THE THIRD ABRAHAM HORWITZ LECTURE

Introductory Remarks
Richard Jolly, SCN Chairman

The Abraham Horwitz Lecture was established to honour Dr Horwitz, who was Assistant Director of the National Health Service in Chile from 1953-59, Director of the Pan American Health Organization (PAHO) from 1959-75, and our SCN Chairman from 1985 to 1995. Dr Horwitz presided over many of the achievements of this committee. He was recently hospitalized, but I am pleased to say that he is feeling better and retains his lively interest in the SCN. May I ask you now for a round of applause to send him our best wishes for continuing recovery. Dr Horwitz was always looking to the ideas of the next generation, and the intention of this Lecture is to promote Dr Horwitz' generous tradition of mentoring young talent. The terms of the Horwitz Lecture require that it should be given by someone in the early stages of their career, and this year we reviewed 16 nominations before deciding on Dr Brigit Toebes. The title of this year's Horwitz Lecture is "Human Rights, Health and Nutrition".

Dr Toebes is, in one sense, at the early stage of her career, but when I read a "slightly longer" version of her abstract I saw that her career is already very well-launched. She is presently the senior researcher at the TMC Asser Institute for International Law in The Hague, Netherlands. She holds a PhD in international human rights law from the Netherlands Institute of Human Rights, and is the author of the book *The Right to Health as a Human Right in International Law*. Dr Toebes has co-founded, and also works with the International Anti-poverty Law Centre, an NGO based in New York. In 1997 she held an appointment as a visiting scholar at the Harvard School of Public Health. Her lecture is based upon material from her book, which aims to contribute to an improved understanding of the right to health.

Human Rights, Health and Nutrition

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The entitlements that have to be promoted for eliminating persistent undernutrition are not merely of food, but also of health care, medical attention and epidemiological environment. (Drèze and Sen 1989)

Introduction

The human rights approach offers a framework for analyzing governmental actions in the field of nutrition and health. Food and nutrition specialists should incorporate the human rights approach in addressing malnutrition, inadequate health, and poverty issues. My particular expertise is in health as a human right. International human rights law is relevant for the protection of people's access to food, and in this regard, I will focus on the meaning and implications of the right to health and the right to food, and on the implications of the fact that they are recognized as 'economic social, and cultural' human rights under international law. I will also provide examples of what might possibly constitute governmental violations of these two human rights.

The ultimate purpose of nutritionists is to improve the nutritional status of the world's population. I will explain the legal structure for preventing States' human rights violations in this field and for holding States accountable for violations

when they occur. In addition, I will suggest that food and nutrition specialists can contribute to a further clarification of the rights to adequate food and health. While lawyers draw the broad frameworks for these rights, it is the nutritionists and health specialists who have the expertise to delineate their precise content.

Human rights protection for food and health

The international human rights laws that protect people's access to food and health include both rights that are primarily 'civil and political' in nature and rights that are considered 'economic, social and cultural rights'. The simultaneous relevance of these two kinds of human rights to food and health exemplifies the indivisibility and interdependence of all human rights -- civil, cultural, economic, political, and social -- as set forth during the Vienna Declaration in 1993 (UN World Conference on Human Rights 1993).

Civil and political rights

Civil and political rights are set forth in various human rights instruments, the most important of which is the 1966 UN International Covenant on Civil and Political Rights (ICCPR). They include, *inter alia*, the right to life, the right to a fair trial and the freedom of expression and of religion. They are not necessarily freedom or 'negative' rights only, since they can also require States to take certain 'positive' actions, e.g., to re- organize the judiciary system in order to guarantee the right to a fair trial.

The right of all persons to be treated equally under the law, without discrimination, is generally considered a civil or political right, and is confirmed in every international human rights treaty: ICCPR, CEDAW, CERD, etc). This legal protection against discrimination applies as much to social laws affecting access to food and to health as to political laws affecting access to justice and electoral enfranchisement.

...if the total amount of food produced was equally distributed throughout the world, there would be more than enough for all to realize their right to food.

