

# **An International and European perspective on the right to food and to adequate food for elderly people and its justiciability. Food Common Policy and Strategies\***

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## *1. Introduction*

Food is one of the biggest challenges of modern time. The United Nations Food and Agriculture Organization (hereinafter FAO) estimates that about more than one billion people are undernourished and over two billion suffer from micronutrient deficiency<sup>1</sup>. These data, on the one hand, give rise to perplexity if one takes into account that international law recognises not only the right to freedom from hunger but also the right to adequate food. On the other hand, such an estimation is an indication that there is a large difference between the formal recognition of food as a human right and the implementation at the national level of this recognition.

Food-related problems are general to all individuals. Undernutrition and malnutrition are faced not only by victims of armed conflict and natural disasters or by people in developing countries and the food bank phenomenon in the world illustrates that. If that is true, then it is also true that access to food is a problem of special concern for some marginalised or vulnerable groups. These include older people.

This article will discuss the right to food and to adequate food with a specific focus on the elderly. Firstly, the recognition of human right to food will be discussed from the international law perspective by placing the greatest emphasis on the content of the International Covenant on Economic, Social and Cultural Rights. Secondly the focus will shift to the European continent, in order to deal with the protection that the right to food and to an adequate food for the elderly receive both within the context of the European Convention on Human Rights and under European Union law. Then the ways to protect the individuals, including the elderly, when faced with violations of the right to food and to adequate food will be commented upon. Finally, some strategies in the European context for advancing the access to adequate food by elderly people will be presented.

## *2. The right to food in international law. A focus on elderly people*

### *2.1. The right to food as a fundamental human right*

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\*\* Even if the paper is the result of a concerted effort, paragraphs 1, 2, 4 shall be attributed to Federica Musso whilst paragraphs 3, 5, 6 shall be attributed to Cristina Grieco.

<sup>1</sup> United Nations of Human Rights, Office of the High Commissioner for Human Rights, *The Right to Adequate Food*, Fact Sheet No. 34, available at [www.ohchr.org/Documents/Publications/FactSheet34en.pdf](http://www.ohchr.org/Documents/Publications/FactSheet34en.pdf), p. 1.

Contrary to what one may imagine, problems related to the lack of food or adequate food concern not only people affected by armed conflicts. According to FAO estimates, only about 10 per cent of deaths from hunger are the result of armed conflicts and the other 90 per cent are victims of chronic lack of access to adequate food<sup>2</sup>.

But, over and above that, food plays a special role in international humanitarian law, as reflected by the fact that this branch of international law contains important rules aimed at ensuring that persons affected by armed conflict have food or have access to it<sup>3</sup>. These rules, however, are not cast as human rights provisions, but rather they complement the human right to food in international human rights law. As rightly pointed out by scholars, the rules relating to food in international humanitarian law are primarily formulated as obligations of parties to an armed conflict, rather than as rights<sup>4</sup>. In any event, it has to be noted that what is set out in international human rights law as regards food also applies to conflict situations, according to the Advisory Opinion of the International Court of Justice (ICJ) on the Legality of the Threat or Use of Nuclear Weapons. On that occasion, the ICJ has recognised, *inter alia*, that the protection offered by human rights conventions does not cease in case of armed conflict<sup>5</sup>.

There is no doubt that the right to food is a human right. Many international texts – of binding or simply recommendatory value and with a universal or a regional vocation – deal with food, whether directly or not.

The human right to food has been first recognised by a soft law instrument. Article 25, paragraph 1, of the Universal Declaration of Human Rights of 1948 provides that “everyone has the right to a standard of living adequate for the health and wellbeing of himself and his family, including *food* [emphasis added], clothing, housing and medical care and necessary social services [...]”.

It was not until 1966 that the human right to food has been embedded in two treaties with a universal vocation, respectively the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).

Food plays a role within the ICCPR and this is not surprising when one considers that hunger imperils the fulfilment of other human rights. Article 1, paragraph 2, concerning the right of self-determination, says that “all peoples may [...] freely dispose of their natural wealth and resources [...] and that “in no case may a people be deprived of its own *means of subsistence*.” Obviously, the means of subsistence, referring to the resources that are necessary for survival, include food. In addition, Article 6, according to which “every human being has the inherent right to life” is relevant to the extent that it clearly implies the right to food and other necessities for sustaining life. This is confirmed by the Human Rights Committee (HRC) that, in the General Comment No. 6, has specified that the expression “inherent right to life” cannot be understood in a restrictive manner and this means that the protection of this right requires that States adopt positive measures, including those aimed at the elimination of malnutrition<sup>6</sup>. Also the right of minorities to enjoy their own culture under Article 27 has been interpreted by the HRC in broad terms.

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<sup>2</sup> *Ibidem*.

<sup>3</sup> For an in-depth analysis, see J. PEJIC, *The right to food in situations of armed conflict: The legal framework*, in International Review of the Red Cross, 2001, p. 1097 ff.

<sup>4</sup> See J. J. PEJIC, *op. cit.*, p. 1109.

<sup>5</sup> Legality of the Threat or Use of Nuclear Weapons, ICJ Reports 1996, p. 240, par. 25. See V. CHETAIL, *The contribution of the International Court of Justice to international humanitarian law*, in International Review of the Red Cross, 2003, p. 240 ff.

<sup>6</sup> UN Human Rights Committee, CCPR General Comment No. 6: Article 6 (Right to Life), 30 April 1982, par. 5, available at: <http://www.refworld.org/docid/45388400a.html>.

According to the General Comment No. 23, that right may include traditional activities as fishing or hunting<sup>7</sup>, that are directly connected to food.

As far as the right to food is concerned, the ICESCR is much more relevant than the ICCPR, if only because this instrument affirms explicitly the human right to food. Article 11 obliges States parties to recognize “the right of everyone to an adequate standard of living for himself and his family, including adequate food” (paragraph 1) as well as “the fundamental right of everyone to be free from hunger [...]” (paragraph 2).

Turning to the recognition of the right to food within the regional human rights systems and leaving aside for the moment the existing regulatory framework at the European level (both within the European Union and the European Convention on Human Rights system)<sup>8</sup>, it should be noted that only the Inter-American system explicitly refers to the right to food with regard to all individuals, regardless of whether they belong or not to a particular category. Article 12 of the 1988 Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador) establishes that “everyone has the right to adequate nutrition which guarantees the possibility of enjoying the highest level of physical, emotional and intellectual development” and provides that “in order to promote the exercise of this right and eradicate malnutrition, the States parties undertake to improve methods of production, supply and distribution of food [...]”.

However, as it is the case for the ICCPR, also with regard to regional instruments the protection of the right to food arises indirectly from the recognition of other human rights.

