

The right to adequate food and indigenous peoples

How can the right to food
benefit indigenous peoples?



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Lidija Knuth
Right to Food Unit



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*HOW CAN THE RIGHT TO FOOD BENEFIT
INDIGENOUS PEOPLES?*

RIGHT TO FOOD STUDIES

Right to Food Studies is a series of articles and reports on right to food related issues of contemporary interest in the areas of policy, legislation, agriculture, rural development, biodiversity, environment and natural resource management.

This study was conducted in the context of the project “Creating capacity and instruments to implement the right to adequate food” financed by the Government of Germany.

Right to Food Studies are available at www.fao.org/righttofood/. For those without web access, mail or paper copies may be requested from the Right to Food Unit, FAO, Viale delle Terme di Caracalla 00153, Rome, Italy, righttofood@fao.org. Readers are encouraged to send any comments or reactions they may have regarding a Right to Food Study.

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The right to adequate food and indigenous peoples

How can the right to food benefit indigenous peoples?

List of Boxes	6
List of Abbreviations	6
Acknowledgements	7
Introduction	8
1. Background and context	10
1.1. Who are indigenous peoples?	10
1.2. What is the right to food?	12
1.3. Other rights important to the realization of the indigenous peoples' right to food	14
1.3.1. Right to equality, non-discrimination and self-determination	14
1.3.2. Right to culture	15
1.3.3. Collective and group rights vs. individual rights?	17
1.4. Right to food or food sovereignty?	19
2. Right to food of indigenous peoples – applicable law and principles	21
2.1. Overview of the international legal framework	21
2.1.1. Article 11 ICESCR	22
2.1.2. Right to Food Guidelines	23
2.1.3. UN Declaration on the Rights of Indigenous Peoples	24
2.1.4. ILO Convention No. 169	25
2.1.5. Agenda 21, Chapter 26	26
2.2. Indigenous peoples' statements	27
2.3. Human rights-based approach to food security from an Indigenous peoples perspective	27
2.4. State obligations to respect, protect and fulfil the right to food of indigenous peoples	31
2.4.1. Respect	31
2.4.2. Protect	32
2.4.3. Fulfil	33
2.5. Limitations and restrictions on the right to food	36
2.6. Right to food of indigenous peoples at the national level	37

The right to adequate food and indigenous peoples

How can the right to food benefit indigenous peoples?

3. Crucial Issues for Indigenous Peoples from a Right to Food Perspective	40
3.1. Ownership, control and access to natural resources, lands and territories	40
3.2. Traditional knowledge	45
3.3. Data collection	47
3.4. Indigenous women	48
3.5. Programmes and operational activities	50
Conclusions	51
References	53
Literature	53
Cases	56



The right to adequate food and indigenous peoples

How can the right to food benefit indigenous peoples?

LIST OF BOXES, ABBREVIATIONS AND ACKNOWLEDGEMENTS

INTRODUCTION

1. BACKGROUND AND CONTEXT
2. RIGHT TO FOOD OF INDIGENOUS PEOPLES
3. CRUCIAL ISSUES FOR INDIGENOUS PEOPLES FROM A RIGHT TO FOOD PERSPECTIVE

CONCLUSIONS

REFERENCES

List of Boxes

Box 1.	Definitions of indigenous peoples (add page numbers in layout)	11
Box 2.	Articles 11 and 2 of the ICESCR	13
Box 3.	Right to Culture	16
Box 4.	Example of mentions of indigenous people in Right to Food Guidelines	23
Box 5.	UN Declaration on the Rights of Indigenous Peoples	25
Box 6.	ILO Convention No. 169	26
Box 7.	UN Declaration on the Rights of Indigenous Peoples	29
Box 8.	SERAC (The Social and Economic Rights Action Centre) and CESR (The Center for Economic and Social Rights) v. Nigeria (“Ogoni case”)	32
Box 9.	Yakye Axa Indigenous Communities v. Paraguay case	34

List of Abbreviations

CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CESCR	Committee on Economic, Social and Cultural Rights
CESR	Center for Economic and Social Rights
CRC	Convention on the Rights of the Child
CSO	Civil Society Organization
FAO	Food and Agriculture Organization
GC	General Comment
HRC	Human Rights Committee
IACHR	Inter-American Commission on Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IFAD	International Fund for Agricultural Development
IGO	Inter-Governmental Organization
IITC	International Indian Treaty Council
ILO	International Labour Organization
IMF	International Monetary Fund

NGO	Non-Governmental Organization
Right to Food Guidelines	Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security
SERAC	Social and Economic Rights Action Centre
TRIPS	Trade-Related Aspects of Intellectual Property Rights
UN	United Nations
UNDG	United Nations Development Group Guidelines on Indigenous Peoples' Issues
UNPFII	United Nations Permanent Forum on Indigenous Issues
WTO	World Trade Organization

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The right to adequate food and indigenous peoples *How can the right to food benefit indigenous peoples?*

LIST OF BOXES, ABBREVIATIONS AND ACKNOWLEDGEMENTS

INTRODUCTION

1. BACKGROUND AND CONTEXT
2. RIGHT TO FOOD OF INDIGENOUS PEOPLES
3. CRUCIAL ISSUES FOR INDIGENOUS PEOPLES FROM A RIGHT TO FOOD PERSPECTIVE

CONCLUSIONS

REFERENCES

Introduction

This paper analyses how right to food is relevant to indigenous peoples and how the implementation of the right to food can benefit them. It provides an overview on the international legal framework of indigenous peoples' right to food and discusses issues of concern from a right to food perspective. The purpose of this study is to inform indigenous peoples, UN staff working on indigenous peoples' issues or the right to food, development practitioners and academia interested in these issues.

This paper focuses on the analysis of the right to food from an indigenous peoples' perspective. It addresses the main issues of concern to indigenous peoples that crosscut the right to food – including access to natural resources, intellectual property rights and the environment.

The right to food is of particular importance to vulnerable groups, amongst which are indigenous peoples. Indigenous peoples usually fall into the poorest segment of society. According to the International Fund for Agricultural Development (IFAD), indigenous peoples make up about 5 percent of the world's population but comprise about 15 percent of the world's poor.¹ It is difficult to place precise numbers on existing indigenous peoples due to the still controversial definition of “indigenous peoples” and because of the problems linked to statistics in general. For example, it has been alleged that many governments undercount their indigenous populations.² Indeed, numbers in United Nations (UN) publications vary between 200 and 300 million³ worldwide. As poverty is a key determinant of food insecurity,⁴ it is not surprising that the levels of hunger and malnutrition among indigenous populations are disproportionately higher than among non-indigenous populations.⁵ Nevertheless, it remains difficult to provide precise numbers on the extent and level of hunger and malnutrition among indigenous peoples because of this lack of disaggregated data. However, the information that is available demonstrates consistently that indigenous groups suffer a higher overall incidence of poverty and hunger.

¹ See website of IFAD available at <http://www.ifad.org/english/indigenous/index.htm> (last visited 6 June 2007).

² Thornberry, P. 2002. p. 16.

³ According to other sources, there are an estimated 370 million indigenous peoples living in 70 countries. However, the majority of indigenous peoples live in Asia.

⁴ FAO. 2006. p. 17.

⁵ UN. 2005. para 18.

Important issues to be taken into account when analysing the right to food of indigenous peoples concern land and renewable resources. A keystone of poor conditions for indigenous peoples is the continuing depletion of their natural resources, mainly through the expropriation of their lands.⁶ Thus, many indigenous peoples have been pushed onto the least fertile and most fragile lands, where it is difficult to grow enough food for sustenance, let alone earn a living, while preserving their cultural identity. Therefore, they are prevented from pursuing their traditional way of life, a way of life that usually offers substantial food security.

Considering its cultural dimensions, food security for indigenous peoples goes far beyond the mere satisfaction of physical needs. The component “cultural acceptability” of the right to food becomes of particular importance in the context of indigenous peoples. Culture is an important aspect of the analysis of the right to food of indigenous peoples because “food” is indispensable to shaping indigenous peoples’ lives and indigenous identities.⁷ Indigenous peoples continue to derive self-worth, individually and collectively, from traditional livelihoods such as hunting, fishing, gathering, shifting cultivation or rotational agriculture, pastoralism, and high mountain agriculture. These practices represent – besides the obtaining of food for purposes of livelihood – an important aspect of cultural identity. Furthermore, it is fundamental to take into account that many indigenous peoples view the right to food as a collective one.

The study is organized in three chapters. Chapter 1 provides a brief overview of the definitions of indigenous peoples, describes briefly what the right to food is and outlines the most relevant human rights that are important for the realization of the right to food of indigenous peoples. It also discusses briefly differences and commonalities between the right to food and food sovereignty concepts. Chapter 2 reviews provisions on the right to food of indigenous peoples of relevant human rights instruments and examines the obligations of States in realizing the right to food of indigenous peoples. Finally, Chapter 3 analyses crucial issues for indigenous peoples from a right to food perspective.

⁶ UN. 2007a, para. 14.

⁷ See also: Statement of the indigenous peoples at the Third Regional Consultation for Latin America and the Caribbean, FAO and NGO/CSO, held in Guatemala on 23–25 April 2004.



The right to adequate food and indigenous peoples

How can the right to food benefit indigenous peoples?

LIST OF BOXES, ABBREVIATIONS AND ACKNOWLEDGEMENTS

INTRODUCTION

1. BACKGROUND AND CONTEXT

2. RIGHT TO FOOD OF INDIGENOUS PEOPLES

3. CRUCIAL ISSUES FOR INDIGENOUS PEOPLES FROM A RIGHT TO FOOD PERSPECTIVE

CONCLUSIONS

REFERENCES

1. Background and Context

The following chapter provides the reader with the necessary background and context information for the analysis of indigenous peoples' right to food.

- Section 1 provides a brief overview of the most cited definitions of indigenous peoples.
- Section 2 explains what the right to adequate food is.
- Section 3 informs the reader about human rights important to the realization of the human right to adequate food.
- The final part of this chapter includes a short discussion of the main differences and commonalities of the right to food and food sovereignty concepts.

1.1. WHO ARE INDIGENOUS PEOPLES?

The answer to the question “*who are indigenous peoples?*” is important for the question “*who are the beneficiaries of the entitlements under an indigenous peoples' right to food?*” To date, there is no universally accepted definition of indigenous peoples. The diversity between regions and countries, and the differences in background, culture, history and conditions have proved extremely difficult for the development of one single definition at the international level applicable to all indigenous communities. Indeed, there is no one accepted characterization of indigenous peoples that captures their diversity; and the prevailing view today is that no formal universal definition is necessary for the recognition and protection of their rights. However, in accordance with international law and indigenous peoples' perspectives, self-identification as indigenous or tribal is seen as the central element.⁸

Any definition has the danger of being over-exclusive or under-inclusive. In fact, the UN Declaration on the Rights of Indigenous Peoples avoids any attempt of a definition due to a lack of agreement on its contents.⁹ For practical purposes, this paper includes only the two most used formulations (see Box 1):

⁸ There are also problems associated with a definition at the national or regional level because “some countries establish a formal definition of indigenous peoples with the view to excluding some indigenous groups from influence and political participation”. See Bartlett, J.G. et al. 2007. pp. 293–4.

⁹ United Nations Declaration on the Rights of Indigenous Peoples, A/Res/61/295. However, Article 33 addresses the issue of identity by recognizing the right to their own identity or membership in accordance with their customs and traditions. One controversy concerns the term “indigenous peoples”, which has an impact on their right to self-determination.

BOX 1.

Definitions of indigenous peoples

A) MARTINEZ-COBO FORMULATION

The Martinez-Cobo definition seems to be the most widely acknowledged at the international level. Despite the prevalence of this definition, indigenous peoples and commentators have objected to it on a variety of grounds.¹⁰

As defined by the United Nations Special Rapporteur to the Sub-Commission on Prevention of Discrimination and Protection of Minorities:

Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop, and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.

(Martinez-Cobo, 1986)¹¹

B) ILO CONVENTION NO. 169

The definition used in ILO Convention No. 169 is broader and less exclusive. ILO Convention No. 169 uses the terms “indigenous and tribal peoples”. It applies to tribal peoples whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations. It applies also to peoples who are regarded as indigenous on account of their descent from the populations who inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonization or the establishment of present State boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.

Article 1.2 of ILO Convention No. 169 also states that: “*self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply*”.

¹⁰ See for a detailed description and discussion of definitions, Thornberry, P. 2002. p. 33–61. Such grounds are, for example, that the definition is under-inclusive and that it creates a “mandatory link to the phenomena of European colonisation and invasion” (Wiessner, at 111).

¹¹ UN. 1986. para. 379.

In any case, the lack of a universally accepted definition of indigenous peoples should not be an impediment to studying issues of importance to indigenous peoples' right to food. Rather, a definition should be developed at local or national levels respecting the particularities of people in a region or country which cannot be captured with a single definition at the international level. Throughout this paper, the term "indigenous peoples" will also be used to refer to traditionally identified tribal groups.¹²

1.2. WHAT IS THE RIGHT TO FOOD?

The right to food is a human right laid down in several international human rights instruments. Its most important legal basis can be found in Article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).¹³ The ICESCR constitutes binding international law. Thus, States are obliged to implement effectively the provisions of the treaty into national law in order to ensure that the rights contained therein form part of its national legal system.

Article 11 of the ICESCR recognizes two dimensions of the right to food:

1. An element of an adequate standard of living (Article 11.1, ICESCR).
2. A fundamental right to freedom from hunger (Article 11.2, ICESCR).