Other civil and political rights are similarly important in protecting people's health and nutritional status. For example, the right to take part in the conduct of public affairs enables people to change their food or health situation at a political level (ICCPR Article 25). The right to peaceful assembly (ICCPR Article 21) and to freedom of expression play a similar role. Through the right to receive and impart information, moreover, people can inform each other about, for example, how to grow crops and how to avoid infectious diseases (ICCPR Article 19(2)).

The UN Human Rights Committee (HRC) (the UN body charged with overseeing implementation of the ICCPR) has declared that the civil and political right to life protects certain health and food concerns. In its General Comment 6 [16], it stipulated that it would be desirable for States parties to take 'all positive measures to reduce infant mortality and to increase life expectancy, especially by adopting measures to eliminate malnutrition and epidemics' (UN Human Rights Committee 1985). In its reporting procedure, the HRC occasionally gives follow-up to this statement by paying attention to infant and child mortality rates in States Parties (Toebes 1999, p. 160).

At a more enforceable level, several civil and political rights have proved important for the protection of people's health status. Much depends, in this regard, on the creativity of lawyers and others to apply these rights. Before the European Court of Human Rights, a right to environmental health protection has been recognized within the framework of the right to family life (*inter alia* Lopez Ostra case, Toebes 1999, p. 234). The case law that has been developed before the Indian Supreme Court is also noteworthy in this respect. On the basis of the right to life in the Indian Constitution, the Indian State and multinational corporations were held accountable for creating certain severe environmental health threats (Toebes 1999, pp. 210-219).

Economic, social and cultural rights

Economic and social rights can be found in, *inter alia*, the 1966 ICESCR. They include the right to adequate food, health and housing, as well as the right to education and the right to work. They were specifically designed as a whole to protect people's health and nutritional status as well as other aspects of an adequate standard of living. Just as civil and political rights are important for the protection of economic and social rights, so are the specific economic and social rights relevant to each other. The economic and social right to education, for example, may enable people to learn about how to grow their crops. Adequate housing has proven to be of crucial importance for people's health, and healthy conditions are considered an explicit element of the right to housing.

During the UN World Conference on Human Rights in 1993, it was stressed that civil and political rights and economic, social and cultural rights are interdependent, interrelated and of equal importance. In practice, however, western States and NGOs have tended to treat economic, social and cultural rights as if they were of less importance than civil and political rights. Reasons for this weaker status are their lack of conceptual clarity, their programmatic character, and the fear of States that recognition of these rights will interfere with their policy choices and will be expensive.

Human rights law, by definition, consists of legal obligations that fall upon the State. It is therefore of use to clarify which

obligations result from the separate human rights. A well-known concept in human rights debate concerns the so-called 'tri-partite typology of State obligations' (Eide 1987, Van Hoof 1984). The 'respect, protect, fulfil' typology has been accepted by numerous scholars and NGOs specializing in the field, as well as by the UN. With regard to food, education and health, matrices, such as the one in Table 1, have been drawn containing the various obligations (Eide 1987, Coomans 1992, Toebes 1999).

This typology distinguishes between obligations to 'respect', to 'protect' and to 'fulfil' a human right, particularly an economic, social or cultural right. Such obligations to respect, protect and fulfil are inherent to all economic, social and cultural human rights. Obligations to respect are more negative in character and require a certain type of State abstention. On the basis of the right to food, for example, States are required to abstain from actively interfering with the access of individuals (say, members of an ethnic minority) to adequate food. Obligations to protect and to fulfil are more positive obligations, in that they oblige States to undertake certain action. On the basis of the obligation to protect the right to food, for example, States are required to adopt the necessary legislation in order to secure safe food production conditions in the factories of private manufacturers. The obligation to fulfil the right to food may require that States take measures to ensure that people have adequate access to food. This typology is more elaborately discussed below.

The right to health and the right to food

Food is important for health because undernourishment makes people vulnerable to illness. Adequate nutrition is of the utmost importance for the healthy development of mothers and children. Some of the main causes of malnutrition are inadequate care for mothers and children, insufficient health services and an unhealthy environment (UN ACC/SCN 1996). Health is, simultaneously, important for food, e.g. because parasitic and other diseases hamper the absorption and retention of nourishment. More generally, adequate health is a condition for people in which they are able to obtain the foodstuffs necessary for their survival and the maintenance of their health (Drèze and Sen 1989, p. 267). The most important rights with regard to the maintenance of people's health and their access to food are accordingly the 'right to health' and the 'right to food'. These human rights grant a number of health- and food-related services and freedoms.