The African Commission on Human and Peoples’ Rights has observed that failure to prevent the destruction and contamination of food sources constitutes a violation of several rights contained in the African Charter on Human and Peoples’ Rights (African Charter), ranging from civil and political rights (articles 2 - non-discriminatory enjoyment of rights- 4 - right to life - and 14 - right to property) to socio-economic rights (articles 16 - right to health and 18 - family rights), and to collective rights of peoples (articles 21 - right of peoples to freely dispose of their wealth and natural resources and 24 - right of peoples to a satisfactory environment)<sup>9</sup>.

Similarly, the Inter-American Court of Human Rights has considered that the failure to ensure to a community the access to its own ancestral lands which provide the natural resources directly related to the survival capacity and the preservation of the ways of life breaches the right to life enshrined in Article 4 of the American Convention on Human Rights. In particular, the Inter-American Court has recognised that the denial of access to land and the traditional means of subsistence is likely to lead a community to extreme poverty, including deprivation of access to a minimum of food, and thus threaten its members’ right to life<sup>10</sup>.

### *2.1.1. The content of the right to food*

What makes the ICESCR so important is not only the explicit enunciation of the right to food, but also and above all the definition of the adequacy of food given by the

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<sup>7</sup> UN Human Rights Committee, CCPR General Comment No. 23: Article 27 (Rights of Minorities), 8 April 1994, par. 7, available at: <http://www.refworld.org/docid/453883fc0.html>.

<sup>8</sup> See *infra* par. 3.

<sup>9</sup> African Commission on Human and Peoples’ Rights, Social and Economic Rights Action Centre (SERAC) and another v. Nigeria, 2001. For a comment, see F. COOMANS, *The Ogoni Case before the African Commission on Human and Peoples’ Rights*, in *International and Comparative Law Quarterly*, 2003, p. 749 ff.; S.A. DERSSO, *The jurisprudence of the African Commission on Human and Peoples’ Rights with respect to peoples’ Rights*, in *African Human Rights Law Journal*, 2006, p. 369 ff.

<sup>10</sup> Inter-American Court of Human Rights, Case of the Sawhoyamaya Indigenous Community v. Paraguay, Judgment of March 29, 2006.

Committee on Economic, Social and Cultural Rights (CESCR) in its General Comment No. 12<sup>11</sup>.

It can be derived from the wording of Article 11 of the ICESCR that the right to food is made up of two different components: on the one hand, the right to adequate food within the broader right to adequate standards of living and, on the other hand, the right of everyone to be free from hunger. The CESCR believes that the right to be free from hunger is a component of the broader right to adequate food. In the international legal literature it has been observed that such an approach wrongly suggests the interchangeability between the two rights<sup>12</sup>. Nevertheless, in no way the Committee calls into question the fact that the freedom from hunger and the right to adequate food are separate. The adequacy of food presupposes, but is not restricted to, the elimination of hunger.

According to the General Comment No. 12, the right to adequate food, far from being interpreted as the right to assimilate a minimum package of calories, proteins and other specific nutrients, 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<sup>13</sup>. One can talk about adequate food when the criteria of availability and accessibility are fulfilled<sup>14</sup>.

The availability is conceived both from the point of view of quantity and quality. As regards the quantity, every individual has to have the possibility of either feeding oneself directly from productive land or other natural resources or purchasing it from the market<sup>15</sup>. As regards the quality, every individual must be able to consume food free from adverse substances<sup>16</sup> and acceptable from the point of view of culture or consumption<sup>17</sup>. Furthermore, both quantitatively and qualitatively the food must satisfy the dietary needs of individuals<sup>18</sup>.

The accessibility takes into account both economic and physical accessibility<sup>19</sup>. Food is accessible economically when every individual or household has the economic means to procure food without compromising other basic necessities. Physical accessibility implies that food must be accessible to everyone, including physically vulnerable individuals.

To sum up, food is adequate when it is safe and corresponds the own cultural traditions; when it satisfies both physical and mental needs of consumers and when individuals can have access, both economically and physically, to it, either directly or by means of purchases.

### *2.1.2. The obligations arising from the right to food*

The right to food is binding on States that have ratified the ICESCR<sup>20</sup>. Article 2 of the ICESCR deals with the legal obligations on States parties. Under the paragraph 1 of this provision, each of them “undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving *progressively* [emphasis added] the full realisation of the rights recognised in the present Covenant by all appropriate means, including

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<sup>11</sup> CESCR, Twentieth session, 26 April-14 May 1999, General Comment 12, *The right to adequate food* (art. 11).

<sup>12</sup> See D.A. YIGZAW, *Hunger and the Law: Freedom From Hunger as a Freestanding Right*, in *Houston Journal of International Law*, 2014, p. 695 ff.

<sup>13</sup> Par. 6.

<sup>14</sup> Par. 8.

<sup>15</sup> Par. 12.

<sup>16</sup> Par. 10.

<sup>17</sup> Par. 11.

<sup>18</sup> Par. 9.

<sup>19</sup> Par. 13.

<sup>20</sup> See [www.ohchr.org/EN/HRBodies/CESCR/Pages/CESCRIndex.aspx](http://www.ohchr.org/EN/HRBodies/CESCR/Pages/CESCRIndex.aspx).

particularly the adoption of legislative measures”<sup>21</sup>. From a combined reading of Article 2(1) and Article 11 it becomes clear that States parties have to take steps to achieve progressively the full realization of the right to food.

The fact that the Covenant foresees the realization over time of the rights contained therein should not be misinterpreted as depriving the obligation at issue of any meaningful content. In order to avoid a narrow interpretation of Article 2(1), the CESCR, in its General Comment No. 3, has not missed the opportunity to define the term of ‘progressive realisation’. The concept of progressiveness does not mean that States are allowed to be inactive. To be progressive, in fact, is only the full realisation of the economic, social and cultural rights enshrined in the Covenant, but steps towards that goal must be taken within a reasonably short time and any deliberately retrogressive measures in that regard would need to be fully justified<sup>22</sup>. In addition, the concept of progressiveness is not synonymous with measures of a long-term character, since States are also required to adopt measures of immediate nature. In particular, a minimum core obligation to ensure satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent on them. It is noteworthy that in the view of the Committee a State party in which any significant number of individuals is deprived of essential foodstuffs is failing to discharge its obligations under the Covenant<sup>23</sup>.

The CESCR, through its General Comment No. 12, has given important pointers on how to realize the right to food in order to comply with Article 11 of the Covenant. In particular, the articulation of the obligation to give effect to the right to food into three obligations, respectively the obligations to respect, to protect and to fulfil is remarkable. States parties firstly have to respect the right to food by not taking any measure that would result in preventing individuals from having access to food. Secondly, States parties have to protect the right to food against actions by third parties (both enterprises and individuals) having the effect of depriving individuals of their access to adequate food. Finally, States have to fulfil the right to food, either indirectly and directly. States are expected to facilitate the access of individuals to food by strengthening the utilisation of resources and other means of livelihood as well as to provide food assistance whenever individuals are unable to have access to food.

