



D. HUMAN RIGHTS BASED ALTERNATIVES AND TOOLS

- 92 **VIII. An Overview of Human Rights Instruments to Raise Concerns
About Trade and Investment Policies**
Elvira Domínguez Redondo and Magdalena Sepúlveda Carmona
- 102 **IX. Towards a Convention on the Rights of Peasants**
Christophe Golay
- 112 **X. Bridging the Divide: A human rights vision for global food trade**
Sophia Murphy and Carin Smaller

Elvira Domínguez Redondo and Magdalena Sepúlveda Carmona¹

VIII. AN OVERVIEW OF HUMAN RIGHTS INSTRUMENTS TO RAISE CONCERNS ABOUT TRADE AND INVESTMENT POLICIES

1. INTRODUCTION

The promise of human rights posits the legal recognition of the de facto and de jure equality of every individual human being, irrespective of their gender, race, ethnicity or other personal or group identifiers. This simple idea was premised on the need to ensure respect for communities by protecting their rights against encroachment, and in seeking ways to promote their different identities should there be agreement to seek such protection within the group. The location of the discourse of human rights within the discipline of law was important: it articulated the need for justice over order and suggested the need for a fulcrum of a legal formulation of equality and non-discrimination. Sixty years after the passage of the Universal Declaration for Human Rights the realization of this dream of equality remains distant, which could be attributed to an overt emphasis on the civil and political components of human rights rather than an all-encompassing indivisible approach that focuses on the economic, social and cultural alongside the civil and political aspects. At the international level, human rights have an added value: they are the axiological horizon of rules governing relationships between international subjects. The lack of global solidarity towards their general realization is reflected in the paucity of structures and political will to effectively combat global inequalities, fight extreme poverty and set up a fairer international economic order. Only the international regime of human rights offers some binding international standards to infuse ethical values in the relationships regulated by international law.

The impact of trade on the enjoyment of human rights has progressively gained the attention of non-governmental and governmental actors involved with the promotion and protection of human rights. However, any human rights approach to trade faces, inter alia, the challenge of adapting rights-oriented/legal concepts, methods, discourses and techniques to the evolution of the economy. Long-established legal tools and techniques used to promote and protect human rights are poorly equipped to deal with issues traditionally addressed by disciplines and methodologies unfamiliar to jurists and human rights experts.

The universal and regional human rights regimes created in the aftermath of the Second World War were designed on a model based on the strategy of “naming and shaming” states that were allegedly violating (civil and political) human rights of citizens under their jurisdiction. For decades, this approach has kept international human rights mechanisms focused on the promotion and protection of civil and political rights, the fight against impunity

and the delimitation of the elements that determine the responsibility of states for human rights violations. In addition, the “judicialization” of their mechanisms has been seen for many years as a natural legal route to progression in advancing the cause of human rights.

Today the relationship between trade and human rights makes news and drives much of the work of human rights and development advocates. This happens in the context of a general shift in the focus of human rights mechanisms towards efficiency on the ground. Human rights instruments and bodies can no longer ignore the effects of poverty and inequality in the enjoyment of human rights, and therefore are increasingly addressing economic, social and cultural rights, as well as the relationship between human rights, development and security.

Important efforts have been dedicated to analyzing the relationship between trade, investment policies and human rights. It is generally acknowledged that due to the different objectives pursued by the multilateral trading system and international human rights standards, trade and investment policies may have a negative impact on the enjoyment of human rights. However there is no general rule on how the relationship between these variables operates, i.e., there is no uniform rule determining that enhanced human rights protections lead to increased trade, or that increased trade leads governments to do more to protect human rights (Aaronson 2008). The same appears true of the relationship between human rights and investments.² The effects of trade and investment on the enjoyment of human rights are not uniform and will depend on the concrete circumstances where that trade and investment operate, the kind of trade and investment concerned or the actors and countries affected (Aaronson and Zimmerman 2008, 194-197).

Several human rights initiatives have resulted in policies and regulations linking human rights standards and trade agreements at regional and domestic levels. This is the case, for instance, of some incentive clauses introduced by the European Union in agreements adopted with countries complying with International Labour Organization standards (Polasky 2006, 36-38). This brief submission will not address these regional and domestic initiatives, but will analyze the human rights instruments that have so far dealt with the issue of trade and investment at the UN level. The first part is devoted to exploring the different strategies used to scrutinize the relationship between human rights, trade and investment policies as well as the efforts to develop normative standards in this area. The second part will focus on how UN conventional and charter-based

human rights mechanisms have gradually incorporated the question of trade and investment policies into the scope of their competence and activities. The paper concludes with a brief exposé of future avenues that are available for furthering issues concerned with trade and investment and their impact on human rights.

2. STANDARD SETTING: RELATIONSHIP BETWEEN TRADE, INVESTMENT POLICIES AND HUMAN RIGHTS

2.1. MAINSTREAMING HUMAN RIGHTS

At the UN level, a common strategy to combat the isolation in which human rights and other issues that affect human rights operate has been to recognize the transversal nature of rights and seek their mainstreaming within UN structures, in keeping with the organizational reforms of 1997. This has resulted in limited change, with its impact restricted to the secretariat of the Organization of the UN, i.e., it did not change how political decisions were made.³ Nonetheless the Office of the High Commissioner for Human Rights (OHCHR) has participated in open forums including the High-level Task Force and Open-ended Working Group on the Right to Development with Bretton Woods Institutions and the World Trade Organization in its efforts to instigate the integration of human rights considerations in their activities (OHCHR 2007a, 23).

Besides this general trend, specific efforts have been deployed aimed at understanding – and addressing accordingly – the impact of trade and investment policies on the enjoyment on human rights.

2.2. UNDERSTANDING THE IMPACT OF TRADE AND INVESTMENT POLICIES ON HUMAN RIGHTS

Several studies have been commissioned by bodies of experts on human rights to analyze and extrapolate the effects of the relationship between trade, investment policies and human rights from different perspectives. The OHCHR has identified seven relevant areas of action that would promote fairer trade to improve the enjoyment of human rights: agriculture, government procurement, intellectual property protection, investment, services, social labeling for fair trade, and public morals and general exceptions to trade and investment rules. In addition it has also identified equality and non-discrimination, participation, accountability and international cooperation as the human rights principles of particular relevance to trade. Accordingly, the OHCHR has prepared a series of reports address-

ing subjects such as trade and investment liberalization, the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), agricultural trade or the liberalization of trade in services.⁴ It has also conducted research and has disseminated several publications on the question of trade and human rights (OHCHR 2007b, 40). Each of these studies includes recommendations aimed at harmonizing trade and human rights goals. Among the general recommendations and proposals within this objective is the study of the OHCHR on the use of general exception clauses in WTO agreements as a means of ensuring that trade agreements maintain the flexibility needed for WTO members to meet their human rights obligations (OHCHR 2005).

Other UN human rights bodies have addressed the impact of trade on human rights focusing on specific areas under their competence. For instance, Paul Hunt (former UN Special Rapporteur on the right to everyone to the highest attainable standard of physical and mental health) published a report focusing on some of the technical issues that lie at the intersection of trade and the right to health, focusing on WTO member states and specific trade agreements relevant to the right to health such as: the Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS); the General Agreement on Trade in Services (GATS); or the Trade Policy Review Mechanism (TPRM).⁵ As part of this study he highlighted ways through which trade policies can deliver positive rights to health outcomes.

2.3. SETTING HUMAN RIGHTS STANDARDS

The duty of states to take appropriate legislative, administrative, budgetary, judicial and other measures to guarantee the enjoyment of human rights is well established in human rights law. In particular, states have the duty to take measures to ensure the fulfillment of basic socio-economic rights by the population under their jurisdiction. The Committee on Economic, Social and Cultural Rights (CESCR) has closely analyzed this obligation. Therefore, while human rights law does not specifically address trade agreements or investment policies, it has had to address it when these have had the impact of, or have played a role in, destroying persons' basic livelihood.

Many advocates of human rights have proposed guidelines to adopt a specific normative framework to ensure a harmonious co-existence of trade and human rights. The effort has not borne much fruit of this effort are few, however, and reduced to non-legally binding standards

developed by a few intergovernmental organizations and private bodies or NGOs, that mainly address the responsibility of multinational enterprises and transnational corporations instead of trade policies as such. The following are some of those instruments:

- The Draft UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights;⁶
- International Labour Organization (ILO) Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policies;⁷
- The UN Global Compact comprising ten principles in the areas of human rights, labor, environment and anti-corruption;⁸
- The Organization for Economic Cooperation and Development (OECD) Guidelines for Multinational Enterprises.⁹ Although dependent on the will of individual companies and not legally binding, the guidelines require that National Contact Points performing monitoring functions be established in each adhering country.
- The "Equator Principles": A financial industry benchmark for determining, assessing and managing social and environmental risk in project financing. Through this initiative many commercial banks around the world have agreed to adopt and follow International Finance Corporation (IFC) social and environmental policies (Watchman 2006, 15-18).

Not even the universally accepted *ius cogens* norm that prohibits torture has been supported in connection with proposals for codifying limitations to trade in goods used for torture or other cruel, inhuman or degrading treatment or punishment. The UN Special Rapporteur on torture has submitted studies on "the situation of trade in and production of equipment which is specifically designed to inflict torture or other cruel, inhuman or degrading treatment, its origin, destinations and forms."¹⁰ It is only recently that trade regulations have been introduced in this field, and even these are restricted to the European Union region.¹¹

3. USING HUMAN RIGHTS BODIES AND PROCEDURES TO RAISE TRADE CONCERNS

This section will outline the main UN human rights treaty-based and charter-based bodies that have used their competence and procedures to raise trade concerns.

The organs of experts (Committees) established by the "Core International Human Rights Instruments" are known

in UN terminology as “treaty-based” mechanisms, or procedures or institutions (or conventional mechanisms/procedures/institutions) since they were established and operate under the framework of a particular treaty. Conversely, other human rights monitoring mechanisms established by the decision of an organ of the UN are known as “charter-based” procedures. This includes the High Commissioner of Human Rights, the Human Rights Council and its subsidiary organs such as public special procedures including the rapporteurs mentioned above, the Expert Mechanism on the Rights of Indigenous Peoples and the Advisory Committee to the Human Rights Council.

3.1. UN HIGH COMMISSIONER FOR HUMAN RIGHTS

The High Commissioner for Human Rights and its office have a broad mandate that includes activities in the field, and the provision of technical cooperation and advisory services to countries in the field of human rights. The office is incorporating the trade dimension to the area of its activities and is encouraging some states to undertake human rights impact assessment of trade rules and policies following public and participatory process.

3.2. UN TREATY BODIES

Each of the “Core International Human Rights Instruments,” open for membership to all states, have established committees of experts to monitor the implementation of the treaty provisions by its states parties. The treaties in question are: the Covenant on Civil and Political Rights,¹² the Covenant on Economic, Social and Cultural Rights,¹³ the International Convention on the Elimination of All Forms of Racial Discrimination,¹⁴ the Convention on the Elimination of All Forms of Discrimination against Women,¹⁵ the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,¹⁶ the Convention on the Rights of the Child,¹⁷ the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families,¹⁸ the Convention on the Rights of Persons with Disabilities (and its Optional Protocol)¹⁹ and the International Convention for the Protection of All Persons against Enforced Disappearances.²⁰

By ratifying or accessing the core treaties named above, states agree to be bound by a range of monitoring systems. The committees of experts have competence mainly to: 1) Consider periodic reports to be submitted regularly by state parties detailing their implementation of

the treaty provisions; 2) Consider interstate complaints and issue decisions on possible treaty violations (only available under certain treaties);²¹ 3) Accept individual complaints and issue decisions on possible violations of any of the rights set forth in the treaties each committee monitors (available under all core treaties except the CESCR²² and the Committee on the Rights of the Child (CRC); and 4) Undertake confidential queries to investigate systematic violations of the provisions, as set forth by the Convention on the Elimination of Discrimination against Women (Optional Protocol, arts. 8-11); the Convention Against Torture (art. 20) and the Convention on the Rights of Persons with Disabilities (Optional Protocol, arts. 6-7). Some Committees have developed follow-up of their recommendations and early warning mechanisms (particularly the Committee on the Elimination of Racial Discrimination (CERD)).

Some of these procedures have been used to raise human rights concerns in connection with trade and investment policies. The CESCR has been a pioneer and the most active treaty-body in this regard. This Committee and the former Sub-Commission for the Promotion and Protection of Human Rights were among the first human rights voices to join protest from civil society against Multilateral Agreement on Investments (MAI), free trade and the WTO, calling for the recognition of human rights as a primary objective of trade, investment and financial policy (Dommen 2005). The CESCR has included specific comments and recommendations about effects of trade agreements on the enjoyment of economic, social and cultural rights, in many of its discussions with states, and in Concluding Observations to periodic reports.²³ Other Committees are progressively engaging with trade related issues affecting human rights under their monitoring competence. For instance, the CRC and the Human Rights Committee (HRC) have addressed the issue of access to medicines in relation with the right to health and the intellectual property agreements involved (3D 2007). The Committee on the Elimination of Discrimination Against Women (CEDAW) has recommended states Parties to consider the adverse impact that free trade agreements may have on living and working conditions of women and to undertake the appropriate impact assessments. Another issue increasingly present in the Committees’ consideration is the participation of possible victims of human rights violations in trade decision-making.²⁴ Accordingly, there is an increased use by NGOs of “shadow reports” to raise concerns on trade before CESCR and other Committees.²⁵

The day of general discussion on a theme designated by CESCR is an important forum for engaging in exchanges

of views regarding trade-related issues and their impact on human rights. The issue of trade has already been addressed in the following General Discussion Days: a) Globalization and its impact on the enjoyment of economic and social rights;²⁶ and b) The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.²⁷ The CESCR has called for further efforts by institutions such as the World Bank, regional development banks, the International Monetary Fund and the WTO to consider the impact of their activities on the full enjoyment of human rights, through its General Comments.²⁸

In addition CERD has developed its own early warning and urgent action mechanisms which are being targeted by indigenous peoples interested in highlighting the potential violation of their rights in relation to the activities of multi-national companies operating in their territories.²⁹

3.3. HUMAN RIGHTS COUNCIL

The Human Rights Council is the only intergovernmental body of the UN system devoted exclusively to the promotion and protection of human rights. This political body, consisting of representatives of 47 countries, is a subsidiary organ of the General Assembly and was created on March 15, 2006³⁰ to replace the main organ of the UN addressing human rights issues in the past: the UN Commission on Human Rights.³¹ The Human Rights Council has inherited the main mechanisms for monitoring human rights performance among the charter-based institutions from its predecessor, i.e., the public special procedures along with a confidential complaint procedure, and subsidiary bodies focused on standard-setting or specific thematic issues such as the development or effective implementation of the Durban Declaration and Programme of Action.