The rights to health and to food are interrelated and have a strong normative overlap. More specifically, CEDAW Article 12 contains the right to health and refers to adequate nutrition during pregnancy, while the CRC Article 24(2) refers to the 'right to adequate nutritious foods' for children. A right to healthy foodstuffs is therefore explicitly part of the right to health. One could even claim that the right to food is inherent in the right to health. Similarly, the right to health is heavily implicated in the right to food. Although ICESCR Article 11stipulates the right to food and does not explicitly refer to health, it is obvious that a right to healthy foodstuffs is an element of the right to food. This relationship between food and health is demonstrated by the implementation practice of the CESCR, the treaty-monitoring body of the ICESCR. In the context of the right to health, this Committee deals with a number of issues that have both food and health implications. Examples include the high incidence of cardiovascular diseases in a certain country due to an incorrect diet; and a case in which a country was allegedly exporting radioactively contaminated foods (Toebes 1999, p. 123).

The issues of international humanitarian assistance and the importance of fair trade cannot be ignored.

Taking into account the interrelated character of both human rights, it is of importance to demarcate more strictly the meaning of the separate rights to health and to food. Given the conceptual lack of clarity that surrounds economic, social and cultural rights, it is important to ask ourselves the question: what is the right to health, and what is the right to food?

The Right to Health

Where we can find it? -- The right to health is firmly embedded in a considerable number of international human rights instruments. Its first international codification was in the Preamble to the Constitution of the World Health Organization (WHO 1946). This provision constituted a point of departure for the further codification of the right to health in several international human rights treaties, the most important and well-known of which is ICESCR Article 12.

Its scope -- The right to health can be said to embrace two larger parts: one including elements related to 'health care' (including medical care as well as preventive health care services), and another one concerning 'underlying preconditions for health' (including safe drinking water, adequate sanitation, occupational health, health-related information).

Its core content -- Certain aspects of the right to health may be subject to 'progressive realization' (ICESCR Article 2(1)), which implies that States may gradually realize such aspects rather than realizing them immediately. The exploration of new treatments for certain ailments, for example, is an obligation which cannot be realized immediately but only gradually. Poorer States will have

Table 1.
Matrix: Tripartite typology of State obligations with respect to the right to health

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	Health Care	*Family Planning and Pre- and Postnatal Care*	*Water and Sanitation*	*Environmental and Industrial Health*	*Physical Integrity*
Respect	1) respect for equal access to health care including preventive services 2) no interference with the provision of health care 3) no interference with the provision of health care related information	4) respect for equal access to family planning services and pre- and post-natal care 5) no interference with the provision of such services by others 6) no interference with the provision of information on such services	7) respect for equal access to water and sanitation 8) no interference with the provision of water and sanitation 9) no interference with the provision of information on water and sanitation	10) abstention from environmental and industrial policies detrimental to health 11) no interference with environmental and industrial health-related information	12) abstention from harmful traditional practices* 13) no interference with information about harmful effects of such practices
Protect	14) adoption of legislation and other measures in order to assure adequate access to health care provided by third parties 15) adoption of legislation and other measures in order assure that adequate information on health care is provided by third parties	16) adoption of legislation and other measures in order to assure adequate access to family planning and pre- and postnatal care provided by third parties 17) assurance of adequate provision of information on such services by third parties	18) adoption of legislation and other measures in order to assure adequate access to water and sanitation provided by third parties 19) assurance of adequate provision of information on such services by third parties	20) adoption of legislation and other measures for protection against environmental and industrial health infringements by third parties, particularly in the field of environmental health 21) assurance of adequate dissemination of information of environmental health risks by third parties	22) adoption of legislation and other measures for protection against harmful traditional practices 23) assurance of adequate provision of information on such harmful practices by third parties
Fulfil	24) provision of health care services 25) provision of health care related information	26) provision of family planning services and pre- and post-natal care, and granting the latter services latter free of charge to clients if necessary 27) provision of information on such services	28) provision of water and sanitation 29) provision of information on water and sanitation	30) measures to ensure and promote a healthy environment 31) provision of information about environmental health issues	32) measures to ensure and promote freedom from harmful traditional practices 33) provision of information on such harmful practices