According to Article 2(1), the obligations arising from the ICESCR include “the adoption of legislative measures”. Even if nowhere the Covenant imposes to States parties to legislate on the right to food, the CESCR, in its General Comment No. 3, “recognises that in many instances legislation is highly desirable and in some cases may even be indispensable”<sup>24</sup>. In General Comment No. 12, the Committee goes further observing that the realisation of the right to be free from hunger and the right to adequate food requires the formulation of national strategies to ensure food supply<sup>25</sup> to be implemented through the adoption of a framework law<sup>26</sup>. Aware of the importance of the implementation of the right to food at the national level, FAO has elaborated a detailed guidance to legislative drafters (primarily) of States parties to the ICESCR, which calls for the incorporation of the right to food into the constitutions as well as for the adoption of a framework law on the right to food<sup>27</sup>.

## *2.2. Adequacy of food with regard to elderly people*

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<sup>21</sup> For more detail, see CESCR, Fifth session, 14 December 1990, General Comment No. 3: The Nature of States Parties’ Obligations (Art. 2, par. 1).

<sup>22</sup> Par. 9.

<sup>23</sup> Par. 10.

<sup>24</sup> Par. 3.

<sup>25</sup> Par. 21.

<sup>26</sup> Par. 29.

<sup>27</sup> FAO, *Guide on legislation for the right to food*, available at [www.fao.org/righttofood/publications/publications-detail/en/c/129278/](http://www.fao.org/righttofood/publications/publications-detail/en/c/129278/).

Although all individuals have an equal right to food, some conventions with a universal or a regional vocation devote specific attention to the right to food of those who belong to vulnerable groups.

The Convention on the Elimination of All Forms of Discrimination against Women deals with the right to food by establishing in Article 12 the right to adequate nutrition during pregnancy and lactation. Article 24 of the Convention on the Rights of the Child, which relates to the right to health, calls for appropriate measures to combat disease and malnutrition, including through the provision of nutritious food and safe drinking water. Article 28 of the Convention on the Rights of Persons with Disabilities recognises the right of persons with disabilities to an adequate standard of living, including adequate food. Looking towards the regional level, Article 14 of the African Charter on the Rights and Welfare of the Child affirms that every child shall have the right to enjoy the best attainable state of physical, mental and spiritual health and this includes the provision of nutritious food. The right to adequate nutrition of children is also enshrined in Article 15, paragraph 3, of the Protocol of San Salvador). According to Article 15 of the Protocol to the African Charter on the Rights of Women, women have the right to nutritious and adequate food.

The question now is whether or not, in addition to women, children and disabled people, also the elders receive an enhanced protection under international law. The question arises on the grounds that older people can face specific hurdles in relation to the right to food resulting from biological or socio-economic factors.

The explicit formulation of the right to food with regard to the elders is contained in the Protocol of San Salvador. Article 17 of this instrument, entitled “Protection of the Elderly”, affirms that “everyone has the right to special protection in old age” and requires States parties “to take progressively the necessary steps to make this right a reality and, particularly, to provide suitable facilities, as well as food and specialized medical care, for elder individuals who lack them and are unable to provide them for themselves [...]”.

With the exception of the Inter-American system of human rights, no other regional human rights system enunciates the right of elderly people to food and the same goes for the conventions open for ratification by all States of the international community. On the other hand, there are some issues which ought to be underlined.

Firstly, at the regional level, and specifically at the European and African level, there are some instruments which contain specific dispositions concerning the rights of elderly, through which an indirect protection may be granted to the right to food. Leaving aside for a while the European context<sup>28</sup>, something needs to be said about the recent Protocol to the African Charter on the Rights of Older Persons in Africa. The preamble of such a treaty calls African Governments to adopt urgent measures aimed at addressing the needs of older persons in Africa such as access to food but, curiously, the substantive does not make any reference to the right to food and confine itself to recognise, in Article 7, the broader right to social protection<sup>29</sup>.

Secondly, and more importantly, it is true that, as far as the right to food enshrined in Article 11 of the ICESCR is concerned, the elders can be regarded as part of vulnerable groups, deserving therefore a particular attention when States parties to the Covenant

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<sup>28</sup> See *infra* par. 3.

<sup>29</sup> According to Article 7, States Parties shall: “1. Develop policies and legislation that ensure that Older persons who retire from their employment are provided with adequate pensions and other forms of social security; 2. Ensure that universal social protection mechanisms exist to provide income security for those Older persons who did not have the opportunity to contribute to any social security provisions; 3. Ensure that the processes and procedures of accessing pensions are decentralised, simple and dignified; 4. Take legislative and other measures to enable individuals to prepare for income security in old age; and 5. Take legislative and other measures that facilitate the rights of Older Persons to access services from state service providers”.

adopt measures in order to give effect to such a right within their legal orders. This follows from the definition of the content of the right to adequate food given by the CESCR in General Comment No. 12<sup>30</sup>.

As we have seen above, according to the Committee, food, among other things, must be available in quantity and quality sufficient to satisfy the dietary needs of individuals to qualify as adequate. On the basis of the assumption that dietary needs are satisfied when the nutrients intake is in compliance with human physiological needs at all stages throughout the life cycle<sup>31</sup>, it goes without saying that the adequacy of food has to be assessed taking into account the individual's age. Since both lean body mass and basal metabolic rate decline with age, an older person's energy requirement per kilogram of body weight<sup>32</sup> is different compared to that of individuals of other age groups. As a consequence, food adequate for a child can be inadequate for the elderly.

Another component of the availability requirement refers to the cultural acceptability of food that, as the Committee has pointed out, implies the need to take into account perceived non nutrient-based values attached to food. This means that food can be culturally unacceptable and therefore inadequate for elderly people in the event that it is inconsistent with their eating habits.

As it is known, food is adequate when, in addition to being available and economically affordable, is also physically accessible. The vulnerability of elderly people becomes clear especially with reference to this aspect of adequacy since it may be difficult for them to go out to get food. And it is no coincidence that the Committee includes elderly people among the physically vulnerable groups<sup>33</sup>.

In the light of the obligations arising from the ICESCR<sup>34</sup>, States parties would violate the Covenant by adopting at the national level measures that do not take into due account the vulnerability of the elders as regards the access to food or even make the situation of the elders concerning their nutrition worse. The obligation to respect the right to adequate food would not be respected if a State party, for example, were to repeal or suspend a national legislation that ensures the delivery of adequate food for the elders with reduced mobility (and unable to bear the cost of the service). The failure by a State party to prevent advertisements addressed to the elders aimed at promoting unhealthy food would entail the infringement of the obligation to protect the right to adequate food. A violation of the obligation to fulfil the right to adequate food would occur in the event that a State party refuses to provide food assistance for the elders unable to adequately feed themselves by the means at their disposal. In the opinion of the Committee, moreover, any discrimination in access to food as well as to means and entitlements for its procurement on the basis of age would lead to a breach of the Covenant<sup>35</sup>.