The Human Rights Council mandate includes promotional and protective human rights powers. Its meetings are public³² and any state members, observers and NGOs with consultative status can participate in the discussions. Some of the activities performed by this organ and its subsidiary bodies are directly relevant to trade related issues and their impact on human rights. Since the Human Rights Council is open to the contributions of civil society and any human rights-related issue falls under the scope of competence, this organ is a privileged forum to further develop the nexus between trade, investment policies and human rights.

3.3.1. Public Special Procedures

Public Special Procedures are monitoring mechanisms of human rights endorsed to individual experts (Special Rapporteurs, Special Representatives and Independent Experts) since 1967, whose common mandate is the investigation and reporting of human rights situations either in a specific territory (country mandates) or with regard to a phenomenon of violations (thematic mandates).³³ These procedures owe their existence to resolutions adopted by majority in the Human Rights Council and are thus not subject to specific consent of any state. The scope of their action is truly universal: all the states of the world are monitored by these bodies and they cover civil, political, economic, social and cultural rights as well as rights of solidarity such as issues related to development and the environment. Individual as well as collective rights are under scrutiny. Mandate holders have developed flexible methods of work and their activities go beyond reporting on activities and findings. Most accept complaints on human rights violations to which they can react expeditiously thorough urgent appeals. Mandate holders also carry out country visits to investigate the situation of human rights in specific domestic contexts. Access to special procedures is also characterized by the lack of formal requirements, enabling swiftness and flexibility.³⁴

Due to the direct connection between their mandates and trade-related issues, some rapporteurs have been particularly engaged in the analysis of the impact of trade and investment policies on human rights. This is the case of:

- a) The Independent Expert on the effects of foreign debt and other related international financial obligations of states on the full enjoyment of human rights, particularly economic, social and cultural rights. The Expert has been expressly given a mandate to explore further [&] the links to trade and other issues, including HIV/AIDS, when examining the effects of foreign debt and other related international financial obligations of states, and also to contribute, to the process entrusted with the follow-up to the International Conference on Financing for Development, with a view to bringing to its attention the broad scope of his/her mandate. ³⁵
- b) The Special Representative of the Secretary General on human rights and transnational corporations. The mandate of this Expert includes identifying and clarifying standards of corporate responsibility and accountability for transnational corporations and other business enterprises with regard to human rights. Professor Ruggie

has highlighted issues pertaining to the subordination of the human rights obligations of states to the promotion of the interests of transnational corporations. This bias in favor of transnational corporations has been generally justified on the basis that the ensuing increased trade and investment is beneficial for economic growth. Ruggie points to the 2,500 bilateral agreements, which provide protection for investors. These protections include access to international arbitration enabling companies to challenge the enactment of any legalization impacting them, even if this legislation is being enacted on the basis of the state's human rights obligations. He describes the result of this interplay between human rights obligations and investor protection as a skewed balance in favor of the latter.³⁶ While this mandate steers clear of tackling what many regard as a fundamental requirement for ensuring responsibility for corporate actions, namely the adoption of legally binding obligations on corporations, it does provide a potential avenue for exposing the extent to which non-transparent bilateral and multilateral trade agreements derogate from the human rights obligations of states that enter into them.

Other mandates have devoted attention to the nexus between investment policies, liberalization of trade and the impact on human rights and have recommended actions to the concerned stakeholders. We have already mentioned some contributions by the Special Rapporteur on the right to health and the Special Rapporteur on torture. The following examples are also illustrative of this trend impregnating all the spheres of activities of Special Rapporteurs (standard-setting, research based studies, monitoring of the compliance of human rights standards, country visits, individual complaints, etc.).

a) The Basic Principles and Guidelines on Development-Based Evictions and Displacement drafted by the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living include specific guidelines requesting the integration of binding human rights standards in international relations, including through trade and investment to avoid unlawful evictions.³⁷

b) The Special Rapporteur on the adverse effects of the illicit movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights has identified and analyzed the emergence of the new phenomena of export of contaminated vessels to developing countries for ship-breaking, trade in electronic waste and other movements of hazardous wastes facilitated by trade liberalization, deregulation of international markets and the creation of new free trade zones.³⁸

c) Mandate holders of public special procedures are introducing recommendations on the impact of trade and investment policies on the enjoyment of human rights in the reports resulting from their country missions. For instance, the former Special Rapporteur on the right to food who decided to address the impact of trade negotiations at WTO on the right to food as part of his mandate recommended to the Guatemalan authorities that they study the potential impact of the Central American Free Trade Agreement to ensure that the obligations entered by means of this agreement were consistent with human rights.³⁹

The Special Rapporteur on torture has made a commitment to examine the situation of trade in instruments used for torture in the course of country visits and to transmit communications to governments concerning allegations of trade in security and law enforcement technology used for torture. In addition, this Rapporteur called upon the Committee against Torture to examine this question when considering states' Section 0 periodic reports.⁴⁰

3.3.2. Special Session on the Right to Food

The Human Rights Council has recently raised concerns on the impact of trade and investment policies on human rights in a rather unexpected forum: its special session. The Human Rights Council can hold Special sessions when the urgency of the situation requires it. While these sessions (also celebrated by the former UN Commission on Human Rights) have traditionally addressed country situations in the context of armed conflicts,⁴¹ the 7th special session, held in May 2008, was the first to address a thematic issue: The Negative Impact on the Realization of the Right to Food of the Worsening of the World Food Crisis, caused Inter Alia by the Soaring Food Prices. This represents a remarkable milestone for the advancement of economic, social and cultural rights and the understanding of human rights emergencies beyond potential or actual armed conflicts.⁴² Moreover, many governmental representatives and NGOs took the floor to underline the relationship between the food crisis, the privatization and liberalization of markets, and the policies imposed by Bretton Woods institutions and trade agreements.⁴³ During the special session, the CE-SCR issued a statement urging states to revise the global trade regime under WTO to ensure that global agricultural trade rules promote the right to food.⁴⁴ The Special Rapporteur on the right to food, Olivier De Schutter, responsible for the background paper of that session, also highlighted the role played in the food crisis by both speculative investment and trade liberalization particularly within net food-importing countries (De Schutter 2008).

3.3.3. Human Rights Council Advisory Committee

Following its first session in August 2008 this body, successor of the former Sub-Commission on the Promotion and Protection of Human Rights, proposed to conduct a study on the right to food addressing the questions of state obligations and the rights of peasants as well as the causes and consequences of the current global food crisis (citing among others: speculation, financial measures made by international financial agencies and agricultural export subsidies).⁴⁵

3.3.4. Universal Periodic Review

The only substantial change introduced in the mandate of the Human Rights Council from that of its predecessor is the existence of a periodic review mechanism to evaluate the fulfillment of human rights obligations by all states: the so-called Universal Periodic Review (UPR). All countries are required to be reviewed under the UPR. Since four years is the established periodicity for the first cycle of the review, 48 states per year will be reviewed during three sessions of the working group lasting two weeks each.

The standards used as a basis for the review include voluntary pledges and commitments made by states, including those undertaken when presenting their candidatures for election to the HRC. Human rights advocates can use the mechanism to ensure that states include, among their voluntary pledges and commitment, issues regarding trade agreements and policies that may impact the enjoyment of human rights. In addition there is an open channel for introducing trade concerns in the three documents issued before the working group of the UPR, as basis for interactive dialogue, namely:

- 1) the national report or written presentation of the state under Review;
- 2) the compilation prepared by the OHCHR of information contained in the reports of treaty bodies, special procedures and other relevant UN official documents; and
- 3) the summary prepared by the OHCHR of other reliable information provided by relevant stakeholders (mainly NGOs, National Human Rights Institutions and regional intergovernmental organizations).

Apart from providing input via the aforementioned reports, civil society participation at the UPR mechanism is limited. Therefore if the issue of trade and investment policies is to be introduced on the agenda it will be

essential that NGOs target governments, particularly those of the Troika, willing to raise the question during the interactive dialogue among states.

3.3.5. Expert Mechanism on Indigenous Peoples

This new body created in December 2007⁴⁶ consists of five independent experts and is mandated to provide thematic expertise on the rights of indigenous peoples, focusing mainly on studies and research-based advice, and to suggest proposals to the Council for its consideration and approval.

The thematic nature of the work to be conducted by the expert mechanism places emphasis on self-determination, participation and free prior informed consent in decision-making. This provides significant scope for the conduct of research and the development of recommendations addressing the impact of trade and investment policies on the rights of indigenous peoples. Given that indigenous peoples are among those most impacted by trade and investment policies globally, and that they have, in the past, been vocal regarding their exclusion from decision making processes in relation to these policies, a thematic focus on the linkages between these policies and indigenous peoples rights may be an area of interest to the expert mechanism in future sessions.

4. POTENTIAL FUTURE AVENUES FOR ENGAGEMENT WITH THE ISSUE OF TRADE AND INVESTMENT POLICIES AND HUMAN RIGHTS

The recent increase in the number of trade agreements pertaining to biofuels (as a result of policies designed to decrease dependency on oil) and the increased emphasis placed on foreign direct investment in the extractive sector by the UN Conference on Trade and Development (UNCTAD) among others, are but two examples of current trends in trade and investment policies that have significant impact on the realization of human rights for many communities and individuals. In light of the increasing pervasiveness of the impact of trade and investment on human rights, a more proactive and creative engagement is clearly required on behalf of the human rights regime to address the skewed nature of the protection afforded to investors vis-à-vis human rights holders.

The following are some provisional suggestions on possible avenues that could be pursued within the existing human rights machinery to advocate for a more balanced approach to trade, investment and human rights:

a) Examine options for thematic discussions within the Treaty Bodies on the nexus of human rights obligations and trade and investment policies. This could be done with a view to encouraging and providing input into the elaboration of a general recommendation addressing the issue from the perspective of the bodies.⁴⁷ The CE-SCR would appear most appropriately placed to address this subject having addressed related issues in its general recommendation on the right to water. Thematic discussions could address the human rights obligation of states under Article 2(1) and its implications for multilateral and bilateral trade agreements. Another example in the context of ICERD is a session examining the extent of de facto discrimination against indigenous peoples resulting from trade agreements or the encouragement of foreign direct investment in indigenous territories.

b) Seek clarification from the ICJ in relation to legal lacuna regarding trade agreements and human rights obligations. There is a lack of legal clarity pertaining to implications of states' human rights obligations under international human rights treaties vis-à-vis their trade and investment policies. In fact the tendency in recent years has been to favor the rights of investors over the obligations of states to uphold human rights. An advisory opinion or ruling by the ICJ on this matter, or an aspect of it such as conditioning trade agreements and associated arbitration mechanism (which generally lack transparency) on human rights obligation, could address this lacuna in international law. UN agencies whose mandates are directly impacted could potentially request an advisory opinion from the ICJ on related questions of law impacting their work and ability to fulfill their mandates. Likewise, states that are considering revising legislation to reflect the evolving human rights normative framework, but which are constrained by multilateral or bilateral trade agreements or arbitration mechanisms, could take a case to the ICJ to clarify their margin of appreciation in relation to human rights obligations and trade and investment priorities. Any emerging decisions or advisory opinions may have implications for WTO agreements and dispute resolution mechanisms.

c) Taking complaints under ILO Conventions, such as ILO Convention 111 on Discrimination in Employment and Occupation, could also be used as an avenue to challenge trade and investment policies. Potential examples include cases where traditional livelihoods of indigenous peoples are rendered impossible as a result of these policies, thereby constituting de facto discrimination against them on the basis of encouraging investment in particular sectors that require access to their lands and resources.

d) Informing the work of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises to ensure that adequate attention is paid in the development of his proposed protect, respect and remedy framework to the role of human rights in the formulation of trade and investment policies and the associated protections afforded to transnational corporations and other businesses.

e) Increased focus in human rights submissions on the correlation between violations of human rights and the trade and investment policies that are determinant in the contexts in which these violations occur. Doing so could facilitate on-going cross-departmental governmental dialogues within and among states, and address the existing dichotomy between human rights issues and trade and investment policies that is at the root of many of the inconsistencies in the existing international regimes.

¹ The authors would like to thank Cathal Doyle for his comments and contribution to this paper.

² Human rights, trade and investment. Report of the High Commissioner for Human Rights. Fifty-fifth session of the Sub-Commission on the Promotion and Protection of Human Rights, UN doc. E/CN.4/Sub.2/2003/9 (2003) paragraphs 5-19.

³ All UN Departments, Offices, Funds and Programmes were divided in five sectoral areas, namely: 1) Peace and Security; 2) Economic and Social Affairs, 3) Development Cooperation, 4) Humanitarian Affairs; and 5) Human rights. An Executive Committee was established for the first four areas while human rights was designated as a cross-cutting issue with participation in each of the other four sectors. Therefore, ostensibly human rights are since incorporated into all the institutional structures of the UN. See UN docs. A/51/829, sec. A, Strengthening of the United Nations System Programme Budget for the Biennium 1996-1997 (17 March 1997), and A/52/584, para. 26, United Nations Reform: Measures and Proposals (10 November 1997).