According to these dimensions, the implications of the "right to food" are that every person is entitled to such an economic, political, and social environment that will allow them to achieve food security through their own means. Under the right to be free from hunger, individuals who do not have the capacity to meet their food needs for reasons beyond their control – such as age, handicap, economic downturn, natural disaster, or discrimination – are entitled to be provided with food directly from the State.

For the UN Special Rapporteur on the right to food, the right to food is "the right to have regular, permanent and unrestricted access, either directly or by means of financial purchases, to quantitatively and qualitatively adequate and sufficient food corresponding to the cultural traditions of the people to which the consumer belongs, and which ensure a physical and mental, individual and collective, fulfilling and dignified life free of fear".¹⁴ This definition is in line with the normative content of the right to food as defined by General Comment No. 12 (GC 12), the authoritative but non-binding interpretation of Article 11 of the ICESCR by the Committee on Economic, Social and Cultural Rights (CESCR) (the body of independent experts that supervises States Parties' implementation of the ICESCR).

¹² It is sometimes very difficult to draw a distinction between indigenous and tribal peoples and other minorities. This is something that has to be assessed on a case-by-case basis. The term "indigenous" refers to those who, while retaining totally or partially their traditional languages, institutions, and lifestyles which distinguish them from the dominant society, occupied a particular area before other population groups arrived. This is a description which is valid in North and South America, and in some areas of the Pacific. In Africa and most of Asia, however, there is very little distinction between the time at which tribal and other traditional peoples arrived in the region and the time at which other populations arrived.

¹³ International Covenant on Economic, Social and Cultural Rights, 16 Dec. 1966, Art. 1, UNTS.3. A covenant is an international treaty which constitutes binding international law for those States which have consented to be bound by the provisions of the treaty – in other words are party to it.

¹⁴ UN. 2001.

The right to adequate food and indigenous peoples

How can the right to food benefit indigenous peoples?

According to GC 12, the normative content of the right to food consists of the following elements: “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 foods in ways that are sustainable and that do not interfere with the enjoyment of other human rights”.¹⁵

BOX 2.

Articles 11 and 2 of the ICESCR

ARTICLE 11

1. The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.
2. The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed: (a) To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources; (b) Taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need.

ARTICLE 2

1. Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.
2. The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

¹⁵ Committee on Economic, Social and Cultural Rights (20th session 1999), “The right to adequate food” (Art.11): 12/05/99. E/C.12/1999/5. (General Comments), para. 8. This definition of the right to food builds on the now commonly used definition of food security of the World Food Summit 1996 and its four main pillars (availability, access, utilization and stability).

Other international conventions stipulate the right to food of particular groups/segments of the society: for example, Article 14 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) provides for the right of women to adequate nutrition, and Article 27 of the Convention on the Rights of the Child (CRC)¹⁶ establishes the right to be provided with “material assistance and support programmes, particularly with regard to *nutrition*, clothing and housing” (emphasis added). These conventions apply to all women and children, whatever their ethnicity or race, and thus provide also protection for indigenous women and children.

1.3. OTHER RIGHTS IMPORTANT TO THE REALIZATION OF THE INDIGENOUS PEOPLES’ RIGHT TO FOOD

The right to food is multi-dimensional. Its realization and enjoyment depend on the effective realization of other human rights. With regard to indigenous peoples, among the most relevant rights that are a prerequisite to the enjoyment of the right to food are the right to culture, the right to land, territories and resources, the right to self-determination and the right to non-discrimination. The category of collective rights is also of particular importance and will be discussed in the next section.

1.3.1. RIGHT TO EQUALITY, NON-DISCRIMINATION AND SELF-DETERMINATION

The first “layer of protection” for indigenous peoples is that of individual human rights.¹⁷ All human beings, including individuals of Indigenous populations, are entitled to the same human rights and fundamental freedoms as other individuals. Thus, all international instruments on the protection of human rights apply also to indigenous peoples.¹⁸

Among the most important rights are those of equality and non-discrimination, *inter alia*, on the bases of race, religion, language, or ethnic origin, which aim to guarantee the same treatment to all individuals under the jurisdiction of a State. These rights should ensure that an indigenous individual receives the same treatment as any other individual, and is not discriminated against on the basis of the individual’s indigenous status. However, in order to safeguard the diversity of indigenous peoples, such a right must be interpreted in a flexible, extensive, and dynamic manner. This involves also recognizing differences and treating different groups differently, and includes special measures to undo existing discrimination, establish equal opportunities and to ensure their survival in accordance with their traditions and customs. Thus, equality means being equal in dignity and rights to all other people, while recognizing the right of all peoples to be different, to consider themselves different, and to be respected as such. Non-discrimination as a principle applies to all human rights. The UN Charter prescribes equality rules also for collective rights and self-determination of peoples. The application of the human rights principle of non-discrimination and equality to the right to food will be discussed in more detail in Chapter 2.4.

¹⁶ Article 25(2) c and d CRC also regulates aspects of the child’s right to nutrition.

¹⁷ Fodella, A. 2006. p. 569.

¹⁸ This is also explicitly reaffirmed in instruments on indigenous peoples, such as the UN Declaration on the Rights of Indigenous Peoples.

The right to self-determination, recognized by both human rights covenants, the International Covenant on Civil and Political Rights (ICCPR)¹⁹ and the ICESCR,²⁰ is of special importance to the right to food of indigenous peoples. As far as Article 1 ICESCR is understood as also covering the internal aspect of self-determination, it establishes minimum rules for the entire population to economic and social rights against its own government.²¹ The right to food of indigenous peoples must be understood as an integral component of the right to self-determination. Article 1.1. of both covenants, establishing the right to self-determination, needs to be read in conjunction with Article 1.2, which stipulates that “in no case may a people be deprived of its own means of subsistence”. The latter provision creates the link to the right to food as the deprivation of means of subsistence generally necessarily implies a deprivation of a people of its subsistence food production. However, indigenous peoples’ right to self-determination has been contentious in international law.²² The recent adoption of the UN Declaration on the Rights of indigenous peoples may bring more clarity to the interpretation of the right to self-determination in the future as it pertains to indigenous peoples. The right to self-determination is expressly stipulated in Article 3 of the UN Declaration on the Rights of Indigenous Peoples.²³ According to Article 3 of the Declaration, the right to self-determination encompasses the rights to freely determine their political status and to freely pursue their economic, social and cultural development. The enjoyment of the right to food is one of the essential elements that enable people to freely pursue their economic, social and cultural development.²⁴

1.3.2. RIGHT TO CULTURE

The right to culture is fundamental for indigenous peoples, as their cultures are distinct and threatened by the continuous pressure of assimilation by the dominant society.

The right to culture should give indigenous peoples the right to conserve, adapt and even voluntarily change their own culture.²⁵ Combined with the right to land, the right to culture gives the right to subsistence activities, which is substantial for the realization of indigenous peoples’ right to food. A number of international and regional human rights instruments make reference to culture but indigenous cultural claims have not been fully accommodated,²⁶ and the implementation of cultural rights has been somewhat

¹⁹ International Covenant on Civil and Political Rights. 16 Dec. 1966. Art. 1, 999 UNTS 171.

²⁰ The CESCR has interpreted common Article 1 of said instruments as being applicable to indigenous peoples. See UNCESCR, *Consideration of Reports submitted by States Parties under Articles 16 and 17 of the Covenant, Concluding Observations on Russian Federation (Thirty-first session)*, UN Doc. E/C.12/1/Add.94, 12 Dec. 2003, para. 11, in which the Committee expressed concern for the “precarious situation of indigenous communities in the State party, affecting their right to self-determination under Article 1 of the Covenant”.

²¹ Alston, P. & Tomaševski, K., eds. 1984. p. 25. The right to self-determination is considered to be the general principle underlying free, prior and informed consent. Furthermore, the right of free, prior informed consent is a corollary right (to the right to self-determination) and integral to indigenous peoples’ control over their lands and territories, to the enjoyment and practice of their cultures, and to make choices over their own economic, cultural and social development.

²² The right of self-determination is a collective rather than an individual right.

²³ United Nations Declaration on the Rights of Indigenous Peoples, A/RES/61/295.

²⁴ Alston, P. & Tomaševski, K., eds. 1984. p. 23.

²⁵ Chiroboga, R.O. 2006. p. 48.

²⁶ Xanthaki, A. 2007. p. 227.

neglected.²⁷ Culture,²⁸ in and of itself, has not often been articulated as a free-standing human right; rather, it is commonly understood as an underlying principal of human rights law with which other rights overlap.²⁹

However, the right to culture as an autonomous right is a “synthesizer right” permeating all individual as well as collective rights. It requires the fulfilment and effective exercise of all human rights; and, reciprocally, their fulfilment is dependent upon the enforcement of many other human rights.³⁰ One of these reciprocal rights is the right to food. The right to food and the right to culture are inextricably intertwined, each lending strength to the other.

BOX 3.

Right to Culture

According to **Article 27 of the International Covenant on Civil and Political Rights (ICCPR)**, members of “ethnic, religious, or linguistic minorities ... shall not be denied the right ... to enjoy their own culture, to profess and practise [sic] their own religion, or to use their own language and do all of these things both as individuals and as a group”.

UNESCO has defined the concept of culture as the distinctive traits, including the total spiritual, material, intellectual and emotional traits that characterize a society or social group, and that include, in addition to arts and literature, their ways of life, the manner, in which they live together, their value systems, and their traditions and beliefs.³¹

This definition also necessarily refers to traditional food and all activities related therewith as a way and manner of life, such as hunting and gathering. **Food, procurement and consumption of food are often an important part of culture**³² and cuisine is considered to be part of cultural heritage.³³

The Human Rights Committee, the monitoring body charged with overseeing Member State compliance with the ICCPR, recognizes a link between culture and other activities that are essential to the cultural survival of indigenous peoples. In its General Comment No. 23(50), it stated: “Culture manifests itself in many forms, including a particular

²⁷ Symonides, J. 1998. Cultural rights: a neglected category of human rights, 50 *International. Soc. Sci. J.* 559, 560 (1998), at 560, cited in Hadjioannou, M. 2005. p. 204.

²⁸ The parameters and definition of culture can be deconstructed and debated, but for purposes of this paper, the essence of indigenous culture has do to with the core body of beliefs, knowledge, traditions and ways of life that is passed on from generation to generation in indigenous communities, and amongst many others it includes food and the activities to obtain it.

²⁹ Hadjioannou, M. 2005. p. 204.

³⁰ Chiriboga, O.R. 2006. p. 46.

³¹ Definition declared at the Mexico Conference held under UNESCO’s auspices, Mexico City in 1982.

³² See UN. 2005. para. 21.

³³ The Recommendation on the Safeguarding of Traditional Culture and Folklore (1989) and the Convention to Safeguard Intangible Cultural Heritage (2003).

way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law. The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them”.³⁴

Indeed, the right to food and the right to culture of indigenous peoples are strongly interrelated: firstly, because culturally appropriate foods and the activities to obtain it, such as hunting and fishing, form an important part of indigenous peoples’ cultural identity.³⁵ Secondly, cultural acceptability of food is an element of the normative content of the right to food and it is of particular relevance to indigenous peoples. Cultural acceptability implies the need also to take into account, as far as possible, perceived non-nutrient-based values attached to food.³⁶

1.3.3. COLLECTIVE AND GROUP RIGHTS VS. INDIVIDUAL RIGHTS?

The right to food is enjoyed first by individuals and, in the case of indigenous peoples, it is frequently exercised collectively.³⁷ Within that collective exercise there are indigenous peoples who require that their additional rights under the right to food as a collective right are realized. In contrast to the traditional understanding of human rights as individual rights, many indigenous peoples view their human rights primarily as collective rights. In fact, the Declaration of Atitlán³⁸ states “that the content of the right to food of indigenous peoples is a collective right”. Collective rights are ascribed to groups of people and can only be claimed by the collective entity and its authorized agents.³⁹ Both the United Nations Declaration on the Rights of Indigenous Peoples and the Inter-American Commission on Human Rights (IACHR) Draft Declaration on Indigenous Rights as well as the ILO Convention No. 169⁴⁰ acknowledge certain collective rights. For example, the UN Declaration on the Rights of Indigenous Peoples establishes the collective right to the protection of cultural property and identity in addition to the rights to education and health. Article 1 of the Declaration provides: “Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights ... as recognized in ... the Universal Declaration of Human Rights and international human rights law”. Thus, the right to food, recognized in Article 25 of the Universal Declaration of Human Rights,⁴¹ is also referred to as a right that can be enjoyed collectively.

³⁴ GC 23, Art. 27, Human Rights Committee, 50th Sess., at 38, UN Doc. HRI GEN 1 Rev.1 (1994), para. 7.

³⁵ In 2004, the International Indian Treaty Council conducted a survey amongst indigenous peoples to ascertain cultural indicators for sustainable agricultural development. The survey showed the importance of the traditional foods to indigenous peoples cultures and identities.

³⁶ GC 12, para. 11.

³⁷ A very interesting summary of the discussion on the pros and cons of collective rights can be found in Xanthaki, A. 2007. pp. 29–38.

³⁸ Indigenous Peoples’ Consultation on the Right to Food. A Global Consultation. Atitlán, Sololá, Guatemala 17–19 April 2002.

³⁹ See Buchanan, A.E. 1991. p. 44 and Jones, P. 1999. pp. 80–107. The relevant human rights literature distinguishes between collective and group rights

⁴⁰ International Convention Concerning Indigenous and Tribal Peoples in Independent Countries (ILO Convention No. 169), June 27, 1989, 72 ILO Official Bull. 59, entered into force Sept. 5. 1991.

