the same time, it is necessary to be supported by state practice, and it is questionable whether it can be evaluated as a crystallisation of customary international law.

Since its inception, the U.N. Human Rights Council has focused on the right to food and has adopted resolutions on the right to food every year since 2008. The resolution has 29 operative paragraphs, most overlapping with the General Assembly resolution. It is noteworthy that operative paragraph 17 calls upon States to consider reviewing any policy or measure that could hurt the realisation of the right to food, particularly the right of everyone to be free from hunger, before instituting such a policy or action³⁵⁾.

In 2004, FAO adopted voluntary guidelines to support the progressive realisation of the right to adequate food in the context of national food security. The guidelines are divided into three parts. The second part is entitled "Enabling Environment, Assistance, and Accountability" and contains 19 guidelines³⁶⁾.

Guideline 19 refers to the international dimension, and paragraph 1 provides that States should fulfil those measures, actions, and commitments on the global size, as described in Section III³⁷⁾. Section III, paragraph 2 provides that food should not be used as a tool of economic and political pressure³⁸⁾. Paragraph 3 provides that States are strongly urged to take steps with a view to the avoidance of, and refrain

³³⁾ Ibid., para.28.

³⁴⁾ Ibid., para.34.

³⁵⁾ U. N. Doc. A/HRC/RES/52/16, 17 April 2023, para. 17.

³⁶⁾ Voluntary Guidelines to support the progressive realisation of the right to adequate food in the context of national food security, adopted by the 127th Session of the FAO Council, November 2004, at <https://www.fao.org/3/y7937e/Y7937E.pdf> (as of February 16, 2024).

³⁷⁾ Ibid., Section II, Guideline 19, Sub-Section 19.1.

³⁸⁾ Ibid., Section III, para.2.

from, any unilateral measure not by international law and the charter of the United Nations that impedes the full achievement of economic and social development by the populations of the affected countries and that hinders their progressive realisation of the right to adequate food³⁹⁾. Paragraph 7 provides that States should promote international trade as one of the effective instruments for development, as expanded international trade could open opportunities to reduce hunger and poverty in many developing countries⁴⁰⁾.

Guideline 19 and Section III show that the FAO guidelines emphasise the perspective of extraterritorial obligations for implementing the right to food.

5.2 Expression of Opinion by the State

Now, I would like to examine the states' expression of opinion regarding extraterritorial obligations on the right to food. The U.S. government has sometimes voted against resolutions adopted by the General Assembly and Human Rights Council and has explained its vote. In explaining its reasoning, the U.S. government stated that it did not accept any reading of the draft resolution or related documents that would suggest that States had extraterritorial obligations arising from any concept of a right to food⁴¹⁾.

It is important to note that the U.S. Government has explicitly rejected extraterritorial obligations regarding the right to food. At the same time, in 2021, a General Assembly resolution on the right to food was adopted with a majority of 186 in favour and two against (U.S. and Israel)⁴²⁾. The fact that an overwhelming majority adopted it suggests *opinio juris* in line with extraterritorial obligations.

6. Conclusion

In conclusion, the discussion on extraterritorial obligations is mainly limited to

³⁹⁾ Ibid., Section III, para.3.

⁴⁰⁾ Ibid., Section III, para.7.

⁴¹⁾ U. N. Doc. A/C.3/74/SR.49, supra note 14, para.86.

⁴²⁾ U. N. Doc. A/76/PV53, 16 December 2021, p.15.

theoretical studies in academic societies and advocacy activities by international human rights NGOs. Thus, it is necessary to develop a new international law that embraces these obligations in the future.

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