⁴ See Human rights as the primary objective of international trade, investment and finance policy and practice, Working Paper submitted by J. Oloka-Onyango and Deepika Udagama in accordance with Sub-Commission resolution 1998/12, UN doc. E/CN.4/Sub.2/1999/11 (1999); Preliminary study of the independent expert on the right to development, Mr. Arjun Sengupta, on the impact of international economic and financial issues on the enjoyment of human rights, UN doc. E/CN.4/2003/WG.18/2 (2002); Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, UN doc. A/HRC/8/5 (2008); Report of the High Commissioner on Human Rights Agreement on Trade-Related Aspects of Intellectual Property Rights, UN doc. E/CN.4/Sub.2/2001/13 (2001); Report of the High Commissioner on Human Rights on the liberalization of trade in services and human rights, UN doc. E/CN.4/Sub.2/2002/9 (2002); or the Report of the High Commissioner for Human Rights on human rights,

trade and investment, UN doc. E/CN.4/Sub.2/2003/9 (2003); Human Rights on the fundamental principle of non-discrimination in the context of Globalization, UN doc. E/CN.4/2004/40 (2004); Analytical study of the High Commissioner for Human rights on the fundamental principle of participation and its application in the context of globalization, UN doc. E/CN.4/2005/41 (2005).

⁵ Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Paul Hunt, on his mission to the World Trade Organization, UN doc. E/CN.4/2004/49/Add.1 (2004).

⁶ Drafted by the former Sub-Commission on the Promotion and Protection of Human Rights, UN doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003). The lack of support of this initiative was clearly shown by the UN Commission on Human Rights that felt compelled to affirm that the draft proposal had no legal standing and therefore the Sub-Commission should not perform monitoring function in this field, UN Commission on Human Rights Decision 2004/116 of 20 April 2004, paragraph c).

⁷ Adopted by the Governing Body of the International Labour Office in November 1977 and amended in November 2000.

⁸ Launched by the UN Secretary General in 1999 consisting of nine principles and revised in 2004 to introduce a tenth principle.

⁹ Adopted in 1976 and revised in 2000.

¹⁰ UN docs. E/CN.4/2005/62 (2005), paragraphs 12-39; E/CN.4/2004/56 (2004), paragraphs 66-68; A/58/120, paragraphs 22-28; and E/CN.4/2003/69 (2003).

¹¹ On 31 July 2006 the European Commission brought into force the European Trade Regulations No. 1236/2005 concerning trade in goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment. Flaws in this regulation have been criticized by Amnesty International: EU: Torture instruments trade regulations flawed and inadequate.

¹² Adopted on 16 December 1966, entry into force 23 March 1976. Its first additional Protocol establishing the competence of the Human Rights Committee to deal with individual petitions was adopted and entered into force at the same time as the Covenant. A Second additional protocol aiming at the abolition of the death penalty was adopted on 15 December 1989 (entry into force 11 July 1991).

¹³ Adopted on 16 December 1966, entry into force 3 January 1976. An additional Protocol opening an international channel through which victims could complain about the violation on economic, social and cultural rights was adopted by the Human Rights Council on 18 June and it is expecting its final adoption by the UN General Assembly by the end of 2008.

¹⁴ Adopted 21 December 1965, entry into force 4 January 1969.

¹⁵ Adopted on 18 December 1979, entry into force 3 September 1981. Its Optional Protocol conferring to the Committee monitoring this treaty competence to deal with individual complaints was adopted on 10 December 1999 (entered into force 22 December 2000).

¹⁶ Adopted on 10 December 1984, entry into force 26 June 1987. Its Optional Protocol was adopted on 18 December 2002 (entry into force 22 June 2006) establishing a system of preventive visits.

¹⁷ Adopted on 20 November 1989 (entry into force 2 September 1990) Two additional Protocols to this Convention were adopted on 25 May

2000 on the rights on the sale of children, child prostitution and child pornography; and on the involvement of children in armed conflict. Both Protocols entered into force in 2002.

¹⁸ Adopted on 18 December 1990 (entered into force 1 July 2003).

¹⁹ Adopted on 13 December 2006 (entered into force 12 May 2008).

²⁰ Adopted on 20 December 2006 (not yet in force).

²¹ Covenant on Elimination of All Forms of Racial Discrimination (articles 11-13); International Covenant on Civil and Political Rights [Art 41 (1)]; Convention Against Torture (Art. 21). All the other treaties setting up this procedure require the specific consent of the State Parties: the International Covenant on Civil and Political Rights [Art 41(1)]; the Convention Against Torture [Art 21] and the International Convention on Migrant Workers [Art 75]. Although states remain reluctant to denounce other states for human rights violations before the Committees, it seems they are increasingly willing to take cases against other states for the violation of provisions of human rights treaties in other fora, particularly, the International Court of Justice. See *Armed Activities on the Territory of the Congo: New Application. Democratic Republic of Congo v Rwanda*, Judgment of 3 February 2006, ICJ Reports 2006, No. 126. Also, the pending case instigated by Republic of Georgia on 12 August 2008 against the Russian Federation for its actions in breach of the International Convention on the Elimination of All Forms of Racial Discrimination.

²² As stated above, the adoption by the General Assembly of the Protocol to this treaty (and its subsequent ratification by states) will also open this channel for the Covenant on Economic, Social and Cultural Rights.

²³ A compilation of the CESCR Section 0s reference to trade-related issues in its examination of State Reports between 2002 and May 2005, can be found in Fabre 2006.

²⁴ See for instance UN docs CEDAW/C/NER/CO/2 (2007, Niger), paragraphs 35 and 36, and CEDAW/C/GUA/CO/6 (2006, Guatemala), paragraphs 31 and 32.

²⁵ For instance, the NGO 3D presented, among many other similar submissions, a paper on *The Impact of Liberalization in Services on the Right of the Child to the Highest Attainable Standard of Health* to the NGO Group for the CRC Sub-group on health, on 19 March 2004 (all available at: <http://www.3dthree.org>).

²⁶ UN doc. E/C.12/1998/8 (1998).

²⁷ Organized in cooperation with the World Intellectual Property Organization (WIPO), May 2008 (report not available at the time of writing this paper).

²⁸ See CESCR General Comment 14 on the Right to Health, UN doc. E/C.12/2000/4, paragraph 64.

²⁹ For more on these decisions see <http://www2.ohchr.org/english/bodies/cerd/early-warning.htm> (accessed October 12, 2008).

³⁰ General Assembly Resolution 60/251 of 3 April 2006.

³¹ Created in 1946 as a subsidiary body of the Economic and Social Council (ECOSOC) it consisted of representatives of 53 states and used to meet publicly once a year.

³² That can also be followed by Webcast connecting to <http://www.un.org/webcast/unhrc/index.asp> (accessed October 13, 2008).

³³ The list of existing special procedures is available at: <http://www2.ohchr.org/english/bodies/chr/special/index.htm> (accessed October 13, 2008).

³⁴ For an overview of the work of special procedures see, Draft Manual of

the United Nations Special Procedures, 2006 available at <http://www2.ohchr.org/english/bodies/chr/special/index.htm> (accessed October 13, 2008).

³⁵ Human Rights Council Resolution 7/4, 27 March 2008. The latest contribution on this issue by this Expert can be found in his annual report A/HRC/7/9 (2008), particularly paragraphs 30, 35 and 36; and his report on the mission to Burkina Faso, A/HRC/7/9/Add.1 (2008), paragraph 60.

³⁶ Report of the Special Representative on the issue of human rights and transnational corporations and other business enterprises, Protect, Respect and Remedy: A framework for Business and Human Rights, UN doc. A/HRC/8/5 (2008) paragraphs 33 and 34.

³⁷ Annex 1 of the Report of the Special Rapporteur on adequate housing, UN doc. A/HRC/4/18, para. 27 and 71.

³⁸ UN doc. E/CN.4/2004/46 (2004).

³⁹ UN doc. E/CN.4/2006/44/Add.1 (2006, mission to Guatemala), para. 58.

⁴⁰ UN doc. E/CN.4/2005/62 (2005), para. 38 and 39.

⁴¹ By 30 August 2008, 7th Special Sessions had been held on the situation of the following territories: occupied Palestinian territories, Lebanon, Myanmar and Darfur.

⁴² A summary and commentary on the session can be found in Council Monitor 2008.

⁴³ Among them, the representatives of Egypt (speaking on behalf of the African Group), Brazil, Bolivia, Chile, Cuba, Colombia, Ecuador, India, Indonesia, Mauritius, Nigeria, Peru, Philippines and Sri Lanka. See also statements of NGOs such as North and South XXI and the International Centre for Human Rights and Democratic Development. Live Webcast archives of the session are available at: <http://www.un.org/webcast/unhrc/archive.asp?go=017> (accessed October 13, 2008).

⁴⁴ UN doc. E/C.12/2008/1 (2008), paragraph 13.

⁴⁵ Advisory Committee Resolution 1/8, 14 August 2008.

⁴⁶ Human Rights Council Resolution 6/36 14 December 2007.

⁴⁷ CERD conducted such a session at its 73rd Session addressing the topic of Special Measures with a view to the future elaboration of a general recommendation on the topic.

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Christophe Golay

IX. TOWARDS A CONVENTION ON THE RIGHTS OF PEASANTS¹

1. INTRODUCTION

Peasants have always been among the first victims of hunger and multiple violations of human rights all over the world. For hundreds of years they have been forcibly evicted from their lands. Their claims have been met by violent repression. Every year thousands of peasants are killed defending their rights to land, water, seeds and other productive resources. For centuries, such violations were committed in the name of the civilizing mission of colonialism; in recent decades, it has been done in the name of neo-liberal free-market policies, which favor highly mechanized, export-oriented agricultural production and the interests of multinational corporations.

Violations of the rights of peasants include the discrimination experienced by peasant families in the exercise of their rights to food, water, healthcare, education, work and social security and the states' failure to implement land reforms and rural development policies which would help to remedy this situation. They also include the exclusion of peasant farmers from their local markets, due to both market deregulation in their countries and cheap imports coming from the global north as a result of dumping practices. They include forced evictions and displacement of peasant families and the confiscation of seeds by transnational corporations who own the patents. Moreover, when peasants try to organize themselves against these violations, they are often criminalized, arbitrarily arrested and detained or physically attacked by private or state police forces (Golay 2009a).²

To address the problem, La Vía Campesina, the international peasant movement founded in 1993, has spent more than ten years denouncing these violations of the rights of peasants to the United Nations. These denunciations, taken up by CETIM at the end of the 1990s, were then presented, in the form of annual reports, at parallel events to the Human Rights Commission, in collaboration with another NGO, FIAN International. At the same time, La Vía Campesina was engaged in a lengthy process of drawing up a comprehensive definition of the rights of peasants until, in June 2008, after seven years of internal discussion and consultation with its member organizations, it finally adopted The Declaration of the Rights of Peasants – Men and Women.³

It took the United Nations a long time to understand La Vía Campesina's demands. It was only with the creation of the Human Rights Council in June 2006, and the work of its Special Rapporteur on the right to food

and its advisory committee in response to the global food crisis, that the rights of peasants were discussed by the United Nations for the first time. In 2009, La Vía Campesina was also invited to the UN General Assembly to give its view on the world food crisis and the possible solutions to overcome it. One of the solutions it offered was The Declaration of the Rights of Peasants – Men and Women.⁴

This article is divided into three parts. The first part deals with the recognition currently given to the rights of peasants in international human rights law (2). The second part looks at La Vía Campesina's Declaration of the Rights of Peasants – Women and Men (3). The third part examines the current state of discussions on the rights of peasants within the United Nations (4).

2. CURRENT RECOGNITION OF THE RIGHTS OF PEASANTS IN INTERNATIONAL HUMAN RIGHTS LAW

The rights of peasants are not subject to any specific protection under international law. However, peasants, like all human beings, benefit from the protection of the rights enshrined in the universal instruments for the protection of human rights, in particular the International Covenant on Economic, Social and Cultural Rights (ICESCR) (2.1) and the International Covenant on Civil and Political Rights (ICCPR) (2.2). As a complement to this universal protection, women peasants and indigenous peasants also benefit from the protection granted by the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and by the United Nations Declaration on the Rights of Indigenous Peoples (2.3).

2.1. ECONOMIC, SOCIAL AND CULTURAL RIGHTS

Many of the economic, social and cultural rights enshrined in the ICESCR have been interpreted by UN experts as offering significant protection for peasants' rights. Of these, the most important are the right to food, the right to adequate housing and the right to health.

The right to food

The right to food is enshrined in Article 25 of the Universal Declaration of Human Rights and in Article 11 of the ICESCR (Golay 2009b). In a number of UN documents, it has been interpreted as the right of all people to "be able to feed themselves, by their own means, with dignity."⁵

It has also been interpreted as "the right to have regular, permanent and free 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 ensures a physical and mental, individual and collective, fulfilling and dignified life free of fear."⁶

According to the Right to Food Guidelines, adopted unanimously by the member states of the UN Food and Agriculture Organization (FAO) in November 2004, the right to food protects the right of peasants to have access to productive resources or the means of production, including land, water, seeds, microcredit, forests, fish and livestock.⁷ In the same guidelines, states recommended the following:

"States should pursue inclusive, non-discriminatory and sound economic, agriculture, fisheries, forestry, land use, and, as appropriate, land reform policies, all of which will permit farmers, fishers, foresters and other food producers, particularly women, to earn a fair return from their labour, capital and management, and encourage conservation and sustainable management of natural resources, including in marginal areas."⁸

The states also unanimously accepted their obligation to respect, protect and fulfill the right to food in the following way:

"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 pro-poor growth. [...] States should also provide women with secure and equal access to, control over, and benefits from productive resources, including credit, land, water and appropriate technologies."⁹

This interpretation of the right to food already offered significant protection to the rights of peasants, but the Committee on Economic, Social and Cultural Rights (CESCR) took it further by pointing out that on the basis of the ICESCR, member states were under an obligation to ensure sustainable access to water for agriculture in order to implement the right to food, and that they should ensure that the most disadvantaged and marginalized workers, including women, had access, on an equal basis, to water and water management, and especially to sustainable techniques for gathering rain water and for irrigation.¹⁰

Furthermore, in several of its concluding observations, the committee set out the need to protect peasant families' access to seed. In its concluding observations addressed to India, for example, it urged the state to, "provide state subsidies to enable farmers to purchase generic seeds which they are able to re-use, with a view to eliminating their dependency on multinational corporations."¹¹

The right to adequate housing

The right to adequate housing, like the right to food, is enshrined in Article 25 of the Universal Declaration of Human Rights and Article 11 of the ICESCR (Golay and Özden 2007). In its General Comment 4, the Committee on Economic, Social and Cultural Rights states that the right to housing should not be interpreted in a narrow or restrictive sense which equates it with, for example, the shelter provided by merely having a roof over one's head. Rather, it should be seen as "the right to live somewhere in security, peace and dignity."¹² The former UN Special Rapporteur on the right to adequate housing defined it like this: "The human right to adequate housing is the right of every woman, man, youth and child to gain and sustain a secure home and community in which to live in peace and dignity."¹³

On the basis of the ICESCR, every person – including peasants – has a right to housing which guarantees, at all times, the following minimum conditions:

- legal security of tenure, including protection against forced eviction;
- availability of essential services, materials, facilities and infrastructure, including access to safe drinking water and sanitation;
- affordability, including for the poorest, through housing subsidies, protection against unreasonable rent levels or rent increases;
- habitability, including protection from cold, damp, heat, rain, wind or other threats to health;
- accessibility for disadvantaged groups, including the elderly, children, the physically disabled and victims of natural disasters;
- a suitable location, which means removed from sources of pollution while being close to schools and healthcare services.¹⁴

The Committee on Economic, Social and Cultural Rights provided that states must put an end to forced evictions, defined as: "the permanent or temporary removal against their will of individuals, families and/or commu-

nities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection."¹⁵ These forced evictions are prima facie incompatible with the states' obligations under the ICESCR and "notwithstanding the type of tenure, all persons should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats."¹⁶

In a number of reports, the former Special Rapporteur on the right to adequate housing has also emphasized the need to put an end to forced evictions and he has produced the Basic Principles and Guidelines on Development-Based Evictions and Displacement.¹⁷ According to these guidelines, it is, for example, a violation of the right to adequate housing when a government evicts peasant families from their land without ensuring that the families concerned have been adequately consulted and re-housed in equivalent conditions or have received adequate compensation.