⁴¹ Universal Declaration of Human Rights, G.A. Res. 217A, UN GAOR, 3d Sess., pt. I, Arts 1–2, UN Doc A/810 (1948).

Why is the right to food as a collective right different from the right to food as an individual right?

A collective right may be the expression of the collective dimension of a corresponding individual right (e.g. the right to collective property) or it may be inherently collective – new and different in comparison to the rights of the individual (e.g. the right of peoples to self-determination, right to culture, right to development). Although the safeguarding of the rights of the individual members of an indigenous group indirectly and cumulatively enhances the protection of the indigenous group as a whole, collective rights may provide for a direct and supplemental protection to the collectivity as such. In fact, the individual-rights approach may be insufficient to defend some crucial collective interests of indigenous peoples in the right to food context – not only from a procedural point of view but also from a substantive one.

The right to food as a collective right should be observed, as its respect, protection and fulfilment via collective rights has an additional value in comparison to individual rights. The nature of the right to food as a collective right has a value that is distinct from its value as an individual right because some property rights to lands, territories and resources are collective rights and subsistence-based activities carried out collectively are part of indigenous peoples' cultural identity, and often are the principal sources for their very existence. The right to food, in its collective dimension, is clearly supplemental to the individual one: a collective right to food may imply, for example, an obligation by the State:

- to respect the collective property rights over lands, territories and resources, right to culture, right to self-determination (right to pursue one's own economic, cultural and social development, right to subsistence);
- to protect certain activities of the indigenous peoples of obtaining food (e.g. hunting, fishing); and
- to provide a minimum essential food that is culturally compliant with the diet of indigenous peoples, something that would be more difficult to conceive of from the perspective of an individual right to food.⁴²

In certain instances, a collective right to food would suit the needs of indigenous peoples better than individual rights, as in the case of a right to participate as a collectivity in decisions concerning their right to food.

What follows from this discussion is that the right to food is, in the first place, according to international law, an individual right, but that it must also be recognized as a collective right, especially for indigenous peoples. The adoption of the Declaration on the Rights of Indigenous Peoples brought the recognition of the right to food as a collective right one step forward. The Declaration states in its preamble "... indigenous peoples possess collective rights which are indispensable for their existence, well-being and integral development as peoples". The right to food belongs to this category of indispensable rights.

⁴² See also Vidar, M. "The interrelationship between the right to food and other human rights" in Eide, W.B. & Kracht, U., eds. 2007. p. 154.

1.4. RIGHT TO FOOD OR FOOD SOVEREIGNTY?

This section provides clarification about the commonalities and differences between the two diverging concepts of the right to food and food sovereignty. This is particularly necessary in the context of indigenous peoples because these concepts are often mentioned together and interchangeably in various indigenous peoples' statements and documents.

For example, the Declaration of Atitlán and the Nyéléni Declaration on Food Sovereignty⁴³ (both non-legal civil society organization [CSO] and non-governmental organization [NGO] documents) deal with the food sovereignty concept in relation to indigenous peoples. The Declaration of Atitlán refers explicitly to both the right to food and food sovereignty whereas the Nyéléni Declaration refers explicitly only to the right to food sovereignty. It states that food sovereignty means defending and recovering the territories of indigenous peoples and ensuring fishing communities' access to and control over their fishing area and ecosystems. The declaration defines food sovereignty as the peoples', countries' or State unions' "right" to define their agricultural and food policy, without any dumping vis-à-vis third countries.⁴⁴

What do these two concepts have in common and how are they distinct from one another? It can be briefly stated that the right to food is a legal concept – a human right – and in the case of its violation, remedies can be claimed where available, whereas the latter is a political concept; thus, there is no existing international human right corresponding to the right to food sovereignty. This means that governments have no human rights obligations, nationally or internationally, under the claim to food sovereignty (although some activists call for the "right to food sovereignty" to be included in the right to self-determination – as outlined in Chapter 1.3.1, the content of the latter is very disputed). However, the quite clear and focused demands of the food sovereignty movement towards governments, intergovernmental organizations and multi-national corporations in regards to local and national production and the peoples' freedom to freely define food and agricultural policies are viewed as advantages.

There has been some criticism⁴⁵ levied against the right to food concept, alleging its neutrality towards liberal trade policies concerning, in particular, agricultural commodities, including foodstuffs. Indeed, the right to food, as distinct from food sovereignty, does not favour any economic system or policies in particular as long as the right to food can be enjoyed by everybody. However, the right to food requires that economic and trade policies affecting the right to food are in compliance with it and the human rights-based approach to food security.

⁴³ Declaration of the Forum for Food Sovereignty, Nyéléni 2007, available at <http://www.nyeleni2007.org/spip.php?article290>

⁴⁴ See What is food sovereignty?, available at http://www.nyeleni2007.org/IMG/pdf/Foodsov_triptico_english-2-2.pdf

⁴⁵ See Mowbray, J. 2007. pp. 545–69.

Moreover, the Voluntary Guidelines to support the progressive realization of the right to adequate food in the context of national food security (Right to Food Guidelines),⁴⁶ a practical tool implementing the right to food in more detail, also promote local production. Guideline 3.7 encourages States, “inter alia and in a sustainable manner, to increase productivity and to revitalize the agricultural sector including livestock, forestry and fisheries through special policies and strategies targeted at small-scale and traditional fishers and farmers in rural areas, ...” and Guideline 4.5 states that “States should, as appropriate, promote the development of small-scale local and regional markets and border trade to reduce poverty and increase food security”.

Indeed, food sovereignty and right to food should not be viewed as competing concepts but as complementary. Right to food mechanisms can be used for the promotion of food sovereignty claims: for example, the right to food as a human right implies the application of the participatory approach to food security on the basis of the human rights principle of participation. This signifies that participating population groups and individuals, in particular the vulnerable and marginalized, including indigenous groups, can shape strategies, policies and programmes promoting the realization of right to food. Right to food in conjunction with the participation principle can be asserted as a separate right, whereas food sovereignty would very much depend on political mobilization and good will. Thus right to food mechanisms can be used for the promotion of food sovereignty claims when this contributes to regular, permanent and unrestricted access to quantitatively and qualitatively adequate and sufficient food.

Furthermore, as the enjoyment of indigenous peoples’ right to food often depends on the right to own, control and have access to lands, territories and resources as well as the ability to pursue their local production and subsistence activities and the right to self-determination, indigenous peoples’ claims for these (often not well-recognized) rights could be strengthened if the claims are based on the right to food. This is because the right to food – laid down in a legally binding agreement – provides the tools for people to use their mobilizing forces and make use of all appropriate legal and extra-legal means to spur the adoption of appropriate policies.



The right to adequate food and indigenous peoples *How can the right to food benefit indigenous peoples?*

LIST OF BOXES, ABBREVIATIONS AND ACKNOWLEDGEMENTS

INTRODUCTION

1. BACKGROUND AND CONTEXT

2. RIGHT TO FOOD OF INDIGENOUS PEOPLES

3. CRUCIAL ISSUES FOR INDIGENOUS PEOPLES FROM A RIGHT TO FOOD PERSPECTIVE

CONCLUSIONS

REFERENCES

2. Right to Food of Indigenous Peoples – Applicable Law and Principles

This chapter:

- Section 1 provides an overview of the protection of the right to food through legal instruments from an indigenous peoples' perspective.
- Section 2 gives examples of indigenous peoples' statements that advocate their collective right to food.
- Section 3 examines the application of the rights-based approach to the right to food of indigenous peoples.
- Section 4 outlines specific State obligations under indigenous peoples' right to food.
- Section 5 discusses the limitations and restrictions on the right to food.
- Finally, Section 6 looks at existing legal provisions on indigenous peoples' right to food at the national level.

2.1. OVERVIEW OF THE INTERNATIONAL LEGAL FRAMEWORK

An explicit reference to the right to food of indigenous peoples cannot be found in any binding or non-binding international legal instrument, but several explicit references to the right to food of indigenous peoples exist in UN and other non-legal documents. For example, in the report of the 4th Session of the United Nations Permanent Forum on Indigenous Issues (UNPFII), the UN Working Group comprised predominantly of indigenous delegations, made the recommendation that “States should recognise the rights of indigenous peoples to food and nutritional security and the production and consumption of healthy and nutritious food by using appropriate sustainable technology”.⁴⁷

The next section will analyse the most relevant legal texts governing the right to food of indigenous peoples. The analysis begins with Article 11 of the ICESCR (the most comprehensive legal provision of the right to food) and is logically followed by the Right to Food Guidelines, a practical tool to implement the right to food at the national level. Furthermore, the UN Declaration on the Rights of Indigenous Peoples and ILO Convention No. 169, both human rights instruments on the protection of indigenous peoples as well as Agenda 21, Chapter 26 will be examined from a right to food perspective and provisions relevant to the realization of the right to food will be identified.

2.1.1. ARTICLE 11 ICESCR

Article 11 of the ICESCR has already been mentioned as the legal basis of the right to food. In this section, we focus on the content of Article 11 only from the perspective of indigenous peoples' right to food. The ICESCR deals more comprehensively than any other instrument with the right to food. Pursuant to Article 11.1 of the Covenant, States Parties recognize "the right of everyone to an adequate standard of living for himself and his family, including adequate food" (see details under Chapter 1.2). This also includes indigenous peoples.

GC 12 does refer explicitly to "indigenous population groups" under *accessibility* in determining the normative content of Article 11.1. Here, physical accessibility is distinguished from economic accessibility. Physical accessibility means that food must be accessible to everyone, including vulnerable individuals and groups such as infants, small children, elderly people, and so on. It must also be accessible to indigenous peoples and ethnic groups everywhere, including remote areas.

Furthermore, in the context of physical accessibility, GC 12 states that "a particular vulnerability is that of many indigenous population groups whose access to their ancestral lands may be threatened."⁴⁸ The GC states that "specially disadvantaged groups", of which indigenous peoples form a part, "may need special attention and sometimes priority consideration with respect to accessibility of food".⁴⁹ Indeed, special attention to their concerns in the food security context is necessary, in terms of positive discrimination, along with priority consideration, because of their special status and persistent disparities in food security in comparison with the dominant population of a country.

The right to adequate food includes an adequacy standard, stemming from the wording of Article 11 ICESCR. In GC 12, the CESCR clarified the meaning of adequacy: food must be "in a quantity and quality sufficient to satisfy the dietary needs of individuals", "free from adverse substances" and "acceptable within a given culture."⁵⁰ The absence of adverse substances is a very important element of the right to food of indigenous peoples and can be linked to one of their central claims in the right to food context which is that food sources must be free from direct pollution through fertilizers, industrial waste, etc. Indigenous peoples foods are particularly vulnerable to threats by the environment as the environment constitutes their food and income source and because they are directly dependent on it.

⁴⁸ GC 12, para. 13. The Committee lists in Comment 7 the groups to be considered as vulnerable: "Women, children, youth, older persons, indigenous people, ethnic and other minorities, ...". See CESCR GC 7. (General Comments), The right to adequate housing (Art. 11.1): forced evictions: 20/05/97, para. 10.

⁴⁹ GC 12, para. 13.

⁵⁰ GC 12, para. 8.

2.1.2. RIGHT TO FOOD GUIDELINES

The *Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security* were adopted unanimously by the FAO Council in 2004. They work as a practical tool, reflecting a consensus among FAO members on what needs to be done in all of the most relevant policy areas to promote food security using a human rights-based approach. The guidelines – which are voluntary in nature, but at the same time build on international law and provide practical guidance on the implementation of the right to food at national level – refer to “indigenous people” or “indigenous communities” explicitly in the context of access to resources and assets in Guidelines 8.1, 8.10 and 8.12. Beyond Guideline 8, indigenous peoples are referred to implicitly as members of vulnerable groups in several more guidelines (3.3 on strategies; 7.2 on legal framework; 8.2 and 8.3 on access to resources and assets; 12.3 on national financial resources; 13 on support for vulnerable groups; 14.4 on safety nets; 15.1 on international food aid; 17.2 and 17.5 on monitoring, indicators and benchmarks). The guidelines referring to vulnerable groups generally point out that States should pay particular attention to their needs or focus their programmes or other activities on them.⁵¹ In addition, Guideline 10.10 on nutrition is particularly relevant to indigenous peoples as it highlights the cultural aspect of nutrition by reminding states “...of the cultural values of dietary and eating habits in different cultures...”.⁵² Some of the relevant guidelines will be discussed in more detail in the following sections.

BOX 4.

Example of mentions of indigenous people in Right to Food Guidelines

GUIDELINE 8

ACCESS TO RESOURCES AND ASSETS

8.1 States should facilitate sustainable, non-discriminatory and secure access and utilization of resources consistent with their national law and with international law and protect the assets that are important for people’s livelihoods. States should respect and protect the rights of individuals with respect to resources such as land, water, forests, fisheries and livestock without any discrimination. Where necessary and appropriate, States should carry out land reforms and other policy reforms consistent with their human rights obligations and in accordance with the rule of law in order to secure efficient and equitable access to land and to strengthen proper growth. Special attention may be given to groups such as pastoralists and indigenous people and their relation to natural resources.

⁵¹ GC 12, para.13 provides a non-exhaustive list of vulnerable groups, which includes also indigenous peoples.

⁵² The Guideline continues by calling for the establishment “...of methods for promoting food safety, positive nutritional intake including fair distribution of food within communities and households with special emphasis on the needs and rights of both girls and boys, as well as pregnant women and lactating mothers, in all cultures”.