*Harmful traditional practices include practices prejudicial to the health of children and women, such as female circumcision or female genital mutilation; traditional birth practices such as dietary restrictions, preferential treatment for male children such as differential feeding patterns, and also forced feeding, early marriage, adolescent childbearing, teenage pregnancies, and ritual enslavement of girls. Source: Toebes 1999, p 258, pp. 314-315.

fewer resources available to provide the necessary health services to everyone, so that they may progressively seek to achieve a better standard of health. Nevertheless, there is a trend among scholars and activists towards delineating a certain core in the right to health. This core content consists of a set of elements that States have to guarantee under any circumstances, irrespective of their available resources. Inspiration for the core content of the right to health can be derived from the Primary Health Care strategy of the World Health Organization (WHO 1978). The elements listed below may serve as the core content of the right to health.

Concerning health care:
* maternal and child health care, including family planning
* immunization against the major infectious diseases
* appropriate treatment of common diseases and injuries
* provision of essential drugs

Concerning underlying preconditions for health:
* education concerning prevailing health problems and the methods of preventing and controlling them
* promotion of food supply and proper nutrition
* adequate supply of safe water and basic sanitation

Guiding principles -- In addition, there exist a number of guiding principles that together constitute the framework of the right to health. Like the core content of the right to health, they are sufficiently flexible to allow for universal application. In this context, the term 'health services' refers both to access to health care services as well as to services necessary for the underlying preconditions to health. I suggest the following guiding principles for the right to health.

* availability of health services: a State must provide health services sufficient for the population as a whole
* financial, geographic and cultural accessibility of health services: health services must be affordable, within reach of everyone, and respect people's cultural traditions
* quality of health services: the available health services must be of an adequate standard
* equality in access to available health services: health services must be equally accessible to everyone, with due attention paid to the position of vulnerable groups in society (Toebes 1999, pp. 287-288)

Given the fact that access to adequate food is an explicit part of the right to food, these guiding principles are relevant for the adequate protection of people's nutritional status. For example, they require that food be sufficiently available and geographically accessible, affordable, and safe.

State obligations -- On the basis of these elements of the right to health, State obligations can now be defined. The following obligations to respect, protect and to fulfil constitute examples of the aggregate of guiding principles for the right to health (Toebes 1999, pp. 314-315).

Obligations to respect:
* to respect equal access to available health services, and not to impede individuals or groups from their access to the available services
* to refrain from acts that encroach upon people's health, such as environmental pollution

Obligations to protect:
* to take legislative and other measures to assure that people have (equal) access to health services even if provided by private health care parties
* to take legislative and other measures to protect people from health infringements by any private or public health care parties

Obligations to fulfil:
* to adopt a national health policy and to devote a sufficient percentage of the available budget to health
* to provide the necessary health services, or to create conditions under which individuals have adequate and sufficient access to health services, including preventative health care services as well as clean drinking water and adequate sanitation

Given that 'health services' include the right to adequate food, access to food is an explicit part of the above-mentioned obligations. For example, the obligation to respect would require that the government refrain from acts that encroach upon people's access to food (e.g., forcibly relocating people from a place where there are means of self-support to a place where there is none).

The Right to Food

The ICESCR Article 11 explicitly states a separate and well-elaborated right to food. A similar analysis to that made of the right to health can be made of the right to food. This right has been examined in great detail by scholars and activists, including a comprehensive report by Asbjörn Eide in his role as a UN Special Rapporteur on the right to food (Eide 1987). I will present a quick overview of this right as a whole, set the conceptual framework, and then discuss those aspects of the right to food that relate most closely to the right to health.