The right to health

The right to health is enshrined in Article 25 of the Universal Declaration of Human Rights and Article 12 of the ICESCR (Özden 2006). In its General Comment 14, the Committee on Economic, Social and Cultural Rights defined it as "the right to enjoy the highest attainable standard of health conducive to living a life in dignity."¹⁸

The right to health includes the provision of adequate health care but also: "the underlying determinants of health, such as access to safe and potable water and adequate sanitation, an adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions, and access to health-related education and information, including on sexual and reproductive health. A further important aspect is the participation of the population in all health-related decision-making at the community, national and international levels."¹⁹

According to the ICESCR, states are required to ensure that medical services and the underlying determinants of health are available to all, including those living in rural areas.²⁰ States have a minimum core obligation to provide, as a minimum and at all times, the following:

- The right of access to health facilities, goods and services on a non-discriminatory basis, especially for vulnerable or marginalized groups;
- Access to basic shelter, housing and sanitation, and an adequate supply of safe drinking water;

- Essential drugs, as periodically defined under the WHO Action Programme on Essential Drugs.²¹

2.2. CIVIL AND POLITICAL RIGHTS

The International Covenant on Civil and Political Rights (ICCPR) protects peasants, as it protects all human beings. In particular the right to life, the right to be free from arbitrary detention, the right to a fair trial, and the rights to freedom of expression and freedom of association are fundamental rights of all peasants.

The Human Rights Committee, which oversees the implementation of the ICCPR, stressed the fundamental importance of the right to life in its General Comment no 6. According to the HRC:

“The protection against arbitrary deprivation of life which is explicitly required by the third sentence of article 6 (1) is of paramount importance. The Committee considers that States parties should take measures not only to prevent and punish deprivation of life by criminal acts, but also to prevent arbitrary killing by their own security forces. The deprivation of life by the authorities of the State is a matter of the utmost gravity.”²²

On the basis of the ICCPR, all human beings also have the right not to be arbitrarily arrested or detained and the right to have access to a judge and a fair trial if they are arrested (Articles 9 & 14). Anyone deprived of his or her liberty has the right to be treated humanely and with respect (Article 10). All people similarly have the right to freedom of expression, the right of free association with others, including the right to form and join trade unions for the protection of their interests, and the right to peaceful assembly (Articles 19, 21 and 22).

Arbitrary arrests, detentions and extrajudicial executions of peasant leaders are therefore serious violations of the ICCPR, as are infringements on their freedom of expression, freedom of association and the right to peaceful assembly by peasant movements.

2.3. THE RIGHTS OF WOMEN AND INDIGENOUS PEOPLES

A major aim of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) is to put an end to discrimination against women in rural areas. Article 14 of the convention specifically pro-

tections the rights of women living in rural areas against discrimination in their access to resources, including land, and in their access to work, adequate housing and programs for social security, health and education. According to this article:

“1. States Parties shall take into account the particular problems faced by rural women and the significant roles which rural women play in the economic survival of their families, including their work in the non-monetized sectors of the economy, and shall take all appropriate measures to ensure the application of the provisions of the present Convention to women in rural areas.”

“2. States Parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right:

- (a) To participate in the elaboration and implementation of development planning at all levels;
- (b) To have access to adequate health care facilities, including information, counselling and services in family planning;
- (c) To benefit directly from social security programmes;
- (d) To obtain all types of training and education, formal and non-formal, including that relating to functional literacy, as well as, inter alia, the benefit of all community and extension services, in order to increase their technical proficiency;
- (e) To organize self-help groups and co-operatives in order to obtain equal access to economic opportunities through employment or self-employment;
- (f) To participate in all community activities;
- (g) To have access to agricultural credit and loans, marketing facilities, appropriate technology and equal treatment in land and agrarian reform as well as in land resettlement schemes;
- (h) To enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications.”

In several of its concluding observations, the Committee on the Elimination of Discrimination against Women, which oversees the implementation of the convention by states parties, required that women in rural areas should be given priority in development programs and that the state should appeal, if necessary, for international assistance and cooperation.²³ In other concluding observations, it recommends that the state party should protect women’s access to land against the activities of

private business and against forced evictions.²⁴ In its concluding observations addressed to India for example, it makes the following recommendation:

“The Committee urges the State party to study the impact of megaprojects on tribal and rural women and to institute safeguards against their displacement and violation of their human rights. It also urges the State party to ensure that surplus land given to displaced rural and tribal women is cultivable. Moreover, the Committee recommends that efforts be made to ensure that tribal and rural women have individual rights to inherit and own land and property.”²⁵

CEDAW and its monitoring body offer, therefore, significant protection for the rights of women peasants.

Indigenous peasants possibly suffer even more than other groups from forced evictions and displacements. Until recently, the only international instrument that offered them any specific protection was the ILO C169 Indigenous and Tribal Peoples Convention of 1989, ratified by 20 states. This ILO Convention protects a large number of civil, political, economic, social and cultural rights. In particular, Articles 13 to 17 enshrine the rights of indigenous people to their land, their territories, and their right to participate in the use, management and conservation of these resources. It also enshrines the right of indigenous peoples to participation and consultation regarding all uses of resources on their lands, and the prohibition of their eviction from their lands and territories.

The adoption of the United Nations Declaration on the Rights of Indigenous Peoples by the Human Rights Council in June 2006, and by the General Assembly in December 2008, represented therefore a major step forward in the protection of the rights of indigenous peasants.²⁶ The declaration begins by recognizing that indigenous peoples, both individually and collectively, have the right to the full enjoyment of all human rights and all fundamental liberties recognized in the United Nations Charter, the Universal Declaration of Human Rights and in international human rights law. It then goes even further than the ILO Convention, in recognizing that indigenous people also have the right of self-determination and the right to land and productive resources. It refers to the injustices that occurred as a result of colonialism and highlights the threat that globalization currently poses. It recognizes the importance of traditional knowledge, biodiversity and the safeguarding of genetic resources and calls for limits on activities that third parties can carry out on the lands belonging to indigenous communities.

The adoption of the United Nations Declaration on the Rights of Indigenous Peoples represents a major step forward in safeguarding the right of indigenous peasant populations, which goes far beyond the rights enshrined in the ICCPR and the ICESCR. The fact that the declaration has already been taken up by certain countries, such as Bolivia, and adopted into their national law, enshrines these rights at the national level and should allow indigenous populations to demand legal remedies in the case of violations.

3. THE ADOPTION OF THE DECLARATION OF THE RIGHTS OF PEASANTS BY LA VÍA CAMPESINA

La Vía Campesina is the largest group of peasant organizations that has ever been created. It came into being in 1993, two years before the creation of the World Trade Organization (WTO), to defend the life, land and dignity of peasant families all over the world. La Vía Campesina’s main concern and policy framework has always been food sovereignty (CETIM 2002). However, for more than ten years now, it has also worked on the promotion and protection of the rights of peasants. As already stated, La Vía Campesina, in collaboration with the NGO FIAN International, has published annual reports in 2004, 2005 and 2006, detailing violations of the rights of peasants worldwide. In June 2008, after several years of internal discussion and consultation, it adopted the Declaration of the Rights of Peasants – Women and Men.²⁷

After describing the process leading up to the adoption of the Declaration of the Rights of Peasants – Women and Men by La Vía Campesina in June 2008 (3.1), we will look at the contents of the declaration (3.2) and La Vía Campesina’s call to action (3.3).

3.1. THE ADOPTION OF THE DECLARATION OF THE RIGHTS OF PEASANTS – MEN AND WOMEN AT THE LA VÍA CAMPESINA CONFERENCE ON THE RIGHTS OF PEASANTS, IN JAKARTA, JUNE 2008.

After a consultation process that lasted seven years, and involved its member groups, La Vía Campesina adopted the Declaration of the Rights of Peasants – Men and Women at the International Conference on Peasants’ Rights in Jakarta in June 2008. The conference brought together about a hundred delegates drawn from 26 countries and representing the various peasant groups that make up La Vía Campesina.

The adoption of the declaration was the final stage of a long process of drafting and consultation. The first draft of the declaration on the rights of peasants was presented to La Vía Campesina's Regional Conference on the Rights of Peasants, which was held in Jakarta in April 2002, following various conferences and events in 2000 and 2001 (Saragih 2005). The wording of the Declaration was discussed by individual member organizations and was finalized at the International Conference on the Rights of Peasants in 2008. The International Co-ordination Committee of La Vía Campesina ratified the final text in Seoul in March 2009.

The fact that La Vía Campesina is made up of more than 140 peasant organizations from nearly 70 different countries and represents more than 200 million peasants, and the fact that their declaration was adopted after a long process of internal discussion, gives the Declaration of the Rights of Peasants – Men and Women a great deal of authority.

3.2. THE CONTENTS OF THE DECLARATION OF THE RIGHTS OF PEASANTS – MEN AND WOMEN

La Vía Campesina's declaration follows the same structure as the United Nations Declaration on the Rights of Indigenous Peoples. It begins with a long introduction which recalls the large number of peasants all over the world who have fought throughout history for the recognition of peasants' rights, and for free and just societies, and concludes with the hope that this declaration represents a major step forward in the recognition, promotion and protection of the rights and liberties of peasants.

The first Article of the Declaration of the Rights of Peasants gives a definition of who peasants are, according to which:

"A peasant is a man or woman of the land, who has a direct and special relationship with the land and nature through the production of food and/or other agricultural products. Peasants work the land themselves, rely above all on family labour and other small-scale forms of organizing labour. Peasants are traditionally embedded in their local communities and they take care of local landscapes and of agro-ecological systems. The term peasant can apply to any person engaged in agriculture, cattle-raising, pastoralism, handicrafts-related to agriculture or a related occupation in a rural area."

"The term peasant also applies to landless peasants. According to the UN Food and Agriculture Organization (FAO 1984) definition [1], the following categories of people are considered to be landless and are likely to face difficulties in ensuring their livelihood: 1. Agricultural labour households with little or no land; 2. Non-agricultural households in rural areas, with little or no land, whose members are engaged in various activities such as fishing, making crafts for the local market, or providing services; 3. Other rural households of pastoralists, nomads, peasants practising shifting cultivation, hunters and gatherers, and people with similar livelihoods."

In Article 2, the Declaration reaffirms that women peasants have equal rights to men and that all peasants have the right to the full enjoyment, collectively or as individuals, of all those human rights and fundamental freedoms that are recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law (Article 2, para 1 & 2). It also states that peasants (women and men) are free and equal to all other people and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular to be free from discriminations based on their economic, social and cultural status (Article 2, para 3). It then declares that peasants (women and men) have the right to actively participate in policy design, decision making, implementation, and monitoring of any project, program or policy affecting their territories (Article 2, para 4).

Following the model of the United Nations Declaration on the Rights of Indigenous Peoples, the Declaration of the Rights of Peasants – Men and Women reaffirms the existing civil, political, economic, social and cultural rights of peasants, and reinforces them by incorporating new rights, such as the right to land, the right to seeds and the right to the means of agricultural production. These new rights are aimed at giving full protection to peasant families and forcing states to put an end to the types of discrimination from which peasants suffer.

The declaration adopted by La Vía Campesina reaffirms the right to life and to an adequate standard of living (article 3); the right to freedoms of association, opinion and expression (article 12); right to have access to justice (article 13). In addition, it also recognizes the following new fundamental rights: the right to land and territory (article 4); the right to seeds and traditional agricultural knowledge and practice (article 5); the right to the means of agricultural production (article 6); the

right to information and agricultural technology (article 7); the freedom to determine price and market for agricultural production (article 8); the right to the protection of local agricultural values (article 9); the right to biological diversity (article 10); and the right to preserve the environment (article 11).

3.3. VÍA CAMPESINA'S CALL TO ACTION

For La Vía Campesina, the adoption of the Declaration of the Rights of Peasants is only a first step that needs to be followed by the drawing up of an International Convention on the Rights of Peasants by the United Nations, with the full participation of La Vía Campesina and other representatives of civil society.²⁸ To this end, La Vía Campesina is hoping to receive “the support of the people who are concerned with the peasants’ struggle and the promotion and protection of the rights of peasants.”²⁹

On several occasions, La Vía Campesina has called for regional, national and international action to mobilize support for the recognition of the rights of peasants. On June 21, 2008, in the Final Declaration of the International Conference on the Rights of Peasants, La Vía Campesina declared:

“A future Convention on Peasant Rights will contain the values of the rights of peasants – and should particularly strengthen the rights of women peasants – which will have to be respected, protected and fulfilled by governments and international institutions.”