2.1.3. UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES

The United Nations Declaration on the Rights of Indigenous Peoples,⁵³ adopted by the General Assembly in September 2007, is the result of collaboration among indigenous peoples, experts and States. The Declaration embodies the most affirmative intergovernmental response yet to the claims of indigenous peoples. It goes beyond ILO Convention No. 169 in its statements on self-determination, land and resource rights; it recognizes indigenous collective rights and contains many provisions on cultural rights. Having been adopted by the General Assembly, and while it is not legally binding, the Declaration can serve as a standard-setting framework that establishes and partly reaffirms important international legal norms for the treatment of indigenous peoples. The Declaration could also be used as a tool to assist governments in eliminating human rights violations against indigenous peoples, combating their marginal status. It sets the international minimum standards for the protection of indigenous peoples' rights.

The Declaration does not contain a provision on the right to food but it includes provisions on land, territories and natural resources and subsistence activities, all relevant to the realization of indigenous peoples' right to food. Beyond recognition of the right to self-determination,⁵⁴ it formulated an array of tailor-made collective rights, such as the right to maintain and develop their distinct political, economic, social and cultural identities and characteristics as well as their legal systems and to participate fully, "if they so choose", in the political, economic, social and cultural life of the State.⁵⁵ They are afforded the right to maintain and develop their political, economic and social systems,⁵⁶ and to determine and develop priorities and strategies for exercising their right to development.⁵⁷ Their treaties with states should be recognized, observed and enforced.⁵⁸

The Declaration also calls for the restitution of the lands or, where this is not possible, establishes the right to just and fair compensation for lands, territories, and resources that have been confiscated, occupied, used, or damaged without their free and informed consent (Article 28). A violation of these rights may also implicitly constitute a violation of the right to food when the land and resources are the means of subsistence of the people and in particular when no alternative sources of income are available. For indigenous peoples dependent for their subsistence on land and its resources, this is generally the case.

Of particular relevance to the enjoyment of the right to food of indigenous peoples are the right to be secure in the enjoyment of their own means of subsistence (Article 20 given in Box 5), and the right to the lands, territories and resources of indigenous peoples (Article 26 given in Box 5). These rights are important because the right to food implies not only access to food, but also access to the means for its procurement.

⁵³ The Declaration has been adopted by the General Assembly at its 61st Session on 13 September 2007.

⁵⁴ Article 3 states broadly: "Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development".

⁵⁵ Arts 4, 8, 19, 20.

⁵⁶ Art. 21.

⁵⁷ Art. 23.

⁵⁸ Art. 36.

The right to adequate food and indigenous peoples

How can the right to food benefit indigenous peoples?

The Declaration also includes a prohibition of storage and disposal of hazardous materials on indigenous lands unless specifically agreed upon (Article 28), which plays an important role regarding the quality element of the normative content of the right to food and the requirement that food has to be free from adverse substances.⁵⁹ The recognition of the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources (Article 29) is important as a clean environment is a pre-condition for the enjoyment of the right to food.

BOX 5.

UN Declaration on the Rights of Indigenous Peoples

ARTICLE 20

1. Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities.
2. Indigenous peoples deprived of their means of subsistence and development are entitled to just and fair redress.

ARTICLE 26

1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.
2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.
3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

2.1.4. ILO CONVENTION No. 169

International Labour Organization (ILO) Convention No. 169 is the only binding international legal treaty on indigenous peoples' rights. Although the number of States that have ratified the Convention is still relatively small (20 countries by December 2008), it represents an important international standard on indigenous peoples' rights. It has influenced policies, laws, judicial decisions and donor priorities, even where it has not been ratified. As with all of the other specific instruments on indigenous peoples, ILO Convention 169 does not include the right to food explicitly, but it refers to it implicitly in Article 2 which urges signatories to promote "the full realization of social and economic rights of [indigenous and tribal peoples] with respect to their social and cultural identity, their customs and traditions and their institutions". Furthermore, it does recognize a number of rights important for the realization of indigenous peoples'

right to food: Articles 2 and 6 (participation and consultation), 7 (development) and 15 (resources); Articles 13 to 17 provide special protection to indigenous peoples' right to land and Article 24 does so with regard to social security. All these articles are supportive for ensuring that indigenous peoples fully enjoy their right to food.

Rights to land

The protection of indigenous peoples' land and their resources is fundamentally important for the realization of indigenous peoples' right to food, as it is often the basis of their economic survival. Taking steps to secure access to such resources is therefore an important element in the realization of the right to food. The Convention clearly states that indigenous and tribal peoples have rights to the land they have traditionally occupied. This necessitates an identification of the land and territories.

Social security

The Convention stresses the need to extend social security programmes in order to include indigenous and tribal peoples, the importance of addressing their specific situations and the application of the non-discrimination principle to the right to access social security services⁶⁰ (see Box 6). In fact, non-discrimination is the key principle that must be respected in the design and implementation of safety nets, as in many countries public spending in basic social services “systematically discriminates against minorities and indigenous peoples”.⁶¹

Social security is an important right to food issue for indigenous peoples. The establishment of social safety nets is one way that states can meet their obligation under the right to food. They refer to cash or in-kind transfer programmes which seek to reduce poverty. Thus, the supply of minimum essential food is generally addressed by a country's social security legislation, policy and its subsequent programmes.

BOX 6.

ILO Convention No. 169

ARTICLE 24

Social security schemes shall be extended progressively to cover the peoples concerned, and applied without discrimination against them.

2.1.5. AGENDA 21, CHAPTER 26

Agenda 21 was adopted by the United Nations Conference on Environment and Development (Earth Summit) in 1992⁶². It is a comprehensive plan of action to be taken globally, nationally and locally by organizations of the UN system, governments, and major groups in every area in which human activity impacts on the environment.

⁶⁰ See ILO. 2003. p. 61.

⁶¹ See HDR. 2004.

⁶² See <http://www.un.org/esa/sustdev/documents/agenda21/english/agenda21toc.htm>

Chapter 26 promotes the recognition and strengthening of indigenous peoples and their communities in the development process. It does not refer specifically to right to food, but it provides for the protection and strengthening of indigenous peoples' access to and utilization of resources which form the basis for ensuring indigenous peoples' food security. Chapter 26 also highlights the special status of indigenous peoples in the development process by recommending that *"national and international efforts to implement environmentally sound and sustainable development should recognize, accommodate, promote and strengthen the role of indigenous peoples and their communities"*.

2.2. INDIGENOUS PEOPLES' STATEMENTS

Indigenous peoples have made several statements to date advocating the recognition of their collective right to food. They have articulated their position on the scope and impediments to the enjoyment of their right to food at a number of international and national gatherings.⁶³ These statements and declarations are not legally binding, but they are important for understanding the common claims, concerns and needs of indigenous peoples in the context of the right to food.

Declaration of Atitlán

The Declaration of Atitlán is the most widely known and most comprehensive statement on indigenous peoples' right to food made by indigenous peoples. It is an indigenous peoples' document and is divided into four parts: (i) the declaration itself; (ii) a list of obstacles to indigenous peoples' food security; (iii) a list of obstacles to indigenous peoples' food sovereignty; and (iv) recommendations on actions important for the enjoyment of the indigenous peoples' right to food. The Declaration addresses, amongst others, issues such as the imposition of industrialized mono-agriculture, the introduction of genetically altered foods and the use of pesticides and chemical fertilizers that "poison the food resources of indigenous peoples". Indigenous peoples' statements stress that the right to food be recognized as a collective right and claim it in conjunction with the right to self-determination

2.3. HUMAN RIGHT-BASED APPROACH TO FOOD SECURITY FROM AN INDIGENOUS PEOPLES PERSPECTIVE

The realization of the right to food, as any other human right, requires the application of human rights principles to food security. These human rights principles include participation, accountability, non-discrimination, transparency, human dignity, empowerment and the rule of law (PANTHER).⁶⁴

The concepts of good governance and the human rights-based approach are similar, but the latter goes beyond good governance. Good governance is more a policy concept, whereas the human rights-based approach is a legal concept and is thus obligatory for human rights duty bearers.

⁶³ See, for example, the website of the International Indian Treaty Council, available at: http://www.treatycouncil.org/new_page_5241.htm (last visited August 2007).

⁶⁴ The Right to Food Unit uses as a memory hook the word PANTHER. Each letter stands for a human-rights principle. See mini lessons available on the website of the Right to Food Unit/FAO: http://www.fao.org/righttofood/kc/dl_en.htm

In order to fully realize the right to food, indigenous peoples should rely on these principles with regards to their entitlements, and the development, implementation, evaluation and monitoring of State policies, strategies and programmes for food security. Fundamental to a human rights-based and culturally sensitive approach is the development of adequate laws, institutions, administrative procedures, practices and mechanisms for accountability and redress that can ensure the realization of rights and respond to their violations.

These principles should also be applied to food security relevant policies, programmes and projects of private corporations, NGOs and IGOs, such as the International Monetary Fund (IMF), the World Trade Organization (WTO) and the World Bank. It is disputed whether these institutions and organizations have legally binding human rights obligations, but they certainly do have at least human rights responsibilities.⁶⁵

The following analysis serves to explain how the principles of non-discrimination, equality and participation apply in the context of right to food for indigenous peoples and how they differ from a conventional approach.

Non-discrimination and equality

The most fundamental principles for indigenous peoples are non-discrimination and equality. Exclusion of indigenous peoples from political, economic and social spheres is a major problem. Thus, the principle of non-discrimination, one of the fundamental principles of international human rights law, is of particular importance to the realization of indigenous peoples' right to food.

Non-discrimination and equality are integral elements of the international human rights normative framework. Article 1 of the United Nations Charter enshrines "respect for human and for fundamental freedoms for all without distinction as to race, sex, language or religion" as a foundational principle.⁶⁶ A partial list of human rights treaties and declarations that obligate States to promote equality and prohibit discrimination on the basis of race includes the Universal Declaration of Human Rights, the American Declaration of the Rights and Duties of Man,⁶⁷ the Convention on the Elimination of All Forms of Racial Discrimination,⁶⁸ the Discrimination (Employment and Occupation) Convention, 1958 (No. 11)⁶⁹ and the International Covenant on Civil and Political Rights (ICCPR). The norms of equality and non-discrimination require tailored legal frameworks that allow cultures and ethnic groups, including indigenous peoples, to flourish equally within a State. Failure to establish such frameworks may constitute human rights violations.

⁶⁵ see Donati, F. & Vidar, M., "*International legal dimension of the right to food*" in Kent, G. ed. 2008, pp. 71-80

⁶⁶ UN Charter, Art. 1, para. 3.

⁶⁷ American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, 9th International Conference of American States, O.A.S. Official Record, OEA/Ser.L/V/II.23, doc.21 rev.6 (1948).

⁶⁸ International Convention on the Elimination of All Forms of Racial Discrimination, opened for signature 7 Mar. 1966, 660 U.N.T.S. 195, 5 I.L.M. 352.

⁶⁹ Convention concerning Discrimination in Respect of Employment and Occupation, Date of coming into force: 15 June 1960. The Committee of Experts on the Application of Conventions and Recommendations (CEACR) has applied the Convention on several occasions.

The UN Declaration on the Rights of Indigenous Peoples also stipulates the right to non-discrimination. It highlights in Subsection 2 (see Box 7) that particular attention should be paid to the rights and needs of indigenous women, *inter alia*.

BOX 7.

UN Declaration on the Rights of Indigenous People

ARTICLE 21

1. Indigenous peoples have the right, without discrimination, to the improvement of their economic and social conditions, including, *inter alia*, in the areas of education, employment, vocational training and retraining, housing, sanitation, health and social security.
2. States shall take effective measures and, where appropriate, special measures to ensure continuing improvement of their economic and social conditions. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities.

Applying the same treatment and standards to both indigenous and non-indigenous individuals in a rigid manner may ensure a formal equality, but may not be enough to achieve a substantive one. Indigenous peoples are often among the weakest groups of societies. Therefore, positive action by the State, in the form of preferential treatment in their favour, may be required to achieve a level playing field in this regard (see also Chapter 2.4). The right to non-discrimination has generally been interpreted in accordance with this view, for example by the Human Rights Committee with reference to the relevant provisions of the ICCPR:⁷⁰

The principle of equality sometimes requires States parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant. For example, in a State where the general conditions of a certain part of the population prevent or impair their enjoyment of human rights, the State should take specific action to correct those conditions. Such action may involve granting for a time to the part of the population concerned certain preferential treatment in specific matters as compared with the rest of the population. However, as long as such action is needed to correct discrimination in fact, it is a case of legitimate differentiation under the Covenant.⁷¹

Indeed the principle of equality and non-discrimination requires special attention to indigenous peoples' particularities and needs when designing policies and legislation and taking decisions. For example, as the case from Brazil illustrates, the adoption of food safety standards may require the inclusion of specific safeguards for indigenous peoples' small-scale production and markets. In Brazil, some indigenous communities cannot sell most of their honey

⁷⁰ Human Rights Committee (HRC), United Nations, GC 18: Non-discrimination para. 10 (1989).

⁷¹ GC 18: Non-discrimination para. 10.

on the local markets as it does not meet the strict standards regarding moisture content of the new food safety regulation.⁷² Although the established standards were considered to be necessary to ensure higher public interest (i.e. public health), by not providing the necessary safeguards (e.g. support measures for small scale producers, including indigenous communities), the legislation resulted in hindering their capacity to exercise their right to food.

Participation

A human rights-based approach to food security requires a high degree of participation. Participation is a fundamental human rights principle. The human rights normative framework includes the right of those affected by key decisions to participate in the relevant decision-making process. To simply call for participation is too vague and may even be counterproductive. Certain standards of participation must also be set and followed. Participation must be active, free and meaningful and not merely a formality. It is key to effective food security strategies, policies or programmes. The participation of indigenous peoples should be ensured at all stages of development, design, implementation and monitoring of food and nutrition strategies and policies and all other relevant decisions. The principle of free, prior and informed consent is an important guiding principle as a precursor to participation of indigenous peoples.