### *3. The right to food and to adequate food in Europe, food policies and elderly people*

As already stated, the right to food must be considered an inclusive right<sup>36</sup>. It is not simply a right to a minimum ration of calories, proteins and other specific nutrients. Rather it is a right to all nutritional elements that a person needs in order to live a healthy and active life, as well as to the appropriate means to access them.

Thus, food must be available, accessible and adequate. In this respect age plays a very important role. Particularly regarding adequacy, it means that the food must satisfy dietary

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<sup>30</sup> See *supra*, par. 2.1.1.

<sup>31</sup> Par. 9.

<sup>32</sup> See [www.who.int/nutrition/topics/ageing/en/index1.html](http://www.who.int/nutrition/topics/ageing/en/index1.html).

<sup>33</sup> Par. 13.

<sup>34</sup> See *supra*, par. 2.1.2.

<sup>35</sup> *General Comment*, No. 12, par. 18.

<sup>36</sup> See *supra* par. 2.

needs, taking into account the individual's age, living conditions, health, occupation, sex, etc. Elderly people's needs are different from those of children. For that very reason food policies must be targeted on specific categories and, thus, effective. Moreover, food must be safe for human consumption and free from adverse substances, such as contaminants from industrial or agricultural processes, including residues from pesticides, hormones or veterinary drugs. In this respect the European legislation is one of the most advanced among regional legal systems.

Unfortunately, at the present moment, from a general perspective, the overall trend is one of regression, rather the progressive realization of a right to food and, worst, to adequate food<sup>37</sup>.

On this matter, the lack of a direct and express recognition of the right to food and to adequate food in the European legal system appears to be particularly severe. Since the express recognition of a right to food and to adequate food means not just ensure a more reliable household food security but it is a reflection of a precise political choice. Unlike what happens in the American and African systems, the right to food and to adequate food is directly protected neither by the European Convention on Human Rights nor by the Treaties establishing the European Union<sup>38</sup>. That is so, especially, because, after the Second World War, doctrine had alleged that in the post conflict creation process of human rights it would have been sufficient to guarantee employment rights and social security. Since, having ensured both rights, there would be no more need of a special protection for the right to food or to adequate food.

Unfortunately, after the international deep economic crisis, the connection between labour, social security and food has unavoidably broken<sup>39</sup>.

### *3.1 Within the European Union*

European Union law does not provide for an express notion of “right to food” or “right to adequate food” neither in the establishing Treaties nor in other specific legislation. Hence, the concept has to be reconstructed by international sources<sup>40</sup> and soft law instruments as well (e.g. the Social Charter<sup>41</sup>).

In accordance with this lack, so far two are the possible ways to recognize the right to food or to adequate food across the EU: namely the Charter of Fundamental Rights of the European Union<sup>42</sup> (hereinafter also CFREU), the European legislation on Food and the International Cooperation policies with Third Countries.

Even if the CFREU does not recognize directly a specific right to food, remarkably, it takes into specific account the situation of elderly people, considered as a vulnerable category<sup>43</sup>. In this respect it provided a specific provision, Article 25, entitled “The rights of the elderly” according to which «The Union recognises and respects the rights of the elderly to lead a life of dignity and independence and to participate in social and cultural

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<sup>37</sup> See *supra* par. 2.

<sup>38</sup> See J. DESRUTINS, *Existe-t-il un droit communautaire à l'alimentation? – Mémoire pour le Master II Recherche de droit public – Université Panthéon-Assas Paris II*, available at [www.aidh.org/alimentation](http://www.aidh.org/alimentation), June 2007.

<sup>39</sup> See P. ALSTON, *International Law and the Human Right to Food*, in P. ALSTON, K. TOMASEVSKY (eds.), *The Right to Food*, Leiden, 1984, p. 17.

<sup>40</sup> See *supra* par. 2.

<sup>41</sup> See *infra* par. 3.2.

<sup>42</sup> The Charter was initially solemnly proclaimed at the Nice European Council on 7 December 2000. At that time, it did not have any binding legal effect. On 1st December 2009, with the entry into force of the Treaty of Lisbon, the Charter became legally binding on the EU institutions and on national governments, just like the EU Treaties themselves. For the first time, members of the College of Commissioners swore a solemn declaration to uphold the Charter as well as the Treaties in May 2010. Full text available at [http://www.europarl.europa.eu/charter/pdf/text\\_en.pdf](http://www.europarl.europa.eu/charter/pdf/text_en.pdf).

<sup>43</sup> See generally G. PALMISANO (eds.), *Making the charter of fundamental rights a living instruments*, Leiden, 2014, *passim*.

life». The origin of the Charter's article dedicated to elderly people is rooted in the beginning of the legal protection that the EU system has built up with respect to fundamental rights<sup>44</sup>. Given such potentially widespread application area of Article 25, it may be noted that its scope is not confined to specific areas of European regulatory activity. As a result, its provisions are capable of applying to any situation where EU law or national implementing legislation affects the right of the elderly to enjoy a dignified and independent life<sup>45</sup>.

Even if the direct impact of EU law in this field is often quite limited, nevertheless, certain elements of EU may impact significantly upon the lives of older persons. One of these cases is, undoubtedly, the Food policy and the recognition of the right to food and to adequate food. But, anyway, other elements concern, for example, EU law in the field of cross-border health care that has an impact on the types of medical treatment that older people can access<sup>46</sup>.

By requiring that the right of elderly people to enjoy a dignified and independent existence be respected, Article 25 sets out a legal principle that should guide the future evolution of EU legislation and case law that affects older persons both individually and as a group. This provision gives specific expression to the more general right to human dignity as set out in Article 1 of the Charter. It is also conceptually linked to, and overlaps with, the right to integrity of the person as set out in Article 3, the prohibition on inhuman and degrading treatment contained in Article 4, the right to liberty and security as set out in Article 6 and the right to respect for private life contained in Article 7, all of which are concerned with protecting human dignity and autonomy<sup>47</sup>. In this regard, as emerged by the explanations to the charter, the European Convention on Human Rights (ECHR) and the European Social Charter (ESC) have played a much more important role than the other human rights instruments. The provision under Article 20, that states that everyone is equal before the law, and the guarantee of non-discrimination, including on grounds of age, set out in Article 21, are also closely linked to Article 25. Together, these three articles establish that older persons are entitled to be treated with equal regard for their dignity, independence and right to participate in social and cultural life. As the Court of Justice has pointed out, equality can be secured by taking into account the difference by making specific provision for the needs of disadvantaged groups, such as the elderly (Article 25), children (Article 24) person with disabilities (Article 26)<sup>48</sup>.