“For that purpose, we commit ourselves to develop a multi-level strategy working simultaneously at the national, regional and international level for raising awareness, mobilizing support and building alliances with not only peasants, but rural workers, migrant workers, pastoralists, indigenous peoples, fisher folks, environmentalists, women, legal experts, human rights, youth, faith-based, urban and consumers organizations [...]”

“We will also seek the support of governments, parliaments and human rights institutions for developing the convention on peasant rights. We call on FAO and IFAD to uphold their mandates by contributing to the protection of peasant rights. We ask FAO’s department of legal affairs to compile all FAO instruments protecting peasant rights as a first step towards this purpose. We will bring our declaration on peasant rights to the UN Human Rights Council.”³⁰

4. THE CURRENT STATE OF DISCUSSIONS ON THE RIGHTS OF PEASANTS WITHIN THE UNITED NATIONS

The United Nations was slow to respond to the demands of La Vía Campesina. For several years, CETIM denounced violations of peasants’ rights in meetings with the United Nations Commission on Human Rights (UNCHR), before the annual reports of La Vía Campesina and FIAN were presented at parallel events, to a relatively small audience. The Human Rights Council was created in June 2006 and it was only with the work of its Special Rapporteur on the right to food and its advisory committee in response to the global food crisis, that peasants’ rights were really discussed by the United Nations. In 2009 La Vía Campesina was invited by the Human Rights Council and the UN General Assembly to give its point of view on the food crisis and the way in which it might be remedied. It was at this point that La Vía Campesina presented its Declaration on the Rights of Peasants as one of the solutions to the food crisis.³¹

Since his appointment as UN Special Rapporteur on the right to food in May 2008, Olivier De Schutter has made significant contributions to the debate about the food crisis and the right to food and has highlighted very clearly the need to restore the role of small-scale peasant farmers and agricultural workers in the fight against hunger.

In May 2008, Olivier De Schutter called on the Human Rights Council to hold a special session on the food crisis and its impact on the right to food.³² The first thematic special session in the history of the Human Rights Council was held on May 22, on the food crisis and the right to food, and a resolution entitled “The negative impact of the worsening of the world food crisis on the realization of the right to food for all” was adopted unanimously.³³

In a very interesting passage from this resolution, the Human Rights Council called upon “States, individually and through international cooperation and assistance, relevant multilateral institutions and other relevant stakeholders [...] to consider reviewing any policy or measure which could have a negative impact on the realization of the right to food, particularly the right of everyone to be free from hunger, before instituting such a policy or measure.”³⁴ According to this resolution, the production of agrofuels, financial speculation and the free-market liberalization of agriculture should be assessed according to the impact they have on the right to food, particularly for peasants’ families.

Following this special session, the Special Rapporteur on the right to food presented a number of reports on the food crisis in 2008 and 2009, in which he stressed the need to protect small peasants. In his most recent report, presented to the General Assembly in October 2009, he lays particular emphasis on the need to protect peasant families' access to seeds.³⁵

The Advisory Committee of the Human Rights Council was created at the same time as the Human Rights Council itself in June 2006 (Özden 2008). In a report presented to the Human Rights Council in March 2009, the Advisory Committee analyzed the effects of the food crisis on the plight of peasants and recommended to the Human Rights Council that it carry out a study on the "The Current Food Crisis, the Right to Food and Peasants' Rights."³⁶

The Human Rights Council did not endorse this recommendation. But the council, in its resolution on the right to food adopted on March 20, 2009, requested the advisory committee to undertake a study on "discrimination in the context of the right to food, including identification of good practices of anti-discriminatory policies and strategies" (para. 36).

The study on discrimination in the context of the right to food is due to be presented to the Human Rights Council in March 2010. In preparation, Jean Ziegler has produced a working document entitled "Peasant Farmers and the Right to Food: a History of Discrimination and Exploitation," in which he describes the different kind of peasant farmers and the many forms of discrimination that they have suffered over the centuries.³⁷

In 2009, representatives of La Vía Campesina were also invited at the Human Rights Council and at the UN General Assembly. At the Human Rights Council, on March 9, 2009, a representative of La Vía Campesina discussed solutions to the food crisis in a debate organized by the Human Rights Council with the High Commissioner for Human Rights, N. Pillay, D. Nabarro, Coordinator of the UN Task Force on the Global Food Security Crisis, the Special Rapporteur on the right to food, Olivier De Schutter, and Jean Ziegler, member of the Advisory Committee. A month later, another representative of La Vía Campesina was invited to take part in an interactive thematic dialogue of the UN General Assembly on April 6, 2009, devoted to the food crisis and the right to food.

Paul Nicholson represented La Vía Campesina at the Human Rights Council on March 9, 2009, and Henry Sara-

gh was their representative at the General Assembly on the April 6, 2009. In their opening speeches and in the debates that followed, the two representatives of La Vía Campesina put particular emphasis on the violations of peasants' rights, which have further increased during the food crisis. They then put forward their view that the Declaration of the Rights of Peasants – Men and Women and the adoption of a UN Convention on the Rights of Peasants could form the basis of a solution to both the discrimination against peasants and the food crisis.³⁸

5. CONCLUSION

Throughout ancient and recent history, peasants have always been among the first victims of hunger and many forms of discrimination. Massive violations of human rights, including the right to food, have been reported by La Vía Campesina and most have been committed with impunity. This situation has been aggravated by the outbreak of the food crisis in 2007 and 2008, and some of the measures chosen by states to remedy the situation, such as the purchase of foreign land, will undoubtedly lead to new violations of peasants' rights.

In order to put an end to the repeated violations of peasants' rights, La Vía Campesina adopted the Declaration of the Rights of Peasants – Men and Women in June 2008. At the same time, it made the recognition, understanding and protection of peasants' rights among its primary objectives.

The rights of peasants are already partly recognized within the international instruments that protect human rights, such as the ICESCR and ICCPR, CEDAW and the UN Declaration on the Rights of Indigenous Peoples. These provisions have been supported by a progressive interpretation of the rights that they protect by monitoring bodies and experts at the United Nations Human Rights Council. In the Voluntary Guidelines on the Right to Food adopted in November 2004, states have also accepted this progressive interpretation and have taken a commitment to respect, protect and fulfill peasants' rights.

However, the need to recognize the rights of peasants within the United Nations, as conceived by La Vía Campesina, seems to be both useful and necessary. It would be useful to recognize in a single document the numerous rights of peasants that have already been recognized in other international instruments, to give coherence and visibility. But it would also be necessary,

at least for two reasons: first, because the current recognition of the rights of peasants is not providing sufficient protection to peasant families, in particular against the growing control over food and productive resources exercised by multinationals; second, because it will force states to take action against the discrimination faced by peasants. It must be backed up by the recognition of new rights for peasants, such as the right to land, to seed and to the means of production.

Since 2007, states have made several commitments to re-invest in rural development policies and sustainable local food production to cope with the food crisis.³⁹ But the same commitments were already made in 1974 and 1996, after similar food crises, without real effects. These promises were never kept and the number of hungry people continued to increase before exploding in 2008 and 2009. The recognition of the rights of peasants within the United Nations would be an important step to guarantee that the current commitments are not an idle dream.

¹ This article is based on a paper written by the author and published by the CETIM in Geneva in September 2009. The original paper on Golay 2009a is available online, in English, Spanish and French, at http://www.cetim.ch/fr/publications_cahiers.php. The author thanks the CETIM for its permission to publish this article.

² See working paper by J. Ziegler, member of the UN Human Rights Council Advisory Committee, Peasant Farmers and the Right to Food: a History of Discrimination and Exploitation, A/HRC/AC/3/CRP.5, 4th August 2009.

³ *Vía Campesina, Declaration of the Rights of Peasants Women and Men*, adopted by the International Conference on the Rights of Peasants in Jakarta in June 2008, available online at <http://viacampesina.net/downloads/PDF/EN-3.pdf>.

⁴ *Vía Campesina Section 0s Statement to the UN General Assembly*, 6th April 2009, available online at www.viacampesina.org.

⁵ See Human Rights Council, Report of the Special Rapporteur on the right to food, Jean Ziegler, A/HRC/7/5, 10th January 2008, § 18.

⁶ See Human Rights Commission, The right to food. Report by Mr. Jean Ziegler the Special Rapporteur on the right to food, E/CN.4/2001/53, 7th February 2001, § 14.

⁷ Right to Food Guideline No 8 (FAO 2005).

⁸ Right to Food Guideline No 2.5 (FAO 2005).

⁹ Right to Food Guidelines No 8.1 & 8.6 (FAO 2005).

¹⁰ General Comment No. 15: The Right to Water (Articles. 11 and 12), E/C.12/2002/11, § 7, adopted on 20 January 2003.

¹¹ Committee on Economic, Social and Cultural Rights, Concluding Observations, India, May 2008 E/C.12/IND/CO/5, § 69. See also General Assembly, Seed policies and the right to food: enhancing agrobiodiversity and encouraging innovation, Report of the Special Rapporteur on the right to

food, Olivier De Schutter, A/64/170, 23 July 2009, § 5.

¹² General Comment 4, The right to adequate housing (Art. 11, para. 1), § 7, adopted on 13 December 1991.

¹³ See the report of the Special Rapporteur on the right to adequate housing presented at the Fifty-seventh session of the Commission on Human Rights, E/CN.4/2001/51, 25th January 2001, § 8.

¹⁴ General Comment 4, The right to adequate housing (Art. 11, para. 1), § 8, 13 December 1991.

¹⁵ General Comment No 7, The right to adequate housing (art. 11 para 1): forced evictions, § 3, 20th May 1997.

¹⁶ General Comment No 7, The right to adequate housing (art. 11 para 1): forced evictions, § 3, 20th May 1997.

¹⁷ See Human Rights Council, report by the Special Rapporteur on the right to adequate housing as a component of the right to an adequate standard of living, Miloon Kothari, 5th February 2007, A/HRC/4/18, Annexe 1.

¹⁸ General Comment No. 14, The Right to the Highest Attainable Standard of Health (Art. 12), § 1, 11th May 2000.

¹⁹ General Comment No. 14, The Right to the Highest Attainable Standard of Health (Art. 12), § 1, 11th May 2000, § 4.

²⁰ General Comment No. 14, The Right to the Highest Attainable Standard of Health (Art. 12), § 1, 11th May 2000, §§ 12 et 36.

²¹ General Comment No. 14, The Right to the Highest Attainable Standard of Health (Art. 12), § 1, 11th May 2000, § 43.

²² Human Rights Committee, General Comment No 6, The Right to Life (article 6), § 3, adopted in 1982.

²³ See, for example, CEDAW, Concluding Observations. Gabon, 28th January 2005, A/60/38, Part. I, par. 247-248.

²⁴ See, for example, CEDAW, Concluding Observations. Cambodia, 25th January 2005, A/60/38, A/61/38, Part. I, par. 49.

²⁵ See, for example, CEDAW, Concluding Observations. India, 20th February 2007, A/62/38, Part. I, par. 184.

²⁶ See General Assembly, Report by the Special Rapporteur on the right to food, Jean Ziegler, A/61/306, 1st September 2006, § 41-44.

²⁷ *Vía Campesina, Declaration of the Rights of Peasants Women and Men*, adopted by the International Conference on the Rights of Peasants in Jakarta in June 2008, available online at <http://viacampesina.net/downloads/PDF/EN-3.pdf>.

²⁸ See *Vía Campesina, Introduction to the Declaration of the Rights of Peasants Men and Women*.

²⁹ See *Vía Campesina, Introduction to the Declaration of the Rights of Peasants Men and Women*.

³⁰ Final Declaration of the International Conference on Peasants' Rights, Jakarta, 24th June 2008, available online at http://www.viacampesina.org/main_en/index.php?option=com_content&task=view&id=572&Itemid=1.

³¹ See *La Vía Campesina Statement at the UN General Assembly*, 6th April 2009, available online at www.viacampesina.org.

³² See De Schutter, O, Background Note: Analysis of the World Food Crisis by the U.N. Special Rapporteur on the right to food, 2 May 2008, p. 14.

³³ Human Rights Council, The negative impact of the worsening of the world food crisis on the realization of the right to food for all, A/HRC/S-7/1, 22nd May 2008.

- 34 Human Rights Council, The negative impact of the worsening of the world food crisis on the realization of the right to food for all, A/HRC/S-7/1, 22nd May 2008, para. 3.
- 35 See General Assembly, Seed policies and the right to food: enhancing agrobiodiversity and encouraging innovation., report of the Special Rapporteur on the right to food, Olivier De Schutter, A/64/170, 23 July 2009.
- 36 See Human Rights Council, Report of the Advisory Committee on its second session, Geneva 26th-30th January 2009, A/HRC/10/68.
- 37 Working paper by J. Ziegler, member of the UN Human Rights Council Advisory Committee, Peasant Farmers and the Right to Food: a History of Discrimination and Exploitation, A/HRC/AC/3/CRP.5, 4th August 2009.
- 38 See Via Campesina Statement to the UN General Assembly, 6th April 2009, available online at www.viacampesina.org and the statement by P. Nicholson to the UN Human Rights Council, 9th March 2009, available online at: [http://www.unog.ch/unog/website/news_media.nsf/\(httpNewsByYear_en\)/83A0C5C3CFF6B0B8C12575740043C2BB?OpenDocument](http://www.unog.ch/unog/website/news_media.nsf/(httpNewsByYear_en)/83A0C5C3CFF6B0B8C12575740043C2BB?OpenDocument).
- 39 See Human Rights Council, Report of the Special Rapporteur on the right to food, Olivier de Schutter, A/HRC/12/31, 21st July 2009, § 13-25.