Core content -- The elements that make up a 'core content' of the right to food have not been fully determined by scholars. The CESCR (UNCESCR 1990), however, has stated that:

...a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each right is incumbent upon every State Party. Thus, for example, a State party in which any significant number of individuals is

deprived of essential foodstuffs... is prima facie *failing to discharge it obligations under the Covenant.*

From this statement one may deduce that 'no deprivation of essential foodstuffs', at the very minimum, forms part of the core content of the right to food. What 'essential' foodstuffs are, of course, may be difficult to determine. A UN ACC/SCN document enumerated three indicators constituting 'basic minimum needs' for adequate food and nutrition:

* *Proper nutrition surveillance from birth to five years, and no moderate and severe PEM (protein-energy malnutrition).*
* *School children receive adequate food to meet their nutritional requirements.*
* *Pregnant women receive adequate and proper food, and delivery of newborn babies with birth weight no less than 3,000 grams.*

These indicators were used as a way to determine problems and their priorities as a basis for planning intervention activities, as well as to monitor and evaluate their results (UN ACC/SCN 1996, p. 74). These are the kinds of indicators that could, perhaps, be used to delineate what constitute `essential foodstuffs' and accordingly that aspect of the core content of the right to food.

The right to food may...be violated if governments prevent people from growing their crops by arbitrarily taking away their land...blocking of food transports, or by the poisoning of land by an oil-producing facility which renders the land barren.

-CESCR 1999, p35

Guiding principles -- Secondly, the guiding principles that were mentioned for the right to health are of crucial importance for the right to food. For the right to health, States were to safeguard the availability, the (geographic, financial and cultural) accessibility and the quality of the health services. Similar guiding principles may be useful to draw the framework of the right to food. According to Eide's 1987 report:

Food must be adequate in terms of nutritional quantity and quality, it must be safe from adverse alien substances, and culturally acceptable in the concept of prevailing food patterns (para 33), [and] Access to food must be sustainable over time (para. 135) [and moreover, is to be] accessible in a manner which does not destroy one's dignity as a human being (para. 52).

Respect, protect, fulfil -- And finally, the tri-partite typology of state obligations, that is, the duty to respect, protect, and fulfil, is as central to the clarification of State obligations resulting from the right to food as it is to the clarification of the right to health. Eide uses the typology in his report on the right to food, including in his 'food security matrix' (Eide 1987).

International dimension -- There are reasons to assume that the right to food, perhaps more than other economic and social rights, has an international dimension. Although economic and social rights must primarily address human rights in a national context, it can be maintained that States have, on the basis of the right to food, international obligations regarding world food security.

Statistics show that if the total amount of food produced was equally distributed throughout the world, there would be more than enough for all to realize their right to food. There is, however, an enormous difference in food production between the industrialized countries and the Third World (Eide1987, sections 14-18). The issues of international humanitarian assistance and the importance of fair trade cannot be ignored. ICESCR Article 11 which contains the right to food, mentions international assistance and cooperation explicitly. In addition, ICESCR Article 2(1) refers to international assistance and cooperation more generally.

Such international assistance and cooperation could include measures to ensure that poor countries do not face too many restrictions in the access to the markets of the more wealthy countries. This access should not be hampered by trade embargoes, discriminatory subsidies, investment or trade rules which may jeopardize the vital food supply of a State's population (Drèze and Sen 1989, p. 273).

Possible violations of the rights to food and to health

In order to examine in more detail the overlap between the right to food and the right to health, I will discuss specific governmental duties with regard to the obligations for each right, and give examples of governmental actions that violate the international legal obligations that each right entails.

Respect -- The obligation to respect the rights to health and food is clearly violated if individuals or groups are excluded from available health and nutritional services. For example, if a government excludes immigrants from access to basic medical services, this may constitute a violation of the obligation to respect the right to health. The obligation to respect the right to health can also be violated if a State encroaches upon people's health by, for example, the use or testing of nuclear or chemical weapons or by engaging in other (environmental) activities that are detrimental to people's health (Toebes 1999, pp. 325-325). The right to food may in this regard be violated if governments prevent people from growing their crops by, for example, arbitrarily taking away their land. One could also think of governmental activities like the blocking of food transports,

or the poisoning of the land by an oil-producing facility which renders the land barren (CESR 1999, p. 35).