Participation may be realized through, for example, ensuring representation of indigenous peoples in civil society mechanisms. Indigenous peoples could be part of civil society groups or be represented through their own civil society groups. They should contribute to policy making as well as drafting of relevant laws and regulations, and be part of the monitoring processes thereafter. Relevant legislation needs to ensure adequate representation. The Law on Food and Nutrition Security of Ecuador, for example, stipulates in Article 5 that active participation should ensure that ethnic and cultural diversity is respected.⁷³

Fundamental for an effective and meaningful participation is how participation is regulated, enforced and practised. For example, participation often requires the identification of a person through the aid of an identity card or other document. Indigenous peoples may, and typically do, lack identity documents, potentially constituting an obstacle to participation (e.g. voting or running for office). Therefore, in such cases, the State either needs to make an exception to this requirement or ensure that identity documents are issued.⁷⁴

⁷² Rodriguez-Amaya, D.B., 2005. Analysis and Composition of Brazilian Foods, Presentations to the consultation of the cross-cutting initiative on biodiversity for food and nutrition, Convention on Biological Diversity, Brasilia 12-13 March.

⁷³ Another example provides Article 61 of the Guatemalan Agreement No 75/06, Regulation to the Law on National System on Food and Nutritional Security, 2006, that explicitly lists the indigenous issues as one of the gaps to be represented in the Consulting and Social Participating Body (INCOPAS), which is part of the national system on food and nutrition security of Guatemala.

⁷⁴ The case of the Bolivarian Republic of Venezuela serves as an example for States encountering this difficulty. There, indigenous peoples acquired the right to political participation on the basis of indigenous groups and not political parties. Among the benefits that political participation has brought them is securing the right to carry national identity cards. The Venezuelan experience demonstrated the need for identity cards to be issued to all indigenous peoples, identifying them as citizens and members of indigenous populations, and for recognition of the right of indigenous peoples to participate in politics on the basis of their indigenous affiliations.

In sum, a human rights-based approach lays the groundwork for State accountability and action, as well as citizen participation and transparency. It focuses on entitlements in concrete terms and identifies who is responsible for ensuring access to entitlements. This approach exposes the roots of vulnerability and marginalization, expands the range of responses by the duty bearers and strengthens the ability of indigenous individuals and communities to improve their conditions.

2.4. STATE OBLIGATIONS TO RESPECT, PROTECT AND FULFIL THE RIGHT TO FOOD OF INDIGENOUS PEOPLES

State obligations under the right to food, as for all other human rights, are divided into three different categories: (i) *respect*, (ii) *protect* and (iii) *fulfil*, the latter category distinguishing between *facilitate* and *provide*. The nature of the steps that each State that has ratified the ICESCR must take is laid down in Article 2 ICESCR and defined by GC 12. Where indigenous peoples are concerned, some obligations under the right to food could become particularly relevant.

2.4.1. RESPECT

States are required not to interfere with the enjoyment of the right to food. The obligation to respect existing access to adequate food requires States Parties not to take any measures that result in preventing such access.⁷⁵ The obligation to respect calls for non-interference of States where groups can provide for their own needs without weakening the possibility for others of doing the same. It is in this regard that the collective right becomes important, because the resources that belong to an indigenous community must be respected in order for them to be able to satisfy their needs. From this, it follows that as part of the obligation to respect the resources, the State should take steps to recognize and demarcate land and register existing land rights of indigenous peoples.⁷⁶ The obligation to respect may also imply the recognition of customary land rights of indigenous peoples where their land tenure is unrecognized. Furthermore, Eide points out that the State cannot authorize and issue licences to individuals or companies granting permission to carry out exploitive mining, harvesting or other activities on indigenous peoples' recognized territories and lands without the free, prior and informed consent of indigenous peoples.⁷⁷ In order to respect the right to food of indigenous peoples, States need to consult and cooperate with indigenous peoples, ideally through their self-appointed representative institutions, and obtain their consent before adopting and implementing legislation or taking any administrative action that could directly affect their right to food.

The obligation to respect implies also not adopting or applying laws that are incompatible with the indigenous peoples' right to food as well as the abrogation of a law in case of a violation of the right to food by the law in force.

⁷⁵ GC 12, para. 15.

⁷⁶ See Eide, A., Krause, C. & Rosas, A., eds. 1995. p. 37. Eide draws this conclusion under the right to an adequate standard of living.

⁷⁷ See above note 74, p. 37.

2.4.2. PROTECT

The obligation to protect requires the State to take positive measures to ensure that enterprises or individuals do not deprive indigenous peoples of their access to food.⁷⁸ Legal protection of traditional lands, territories, the resources contained therein and the protection of subsistence activities is a requirement for the food security of indigenous peoples. For indigenous peoples, whose culture is closely linked to the use of land, the protection of that land is even more important to realization of the right to food. Better legal protection for indigenous peoples' customary subsistence activities in the face of increasing competition for access to fish and game, intensifying exploitation of non-renewable resources, growing environmental pollution, and continuing animal rights activism is a challenge states need to face.⁷⁹ Complicating this challenge are recreational and commercial users of natural resources, who oppose any preferential access to fish and game and claim their right to equality. However, the legislative duty of the State would require the State to adopt laws that provide for preferential treatment of indigenous peoples' communities in this arena. The obligation of the State to protect, when private persons or companies deprive indigenous peoples of their access to adequate food, is particularly important regarding the activities of timber, oil and mining companies who often carry out their activities in an unsustainable manner or without benefit sharing or the free, prior and informed consent of the indigenous people affected (see Box 8).

BOX 8.

SERAC (The Social and Economic Rights Action Centre) and CESR (The Center for Economic and Social Rights) v. Nigeria ("Ogoni case")

One illustrative case for the failure by the State to protect the right to food from the hazardous and contaminating activities of a private company can be found in the decision by the African Commission on Human and Peoples' Rights in the case brought by SERAC and CESR against Nigeria.⁸⁰ This case argued that the Government of Nigeria had failed to regulate or monitor the activities of the oil consortium (Nigerian National Petroleum Company and the Shell Petroleum Development Corporation) in Ogoniland. In its decision, the African Commission found several violations of the African Charter, including a violation of the right to food of the Ogoni people. The African Commission ruled that "Governments have a duty to protect their citizens, not only through appropriate legislation and effective enforcement but also by protecting them from damaging acts that may be perpetrated by private parties. ... the right to food requires that the Nigerian Government ... not allow private parties to destroy or contaminate food sources, and prevent people's effort to feed themselves".

⁷⁸ GC 12, para. 15.

⁷⁹ See for example, Thériault, S. & Otis, G. & Duhaime, G. & Furgal, C. 2005. p. 37.

⁸⁰ In its conclusions, the African Commission appealed to the Government of Nigeria to ensure protection of the people of Ogoniland, including ensuring adequate compensation to victims of the human rights violations, ensuring relief and resettlement assistance to victims of government-sponsored raids, and ensuring that any further oil development is monitored by effective and independent oversight bodies for the petroleum industry.

2.4.3. FULFIL

The obligation to fulfil includes the obligations to facilitate and to provide.

Facilitate

The obligation to facilitate means that the State must pro-actively engage in activities intended to strengthen people's access to and utilization of resources and means to ensure their livelihood, including food security.⁸¹ It requires States to adopt appropriate legislative, administrative, budgetary, judicial, promotional and other measures towards the full realization of the right to food. For example, under the obligation to facilitate, governments should implement special policies directed to employment creation for indigenous peoples, facilitating access to credit and the creation of small and medium-sized businesses.⁸² This also implies the improvement of employment conditions for indigenous peoples, which unfortunately remain unequal, as can be illustrated by an example from Guatemala, where three-quarters of agricultural labourers receive less than the minimum wage, a share that rises to 82 percent for indigenous peoples.⁸³

To create and maintain favourable environmental conditions is also an obligation of the State under the obligation to facilitate the realization of the right to food.⁸⁴ The protection of the environment is particularly important for indigenous peoples as they directly depend on it. For example, contaminants found in foods in Alaska,⁸⁵ from non-direct interventions but general environmental pollution proved to pose public health risks to local indigenous communities. The State is required to prevent such health risks by adopting and enforcing environmental legislation and policies that protect the environment and food sources of indigenous peoples and ensure the sustainable use of resources.

Furthermore, State measures should facilitate access to healthy marketed foods (such as fruits, vegetables, whole-grain cereals and dairy products) of remote indigenous peoples' communities in case traditional foods are insufficient and do not provide all necessary key nutrients.

Provide - Right to be provided with food

Under the obligation to provide, States are under certain circumstances required to provide adequate food to those who are unable to meet their food needs for reasons beyond their control (see Chapter 1.2). This entitlement is subject to the progressive realization of the right to food. Article 11.2 ICESCR establishes the "*right of everyone to be free from hunger*". This means that States have the minimum obligation to ensure that everyone on their territory, at the very least, has access to the minimum essential food which is

⁸¹ GC 12, para. 15.

⁸² UN. 2004. para. 58.

⁸³ See HDR. 2005. p. 123.

⁸⁴ Furthermore, environmental issues can have an impact on the more specific obligations to respect or protect the right to food. The above-mentioned Ogoni case is an example in which both categories of State obligations were found to be violated under the right to food (see also Box 8).

⁸⁵ Thériault, S. & Otis, G. & Duhaime, G. & Furgal, C. 2005. p. 53.

The right to adequate food and indigenous peoples

How can the right to food benefit indigenous peoples?

sufficient and safe to ensure their freedom from hunger.⁸⁶ The obligation to provide may be of particular importance to indigenous peoples, considering the high level of poverty, and as a result of this poverty, high levels of hunger and malnourishment, faced by indigenous peoples. However, these measures are considered to be supplementary, exceptional means for the realization of the right to food (see Box 9), as they often result in dependence at the expense of self-reliance.⁸⁷

BOX 9.

Yakye Axa Indigenous Communities v. Paraguay case

An example of international jurisprudence in which a State was ordered to provide an indigenous community with food in order to prevent it from starvation can be seen in the case *Yakye Axa Indigenous Communities v. Paraguay*.

In this case, the indigenous community lived under undignified conditions during a period in which they were forced to go without their land: While they stayed on the side of the road across from the land they claimed, the community lacked adequate access to food, health services and education. The court ordered the State to provide basic goods and services necessary for the community to survive until such time they recovered their land. Indeed during the judicial process, the president of Paraguay decreed that the Paraguayan Indigenous Institute, the Ministry of the Interior, and the Ministry of Public Health and Social Welfare shall take appropriate steps for the immediate provision of medical and nutritional assistance to the families that make up these communities for as long as the judicial proceedings relating to the legal status of the land they claim as their traditional habitat remain ongoing.

To secure freedom from hunger, the State is required to ensure that everyone under its jurisdiction has access to the minimum essential food which is sufficient, nutritionally adequate and safe for survival. The State is only obliged to provide the individual with food if the person is not able to provide for him or herself through his or her own means and because of reasons beyond his or her control.

When it comes to the minimum essential food to ensure indigenous peoples' freedom from hunger, cultural acceptability plays a particularly important role. Depending on the traditions of indigenous peoples, certain foods cannot be eaten. As a result, the State must provide, within the limits of State resources, culturally acceptable foods.⁸⁸

⁸⁶ The minimum food to be provided under the right to be free from hunger is not subject to progressive realization. At the international level the precise content and definition of "freedom from hunger" is debated. The question is how much and what quality of food needs to be provided in order to ensure "freedom from hunger"? For more information, please see FAO. 2008.

⁸⁷ Alston, P. & Tomševski, K., eds. 1984, p. 155.

⁸⁸ See also Vidar, M. "The interrelationship between the right to food and other human rights" in Eide, W.B. & Kracht, U., eds. 2007. p. 154.

States are obliged to provide the minimum essential food to those in need is one of the core obligations under the right to food. The creation of appropriate safety nets is one way of fulfilling the obligation to provide food and achieve food security (see also under Chapter 2.1.4). Food safety nets should not be viewed as a long-term solution but rather as forming an integral part of a larger policy of sustainable economic development which can provide jobs and economic opportunity.⁸⁹ It is important to highlight that food also nets are an obligation of the State under the obligation to fulfil, and not “charity”.

Applying the human rights-based approach to minimum essential food

The non-discrimination principle, discussed above, is fundamental for food safety nets and is particularly relevant to indigenous peoples. As they make up a significant number of the hungry in the world, indigenous people should be specifically targeted as a traditionally disadvantaged group. Such “positive discrimination” or “affirmative action” measures are not discriminatory against people who are not targeted as a group because the non-discrimination principle also involves positive measures in order to establish equal opportunities. Thus, it is justifiable to specifically target indigenous communities as beneficiaries of food safety net programmes. The requirement for positive action measures for indigenous peoples should be stipulated by law or regulation. It should also detail the conditions and features of positive action measures.

The human rights-based approach would require governments to ensure the application of the participatory principle and to empower intended beneficiaries when designing, implementing and monitoring safety nets. The State would also be required to inform the beneficiaries about their right and the different programmes created under the right in order to enable every right holder to claim and demand his or her part. The necessary information should also include specifics about responsible authorities and the quantities of food or the amount of cash every individual or household is provided with in order to ensure that everybody is able to claim what he or she is entitled to receive and to file a grievance if necessary.