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X. BRIDGING THE DIVIDE: A HUMAN RIGHTS VISION FOR GLOBAL FOOD TRADE

1. INTRODUCTION

Global food and agricultural systems are in crisis. An already simmering hunger crisis exploded early in 2008. At the same time, predictions on how climate change will undermine food security in already poor regions, especially Sub-Saharan Africa and small island states, are alarming (IPCC 2007). Over one billion people live with extreme hunger today. Climate change is not just affecting agriculture but is also affected by agriculture: as a sector, agriculture is estimated to be the second largest contributor to global greenhouse gas emissions.

Meanwhile, a large influx of speculative investment on commodity markets exacerbated the food price crisis earlier in 2008. Farmers and commodity processors alike complained that the tools they rely on to finance their production were no longer working, distorted by the flood of speculative capital. With the financial crisis now crippling banks' role as lenders and borrowers, credit for farmers, traders and food distributors will be much harder to obtain in the future.

This year all eyes turned to the food crisis. A summit of world leaders, a special UN taskforce, emergency sessions at the UN General Assembly, and G-8 pledges for increased aid were all part of the global response to the food crisis. The human rights community responded with a special session at the Human Rights Council and a report by the newly appointed Special Rapporteur on the right to food. The message is clear: It is time for a new vision for food and agriculture.

Eradicating hunger is an obligation that governments must fulfill as part of their international human rights treaty obligations. The human rights framework provides many of the guidelines needed for undertaking this mammoth task and for ensuring that governments and international organizations respond with policies that put people at the center. Importantly, human rights require governments to prioritize the most vulnerable groups, ensure no discrimination and pay attention to the outcomes of policies. To date, governments have failed to consider human rights obligations when they negotiate trade agreements.

This paper explains the importance of using human rights to build a global trading system. It explains why existing trade rules undermine human rights and makes proposals for a trading system that would instead support food systems that protect, promote and fulfill human rights. The paper focuses on the universal human right to food, as one

of an indivisible body of human rights, encompassing civil, political, economic, social and cultural rights.

2. HUMAN RIGHTS: A BASIS FOR BETTER TRADE RULES

“Everyone has the right to a standard of living adequate for the health and wellbeing of himself and his family, including food, clothing, housing and medical care.”

Universal Declaration of Human Rights

A human rights framework offers a powerful basis for making policies and laws that improve human welfare. There are six dimensions of the framework that are worth underlining in relation to global trade rules:

- a) Human rights are universal, indivisible and interdependent. Human rights belong equally to everyone. Human rights cannot be realized in isolation from one another. The improvement of one right facilitates advancement of the others. Likewise, the deprivation of one right adversely affects the others (OHCHR 2009).
- b) Human rights are legally binding on all states. All states have ratified at least one of the international human rights treaties and are required to uphold and protect human rights. Some states include human rights in their national laws and constitutions (FAO 2006). Twenty-two countries mention aspects of the right to food in their constitutions (FAO website). This provides an important legal recourse in the event the right to food is violated.
- c) Human rights emphasize equality and non-discrimination. “All human beings are born free and equal in dignity and rights.”² They cannot be discriminated against on the basis of sex, race, color or religion. In practice, equality means that states have to pay particular attention to the needs of the most vulnerable; and non-discrimination means paying attention to outcomes, not just process. Applying the same rules to dissimilar populations can worsen the situation of the disadvantaged. This is not an acceptable outcome within a human rights framework. Governments’ overriding obligation is to improve the condition of excluded and marginalized groups.
- d) Human rights enshrine the principles of participation, accountability and transparency. Human rights start with people. The realization of human rights depends on people having a voice in public policy making. Without active citizenry, including social movements, trade unions and civil society organizations, human rights have little meaning.
- e) Human rights imply international and extraterritorial obligations. The question of whether states have an obligation to recognize and protect human rights outside their borders is an area of debate. In his recent report to the Human Rights Council, the UN Special Rapporteur on the right to food, Olivier De Schutter, says, “States should not only respect, protect and fulfill the right to adequate food on their national territories; they are also under an obligation to contribute to the realization of the right to food in other countries and to shape an international environment enabling national Governments to realize the right to food under their jurisdiction”.³ At a minimum, states should ensure that the policies and actions of the international organizations they belong to are consistent with the fulfillment of human rights. States are also required to meet their commitment to provide international assistance and cooperation “to the maximum of available resources.”⁴
- f) Human rights are not associated with one type of economic system. Human rights provide a framework for policymaking, law and action. But they do not dictate any one way of organizing markets or stimulating economic growth.

Governments have three kinds of obligations in relation to the realization of economic, social and cultural rights: to respect, protect and fulfill. Respect means ensuring no public policy, law or action interferes with people’s enjoyment of human rights. Protect means enforcing laws and public policy to prevent third parties, individuals or corporations from depriving individuals of their access to human rights. In recognition that governments may not have the means to immediately realize everyone’s economic, social and cultural rights, the International Covenant on Economic, Social and Cultural Rights, relies on the concept of “progressive realization.” This creates both immediate and ongoing obligations on governments to provide a legal and institutional framework that enables all people under their jurisdiction to enjoy their rights. This includes fulfilling human rights through the design and implementation of programs that target vulnerable groups who may need assistance in realizing their rights because of poverty, racism, sexism, disenfranchisement (as non-citizens or former convicts) or other sources of social and economic exclusion.

The human rights framework is not perfect. One of its weaknesses has been its undue reliance on governments and courts as the primary locus for action for rights. It is important that the human rights framework incorporate a central role for citizen action as the engine of the de-

velopment process and the means by which to hold the state accountable. Furthermore, human rights treaties and their interpretations do not provide all the answers on how to fulfill rights – how the market should be managed, how services must be delivered, which agricultural practices should be encouraged, and how to create jobs, is not the stuff of human rights obligations (Sreenivasan 2008). But human rights can provide the people-centered yardstick against which policies can be measured (Smaller 2005).

3. FOCUS ON THE RIGHT TO FOOD

“The core content of the right to adequate food implies: the availability of food in a quantity and quality sufficient to satisfy the dietary needs of individuals free from adverse substances and acceptable within a given culture; the accessibility of such food in ways that are sustainable and that do not interfere with the enjoyment of other human rights.”

General Comment 12, The right to adequate food.

The right to food is central to building food and agriculture systems. The content of the right to food is outlined by the Committee on Economic, Social and Cultural Rights in the form of General Comment Number 12. General Comments are guidelines for states on how to interpret the specific rights contained in the seven major UN human rights treaties.⁵ In 2004, the 188 member countries of the FAO adopted the Voluntary Guidelines on the Right to Food. The FAO’s voluntary guidelines on the right to food provide a further instrument for governments that want to make the right to food a reality in the context of their national food security strategies (FAO 2005). Some countries, like South Africa and Brazil, have enshrined the right to food in their national constitutions. Others like Uganda, Guatemala, and Indonesia have national legislation that creates a legal obligation to fulfill the right to food.

Other economic and social rights affected by the food system include the right to health, work and life. The General Comment on the right to health, for example, says “the right to health embraces a wide range of socio-economic factors that promote conditions in which people can lead a healthy life, and extends to the underlying determinants of health, such as food and nutrition, housing, access to safe and potable water and adequate sanitation, safe and healthy working conditions, and a healthy environment.”

Importantly, the General Comment on the right to food states: “the roots of the problem of hunger and malnutrition are not lack of food but lack of access to available food.” This is an important distinction. Free traders focuses on supply, based on the assumption that the market will distribute supply according to demand. If food insecurity arises, the free trade response is to increase production. Governments that believe in this theory give considerable public resources to realizing this “natural” market response, by encouraging more land into cultivation or developing new technologies to raise yields or improving varieties of seeds, fertilizers and pesticides. Many governments are satisfied that food security is assured when there is enough food available to feed the population.

A rights approach goes much further, because the right to food makes explicit the requirement that the available food be affordable or otherwise accessible to every individual. The United States is food secure, but the government fails to protect its’ people’s right to food. The U.S. Department of Agriculture reports that some 11 percent of U.S. households (and 18 percent of U.S. children) lack access to adequate food at some point in the year. That statistic represents 12.6 million people. Yet, even after exports, the domestic supply of food in the U.S. could feed everyone in the country twice over (Murphy 2005).

Nepal is food insecure but the government is taking steps to realize the right to food. A new government, formed after the end of a decade of civil war, included the right to food sovereignty in their interim constitution. On September 25, 2008, the Supreme Court of Nepal, recognizing this right, ordered the Government of Nepal to immediately supply food to 32 food-short districts. The Court found immediate action necessary because over three million people were suffering from food scarcity as a result of soaring food prices. The Government also increased the budget to the Nepal Food Corporation, a state enterprise that supplies food to districts that need it most.

4. THE WTO: IN CONFLICT WITH HUMAN RIGHTS?

The multilateral trade system now in place depends on free market economics. It is in tension with a human rights framework in important ways.

- a) Discourages state intervention: For over two decades, the multilateral trade system has been driven by a vision of the economy that reduces the role of the

state in the market. The state is discouraged from intervening. Under the human rights framework, states are the duty-bearers of rights and cannot be relieved of these obligations. States are required to take legislative, administrative and budgetary measures to deliver economic, social and developmental outcomes that protect people's rights. Human rights law requires states to "take steps individually and through international assistance and cooperation," and to use "the maximum of their available resources."⁶ In some cases the state may be required to intervene in the market, even if this creates trade distortions, in order to protect human rights.

- b) Uses a trade yardstick: The WTO insists on all policy being minimally trade-distorting as if trade was some-how an end in itself – it isn't. Positively encouraging the realization of human rights would make a far more sensible basis on which to assess countries' policies.
- c) Ignores the most vulnerable groups: The goal of the multilateral trading system is economic growth, and growth in the overall volume of trade is often used as a proxy for improved welfare. This is inadequate from a human rights perspective. Human rights require states to implement policies that target specific groups who are not enjoying human rights, not just to improve overall welfare.
- d) Dictates one economic model: Twenty-five years of trade regulation have pushed a specific vision for economic development (based on open markets, deregulated capital movements and restrictive intellectual property rights). A human rights framework does not dictate what particular economic policies a government should follow. But it does require governments to pay attention to outcomes when they put policies into practice.
- e) Lacks participation and transparency: Despite some recent improvements, multilateral (and bilateral) trade negotiations fail to meet a minimal level of participation and inclusion from affected people. Indeed, WTO member negotiators, and even trade ministers, can find themselves excluded from key negotiations at various times. A human rights framework pays attention to process as well as outcomes: people must be able to express their preferences, and to debate and change policies and laws.

5. PUTTING TRADE IN THE RIGHT PLACE

"The right to adequate food is realized when every man, woman and child, alone or in community with others, has physical and economic access at all times to adequate food or means for its procurement."

General Comment 12, the Right to Adequate Food

Most food is consumed in the country where it is grown. Trade plays a relatively minor role in food and agricultural systems. Over the past three years, an average of 18 percent of wheat, 7 percent of rice and 12 percent of corn were traded internationally (USDA 2008b). Over the same period, an average of 5 percent of pork, 10 percent of poultry and 12 percent of beef and veal were traded internationally (USDA 2008a). The United States, one of the world's biggest exporters of food, exports just less than one third of its agricultural production. Most countries export far less. Despite its minority role, international trade and investment requirements dictate food and agricultural policies. Most smallholder producers must now compete with imported food in their local markets. These imports, often priced by factors that have no relationship to local conditions (supply, demand, input costs, consumer preferences, etc.), have a big impact on local prices.

For more than two decades, governments, international financial and trade institutions, and bilateral donors have used free trade theory to inform their food and agricultural policies. Both the World Bank and International Monetary Fund condition their loans to developing countries on the recipient government's reducing trade barriers, deregulating currency markets, implementing export-oriented development strategies and minimizing the role of the state. The UN has often provided nuance and caution, but rarely has its institutions (and more especially, its leadership) challenged the underlying assumption that globalization through free trade and capital flows is the only path to successful development.

Most developing country governments had little choice but to follow the Bank and IMF prescriptions. In so doing, they moved away from a development path rooted in agriculture, which for most countries would have helped to secure the right to adequate food. Instead, these governments expanded existing export strategies, either forsaking diversification to focus on one or two commodities (cocoa in Ghana, cotton in Burkina Faso, or bananas in Ecuador), or moving into new exports, such as shrimp (Bangladesh and Thailand), green beans (Kenya) or cut flowers (Uganda and Kenya). Most low-income countries have paid too much at-

tention to export crops and too little attention to domestic food crop sectors (Morrissey 2007). The cost is not just in the money spent on producing, processing and transporting exports, but also in the concomitant failure to invest in domestic food crops and to provide support to local markets (including roads, storage and processing facilities).

Since 1950, world food production has soared. More recently, barriers to food trade have been dismantled. Governments, and, more especially, transnational agribusinesses, have more access to global commodity markets than ever before, access that is secured not just in law (because WTO members are constrained in how they can limit food imports and exports) but also in technology: the equipment, the know-how, the communications and the transportation systems that make global trade work. And yet, the number of hungry people continues to increase, and the right to food has not been realized.

6. A NEW SYSTEM OF RULES FOR TRADE IN AGRICULTURE

Existing multilateral rules for food and agriculture are primarily contained in the WTO's Agreement on Agriculture. There are many rules in other WTO agreements that relate to food and agriculture including the General Agreement on Tariffs and Trade, the Agreement on the Application of Sanitary and Phytosanitary Measures, the Agreement on Subsidies and Countervailing Measures, the General Agreement on Trade in Services, and the Agreement on Trade-Related Aspects of Intellectual Property Rights. This paper is not exhaustive. It reviews the overarching question of governance (five principles, explored in the section "The Guiding Principles") and eight areas for trade regulation ("The Trade Toolkit"), in an attempt to create the building blocks for a trading system rooted in a human rights framework and the realization of the right to food.

6.1. THE GUIDING PRINCIPLES

"Good governance is essential to the realization of all human rights, including the elimination of poverty and ensuring a satisfactory livelihood for all."

General Comment 12, the Right to Adequate Food

A human rights approach to governance emphasizes a number of core principles, including: coherence, flexibility, accountability, transparency, participation, monitoring, assessment, and access to effective judicial remedies.