Protect -- The obligation to protect the right to health is violated if the authorities do not take the necessary legislative and other measures to assure that, if health services are privately provided, such services are provided equally for all vulnerable groups in society. States will need to adopt necessary legislation in order to assure that private providers of health services take into account the principles of accessibility and equality. It is important to note that if the provision of health services is privately organized, States remain responsible, on the basis of the right to health, for the equal and adequate provision of these services. Making necessary alterations, a similar analysis applies to the right to food. Violations may occur if governments do not make the necessary legislative and other measures in order to ensure the accessibility, availability and quality of food. For example, a government may violate the right to food if it allows an oil company to operate in inhabited areas without enforcing environmental protection laws. Or, for example, if it fails to restrain practices that force indigenous peoples to abandon their traditional food production or gathering practices (CESR 1999, p. 36).

Fulfil -- The obligation to fulfil concerns the positive obligation to make health and food accessible to everyone. Given its programmatic character, this obligation is difficult to pinpoint. It is difficult indicate exactly what States are required to do in order to comply with obligations to fulfil. Which health and food services should be made available in order for States to comply with their obligations under the rights to health and food? In this regard it may be of use to make an assessment of statistical data that provide insight into governmental health and food expenditures. How much of their general budget do governments devote to health, to food and to poverty alleviation more generally? The following data were presented in, *inter alia*, the State reports to the CESCR, and compared to data from the UNDP and the World Bank.

Table 2.
Governmental health expenditures as a percentage of GNP.

	ICESCR State reports:	UNDP (1990)	World Bank (1991)
Algeria	5.5 (1989)	5.4	–
The Netherlands	9.3 (1995)	–	12.4
The Philippines	6.0 (1992)	1.0	4.2
South Korea	2.4 (1990)	2.7	2.0
Tunisia	8.0 (1989)	3.3	6.3
Uruguay	6.8 (1987)	2.5	4.5

(Source: ICESCR reports, UNDP 1995, World Bank 1993)

Before an assessment of the data in Table 2 is made, caution is required when comparing statistics from various sources. Firstly, almost all of the countries mentioned appear more positive regarding health expenditure than the UNDP and World Bank data shows. A possible explanation may be that the years to which these figures relate do not always correspond. This cannot entirely explain, however, the striking differences between some of the figures in the State reports and the UNDP and the World Bank reports. It is possible that some States misrepresent the facts, perhaps in order to suggest that they spend more on health than they actually do. In addition, however, there are large unexplained differences between the statistics provided by the UNDP and the World Bank. Secondly, general health expenditure figures do not indicate how the resources are distributed among the various groups of society. They do not make clear to what extent vulnerable groups, such as women, children, the economically deprived and prisoners, profit from the available services.

Taking into account their shortcomings, expenditure statistics may still help to draw rough conclusions on governmental commitments made regarding health and other socio-economic needs. Some States devote only very little of their budget to health. For example, according to the World Bank statistics, South Korea devoted only two percent of its GNP to health in 1991. Such an observation may lead to the prima facie conclusion that South Korea does not comply with its obligations under the right to health. It may also be illustrative to compare the proportion of military expenditure in a country's total expenditure with expenditures on health, education, and other social facilities (Table 3).

Table 3.
Governmental health and defense expenditures as a percentage of GNP.

	Health	Defense
The Netherlands	12.4	4.8
The Philippines	4.2	10.9
South Korea	2.0	22.2
Tunisia	6.3	5.6
Uruguay	4.5	9.2

(Source: World Bank 1993, pp. 258-259)

These statistics show that in South Korea defense spending in 1991 was more than ten times as high as health expenditure, whereas in the case of the Philippines and Uruguay it was approximately double. Such comparisons may lead to the conclusion that these States fail to comply with the right to health to the 'maximum of their available resources' as set forth in ICESCR Article 2(1). There are no indications as to what an appropriate ratio percentage

should be for health and for defense. As part of its "Health for All" strategy, WHO used a five percent figure as a benchmark for monitoring relative amounts of health spending across countries. It is, however, no longer a target. No benchmark percentages exist for defense expenditure because defense is dependent on the strategic position of a country and the extent to which a country is under threat (and needs to arm itself).