Thus, Article 25 plays a very important role since it provides a focal point when it comes to the right of the elderly. Particularly, it is designed to guarantee that their specific needs are not neglected within the EU's human rights framework.

It does not solely require that the rights of older people shall be respected. It also commits the EU to recognising and respecting the special needs of older people. Unfortunately, the content of the provision is not strong enough to enforce an individual subjective right<sup>49</sup>. In fact, the Article is not drafted in a manner that appears to create directly enforceable individual rights<sup>50</sup>. It is meant more to be a general principle laying down a general framework for the creation of a European widespread standard of protection.

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<sup>44</sup> R. FORASTIERO, *The Charter of Fundamental Rights and the Protection of Vulnerable Groups: Children, Elderly People and Persons with Disabilities*, in G. PALMISANO, *Making the Charter of Fundamental Rights a Living Instruments*, *op. cit.*, pp. 165-198.

<sup>45</sup> See C. O'CONNOR, *Article 25*, in S. PETER, T. HERVEY, J. KENNER, A. WARD (eds.), *The EU Charter of Fundamental Rights, A Commentary*, Oxford, 2014, p. 694.

<sup>46</sup> In particular, the Directive 2011/24/EU provisions on the application of patients' rights in cross-border healthcare.

<sup>47</sup> See C. O'CONNOR, *Article 25*, in *The EU Charter of Fundamental Rights, A Commentary*, *op. cit.*, p. 695.

<sup>48</sup> See ECJ, Case 319/03, *Bribeche v. Ministre de l'Intérieur*, 2005, 1, CMLR 4, 25.

<sup>49</sup> See *infra* par. 4.

<sup>50</sup> See C. O'CONNOR, *Article 25*, in *The EU Charter of Fundamental Rights, A Commentary*, *op. cit.*, p. 702.

However, the commitment to respect the rights of the elderly set out in Article 25 appears to give rise to both negative and positive obligations, which should be given due weight when it comes to the framing, interpretation and application of EU legislation as well as national measures which implement EU law. The main obligation set out by Article 25 refers to respecting the dignity of elderly people, their right to enjoy an autonomous existence and their entitlement to participate in the social and cultural life of their communities. By extension, access to health care, housing and other forms of social rights must come within its scope, insofar as this is necessary to enable older persons to enjoy a dignified, autonomous and participative existence<sup>51</sup>. Their provisions establish that older persons are entitled as of right to receive sufficient social protection in the form of pensions<sup>52</sup>, health care, housing and other resources where this is necessary to meet their needs. But most of all, in this respect, the original recognition of the right to get adequate food that meet specific dietary needs seems fundamental. A kind of primary right that must be protected to ensure, as a sort of chain reaction, all the others and, as a consequence, the right of the elderly “to lead a life of dignity and to independence and to participate in social and cultural life”. Mostly because whenever some individuals have not enough sources to buy food, it means that they have already been deprived of all the rest. As immediate consequence, is not possible to ensure the full enjoyment of a dignity life.

Nevertheless, in the CFREU, even if just indirectly, the right to food and to adequate food might be ensured also by Article 1 on “Human Dignity”, Article 2 “Right to Life”, Article 3 “Right to the Integrity of the Person”, Article 21 “Non Discrimination” and Article 22 “Cultural, religious and linguistic diversity”. All these provisions can be considered as being mutually dependant and linked.

From the point of view of European substantive legislation on food and the international cooperation policies with Third Countries, it must be highlighted, so far, that from the European Legislator’s point of view, since food is liable for economic evaluation, it shall be considered as a good rather than as a basilar need.

On a strict legal reading, after the publication of the Green Paper on the general principles of food law in 1997<sup>53</sup> and the White Paper on food safety in 2000<sup>54</sup>, in January 2002 the European Commission presented the General Food Law Regulation 178/2002<sup>55</sup> of the European Parliament and the Council (here in after also General Food Law). The legal definition of “food” or “foodstuff”<sup>56</sup> is provided by Article 1. Furthermore, the

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<sup>51</sup> The explanation of Article 25 set out in 2007 Oj C303 makes it clear that its provisions drawn upon Article 23 of the revised ESC and Articles 24 and 25 of the Community Charter. Article 24 sets out that «Every worker of the European Community must, at the time of retirement, be able to enjoy resources affording him or her a decent standard of living. Article 25 establishes that «Every person who has reached retirement age but who is not entitled to a pension or who does not have other means of subsistence, must be entitled to sufficient resources and to medical and social assistance specifically suited to his needs». The provisions of Article 24 and 25 of the Community charter of the Fundamental Social Rights of Workers are other main sources of Article 25 along with Article 23 of the European Social Charter. See *infra* par. 3.2 and C. O’CINNEIDE, *loc. ult. cit.*

<sup>52</sup> In this respect, see also ECtHR *infra* par. 3.2 and foot note 35.

<sup>53</sup> Commission Green Paper on the General Principles of Food Law in the European Union, COM (1997) 176 Final, Brussels, 30 April 1997, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:1997:0176:FIN:EN:PDF>.

<sup>54</sup> Commission White Paper on Food Safety COM (1999) 719 Final, Brussels, 12 January 2000, [http://ec.europa.eu/dgs/health\\_consumer/library/pub/pub06\\_en.pdf](http://ec.europa.eu/dgs/health_consumer/library/pub/pub06_en.pdf).

<sup>55</sup> Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002, in the *Official Journal of the European Union* of 28 January 2002.

<sup>56</sup> For the purpose of the Regulation “food” or “foodstuff” means: «Any substance or product, whether processed, partially processed or unprocessed, intended to be, or reasonable be expected to be ingested by humans. “Food” includes drink, chewing gum and any substance, including water, intentionally incorporated into the food during its manufacturing”. The definition “food” shall not include: feed, live animals unless they are prepared for placing on the market for human consumption, plants prior harvesting, medicinal products, cosmetics, tobacco and tobacco products, narcotic or psychotropic substances, residues and contaminants».

Regulation lays down the general principles governing food and feed in general, and food and feed safety in particular, at EU and national levels. The Regulation provides a limited set of objectives for food law. Legislation in this field shall pursue a high level of protection of life and human health, as well as protection of consumers' interests, including fair practices in food trade. In seeking and achieving these aims, attention should also be paid to the protection of animal health and welfare, plant health and the environment, as regards food additives, food enzymes and food flavourings. The Regulation establishes also a European Authority on food security (EFSA). The European food legislation shall be supplemented by the so called "food hygiene package", (and in particular Regulation (EC) 852/2004; 853/2004; 854/2004) by Regulation (EC) 882/2004 on official controls performed to ensure the verification of compliance with feed and food law, and by the Food Improvement Agents package (FIA) which will lead to the definition of a Common Authorisation Procedure for food additives, food enzymes and food flavourings.