6.1.1. Be Coherent

A first essential challenge for building trade rules on a human rights framework is establishing the priority of human rights over trade obligations. While the legal case is there, established by the Vienna Convention on the Law of Treaties, the reality is more complicated because political will and the possibilities for legal redress conspire to give the edge to trade rules. Under the human rights conventions and protocols, abuses can be documented, described and discussed. But there is no punishment for breaking the law. Under the WTO system, the dispute settlement system can enforce rules by threatening trade or financial penalties for failure to comply. As a result, trade agreements consistently trump human rights treaties. Most governments are more loyal to their trade commitments than they are to their human rights obligations.

The need to look at trade and finance in a broader context has been recognized by UN member states. For example, the continuing Financing for Development process, due to meet for a second high-level meeting in Doha at the end of November, is explicitly about measuring trade, investment and financial flows from a development perspective. But a lack of political will, particularly from industrialized countries, makes the forum ineffectual. Until governments are willing to use human rights language as a basis for their trade positions, it will be impossible to shift global trade rules to where they should go.

An alliance of forty-six developing countries⁷, known as the G-33, was the first to bring human rights into the WTO. In 2005 the group issued a Ministerial Communiqué that stated, "addressing the problem of food and livelihood security as well as rural development constitute a concrete expression of developing countries' right to development." Their goal was to introduce a special safeguard mechanism and a category of special products into the revised rules for the Agreement on Agriculture. It was a radical and strategic moment. First, the proponents openly promoted the measures on the grounds that they were necessary to meet social and developmental objectives (not commercial ones). Secondly, the group has been willing to fight for the right to be allowed to raise tariffs over existing bound levels so as to realize these objectives – a proposal that has met hard resistance from many WTO members (industrialized and developing alike). Winning such fights will be essential if trade talks are to move towards supporting a human rights framework.

A number of institutions other than the WTO play a role in trade policy and they too will have to change if they are to be supportive of a human rights framework. The Bretton Woods Institutions (the World Bank and International Monetary Fund) have both played a central role in shaping developing countries' trade policy through the conditions they impose on their loans and development grants. These institutions ignored mounting evidence that their economic prescriptions were leading to social and economic dislocation and distress – i.e., ignored human rights violations. The push to put trade on a more human-rights appropriate footing will have to include changes to interventions by the Bretton Woods Institutions.

The trade system needs to learn to operate in a wider multilateral context. Governments allowed the WTO to isolate itself from other parts of the multilateral system, at the expense of coherence with vital areas of policy, including managing and abating climate change and biodiversity loss; enforcing international labor rights; ensuring universal access to affordable medicines; protecting endangered species; and, much, much more. Bringing trade back into the UN fold, rather than allowing it to affect all areas of policy from an isolated outpost, is an essential step in reform of the trade system.

6.1.2. Discipline Bad Trade Practices

Trade rules should focus on disciplining bad practices – dumping, excessive speculation, unchecked market power – rather than on promoting a particular vision of how trade should be structured. The WTO membership (over 150 countries and climbing) is vastly varied. Some countries are recovering from decades of civil war and misrule. Others industrialized a long time ago, but need considerable investment in their economies to modernize, replace failing infrastructure and train workers to use new technologies and systems.

The differences are not just material, though that matters – in some countries poverty affects a minority of people while in others a majority of their people live in, or uncomfortably close to, poverty. The differences are also cultural, social, ecological and physical. Some countries are mountainous, others land-locked or islands. Some countries have a tradition of collective land ownership; others continue to operate what is effectively a system of bonded labor in agriculture, locking in privilege for a small number of landowners at the expense of large population of disenfranchised and impoverished workers. In all of this, the potential for trade, and the context in which global trade rules work, varies from

country to country. These circumstances require a flexible system of trade rules. Human rights will help governments focus on how people are affected. A human rights analysis checks whether trade rules are impoverishing poorer countries or vulnerable populations within countries rather than being satisfied with conformity with a uniform set of rules that mask important differences within a population.

6.1.3. Establish Accountability, Transparency and Participation

“Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas.”

International Covenant on Civil and Political Rights

“Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.”

Universal Declaration of Human Rights

Governments are required to provide information to their people when they enter trade negotiations and sign trade agreements. After years of campaigning and public pressure by civil society organizations, transparency in international trade negotiations has improved. Some WTO member states make negotiating documents available to their constituencies and allow them on their delegations during negotiations. The WTO Secretariat has also taken important steps to improve transparency by publishing most negotiating documents on their website and opening some of their dispute panels to the public, but most of these efforts are informal and not guaranteed under WTO law. And governments are selective about what information they make publicly available. Access to information remains largely dependent on the good will of the holders of information. Furthermore, bilateral and regional trade negotiations, which have multiplied exponentially in the past ten years, remain highly secretive and closed to the public.

People have the right to participate in trade policymaking and raise concerns about the possible impact of trade agreements. Some governments have taken steps to realize this right. The governments of Uganda, South Africa and Brazil, for example, have set up consultations for national stakeholders on the Doha Agenda, which allow trade unions, farmers, business groups and other civil society organizations to input into their government's negotiating position. But the vast majority of people are still excluded from participating in decisions on their country's trade agenda.

6.1.4. Conduct Monitoring and Assessments

“State parties should, in international agreements whenever relevant, ensure that the right to adequate food is given due attention and consider the development of further international legal instruments.”

General Comment 12, the Right to Adequate Food

Existing human rights mechanisms require states to submit periodic reports on the measures taken to realize human rights. Human Rights monitoring and development is overseen by the regular meetings of the Human Rights Council, the Office of the High Commissioner for Human Rights (OHCHR), and a well-developed treaty-body system. Concerns about the impact of trade agreements or particular policies can be raised under these mechanisms. Human rights do not need to be brought into the WTO. Civil society organizations such as the NGO 3D -> Trade – Human Rights – Equitable Economy are active in this field. There have been a number of questions raised and recommendations made by different Human Rights Committees on the impact of trade agreements on the realization of human rights. 3D, for example, made a submission to the Committee on Economic, Social and Cultural Rights about the right to food in India. They were concerned with the Indian government’s trend towards stricter intellectual property protection and the negative impact on the right to food (Devaiah and Dommen 2008).

The WTO also has a review mechanism called the Trade Policy Review Mechanism which monitors the implementation of WTO Agreements. To date, no government has raised human rights concerns under this mechanism. Civil society organizations do not have access to its procedures. The International Trade Union Confederation, however, prepares shadow reports to the Trade Policy Review Mechanisms to highlight concerns about the impact of trade agreements on labor conditions. Civil society organizations focused on food and agriculture could do the same.

At the national level, it is essential for governments to develop processes to ensure that their trade policies are coherent with their human rights obligations. Trade policies or trade agreements that are found to undermine human rights should change. Impact assessments should be undertaken before new agreements are signed. The European Union has started conducting Sustainability Impact Assessments for trade agreements. There are no human rights criteria for these impact assessments. The

Office of the High Commissioner for Human Rights has also been working on a methodology for human rights impact assessments but much more work and political will is needed to turn this into a reality.

6.1.5. Create Effective Judicial Remedies

“Any person or group who is a victim of a violation of the right to adequate food should have access to effective judicial or other appropriate remedies at both national and international levels.”

General Comment 12, the Right to Adequate Food

There are currently insufficient legal remedies at the national and international levels for the violation of human rights, including the right to food. At the international level, UN members recently approved the Optional Protocol on Economic, Social and Cultural Rights. The instrument will provide a complaints mechanism for individuals whose economic, social and cultural rights have been violated. This is an important mechanism to raise concerns about human rights violations and to name and shame governments at the international level. But the mechanism has no teeth and it will not be able to impose judicial remedies.

6.2. THE TRADE TOOLKIT

This section proposes a range of tools that could help governments to respect, protect and fulfill human rights. The tools to respect and protect human rights include border measures, international competition law, anti-dumping rules and managing volatility. The tools to fulfill human rights include subsidies, food stocks, food aid and state trading enterprises.

6.2.1. Border Measures

One of the explicit goals of the trade system is to ratchet tariffs down. This is one of the five foundational principles elaborated by the WTO to describe its mission on its website. WTO rules for agricultural tariffs require WTO members to bind and reduce tariffs and convert all border measures into ordinary customs duties.⁸ The rules also call for the substantial reduction of the overall level of tariffs, and encourage members to enter into periodic tariffs reduction negotiations.⁹ The rules give countries the flexibility to reduce or eliminate tariffs but not to increase them beyond the levels set when they joined the WTO, or agreed to under the Uruguay Round if they were already members in 1994.

The refusal to countenance tariff increases on principle is a mistake and is in tension with states' obligation to protect human rights. The WTO tariff provisions create a right for exporters to access foreign markets – there should be no such right. Many developing countries argue they bound tariffs at inappropriate levels in 1994 and they want the chance to revise those bindings. Others are arguing more generally that there are situations in which tariffs may need to rise to meet development priorities that are more important than satisfying the imperative to increase global trade volumes. To meet its obligations to protect the human right to food, the state needs to maintain some control over trade flows, including through tariffs.

Border measures can be used constructively for a number of goals. Tariffs can help keep domestic markets more stable, helping to manage external volatility that disrupts the supply and cost of food on local markets. For large integrated economies, such as the European Union or the United States, the use of tariffs has to be subject to multilateral disciplines, to ensure that any domestic problems that arise are not dumped on the outside world. For instance, both the E.U. and the U.S. have allowed (and even encouraged) their exporting firms to dump surplus agricultural commodities at less than cost of production prices on world markets, destroying agricultural output in developing countries. But for the majority of countries who neither buy nor sell enough in world markets to affect world prices, allowing tariff policy to maintain some local stability in prices can protect local capital investment, local jobs and local food production, all of which are necessary to realize the right to an adequate standard of living, including food, health and work.

Tariffs are not a magic solution to domestic economic problems. Tariffs can be abused, and their misapplication can cost economies dramatically in lost opportunities – either for new investment and innovation, or to keep domestic firms competitive and accountable. Nonetheless, tariffs play a central role in many developing country economies, and for their governments in particular – some states earn 50 percent or more of their revenues from tariffs.¹⁰ For countries with small economies and a small tax base, tariffs provide an essential revenue stream that can be important to progressively realize economic, social and cultural rights (Osakwe 2007).

6.2.2. International Competition Law

“Violations of the right to food can occur through direct action of States or other entities insufficiently regulated by States. These include, [...] failure to regulate

activities of individuals or groups so as to prevent them from violating the right to food of others, or the failure of the State to take into account international legal obligations regarding the right to food when entering into agreements with other States or with international organizations.”

General Comment 12, the Right to Adequate Food

In an open market, prices provide signals to buyers (and sellers) about what price they should charge (or pay). Effective competition is a necessary attribute of a functioning market. Yet globalization along the lines set out by the WTO, the World Bank and the IMF have undermined some fundamental aspects of competition, while prioritizing a very narrow definition of competition that has given the concept a bad reputation. That agenda, first promoted (and effectively blocked by civil society protests) at the OECD, defined competition policy as allowing foreign firms to compete with domestic firms without discrimination. In practice, the dismantling of barriers to trade and capital flows has concentrated significant economic power in the hands of a small number of global firms; there is nothing fair, or competitive, about forcing developing country private sectors to compete with these giants, some of whom have sales worth more than whole national economies.

Even states with relatively strict domestic competition laws show remarkably little interest in holding accountable firms headquartered in their jurisdiction but operating abroad. At the same time, domestic markets vary enormously in size and economic might. National firms in the U.S. operate in an internal market of close to 300 million people, and are likely to dwarf even a monopoly in a small market such as Iceland or Canada (let alone in Mali or Niger). A practical solution to confronting giant private firms, in a globalized world, might be to maintain the monopoly, as dairy operators have in New Zealand and in Scandinavia. Yet without careful regulation, that solution might impose costs in local markets that are unacceptable, both for consumers and producers.

Governments have a responsibility to protect the positive dimensions of competition: they should provide open and universal access to information, work against collusion among firms, and provide disempowered groups (including farm workers and smallholder producers) with the tools and information they need to redress unequal market power. From a human rights perspective, states are responsible to ensure that competition policy and regulation respects, protects and supports the fulfillment of the right to food, work and health. There is

no equivalent right of transnational firms to compete in every local market.

6.2.3. Subsidies and Domestic Support

“State Parties [...] shall take, individually and through international cooperation, the measures, including specific programmes, which are need to improve methods of production, conservation and distribution of food.”

International Covenant on Economic, Social and Cultural Rights

Many agricultural subsidies are problematic, but not all subsidies result in unfairly traded exports. The subsidy classification system at the WTO is too politicized. Developed country negotiators have manipulated the different colored boxes to suit their domestic needs. Support is classified according to the degree to which it distorts trade. Governments need better criteria for disciplining agricultural subsidies and support that take into account human rights objectives.

Economists Dorward and Morrison argue that considerable evidence supports the contention that the state needs to play a significant role in stimulating the transformation of agriculture, especially in the early stage of agricultural development. They conducted a review of a number of countries to compare their agricultural development strategies and to provide lessons for the least developed countries (Dorward and Morrison 2000). They found the support from the government was in many cases essential for a good outcome.

Dorward and Morrison argue the problem is not public support to agriculture per se, but rather that many policies to support agricultural development are conceived as temporary but become permanent as lobbies emerge to fight to continue the level of support. Multilateral rules could support a good final outcome, by establishing criteria to guide governments on when public investment and support for agriculture contributes to realizing human rights and when it is time to eliminate programs that undermine human rights. The human rights treaty bodies could provide regular checks and balances on government policies to provide the impetus for change. Indeed, a multilateral system of rules offers a way to create a check on the entrenchment of too-powerful local interests. The right framework would allow rules to evolve. The General Comment on the Right to Adequate Food says “State parties shall develop and maintain mechanisms to monitor progress towards the realisation of the right to adequate food for all, to identify the factors and difficulties affecting the degree of implementa-

tion of their obligations, and to facilitate the adoption of corrective legislation and administrative measures, including measures to implement their obligations.”