Information is central to the realization of the right to food. Without the necessary information, for example, about existing social safety net programmes, a right holder will not be able to demand his or her portion of food or support to obtain food. Thus, the State must ensure that information about existing State assistance is provided to indigenous peoples. The illiteracy rate is quite high among indigenous peoples – therefore, to provide written information may be useless. This means that it may be necessary to provide information through television, radio or other means with the capacity to reach the different target groups.

In-cash or in-kind help?

Another question centres on whether the minimum essential food should be provided in-cash or in-kind. Here, the preferences of the target population should be considered. Potential beneficiaries may prefer a certain kind of programme for

economic, social or cultural reasons. Indigenous communities may prefer in-cash help because it allows greater flexibility, while in other cases it may be easier to provide in-kind help because of, for example, the long distance to local markets or the poor functioning of local food markets in general. Also, indigenous communities may resist measures targeted at the individual or household level, preferring instead community-based measures.⁹⁰ Ignoring such local preferences may reduce the impact of a given intervention. These are all elements of food security programmes and measures that should be identified with the help of the participatory approach.

Other issues related to the minimum essential food

In this context, as noted above, States must also confront the perennial problem of the lack of identification documents. Often indigenous peoples do not have the necessary papers to prove their identities, but these papers are typically a condition to eligibility for certain programmes. In this case, the State is required to issue the necessary papers or to provide assistance, bypassing the condition that identification documents must be presented.

For essential service delivery, and the provision of basic community infrastructure, indigenous peoples are largely dependent on programmes and services falling within the jurisdictions of State, territory and/or local governments. The State must ensure an adequate and equitable range of service deliveries with respect to remote indigenous communities.

2.5. LIMITATIONS AND RESTRICTIONS ON THE RIGHT TO FOOD

The protection of the right to food under Article 11 ICESCR is not absolute. This means that a State is able to restrict under certain circumstances, the indigenous peoples' right to food. Thus, the right to food does not prevent the State from granting any type of concession for the exploration and extraction of for example, natural resources within the territory of indigenous peoples. Indeed, administrative and judicial decisions frequently require trade-offs between two or more concurring interests and rights.⁹¹ For example,⁹² traditional activities of indigenous peoples, such as fishing, hunting, gathering, shifting cultivation, and pastoralism may be in conflict with the interest of individuals or companies in expanding their economic activities on the land where the indigenous community pursues its traditional way of life. In such cases, it is likely that the social cost of providing the affected indigenous community with a social safety net in the event of setting aside their traditional entitlements is lower than the economic benefit derived from allowing the company or the individual to carry out its economic activity. This may lead to the conclusion that States should prefer the option to provide the community with social assistance

⁹⁰ FAO. 2003.

⁹¹ For example, in *G and E v. Norway*, two members of the Sami people alleged a violation of Article 8 ECHR due to a proposed hydroelectric project that would flood part of their traditional reindeer grazing grounds. The European Commission accepted that traditional practices could constitute private and family life within the meaning of Article 8. It questioned, however, whether the amount of land to be flooded was enough to constitute an interference and found that in any case, the project was justified as necessary for the economic well-being of the country.

⁹² This example is described in Vidar, M. in Eide, W. B. & Kracht, U., eds. 2007, p. 149.

in order to pave the way for the private investor rather than to set aside existing entitlements or existing protections. But it would be more in line with human rights “to respect and protect the functioning entitlements of groups who would otherwise become vulnerable”.⁹³ Moreover, when the State takes a decision that may undermine people’s traditional way of life, it is required to take into account “loss of meaning and orientation as a very common accompaniment of displacement, which can even lead to apathy, alcoholism, suicide or criminal behaviour”.⁹⁴ As a result, the weight of indigenous peoples’ right to food requires special regard when competing interests are taken into consideration. The decision in favour of a concerned indigenous peoples’ community may usually be justified with regard for the government’s human rights obligation of having to consider hardship situations. This means that in case of indigenous peoples’ the State should go beyond Article 4 ICESCR that contains a general limitation clause according to which the right to food may be subjected “*only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society*”. Indeed, because of the described hardship situations an interference with indigenous peoples’ right to food may even be justified only in exceptional cases, if it is necessary for the purpose of a compelling public interest, if it is proportionate to that purpose and when it does not deny their survival as indigenous people.

In any case, even when the economic activity in question should be in accordance with the conditions mentioned above and the State issues a concession, the State must comply and put in place adequate safeguards in order to ensure that these concessions do not cause major damage. Safeguards include effective participation, benefit-sharing and the right to consultation and – where applicable – the duty to obtain free, prior and informed consent.

2.6. RIGHT TO FOOD OF INDIGENOUS PEOPLES AT THE NATIONAL LEVEL

Implementation of right to food in national law

Countries that have ratified the ICESCR⁹⁵ are obliged to implement the right to food in national legislation in order to meet their obligations under international law. The implementation of the right to food in national law implies ideally the adoption of both a constitutional provision and a framework legislation on the right to food,⁹⁶ making the right to food justiciable in front of national courts. When such a law and provisions already exist, indigenous peoples can file their claims with the corresponding administrative bodies or courts in case of a violation of the right to food.

⁹³ Eide, A. in Eide, W. B. & Kracht, U., eds. 2007, p. 149.

⁹⁴ Eide, A. in Eide, W. B. & Kracht, U., eds. 2007, p. 150.

⁹⁵ As of 26 September 2008, 159 countries have ratified the Covenant. For ratification status, visit the following website: <http://www.ohchr.org/english/countries/ratification/3.htm> (last visited November 2008).

⁹⁶ See for more information about the implementation of right to food into national legislation FAO. 2009, forthcoming.

The following countries have already adopted legislation on food and nutrition security that recognizes the right to food: Argentina,⁹⁷ Brazil,⁹⁸ Ecuador,⁹⁹ Guatemala,¹⁰⁰ Indonesia,¹⁰¹ Peru,¹⁰² and Venezuela.¹⁰³ Of these laws, only the Guatemalan Food and Nutrition Security Law refers explicitly to indigenous peoples.

Indigenous peoples' right to food should generally be regulated by a framework law on the right to food, if such a law already exists. Specifics would then need to be included in subsidiary right to food legislation, and/or specific provisions on and relevant to the right to food of indigenous peoples would need to be introduced in laws on indigenous peoples. Laws incorporating right to food and human rights principles should integrate the focus on vulnerable groups, including indigenous peoples as a rights-based approach requires to give particular attention to vulnerable groups (see also Right to Food Guideline 13), amongst which are indigenous peoples.

Provisions on indigenous peoples in existing food and nutrition security legislation

Most existing food and nutrition security laws that recognize the right to food include provisions on vulnerable groups or groups at risk. Generally the provisions of these laws on vulnerable groups implicitly refer to indigenous peoples as a vulnerable group. Although generally indigenous peoples do not like to be viewed only as a vulnerable group¹⁰⁴ but want also to be recognized as distinct people, the explicit recognition of indigenous peoples as a vulnerable group in food security laws is useful and important as it requires a State to apply so-called special measures in the area of food security in order to improve indigenous peoples' access to food. The classification as a vulnerable group in this context is necessary because of the generally greater food insecurity and vulnerability to food insecurity of indigenous peoples. Most examined food and nutrition security laws, however, do not explicitly recognize indigenous peoples under vulnerable groups. For example, the programme for food security created by Law No. 25724 of Argentina¹⁰⁵ targets those living on the verge of poverty, focusing particularly on pregnant women, children under five years old and the elderly over 70 years old. The law does not explicitly mention indigenous groups, but it does include them by aiming to incorporate progressively other sectors of the population living below the poverty line, such as numerous families and marginalized minorities. Thus, Article 7 of the law also addresses indigenous peoples. It prescribes that the local food production industry on

⁹⁷ Law 25.724 on the National Programme on Food and Nutrition Security, 2003; Decree N° 1.018/03, regulating Law 25.724 that sets up the National Programme on Food and Nutrition Security, 2003.

⁹⁸ Law Establishing the National Food and Nutrition Security System (SISAN), Law No. 11,346, 15 Sept. 2006.

⁹⁹ Law on Food and Nutritional Security, 2006.

¹⁰⁰ Law on National Food and Nutrition Security System, Decree No 32-2005, 2005.

¹⁰¹ Food Law No. 7/1996 and Regulation on Food Security No. 6/2002, 2002.

¹⁰² Decree No 118-2002 PCM, Decree establishing the Multisectoral Commission on Food Security, 2002.

¹⁰³ Organic Law on Food and Nutrition Security, 2008.

¹⁰⁴ Personal communication by Victoria Tauli-Corpus: "[indigenous peoples want] ... to be recognized as distinct peoples who have collective rights over our lands, territories and resources. Starting from a perspective of vulnerability justifies welfare projects such as food aid, instead of recognizing and respecting human rights".

¹⁰⁵ Law 25.724 on the National Programme on Food and Nutrition Security, 2003; Decree N° 1.018/03, regulating Law 25.724 that sets up the National Programme on Food and Nutrition Security, 2003.

The right to adequate food and indigenous peoples

How can the right to food benefit indigenous peoples?

a small and medium scale be oriented to ensure the well-being of vulnerable sectors of the population, empowering their cultural identity. Guatemala provides an example of a food security law that explicitly refers to indigenous peoples. The law highlights in its preamble, the importance of the right to food for improving conditions to overcome nutrition and food insecurity, in particular in rural areas and for marginalized urban and indigenous groups.¹⁰⁶

The draft Law on Food and Nutritional Sovereignty and Security of Nicaragua contains provisions that do not explicitly refer to indigenous peoples but encompass them by referring to the ethnicity of groups and individuals as a prohibited ground for discrimination with regard to the right to produce, procure, and access food. The relevant provisions lay down the basic principles of the draft law of non-discrimination, equality and inclusion and one of the provisions provides explicitly for special measures.¹⁰⁷

Human rights-based food and nutrition security legislation should also lay down the principles for the regulation of fundamentally important issues for the realization of indigenous peoples' right to food such as traditional knowledge and access to resources.¹⁰⁸

¹⁰⁶ Law on National Food and Nutrition Security System, Decree No 32-2005, 2005.

¹⁰⁷ Arts 3.g) and k) and 9.d) Draft Law On Food and Nutritional Sovereignty and Security, as of Feb. 2008.

¹⁰⁸ For example, the Peruvian Regulation adopting the National Strategy for Food Security for 2004–2015 does so by recognizing the human right to food as an integrative part of the food security strategy. It sets as a medium-term objective the protection of collective knowledge of indigenous peoples on natural and genetic resources that are associated with traditional practices, with particular focus on food diversity.



The right to adequate food and indigenous peoples

How can the right to food benefit indigenous peoples?

LIST OF BOXES, ABBREVIATIONS AND ACKNOWLEDGEMENTS

INTRODUCTION

1. BACKGROUND AND CONTEXT

2. RIGHT TO FOOD OF INDIGENOUS PEOPLES

3. CRUCIAL ISSUES FOR INDIGENOUS PEOPLES FROM A RIGHT TO FOOD PERSPECTIVE

CONCLUSIONS

REFERENCES

3. Crucial Issues for Indigenous Peoples from a Right to Food Perspective

This chapter reviews issues of particular relevance to indigenous peoples' right to food. It assesses the linkages between the cross-sectoral themes and highlights what positive differences the right to food would make in the different areas of concern to indigenous peoples.

3.1. OWNERSHIP, CONTROL AND ACCESS TO NATURAL RESOURCES LANDS AND TERRITORIES

Access to natural resources is fundamental for the realization of indigenous peoples' right to food. What are indigenous peoples' natural resources? In general these are the natural resources belonging to indigenous peoples in the sense that they have historically held or enjoyed the incidents of ownership, that is, use, possession, control, right of disposition, and so forth. There appears to be the understanding that natural resources located on indigenous lands or territories, resources such as timber, water, flora and fauna, belong to the indigenous peoples that own the land or territory.¹⁰⁹ Indeed, in interpreting the right to property, the Inter-American Court of Human Rights made clear that indigenous peoples' rights to their lands include rights to the resources contained therein, and that these rights are held by the community in their collective capacity and according to their own customary law, values, customs and mores.¹¹⁰

There are also numerous international statements and declarations that recognize the right of indigenous peoples to their lands, although international treaties have been slow to establish clear standards on indigenous property rights. The

¹⁰⁹ UN. 2004a, para. 42.

¹¹⁰ Case of the *Mayagna (Sumo) Community of Awas Tingni v. Nicaragua*, paras 148, 151, 153. Furthermore, the African Commission, as well as the Canadian Supreme Court and the South African Constitutional Court, have ruled that indigenous communities' land rights are to be understood as including the natural resources therein. Nevertheless, according to the African Commission and the Canadian Supreme Court, these rights are not absolute, and may be restricted under certain conditions. Cf. African Commission on Human and Peoples' Rights, in *SERAC and CESR v. Nigeria*, Communication 155/96 (2001), paras 42, 54 and 55, and *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 (11 Dec. 1997), paras 194, 199 and 201. The South African Constitutional Court, citing a domestic law that required the return of land to owners who had been dispossessed by racially discriminatory policies, affirmed the right of an indigenous peoples to the mineral resources in its lands. Cf. *Alexkor Ltd. and the Government of South Africa v. Richtersveld Community and Others*, CCT/1903 (14 Oct. 2003), para. 102.