A second important assessment of possible violations concerns an analysis of distribution of social services among the various population groups. As mentioned above, one should not only look at general social expenditures, but also at how the various expenditures are distributed among the various population groups. This concerns the guiding principle of the geographic, financial and cultural accessibility to health services. A State may violate the right to health if it structurally fails to offer adequate health services to certain segments of society, such as prisoners, illegal immigrants, women, children, or people living in remote, rural areas. For example, as mentioned in a UN ACC/SCN report:

There are many countries...where health expenditure, although substantial, is skewed towards curative health care in large hospitals in developed urban areas, rather than improving outreach of good quality primary health care to marginalized communities (UN ACC/SCN 1996, p. 47).

A human rights analysis of statistical data should, therefore, also examine the extent to which various expenditures are distributed among the diverse population groups.

Implications for UN Food and Nutrition Specialists

As mentioned in the introduction, nutrition experts can analyze specific governmental actions that serve to respect, protect or fulfil the rights to health and food - or actions that fail to do so. They can seek to address governmental human rights violations in the field of nutrition and health. Furthermore, they can contribute to a clarification of the human right to adequate food.

Whether the UN itself can be held accountable for human rights violations is a question that scholars have not yet resolved. For example, given the negative effects of structural adjustment programs on social expenditure, it has been argued that these programs violate economic and social human rights (UN ACC/SCN 1996, p. 49). UN agencies have an important role to play in poverty alleviation. They may provide development aid and assistance to governments to establish programs for the improvement of people's health and nutritional status. It should always be taken into account, however, that under international human rights law, States have their own responsibility in the field of health, nutrition, and other social areas. The UN should seek to hold States accountable for non-compliance with their specific human rights obligations in this regard. The UN, as funding agency, humanitarian aid organization or political actor, also has its own set of international obligations in order to assist States to ensure the realization of the human right to food and nutrition.

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Comments
...the Dr Abraham Horwitz Lecture

Richard Jolly (SCN Chair): Thank you very much Dr Toebes for your interesting and relevant presentation connecting human rights issues to the right to food and nutrition. It is very exciting to think that you will be in a position to carry these ideas forward. I will give the final word to Graeme Clugston, Director of the Nutrition for Health and Development Department at WHO, but I now solicit questions, comments and discussion from the participants.

Ricardo Uauy (AGN): Taking into account that this legal framework is being developed, how do you envision that this will be enforceable, because a country level issue is 'Who will be accountable, who will be responsible?'.

Peter Matlon (UNDP): Could you focus your response to Ricardo's question on infractions that occur at the domestic level and then at the international level, and what forms of enforcement are available?

Dr Toebes: Regarding the enforceability of economic, social and cultural rights, this is a matter that has not been elaborately addressed in this symposium, and in my lecture I focussed on explaining the normative content of these rights. We need the input of legal practice. Legal practitioners could, by applying these rights before the courts over and over again, seek to get further clarification of these rights. That is one way to get more clarification in this regard at the national and international level; but at the international level this is quite difficult because there are hardly any international complaints being pursued in force for these human rights. A 'limited complaints' procedure is now before the European Social Charter which is a promising development. In additional to legal practice, I think the input of NGOs to lobby governments for rights is necessary.

Urban Jonsson (UNICEF): When you showed the table with the three types of obligations, you limited the *respect* function to State abstention. In my mind that should also include positive action by the State. I would like your comment.

Dr Toebes: I think it's very difficult to strictly delineate the three different types of obligations: respect, protect, fulfil, and to a certain extent they may overlap. You may find some obligations to respect as well as obligations to fulfil. For example, if you exclude a certain population group from medical services, shouldn't you say that it is actually an obligation to fulfil because you should actively provide the services?

Urban Jonsson (UNICEF): Also, a question on conflicting rights which is discussed now in my region, Eastern and Southern Africa, is that on one side we can argue that new-born children have a right to know whether their mother is HIV positive, and on the other side the mother has a right to decide not to be tested. Would you address this issue?

Dr Toebes: A dangerous aspect of the right to health is that it is interpreted as a means to take certain public health measures that may inflict upon people's civil and political rights, like their right to physical integrity. We must always find a balance in this regard.

Richard Jolly (SCN Chair): Would you comment in the particular case of HIV/AIDS when there is a need to provide a child with special support if the mother is HIV positive, but the mother does not wish to be tested.

Dr Toebes: Perhaps in that situation the balance would go into the other direction and the child would have a right to access to services needed.