However, the European Union's food policy is more focused on food safety. It aims to protect consumers, while guaranteeing the smooth operation of the single market. Dating from 2003, the policy centres on the concept of traceability both of inputs (e.g. animal feed) and of outputs (e.g. primary production, processing, storage, and transport and retail sale). The EU has agreed standards to ensure food hygiene, animal health and welfare, and plant health and to control contamination from external substances, such as pesticides. Rigorous checks are carried out at every stage, and imports (e.g. meat) from outside the EU are required to meet the same standards and go through the same checks as food produced within the EU.

Nonetheless, the consumers, as the elderly, are guaranteed through the European food legislation both *food security* (which means confidence to have adequate quantitative food for each day) and *food safety* (which means confidence to have available safe nutrient food)<sup>57</sup>.

In this specific legal framework, particular significance has the *Codex Alimentarius*, which provides international food standards<sup>58</sup>. At the same time, in addition to formally accepted standards, the *Codex* includes advisory provisions called code of practice or guidelines that mainly address food business and contribute to the safety, quality and fairness of this international food trade<sup>59</sup>. Biotechnology, pesticides, food additives and contaminants are some of the issues discussed in the *Codex*<sup>60</sup>. The food standards provided are based on the

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<sup>57</sup> L. COSTATO, P. BORGHI, S. RIZZIOLI, V. PAGANIZZA, L. SALVI, *Compendio di diritto alimentare*, 7th ed., Padova, 2015, pp. 3-4; 387-452.

<sup>58</sup> In 1963 the Food and Agriculture Organization (FAO) and the World Health Organization (WHO) established the *Codex Alimentarius* Commission (CAC). Over the years, the CAC established specialised committees hosted by Member States all over the world. Some 175 countries, representing about 98% of the world's population, participate in the work of Codex Alimentarius. See Generally the website [www.CodexAlimentarius.net](http://www.CodexAlimentarius.net) and B. VAN DER MEULEN, *The Codex Alimentarius*, in I. SCHOLTEN-VERHEIJEN, T. APPELHOF, R. VAN DEN HEUVEL, B. VAN DER MAULEN (eds.), *Roadmap to Eu Food Law*, The Hague, 2011, pp. 31-40; *Codex Alimentarius Commission, Procedural Manual*, 20<sup>th</sup> ed., Rome, 2011.

<sup>59</sup> These include, for example, a Code of Ethics for International Trade in Food, and a set of Hygiene Codes like the Recommended International Code of Practice, General Principles of Food Hygiene and the Hazard Analysis and Critical Control Point (HACCP) System and Guidelines for its application.

<sup>60</sup> At present the Codex comprises more than 200 standards for specific foods (so called vertical standards), close to 50 food hygiene and technological codes of practice, some 60 guidelines, over 1000 food additives and contaminants evaluations and over 3200 maximum residue limits for pesticides and veterinary drugs. Finally, the *Codex Alimentarius* includes requirements of a horizontal nature on labelling and presentation and on methods of analysis and sampling. See M. D. MASSON-MATTHEE, *The Codex Alimentarius Commission and Its Standards: An Examination of the Legal Aspects of the Codex Alimentarius Commission*, The Hague, 2007, *passim*; S. NAVARRO, R. WOOD, *Codex Deciphered*, UK, 2001, p. 1 ff. E. KIMBRELL, *What is Codex Alimentarius*, 2000, 3 (4), *AgBioForum*, pp. 197-202; and also FAO, *Understanding The Codex Alimentarius*, 3th ed., Rome 2006, available at [www.who.int/foodsafety/publications/codex/Understanding\\_EN.pdf](http://www.who.int/foodsafety/publications/codex/Understanding_EN.pdf); FAO/WHO, *Report of the Evaluation of the Codex Alimentarius and other FAO and WHO Food Standards Work* (2002), available at: [www.who.int/food-safety/codex/eval\\_report/en/index.html](http://www.who.int/food-safety/codex/eval_report/en/index.html) and [www.codexalimentarius.net/web/evaluation\\_en.jsp](http://www.codexalimentarius.net/web/evaluation_en.jsp).

best available science, and on inferred by independent international risk assessment bodies or ad-hoc consultations organized by FAO and WHO<sup>61</sup>. They are established through an elaborate procedure of international negotiations.

However, the *Codex* standards are not legally binding norms. They do bear a slight resemblance to directives in European law in the sense that they present models for national legislation, but without an obligation to implement them. Member states undertake to transform the Codex standards into national legislation. No sanctions apply, however, if they do not honour this undertaking<sup>62</sup>.

Its importance as a focal point in this field is strengthened by the fact that *Codex* members cover 99% of the world's population and, since 1963, its system has evolved in an open, transparent and inclusive way to meet emerging challenges.

From European food law's point of view, the *Codex* is also having an increasing legal impact. In fact, in its case law, the European Court of Justice uses Codex standards as an interpretation aid for open standards in European law<sup>63</sup>. Moreover, the EU General Food Law recognises the significance of the *Codex Alimentarius*. In fact, Article 13 of the General Food Law emphasises on the importance of the development of international standards. Albeit this provision leaves a wide margin of appreciation for the national and EU legislators, it introduces an obligation to take international standards like the *Codex* into account. This comes close to an obligation under European law for both the EU and the Member States to include standards like the *Codex* in national and EU food legislation. If this provision is indeed interpreted and applied in this way, this will boost the legal position of *Codex* standards in Europe. The European General Food Law itself gives the proper example. The definition of food which forms the foundation of the Regulation is based on the *Codex Alimentarius*<sup>64</sup>.

It seems also particularly interesting that, for over 40 years, the EU was not a member of the *Codex Alimentarius* Commission. But on 17 November 2003, the EU made the final breakthrough in the process of increasing recognition of the *Codex*. The Council applied for membership of the *Codex Alimentarius* Commission and the European Union now is a full member<sup>65</sup> of such a Commission.

The above mentioned-framework shows that the primary aim of the European food policy is not to guarantee access to food to each single individual but to ensure that the consumed food is safe for human health, for the consumers' best interest and for the *effective functioning of the internal market* (emphasis added). Undoubtedly, food safety emergencies may predominantly affect certain segments of a population, as elderly people, children, pregnant women or immune-compromised persons. In this respect, the strict regulation of those aspects is, however, a positive result.

### 3.2 In the ECHR system

In the field of human rights for elderly people at the Council of Europe level there are two broad legislative instruments: the European Convention on Human Rights and

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<sup>61</sup> See *supra* foot note 22.