Annex 3 of the Agreement on Agriculture, also known as the amber box, lists the forms of domestic support that are considered to be the most trade-distorting and that members are required to reduce. Market price supports are included in Annex 3. Yet price supports can be an important policy tool to ensure stable food prices for consumers and a decent return for producers. Price supports also offer a way to manage production (governments could guarantee the price at X, but only for Y quantity of production). For a food system that is reeling from too much of some commodities (especially sources of sugar and fat) and too little of others (sufficient variety of fruits and vegetables), this kind of control could be useful.

There are some important provisions in the existing system of categorizing subsidies that could support the realization of human rights. Article 6.2 of the WTO Agreement on Agriculture allows developing country members to provide investment subsidies for agriculture and input subsidies for low-income or resource-poor farmers to encourage agricultural and rural development. This support could improve both availability and accessibility of food to these particular groups where poverty is extremely prevalent.

6.2.4. Food Stocks

WTO rules allow developing country governments to establish public stockholding for food security purposes, on condition that food purchases and sales are made at prevailing market prices. The way food prices jumped early in 2008 shows the limitations of such demands; a government may not be able to afford a stock at prevailing prices, or may not believe those prices reflect market fundamentals (potential supply, real demand, the scope for substituting foods for one another, etc.) so much as temporary aberrations (excessive speculation, hoarding by traders, etc.). The provisions are too limiting. The withdrawal of the state from managing food stocks is one of the fundamental reasons that poor harvests and increased demand for specific crops triggered a global food crisis in 2008. Grain reserves protect world and local prices from market volatility in the face of cyclical supply shortfalls (de la Torre Ugarte and Murphy 2008).

In one of the most important policy changes of recent years, the U.S. government eliminated its program of

farmer-owned commodity reserves in 1996. The U.S. is a major grower of a number of agricultural commodities for world markets, and the shift in domestic policy had repercussions for producers around the world. Just twelve years later, the food price crisis has called into question that experiment to eliminate a basic area of public oversight of food and agriculture. Policy changes required under the conditionalities of structural adjustment programs (and then poverty reduction strategies) designed by the World Bank and IMF have pushed developing countries to abandon national and regional grain reserves as well.

A grain reserve is anathema to the processing and trading firms that rely on cheap commodities for their business. It is also anathema to free trade purists. However, political support for food reserves has sprung up in surprising corners in 2008. For instance, the heads of state of the G-8 countries wrote in a communiqué from their summit in July, We will explore options on a coordinated approach on stock management, including the pros and cons of building a 'virtual' internationally coordinated reserve system for humanitarian purposes. At the September session of the UN General Assembly in New York, Bangladesh called for the establishment of a global food bank, echoing a regional initiative agreed to by the SAARC countries (Afghanistan, India, Bangladesh, Sri Lanka, Pakistan, the Maldives, Bhutan and Nepal) in August (SUNS 2008). Even the World Bank recently advocated in favor of establishing international grain reserves (World Bank 2008).

Local ownership and control issues will still need to be addressed in such a global project. The recent report of the UN Special Rapporteur on the right to food to the Human Rights Council also called for [&] the constitution of strategic grain reserves at the national, or preferably at the local level, highlighting concerns among many social movements that food security starts with sovereign control over food production and distribution. In any event, such measures should be seen as strengthening the global trading system by building predictability and avoiding the peaks and troughs that are widely acknowledged by most commentators to exaggerate disparities in short-term supply and demand.

6.2.5. Manage Volatility

A food supply that guarantees access to food at all times needs to manage volatility. Between September 2006 and June 2008, average food prices on international markets increased by 73 percent. By September 2008 prices had plummeted to a nine-month-low (FAO food price indices,

accessed October 2008). Both producers and consumers are better off when prices are not too variable; prices should not be rigid, but farmers run considerable financial risks when they plant a crop, while poor consumers spend too much of their income on food to make it easy for them to absorb sharp price increases. The theory of building a single global market was to reduce volatility by giving every country access to a global supply. In practice, the effort to build a single market has had quite another effect: it has given the richest consumers access to that global supply, undermining the claims of those who are less well-off to keep a share of their land, water and agricultural productive capacity.

The volatility of global food and agricultural markets undermine local and national food systems. When world prices are low, cheap imports (often at dumped prices) flood into local markets destroying local production and the livelihoods of producers who are not able to find alternative sources of income. Food aid donations jump, though less food aid is needed. In times of high world prices, on the other hand, countries that depend on the world market to feed their people are unable to afford the increased food import bills and food aid contributions drop, sometimes dramatically. This is unacceptable under human rights law, which requires governments to take steps to ensure economic and physical access to adequate food at all times.

6.2.6. State Trading Enterprises

The availability of food refers to the possibilities [...] for well functioning distribution, processing and market systems that can move food from where it is needed in accordance with demand.

General Comment 12, the Right to Adequate Food

A number of countries have long histories of state-run enterprises in the agricultural sector. Most developing countries with large rural communities used state trading enterprises (STEs) including China, India, Indonesia, Kenya, the Philippines and Malaysia. Since the 1990s these enterprises have been subject to significant reform. In many poorer developing countries, STEs were dismantled under the structural adjustment programs of the World Bank and the IMF in the 1980s and 1990s. Among developing countries, significant STEs now only exist in Indonesia, Philippines and Malaysia although they are still used to varying degrees in other developing countries.

STEs have the potential to distort trade and more importantly from a human rights perspective, have been

regarded as highly corrupt and inefficient in many developing countries. Lamon Rutten from the UN Conference on Trade and Development (UNCTAD) provides an example of the Food Corporation of India as an STE that performed important functions but did so inefficiently. The presence of food mountains around its warehouses amidst hunger, and its burgeoning operational costs have been contentious, (Rutten 2007).

STEs can play an indispensable role, however, particularly in countries where hunger and poverty are widespread, by supporting rural communities, guaranteeing stable prices for the poor, trading of key staple crops, and ensuring proper food distribution to where it is needed. Rutten ultimately advocates for STEs in developing countries because of their role in ensuring food security, food self-sufficiency and market functions.¹¹ In Asia, for example, the public food distribution system has helped increase availability and affordability of rice and the proportion of undernourished people declined from almost 40 percent to 15 percent over a period of 40 years (FAO 2004).

Creating a role for the state in trading and distribution can be used to support the realization of the right to food. The broader human rights framework has to be used alongside to ensure the institutions remain legitimate, transparent and accountable to the people they are established to serve.

6.2.7. Anti-Dumping Rules

Current WTO rules tackle dumping by allowing countries to tax imports that are sold for less than the prices in the home market. The rules ignore the problem of dumping that starts at the farmgate, with farmers who are not paid a fair price in the domestic market. U.S. production of key export commodities, including corn, soybeans, rice and cotton, are consistently sold at less than the cost of production prices in domestic markets (Murphy et al. 2005). The Ecumenical Advocacy Alliance and the Foodfirst Information and Action Network (FIAN), conducted three cases studies (one each in Honduras, Ghana and Indonesia), to demonstrate how the dumping of rice on world markets has undermined the right to food (Paasch 2007). The research found that as a result of liberalization each country had experienced surges of rice imports. Farming communities lost income, many farmers quit farming, and their access to food was less secure than it had been in previous decades. The studies acknowledged that food is one of the last things that people will cut back on, but at the hungry times (before the next harvest, when stocks from

the last harvest are running low) people cut back on both the number of meals they ate and the nutritional content of the meals.

Among the issues contributing to this problem is chronic overproduction in developed countries that has made dumping endemic. Linked to overproduction is the overwhelming power of a small number of food processing and retail companies, whose interests are served by abundant and therefore cheap supplies of agricultural commodities. These firms have sufficient market power to dominate prices in a number of markets, particularly in their purchases from farmers.

WTO rules to address agricultural export dumping are inadequate. It is complicated and time consuming for countries to take action against dumping within the trade system. A country must have domestic anti-dumping laws in place to impose import duties on dumped products, a first hurdle that many developing countries fail to address. Then, the plaintiff must take their complaint to the WTO Dispute Settlement Body, a course that takes up to four years and hundreds of thousands of dollars in legal fees. There are very few quick remedies for governments prepared to act to protect human rights if livelihoods are lost: anti-dumping actions are slow and the outcome unsure.

WTO rules against dumping should be strengthened and simplified. They can be strengthened by reviewing the definition of dumping and ensuring that dumping margins are measured against production costs and not against domestic prices. Countries should also have access to stop-gap measures that allow the imposition of safeguard measures to prevent subsidized agricultural commodities from damaging local markets while investigations of reported damage are underway, as the Group of 33, an alliance of developing countries coordinating their positions on agriculture, has proposed in the Doha negotiations.

6.2.8. Food Aid

“Food aid should, as far as possible, be provided in ways which do not adversely affect local producers and local markets, and should be organized in ways that facilitate the return to food self-reliance of the beneficiaries. Such aid should be based on the needs of the intended beneficiaries. Products included in international food trade or aid programs must be safe and culturally acceptable to the recipient population.”

General Comment 12, the Right to Adequate Food

The inclusion of food aid disciplines as part of the negotiations on agriculture within the Doha Agenda has given the WTO a kind of first among equals status in multilateral food aid circles, despite the peripheral interest and experience of trade officials with food aid. Trade officials (especially from countries that export crops such as wheat) are worried that food aid (most especially U.S. food aid) is used as a tool to subsidize exports. This relatively minor concern has been allowed to dominate food aid negotiations in other arenas, including at the Food Aid Convention. Meanwhile, the few simple steps that could ensure food aid is not so easily used to displace local production continue to be rejected, first and foremost by the U.S. in concert with some of the recipients of food aid.

Food aid is not a strong human rights tool, but it does offer a tool to address the most immediate obligation on states with regard to the right to food: that people not starve in times of crisis. Food aid provides an important social safety net and if guided by proper targeting and timing requirements, as well as respect for cultural preferences, it plays an important role. Nonetheless, food aid can also be disruptive and even destructive of long-term food security by undermining local production and local markets. These effects have been well documented. Trade rules can contribute by insisting that food aid meet some relatively simple but essential criteria to avoid abuse or unintended damage to already-fragile food systems.

7. CONCLUSION

The world is ready for a new vision for food and agriculture. There is no shortage of ideas for how to charter this new path. The solutions will differ for each country depending on their particular circumstances and stage of development.

The challenge for each government, their citizens, and for the international organizations that have a say in food and agriculture policies, is to find the right mix of policies and regulations that serve the many and varied goals of the food system. The goals include: an end to hunger; improved access to healthy and affordable food for consumers; a decent wage for farm workers; fair and remunerative prices for farmers; a framework to encourage investment; innovation and the transfer of technology, and a more equitable distribution of wealth along the food chain.

The human rights framework provides an important set of guidelines to embark on this path. Human rights are indispensable to ensure a people-centered approach to food and agriculture. The production-centered approach has failed to ensure access to adequate food for all. The trade-centered approach stimulated growth in a handful of countries, but failed to alleviate poverty, or offer a viable development path for the poorest countries.

Furthermore, human rights law provide an important set of checks and balances to ensure that one policy targeted at one specific group, say urban settlers, will not negatively impact another group, say farm workers, or that one country Section 0s agricultural development strategy does not undermine another country Section 0s development strategy. The periodic review of each country Section 0s implementation of their human rights obligations provides an important space for governments to review and reform outdated policies that no longer serve the needs of the poorest and most vulnerable people.

A new vision for food and agriculture requires active citizens and responsive governments. It also requires a set of multilateral institutions that are capable of changing as new challenges arise, working together, and tackling global issues as a complex, overlapping, messy whole. Now is the time to be truly daring.

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² Article 1, Universal Declaration of Human Rights.

³ Schutter, O. De. 2008. *Building Resilience: a human rights framework for world food and nutrition security*. Report of the UN Special Rapporteur on the right to food. A/HRC/9/23. September 8. Section IV. Para. 24.

⁴ Article 2, International Covenant on Economic, Social and Cultural Rights.

⁵ These include the Covenant on Economic, Social and Cultural Rights, the Covenant on Civil and Political Rights, the Convention on the Rights of the Child, the Convention on the Elimination of Discrimination Against Women, the Convention Against Torture, the Convention on the Elimination of Racial Discrimination and the Convention on Migrant Workers. See www.ohchr.org

⁶ Article 2, International Covenant on Economic, Social and Cultural Rights.

⁷ Antigua and Barbuda, Barbados, Belize, Benin, Bolivia, Botswana, China, Congo, Côte d'Ivoire, Cuba, Dominica, Dominican Republic, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, India, Indonesia, Jamaica, Kenya, Rep. Korea, Madagascar, Mauritius, Mongolia, Mozambique, Nicaragua, Nigeria, Pakistan, Panama, Peru, Philippines, St Kitts and Nevis, St Lucia, St

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Vincent and the Grenadines, Senegal, Sri Lanka, Suriname, Tanzania, Trinidad and Tobago, Turkey, Uganda, Venezuela, Zambia, Zimbabwe.

⁸ Article 4 paragraphs 1 and 2, Agreement on Agriculture. Article 4.2 instructs countries to use ordinary customs duties and bans the use of other types of border measures including quantitative import restrictions, variable import levies, minimum import prices etc & except under special conditions laid out in Article 5 Annex 5.

⁹ Article 28bis, General Agreement on Tariffs and Trade (GATT), 1947.

¹⁰ Over the period 1985-1994, taxes from international trade represented 20 percent of total revenue in 26 out of 42 countries in sub-Saharan Africa. Over the period 2000-2003, trade taxes represented more the 50 percent of the total revenue for the Comoros, Gambia and Niger. In the same period, trade taxes represented more than 40 percent for Benin, Lesotho, Madagascar, Mali, Sierra Leone, Togo and Uganda.

¹¹ Rutten elaborates on the types of activities undertaken by STEs in developing countries. For food security this includes public distribution systems and welfare schemes, stocking food reserves and intervening in times of crisis. For food self-sufficiency this includes domestic purchases to incentivize production of crops critical for domestic security and providing an impetus for higher investment in agriculture. The market functions of STEs include providing a market and a price for producers, as investors, negotiators of prices with buyers, providing competitive loans, better freight rates, longer-term forward contracts, and robust agricultural infrastructure including warehouses, transportation and distribution.

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