ILO Conventions and the UN Declaration on the Rights of Indigenous Peoples offer some protection of indigenous land and resource rights. According to the UN Declaration, indigenous peoples have the right to determine and establish priorities and strategies for their self-development, and for the use of their lands, territories and other resources. The Istanbul Declaration and the Global Plan of Action (1996) commit to the following objectives: “Protecting, within the national context, the legal traditional rights of indigenous people to land and other resources, as well as strengthening of land management ... [and] Protecting and maintaining the historical, cultural and natural heritage, including traditional shelter and settlement patterns, as appropriate, of indigenous and other people”.¹¹¹ According to some experts, indigenous land rights even have attained the status of customary law and are therefore binding on States.¹¹²

However, one of the most widespread contemporary problems from a right to food perspective remains the failure of States to recognize the existence of indigenous land use, occupancy and ownership, and the failure to accord legal status and legal rights to protect that use, occupancy and ownership.¹¹³

As land rights often form the basis for physical survival of indigenous groups, facilitating legal access to land for indigenous peoples and protecting their existing land rights enables them to enjoy their right to food.¹¹⁴ The legal protection of subsistence activities on their traditional lands and territories is a requirement for indigenous peoples’ existence. Secure land rights and access contributes directly to household food security, for example by providing the means to ensure household food supplies and income. Moreover, secure land rights and access strengthens the human rights principle of participation by creating a basis for the direct participation of indigenous peoples. For example, only if their land rights are secure can indigenous peoples claim to be involved in decision-making processes on the basis of the free, prior and informed consent procedures.

With regard to indigenous peoples, an argument that there is dichotomy between the promotion of agribusinesses to attract private capital and increase agricultural productivity on the one hand and the alleged inefficiency of traditional family farming on the other (the hypothesis that the rural poor would be better off leaving the land in pursuit of employment in the “modern” economy) can be viewed as obsolete because of indigenous peoples’ particular link to and dependence on their lands and the subsistence activities they carry out on these lands.

¹¹¹ See para. 40 (m), (r), (s).

¹¹² According to Anaya, J. & Williams, R.A., 2001. p. 55, there is a sufficiently uniform and widespread acceptance of core principles to constitute a norm of customary international law. “The relevant practice of States and international institutions establishes that, as a matter of customary international law, States must recognize and protect indigenous peoples’ rights to land and natural resources in connection with traditional or ancestral use and occupancy patterns”.

¹¹³ Deas, E.I. 2001. para. 124.

¹¹⁴ See also study, FAO. 2008.

The right to food may have an important role with regards to indigenous peoples' land rights. Because indigenous land and territories are typically linked with "the very existence of indigenous communities as discrete social and cultural phenomena",¹¹⁵ the State's obligation to respect and protect the right to food is inextricably linked to the obligation to respect and protect traditional lands. This protection is the *sine qua non* of their survival. Thus, an unjustified infringement upon indigenous peoples' use of or access to their traditional land, and the resultant hindrance to their subsistence activities, could also constitute a violation of their right to food. Because of indigenous peoples' singular bond with land and their agricultural and other land-use patterns that provide means of subsistence, compensation for expropriation may in most cases be insufficient.

The normative content of the right to food under "*availability refers to the possibilities either for feeding oneself directly from productive land or other natural resources...*".¹¹⁶ This means that the right to food does not grant an entitlement to land or its resources, but it does require governments to *respect* and *protect* the existing access to and use of land and resources when such access and use represent the main means of production or procurement of food for indigenous peoples. The problem here is that often traditional land and territories where indigenous peoples have been living are not recognized as collective property, and usually they are not in possession of land titles. In this case, States should recognize the ownership, use and control of indigenous peoples' traditional lands in order to comply with the right to food of indigenous peoples. This includes taking measures of delimitation, demarcation and granting of collective titles over the land or territory of the members of an indigenous peoples community.

In line with this position is the case of *Indigenous Community Yakye Axa v. Paraguay* (see also Box 9 above),¹¹⁷ in which the Inter-American Court held that Paraguay had failed to adopt adequate measures to ensure that its domestic law guaranteed the community's effective use and enjoyment of their traditional land, thus threatening the free development and transmission of its culture and traditional practices. The Inter-American Court concluded that the State had the obligation to adopt positive measures towards a dignified life, particularly when high-risk, vulnerable groups were at stake, whose protection became a priority. The court ordered the State to demarcate the traditional land and to tender it to the community at no cost.

¹¹⁵ Deas, E.I. 1999. Indigenous People and their Relationship to Land: Second Progress Report on the Working Paper, UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, UN Doc. E/CN.4/Sub.2/1999/18 (June 1999) cited in Anaya, J. & Williams, R.A. 2001, p. 50.

¹¹⁶ GC 12, para. 12. The sentence continues with "...or for well functioning distribution, processing and market systems that can move food from the site of production to where it is needed in accordance with demand".

¹¹⁷ *Indigenous Community Yakye Axa v. Paraguay*, Inter-American Commission of Human Rights, Report no. 40/04, Case 12.053, 12 Oct. 2004.

Decreasing access to land that indigenous communities have occupied for generations is a general trend in the world, and not only for example in Cambodia, where one study has found decreasing access to land to be the major cause of poverty and hunger for indigenous peoples.¹¹⁸ Therefore, secure rights to land and other natural resources are essential to their livelihoods and constitute a prerequisite for the protection of many other indigenous peoples' rights, including the right to food. Recognizing these rights would mean more security against development projects, urban expansion, establishment of national parks, mineral, gas and oil extraction, toxic and radioactive contamination from agricultural, military and industrial activities, logging of forests and the growth of large agribusinesses, including plantations of biofuels, that have undermined the natural resource base and livelihoods of indigenous peoples. The granting of generous land concessions at national and sub-national levels to speculators, entrepreneurs and the growing population makes it increasingly difficult for indigenous communities to operate their usually "well-developed" land allocation and land-management systems, which rely on communal decision-making through traditional structures.

Adequate protection through native land title?

Existing legislation and State practice concerning the recognition of indigenous peoples' land rights and titles would need to be reviewed according to right to food standards. One example of State practice which is not conducive to the realization of the right to food is the use of native land titles. A number of countries have passed legislation specifically designed to recognize or protect indigenous rights to land and resources. Often such legislation is based on the doctrine of aboriginal/native title. So, for instance, common law countries often recognize collective land titles through this concept of native title.¹¹⁹ Xanthaki identifies some important limitations of the right, which are that the "native title cannot prevail over other individuals' valid rights, including ownership of a property in the land, a pastoral lease or a mining license", nor does it "prevail over legislation and does not prevail in cases where the public has the right to access places such as parks". For example, the Human Rights Committee concluded in its general observations regarding the United States of America that it is concerned that in certain situations (in particular in the assignment of land by creating a reservation or when land is held by reason of long possession and use), tribal property rights can be extinguished on the basis of the plenary authority of Congress for conducting Indian affairs without due process and fair compensation.¹²⁰ Because of the discriminatory nature of the legislation, the recognition of native titles is often no guarantee against other interests and rights prevailing – often because they do not prevail over legislation and do not prevail in cases where the public

¹¹⁸ ILO. 2005. p. 7, 29.

¹¹⁹ Like contract, "native title" is another collective term for a particular species of legal rights. It describes the rights held by indigenous peoples in relation to land or waters that arise under their traditional laws and customs. As with contractual rights, there is a common law framework, modified by statute, which establishes the principles that govern the creation, identification, modification and enforcement of native title rights. "Native title" can encompass a very diverse set of rights.

¹²⁰ United Nations A/62/184, General Assembly, Right of peoples to self-determination, Universal realization of the right of peoples to self-determination, Report of the Secretary-General, para. 13.

has the right to access areas, such as parks, recreation reserves and beaches.¹²¹ To conclude, the land titles of indigenous peoples are generally not sufficiently protected by the native title practice, and would need to be strengthened and secured for the State to be in conformity with its obligation to respect the right to food.

Indigenous peoples and the forest

Traditionally, indigenous communities have managed and used a wide range of natural resources, including forests. The forest has always played a critical role providing forest fruits, wildlife, fish, traditional medicines, and construction materials, complementing crop production. Forest vegetables, leaves and tubers are very important elements in the diets of some indigenous communities.¹²² According to a recent UN report,¹²³ about 60 million indigenous peoples around the world still depend almost entirely on forests for their survival.

However, a steady decrease of forests and other natural resources due to the encroachment by outsiders affects the ability of indigenous communities to pursue their traditional livelihood strategies. Therefore an appropriate policy, legal and administrative protection of (customary) forest use rights should be established. A failure to recognize and respect these rights undermines the realization of the right to food. In compliance with the right to food, forest management regimes would need to integrate indigenous communities, who depend primarily on the forest resource, into their designed management processes (participatory forest management). The right to food approach can offer the basis and tools for designing such processes as it gives the right to participate in decisions affecting the exercise of right to food, and as it is only one element of the rights-based approach.

Protected areas

The establishment of protected areas or national parks continue to cause indigenous communities to be expelled from their territories. From a legal point of view the protection of the environment as a public interest is a legitimate objective that needs to be weighed as any other objective against other compelling interests. In the case of the establishment of a national park or protected area, the respect obligation under the right to food may require the legislator or the enacting authority to make an exemption providing for the carrying out of subsistence activities of indigenous peoples on the land categorized as a protected area or national park. An exemption is generally justified because the pursued activities of indigenous peoples (for example, the right to collect, utilize or transfer minor forest produce) are generally not in conflict with the objectives of protected areas. In reality, indigenous peoples' philosophy pursues the conservation and traditional use of their lands, territories, waters, coastal seas and other resources, and where their fundamental rights (including the right to food) are accorded, conflicts should generally not arise between those peoples' rights and interests

¹²¹ Xanthaki, A. 2007. p. 247.

¹²² This is for example, the case in Cambodia. See ILO. 2005, p. 19.

¹²³ UN. 2007a.

and protected area objectives. Moreover, formal protected areas can provide a means to recognize and guarantee the efforts of many communities who have long protected certain areas.

The right to food in conjunction with the human rights principle of participation and in line with other human rights and legal instruments including the Convention on Biological Diversity, ILO Convention 169, Agenda 21, and the Rio Declaration on Environment and Development,¹²⁴ can be used as the basis for claims to put in place policies and strategies to help establish effective, sustainable partnerships between conservation agencies and indigenous peoples. The partnerships should be based on a sound understanding of the social, economic and cultural needs of peoples and individuals, as well as of the complex interplay of factors driving resource-use-patterns.

3.2. TRADITIONAL KNOWLEDGE

As pointed out in the report of the Special Rapporteur on the right to food, indigenous peoples continue to lose their genetic resources and indigenous knowledge.¹²⁵ Indigenous peoples identify “biopiracy”¹²⁶ as a threat to their traditional knowledge and their food security as also declared by the International Indian Treaty Council (IITC) Conference in its Resolution on Environment, Biodiversity, Right to Food, Traditional Knowledge, Subsistence and Health.¹²⁷

The right of indigenous peoples to protect and enjoy their cultural heritage is recognized in a number of international instruments, including the Universal Declaration on Human Rights, the ICESCR; their right to enjoy civil and political rights is recognized in the ILO’s Convention No. 169 and the UN Declaration on the Rights of Indigenous Peoples. However, the nature of indigenous peoples’ intellectual property, which is often inseparable from spiritual, cultural, social and economic aspects of indigenous life and the realization of their right to food, and the notion of collective ownership of such property, is not adequately addressed in existing international intellectual property law.

¹²⁴ The listed legal instruments recognize that protected areas will survive only if they are seen to be of value, in the widest sense, to the nation as a whole and to “local people” in particular and that knowledge, innovations and practices of indigenous and other traditional peoples have much to contribute to the management of protected areas.

¹²⁵ UN. 2005. para. 24.

¹²⁶ See Declaration of Atitlán under obstacles to food security and food sovereignty: “The extension of intellectual property rights in favor of multinational corporations that has increased bio-piracy and the illicit appropriation of our biological diversity and traditional knowledge”.

¹²⁷ 1st Anniversary IITC Conference hosted by the Confederacy of Treaty 6 First Nations at Ermineskin Cree Nation, Alberta Canada, 3–7 Aug. 2005. Indigenous peoples regularly issue demands regarding the protection of their knowledge. Other indigenous peoples’ declarations include the Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples and the Kari-Oca Declaration of 1992.

Therefore, indigenous people oppose the intellectual property rights system that is nowadays in place pursuant to the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). It has been recognized that the international trade system often has a negative impact on the poor (including indigenous peoples). Indeed, the UN Declaration on the Rights of Indigenous Peoples¹²⁸ and the Draft Principles and Guidelines for the Protection of the Heritage of indigenous peoples¹²⁹ define protectable subject matters more broadly than existing intellectual property law. A human rights compliant intellectual property law should provide for “sharing of ownership, control, use and benefits” and States should be required to deny patents, copyrights, and other exclusive rights over any “elements of indigenous peoples’ indigenous heritage”.

The Rio Declaration, its plan of action (“Agenda 21”), and the Convention on Biological Diversity, adopted at the 1992 Earth Summit in Rio de Janeiro, Brazil, all emphasize the need for governments and inter-governmental organizations to protect the traditional conservation methods and knowledge of indigenous people. Article 8(j) of the Convention on Biological Diversity creates legal obligations for States Parties to respect, preserve and maintain the knowledge, innovations and practices of indigenous people related to the conservation and sustainable use of biodiversity. This Convention also recognizes the right of indigenous peoples to share in the economic and social benefits that accrue from the wider application of their traditional knowledge and practices. Article 10 protects indigenous peoples’ customary use of biological resources in accordance with traditional cultural practices, which has been interpreted to require recognition and respect of indigenous tenure over terrestrial and marine estates, control over and use of natural resources and respect for indigenous peoples’ self-determination and self-government.¹³⁰

While GC 12 on the right to food is silent on the topic of genetic resources and traditional knowledge, Right to Food Guideline 8.12 reasserts the content of provisions 8(j) and 10 CBD by providing “for the protection of relevant traditional knowledge and equitable participation in sharing benefits arising from the use of these resources”. The guideline stresses the importance of “encouraging, as appropriate, the participation of local and indigenous communities ... in making national decisions on matters related to the conservation and sustainable use of genetic resources”. It advocates also for specific national policies, legal instruments and supporting mechanisms to prevent the erosion and ensure the conservation and sustainable use of genetic resources for food and agriculture. At the same time Right to Food Guideline 8.12 clarifies that the recommendations of this guideline are to be consistent with State obligations under relevant international agreements, which, however, would not only refer to the international trade agreements but would necessarily also include relevant human rights agreements, which may be in contravention of the former.