<sup>62</sup> See B. VAN DER MEULEN, *op. cit.*, p. 35.

<sup>63</sup> In the so-called *Emmenthal cheese case*, ECJ, Judgement of 5 December 2000, Case C-448/98, for example, the Court was called upon to judge whether the definition of "Emmenthal cheese" in French legislation constituted a barrier to trade as prohibited in the EC Treaty, particularly at that time to Article 30 (later Article 28) of the EC Treaty, now Article 34 of the Treaty on the Functioning of the European Union.

<sup>64</sup> See B. VAN DER MEULEN, *The Codex Alimentarius, loc. ult. cit.*

<sup>65</sup> See Council Decision, 2003/822/EC, OJ 2003 L 309/14. Point 83 of the Action Plan on Food Safety has been implemented in this way (Annex to the 2000 White Paper on Food Safety, COM (1999) 719 Final).

Fundamental Freedoms (hereinafter also ECHR)<sup>66</sup> and the European Social Charter (hereinafter also ESC)<sup>67</sup>.

The ECHR does not contain an equivalent provision to Article 25 of the CFREU and its text does not contain any explicit references to age or to the right of older persons. However, the provisions of Article 25 of CFREU can nevertheless be regarded as being conceptually linked to the prohibition on inhuman and degrading treatment set out in Article 3 of the Convention, together with the Article 8 right to private, home and family life and the Article 14 right to non-discrimination in the enjoyment of Convention rights. The scope of these ECHR rights is more restricted than Article 25, even if they are similarly concerned with protecting human dignity and the independence of the individual, including elderly people<sup>68</sup>.

Relevant references to the legal bases of the right to food and to adequate food might be found, once again just indirectly, in some articles of the ECHR, even if the Convention came into force essentially in order to protect civil and political rights. This is also probably the reason whereby the ECHR does not provide a specific protection to the right to food and adequate food<sup>69</sup>.

In accordance with the doctrine, the right to adequate food should be considered indirectly protected by Article 2<sup>70</sup> of the Convention, on the “Right to Life”, whereby, particularly for elderly people, the right to have an adequate pension for sustaining life should be ensured.

In this respect, the European Court of Human Rights (hereinafter also ECtHR) in *Budina v. Russia* case<sup>71</sup> has argued about this specific issue. Whilst the complaint has been declared inadmissible, the Court has agreed that the provisions under Articles 2 and 3 of the ECHR are both entitled to come for consideration in proceedings regarding the minimum income for elderly people. As regards the types of “treatment” which fall within the scope of Article 3 of the Convention, the Court’s case-law refers to “ill-treatment”, that attains a minimum level of severity and involves actual bodily injury or intense physical or mental suffering<sup>72</sup>. Where treatment humiliates or debases an individual, showing a lack of respect for, or diminishing, his or her human dignity, or arouses feelings of fear, anguish or inferiority capable of breaking an individual’s moral and physical resistance, it may be characterised as degrading and also fall within the prohibition of Article 3<sup>73</sup>. Moreover, it is

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<sup>66</sup> Since its adoption in 1950 the Convention has been amended a number of times and supplemented with many rights in addition to those set forth in the original text. Text is available at [http://www.echr.coe.int/Documents/Convention\\_ENG.pdf](http://www.echr.coe.int/Documents/Convention_ENG.pdf). See R. BIFULCO, M. CARTABIA, A. CELOTTO, *L'Europa dei diritti. Commento alla Carta dei diritti fondamentali dell'Unione Europea*, Bologna, 2001, *passim*.

<sup>67</sup> See *infra* foot note 78.

<sup>68</sup> See C. O'CONNOR, *Article 25*, in *The EU Charter of Fundamental Rights, A Commentary*, *op. cit.*, p. 696 and H. MEENAN, *Age Discrimination and the Future Development of Elder Rights in the European Union: Walking Side by Side or Hand in Hand*, in I. DORON, A.M. SODEN, *Beyond Elder Law: New Directions in Law and Aging*, Berlin, 2012, pp. 57-98, 62. Even if the case law of the European Court of Human Rights is not very developed when it comes to the rights of the older persons, some cases seem particularly interesting. E.g. in *Farbthuis v. Latvia*, the ECtHR held that than a failure to take into account the age and health of an elderly person in imposing a prison sentence upon him for participating in Stalin’s purges in 1940 could constitute a violation of Article 3 (*Farbthuis v. Latvia* App no 4672/02, Judgement of 2 December 2004). See O. DE SCHUTTER, *The Prohibition of Discrimination under European Human Rights Law*, Luxembourg, 2011, p. 71.

<sup>69</sup> K. GARCIA, *Existe-t-il un droit à l'alimentation au regard de la convention européenne des droits de l'homme?*, in *De la terre aux aliments, des valeurs aux règles from land to food, from values to rules*, Nantes, France, 2010, *hal.inria.fr*, pp. 4 e 6.

<sup>70</sup> See for a general comment W. A. SCHABAS, *Article 2*, in W. A. SCHABAS (ed.), *The European Convention on Human Rights, A Commentary*, 2015, p 117 ff.

<sup>71</sup> ECtHR, Section I, *Budina v. Russia*, n. 45603/05, Decision 18 June 2009.

<sup>72</sup> See *V. v. the United Kingdom* [GC], no. 24888/94, 71, ECtHR 1999-IX.

<sup>73</sup> See amongst other authorities, ECtHR, *Price v. the United Kingdom*, no. 33394/96, 24-30, ECtHR 2001-VII, and *Vlašinas v. Lithuania*, no. 44558/98, 117, ECtHR 2001-VIII.

sufficient if the victim is humiliated in his or her own eyes<sup>74</sup>. Finally, in considering whether a treatment is “degrading” within the meaning of Article 3, the Court will have regard to whether its object is to humiliate and debase the person concerned and whether, as far as the consequences are concerned, it adversely affected his or her personality in a manner incompatible with article 3<sup>75</sup>

In the Court’s view in this case «it cannot be said that State authorities have imposed any direct ill-treatment on the applicant. The essence of the applicant’s complaint is that the State pension on which she depends for her subsistence and livelihood is not sufficient for her basic human needs. The Court cannot exclude that State responsibility could arise for a “degrading treatment” where an applicant, in circumstances wholly dependent on State support, found herself faced with official indifference when in a situation of serious deprivation or want incompatible with human dignity»<sup>76</sup>.

In this case, even if the Court has argued for an insufficient allegation of an actual breach, it has impliedly recognised that whenever the level of pension and social benefits available for elderly people are insufficient to protect themselves from damage to their physical or mental health, as entailing the lack of enough sources to buy adequate food that meets their specific dietary needs, or to shield them from a situation of degradation incompatible with human dignity, Article 3<sup>77</sup> of the Charter might be invoked<sup>78</sup>.