Hartwig de Haen (FAO): My question relates to what lawyers have to say about State obligations verses obligations at lower levels. I assume access to health or food is not possible due to a person's poverty. To what extent do criteria exist, that help the State refer first to lower levels such as the individual, the family, and the wider community to use opportunities in terms of property, work, etc. before the claim is expressed to the State. This type of delineation of obligations is very important for practical implementation of a system that ensures the State will fulfil its obligations.

Dr Toebes: It is important and we should look at the responsibilities of individuals. If we move into this area now, however, it can be dangerous because States may do away with their responsibilities by claiming that individuals also have obligations.

Tom Marchione (USAID): The obligations framework seems to be clearer but we lack sufficient illustration of its meaning and application. When we look at the violations in terms of the right to food and the persistent malnutrition that exists across the world, which of these three dimensions is most important in rectifying the situation? Is it the lack of respect by governments? Lack of protection or neglect? Is it the lack of action by third parties? Or is it the lack of fulfillment and facilitation? The lack of really developed resources? This is important because the resource question keeps coming up as a constraint. If it's the first two it becomes less of a constraint. It is also important in terms of mobilizing other actors who have financial and institutional resources to do something about it.

Dr Toebes: You cannot really say that one of the obligations is more important than the others. In terms of enforceability, however, I think the obligation to respect is particularly successful because it requires that States abstain from action, which is rather easy to formulate and also to justify. In terms of successful obligations I think we should first focus on the obligation to respect.

Virginia Dandan (CESCR): How do you perceive, or do you perceive, a role for the CESCR to address these issues of resources at the international level, particularly because it is a good forum for States parties to address these issues in their own particular territories. Could you also make a concrete connection regarding the possibility of cooperating with other agencies present here today?

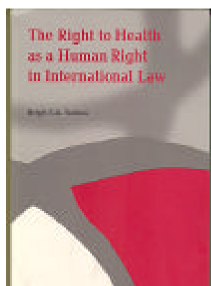
Dr Toebes: The role of the committee is extremely important, has been extremely important, and will be more important in the future as these general comments on food and health are adopted. The CESCR does need input from other agencies. Representatives from agencies such as WHO, FAO, UNICEF, and UNDP, should be present during committee sessions offering their specific expertise.

Graeme Clugston (WHO): I would like to say thank you to our speaker, Dr Toebes. An expert in international human rights law and health, you ably applied specific human rights concepts to the area of nutrition. On behalf of the ACC/SCN we thank you for your dedicated work which will enable us to implement a human rights approach in our programmes. Many of us who remember Dr Horwitz and knew him well, will recall how during his period as ACC/SCN chair between 1985-95, he went out of his way to encourage young, visionary, thought-provoking, refreshing talent. Dr Toebes' lecture fulfilled all of these things. We heard a very rigorous and thoughtful analysis of the human right to health; the core elements of primary health care, the underlying preconditions for health and their accompanying guiding principles; and the parallel track regarding the right to food, and the resulting obligations upon member States. This question and answer session indicated how thought-provoking and interesting your lecture has been for us. Dr Toebes has done an excellent job in this, *The Third Abraham Horwitz Lecture*.

The Right to Health as a Human Right in International Law

Brigit CA Toebes

The international human right to health as one of the economic, social and cultural rights is firmly embedded in existing human rights instruments. There is, however, little understanding of the contents and significance of this specific right. What exactlyare individuals entitled to on the basis of the right to health and what are the resulting obligations on the part of States? To what extent is this right susceptible to judicial review?



This book aims at contributing to an improved understanding of the right to health. It addresses its current implementation practices by treaty monitoring bodies by providing an extensive evaluation of reporting practices. In addition, it addresses the justiciability issue by giving an elaborate description of international and national case law by judicial and quasi-judicial bodies. On the basis of these findings it outlines the content of the right to health and describes the resulting obligations on the part of States.

This study is based on materials derived from various sources: United Nations, including the World Health Organization, NGOs, national and international case law, and human rights doctrine. It seeks to contribute to the international debate about the character and significance of economic, social and cultural human rights in general and it tries to substantiate the interdependence and equality of all human rights.

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