¹²⁸ Article 31.

¹²⁹ Subcommission on the Promotion and Protection of Human Rights, Draft Principles and Guidelines for the Protection of the Heritage of Indigenous Peoples, Decision 2000/7 on Intellectual Property Rights and Human Rights, 17 Aug. 2000.

¹³⁰ CBD. 1997. p. 18.

Existing international conventions and the WTO TRIPS may not be the adequate and appropriate mechanisms to protect indigenous and traditional knowledge. Therefore, other forms of protection should be explored and developed in partnership with indigenous peoples and other traditional knowledge holders in order to ensure that traditional knowledge is used and shared in compliance with human rights, in particular the right to food. Indeed, “any effort to negotiate a multilateral framework to protect indigenous and traditional knowledge should consider indigenous practices and customary laws used to protect and nurture indigenous knowledge in the local, national, and regional levels”.¹³¹ Some indigenous peoples¹³² view it as essential to develop and design “*sui generis*”¹³³ intellectual property laws to protect indigenous peoples’ traditional knowledge.

In any case, the effective and meaningful participation of indigenous peoples in processes relating to right to food is key to the protection of traditional knowledge.

3.3. DATA COLLECTION

Disaggregated data by ethnic status and race highlight the discrimination suffered by indigenous peoples and their vulnerability, and counteract the often erroneous view that no such problems exist. Fundamental to many inquiries into whether discrimination regarding the realization of the indigenous peoples’ right to food exists is a showing of disparate outcomes— that indigenous peoples suffer higher rates of malnutrition, hunger, poverty and unemployment.

Ethnically disaggregated data is an essential tool in the battle against hunger, malnutrition and discrimination of indigenous peoples (see also Right to Food Guideline 13.2). The reasons are clear: data provide information, knowledge, and work as basic tools for understanding reality necessary to the making of sound rights-based food security policy. In the absence of data broken down by race or ethnicity, we cannot know or measure the impact of a range of practices on indigenous peoples. Without such data, the prohibition against discrimination is often an empty exhortation, impossible to monitor or enforce. Moreover, without a clear picture of an indigenous community’s situation, governments can develop food security policy only obliquely, and run the risk of adopting programmes that are irrelevant or even detrimental (due to unintended consequences or otherwise) to both the community for which policies are adopted and for society as a whole.

The cultural indicators for food security, food sovereignty and sustainable development¹³⁴ identified at the Second Global Consultation on the Right to Food¹³⁵ could provide practical assistance and tools primarily for UN agencies and bodies, development institutions, NGOs and indigenous communities working to promote and ensure

¹³¹ See Kohr, M. 1999.

¹³² See PFII. 2005. p. 6.

¹³³ *Sui generis* literally means something that is unique or “of its own kind”. However, experts are divided over the idea of creating intellectual property rights in indigenous and local knowledge.

¹³⁴ See UN. 2008. pp. 10, 19–36.

¹³⁵ 2nd Global Consultation on the Right to Food, Food Security and Food Sovereignty for Indigenous Peoples September 7 – 9, 2006, Bilwi, Puerto Cabezas Nicaragua, available at: http://www.treatycouncil.org/new_page_52412242132.htm

the realization of the right to food. These indicators based on a human rights-based framework enable the assessment and measurement of situations and changes concerning the realization of indigenous peoples' right to food and food sovereignty. They allow, for example, monitoring and evaluation of developments and achievements in the area of food security, food sovereignty and sustainable development.

Applying a human rights-based approach to data collection, generation and evaluation

It is important to involve indigenous peoples in the design, conduct and analysis of ethnic data collection efforts, thus applying a participatory approach to data collection. The involvement of indigenous communities themselves in the data-collection process is key to ensuring their interests are respected and taken into account. Furthermore, the involvement of indigenous peoples in generating data can further strengthen their capacity to evaluate their assets and problems, and design their own solutions.¹³⁶

3.4. INDIGENOUS WOMEN

Women are exposed to discrimination all over the world, but indigenous women suffer from two “strikes” against them: for being indigenous and for being women. Indigenous women may also suffer from discrimination within their own communities. It is important, however, to view indigenous women not as a homogeneous group but as part of a variety of cultures with different concerns and needs.¹³⁷ This should be the central premise for the implementation of the right to food of indigenous women into national and sub-national laws, policies and programmes.

In many instances, indigenous women are the primary producers of food in their communities and the keepers of agricultural technology. They have the primary responsibility for food processing, preparation and distribution in the household. Nevertheless, they may have little or no control over natural resources and may not be able to participate fully in community decisions.

Indigenous and women's rights are inextricably linked. Indigenous women continue to be one of the most marginalized groups in many countries and to be victims of discriminatory activities. The importance of the focus on indigenous women's rights because of multiple discrimination has also been stated by governments participating in the Fourth World Conference on Women in the Beijing Declaration, by acknowledging that they are determined to “intensify efforts to ensure equal enjoyment of all human rights and fundamental freedoms for all women and girls who face multiple barriers to their empowerment and advancement because of such factors as their race, age, language, ethnicity, culture, religion, or disability, or because they are indigenous people”.¹³⁸

¹³⁶ See website on the “Workshop on Data Collection and Disaggregation for Indigenous Peoples” which was held in New York, in January 2004 in accordance with the decision of the Economic and Social Council 2003/300, available at <http://www.un.org/esa/socdev/unpfii/en/workshopDCD.html>
The final report of the Workshop states that the rights-based approach to development requires the development of a conceptual framework for rights based indicators, that are relevant to indigenous and tribal peoples.

¹³⁷ See UN. 2004. para. 3.

¹³⁸ Beijing Declaration of Indigenous Women; NGO Forum, UN Fourth World Conference on Women Huairou, Beijing, para. 37.

Of particular importance to the right to food of (indigenous) women is Article 12 CEDAW (CEDAW makes no explicit reference to indigenous women), which stipulates the right of women to adequate nutrition during pregnancy and lactation. This article provides an additional layer of protection for women as compared with Article 11 ICESCR, in particular because of the individual complaint system provided for in the optional protocol to CEDAW. Indigenous women typically understand women's human rights, including the right to food, as being collective rights. Although the right to food is not specifically a woman's right, women, and in particular indigenous women, need special protection provided in the form of adequate policies, laws and regulations. For example, the Indigenous Peoples' Right Act of the Philippines guarantees gender equality and the human rights of indigenous women explicitly,¹³⁹ balancing the recognition of Indigenous Peoples' autonomy with the protection of universal human rights.

Employment creation

Under the obligation of the State to facilitate the realization of the right to food, States should create national policies that generate employment for indigenous women and thus provide the means to purchase food.

Participation and empowerment of indigenous women

Gender mainstreaming should view women as rights holders and pay special attention to indigenous women. In this context, the participation of indigenous women must be an overarching principle.¹⁴⁰ The involvement of indigenous women in international, national and sub-national forums, giving them the opportunity to stress their interests and rights concerning the realization of their right to food, needs to be ensured. Therefore, States should take concrete steps to increase the participation of indigenous women in governance and decision-making structures at all levels. States may encourage the appointment of qualified indigenous women to decision-making positions in the areas of administration and public service. In the right to food context, this means including representatives of indigenous women in institutions and organizations relevant to food security, in particular in food security coordinating bodies, food security authorities at regional and local levels and concerned NGOs. In order to ensure their effective and meaningful participation, States should increase indigenous women's capacity for decision-making and political participation, and ensure that adequate numbers of indigenous women are placed in political positions as well as in governance and public administration.

Disaggregated data by sex

An effective implementation of right to food for indigenous women requires a systematic analysis of data disaggregated not only by ethnicity and race but also by sex (see also Right to Food Guideline 13.2 and Section 3 of this chapter).

¹³⁹ See Art. 2(d), 21 and 26.

¹⁴⁰ For the relevance in the development context, see UNDG Guidelines, p. 6.

3.5. PROGRAMMES AND OPERATIONAL ACTIVITIES

All UN Country Teams must use a human rights-based approach to support country analysis and advocate for priorities in the national development framework. The United Nations Development Group Guidelines on Indigenous Peoples' Issues (UNDG Guidelines)¹⁴¹ provide guidance to assist the UN system to mainstream and integrate indigenous peoples' issues in processes for operational activities and programmes at country level and set out a framework for implementing a human rights-based approach to development.

The guidelines provide information on the international human rights framework that guides the UN's work on indigenous issues and also provide practical advice on designing programmes with a special focus on indigenous issues. The publication of these guidelines follows the adoption of the United Nations Declaration on the Rights of Indigenous Peoples.

Although the UNDG Guidelines do not mention the right to food explicitly, they provide human rights-based guidance for action in planning, implementation and evaluation of food security and related programmes and activities with a focus on indigenous peoples' issues (e.g. social security, education, land and fisheries).

¹⁴¹ Adopted on 1 Feb. 2008. The Guidelines were drafted by a group of UN organizations and specialized agencies under the aegis of the Inter-Agency Support Group on Indigenous Peoples' Issues. They are available at: <http://www2.ohchr.org/english/issues/indigenous/docs/guidelines.pdf>



The right to adequate food and indigenous peoples

How can the right to food benefit indigenous peoples?

LIST OF BOXES, ABBREVIATIONS AND ACKNOWLEDGEMENTS

INTRODUCTION

1. BACKGROUND AND CONTEXT

2. RIGHT TO FOOD OF INDIGENOUS PEOPLES

3. CRUCIAL ISSUES FOR INDIGENOUS PEOPLES FROM A RIGHT TO FOOD PERSPECTIVE

CONCLUSIONS

REFERENCES

Conclusions

This study analysed the most important aspects relevant to the right to food of indigenous peoples to show what protection the right to food provides for such groups and what added value it may have for their everyday life. The study has shown that various international legal instruments, whether binding or non-binding, provide protection of the right to food of indigenous peoples directly, indirectly or implicitly.

The paper argues for an explicit recognition of the collective right to food of indigenous peoples. Indeed the right to food of indigenous peoples cannot be realized – amongst others – without a sound legal basis which recognizes, respects and protects not only their individual right, but also their collective right to food as distinct groups. In the first place States should recognize indigenous peoples' collective right to food through national laws on indigenous peoples (rights). In addition, (subsidiary) food and nutrition security legislation should be adopted that specifically regulates the right to food of indigenous peoples granting them special consideration and special entitlements.

As also illustrated by a few court decisions, the right to adequate food is of additional value to indigenous peoples. Court cases, in which indigenous peoples were involved, have already proven that right to food provides indigenous peoples with an additional legal argument when claiming their rights or when challenging decisions or omissions of the State interfering with their right to food in front of administrative authorities or courts. Indeed the right to food as a cross-sectoral right may provide additional protection against violations in the case of illegal expropriation, a lack of access to adequate and culturally acceptable food or in the case of contamination of food sources through States, private persons or companies. Human rights compliant remedies for violations of indigenous peoples' right to food in addition to other rights should include in the first place restitution of the right and only, if not possible, compensation, by for example providing alternative land in the case of eviction.

The right to food does not only address the final outcome of eliminating hunger, but provides a holistic tool and approach for indigenous peoples to improve their food security situation. The human rights-based approach, normatively based on international human rights standards, determines in the food security context the relationship between indigenous groups and individuals as rights holders and the State with correlative obligations as a duty bearer. The application of the principles of participation, accountability, non-discrimination, transparency, human dignity, empowerment and rule of law (PANTHER) to food security enables indigenous peoples to realize their

The right to adequate food and indigenous peoples

How can the right to food benefit indigenous peoples?

right to food. The human rights-based approach requires States to take into account the needs of vulnerable groups, including indigenous peoples, to engage in processes that determine food security and related policies and decisions. This requires particular attention to indigenous peoples' specific circumstances and concerns through measures of non-discrimination and affirmative action. The Right to Food Guidelines should be used for guidance for policy decisions affecting indigenous peoples as they may provide additional protection and are conducive for a favourable environment for indigenous people to realize their right to food.

However, the process of clarifying the content of indigenous peoples' right to adequate food has just started. Indeed, right to food compliant laws and policies need to be put into practice to make them meaningful.¹⁴² This will only be possible when indigenous peoples assert their human rights (including the right to food) and exert pressure on States and their officials to meet their obligations and commitments. States on the other hand are required to respect and protect indigenous peoples' unique cultural identities and special concerns when realizing their right to food. Increased awareness and capacity of both rights holders and duty bearers is necessary for right to food to be realized.



The right to adequate food and indigenous peoples

How can the right to food benefit indigenous peoples?

LIST OF BOXES, ABBREVIATIONS AND ACKNOWLEDGEMENTS

INTRODUCTION

1. BACKGROUND AND CONTEXT

2. RIGHT TO FOOD OF INDIGENOUS PEOPLES

3. CRUCIAL ISSUES FOR INDIGENOUS PEOPLES FROM A RIGHT TO FOOD PERSPECTIVE

CONCLUSIONS

REFERENCES

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