Another fundamental instrument which might be relied upon in order to ensure rights to the elderly is the European Social Charter (ESC)<sup>79</sup>, which was revised in 1996<sup>80</sup>. It is a Council of Europe treaty that guarantees fundamental social and economic rights as a counterpart to the European Convention on Human Rights, which refers to civil and

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<sup>74</sup> See the *Tyrer v. the United Kingdom* judgment of 25 April 1978, § 32, Series A no. 26; *Smith and Grady v. the United Kingdom*, nos. 33985/96 and 33986/96, 120.

<sup>75</sup> See ECtHR *Peers v. Greece*, no. 28524/95, 67-68, 74; *Valašinas*, 101.

<sup>76</sup> See *Budina v. Russia*, cit., p. 3; and also *O’Rourke v. United Kingdom*, no. 39022/97, 26 June 2001, where the Court held that the applicant’s suffering, notwithstanding that he had remained on the streets for 14 months to the detriment of his health, had not attained the requisite level of severity to engage Article 3 and had, in any event, not been the result of State action rather than his own volition as he had been eligible for public support but had been unwilling to accept temporary accommodation and had refused two offers of permanent accommodation; also see, *mutatis mutandis*, *Nitecki v. Poland*, no. 65653/01, 21 March 2002, where, in rejecting the applicant’s complaint about the State’s refusal to refund him the full price of a life-saving drug, the Court noted while Article 2 might be engaged if the authorities of a Contracting State put an individual’s life at risk through the denial of health care which they have undertaken to make available to the population generally, in this case 70% of the drug price had been compensated by the State and the applicant only had to stand for the outstanding 30%.

<sup>77</sup> See for a general comment W. A. SCHABAS, *Article 3*, in W. A. Schabas (ed.), *The European Convention on Human Rights*, op. cit., p. 164 ff.

<sup>78</sup> See K. GARCIA, op. cit., p. 3.

<sup>79</sup> The European Social Charter was revised in 1996. The first text is available at <http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/035> and the revised one at <http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/163>. The Revised Charter came into force in 1999 and is gradually replacing the initial 1961 treaty. It takes account of the evolution which has occurred in Europe since the Charter was adopted in 1961, and includes the following new rights : right to protection against poverty and social exclusion; right to housing; right to protection in cases of termination of employment; right to protection against sexual harassment in the workplace and other forms of harassment; rights of workers with family responsibilities to equal opportunities and equal treatment; rights of workers’ representatives in undertakings. The amendments regard reinforcement of principle of non-discrimination; improvement of gender equality in all fields covered by the treaty; better protection of maternity and social protection of mothers; better social, legal and economic protection of employed children; better protection of handicapped people, an elderly people. Enforcement of the new Charter is submitted to the same system of control as the Charter of 1961, developed by the Amending Protocol of 1991 (ETS No. 142) and by the Additional Protocol of 1995 providing a system of collective complaints (ETS No. 158). See <http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/163>. See also the explanatory report at <http://www.worldlii.org/int/other/COETSER/1996/4.html>.

<sup>80</sup> See D. J. HARRIS, J. DARCY, *The European social charter*, Ardsley, NY, 2001, 2 ed., 2001, *passim*, particularly p. 318 ff.; and C. BENELHOCINE, *The European Social Charter* (Council of Europe, 2012) pp. 77-78.

political rights. It guarantees a broad range of everyday human rights related to employment, housing, health, education, social protection and welfare. It provides also a mechanism for monitoring their implementation within the States concerned<sup>81</sup>.

Extremely interesting, as witness of the increasing attention at different levels to the situation of the elderly, is that after the revision, by the amending additional protocol of 1995<sup>82</sup>, a specific provision concerning elderly people was included in the ESC (Article 23). It requires that enjoyment of the protected rights be guaranteed without any kind of discrimination. No other legal instrument at a pan-European level can provide such an extensive and complete protection of social rights as that provided by the Charter, which also serves as a point of reference under European Union law. Most of the social rights in the CFREU are based on the relevant articles of the ESC. The latter is therefore seen as the Social Constitution of Europe and represents an essential component of the continent's human rights architecture.

Moreover, the Revised Social Charter represents also one of the main sources of inspiration for Article 25 of the CFREU<sup>83</sup>. In fact, Article 23<sup>84</sup> of the ESC was the first provision in an international human rights treaty to ensure specific protection for the right of the elderly. It requires states to establish a comprehensive floor of protection for the right of older persons to social protection, which in turn serves to protect their privacy, dignity and independence, as well as their ability to participate in social and cultural life<sup>85</sup>. The European Committee on Social Rights (ECSR) has interpreted Article 23 as concerned with protecting the right of the elderly to remain full, active and participating members of society<sup>86</sup>.

However, once again, it does not protect expressly a right to food or to adequate food. But once it guarantees the rights to employment and to proper income (by Article 4), to

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<sup>81</sup> Control is entrusted to the European Committee of Social Rights (ECSR). States parties to the Charter must submit annual reports on a part of the provisions of the Charter (be it the 1961 Charter or the 1996 Revised Charter), showing how they implement them in law and in practice. The Committee is responsible for monitoring compliance in the States party to the Charter. The ECSR is composed of 15 independent members who are elected by the Council of Europe's Committee of Ministers for a period of six years, renewable once. Under the 1995 Additional Protocol providing for a system of Collective Complaints which came into force in 1998, complaints of violations of the Charter may be lodged with the ECSR. Certain organisations are entitled to lodge complaints with the ECSR (a special list of NGOs has been established, made up of NGOs enjoying participatory status with the Council of Europe). The ECSR examines the complaint and, if the formal requirements have been met, declares it admissible. The State Party may then respond in writing, and a hearing may be requested by either party to the procedure. Finally, the Committee comes to a decision on the merits.

<sup>82</sup> See amending Optional Protocol of 1995 at <http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/158>.

<sup>83</sup> See *supra* par. 3.1.

<sup>84</sup> Article 23 «The right of elderly persons to social protection: With a view to ensuring the effective exercise of the right of elderly persons to social protection, the Parties undertake to adopt or encourage, either directly or in co-operation with public or private organisations, appropriate measures designed in particular: –to enable elderly persons to remain full members of society for as long as possible, by means of: adequate resources enabling them to lead a decent life and play an active part in public, social and cultural life; provision of information about services and facilities available for elderly persons and their opportunities to make use of them; –to enable elderly persons to choose their life-style freely and to lead independent lives in their familiar surroundings for as long as they wish and are able, by means of: A provision of housing suited to their needs and their state of health or of adequate support for adapting their housing; the health care and the services necessitated by their state; – to guarantee elderly persons living in institutions appropriate support, while respecting their privacy, and participation in decisions concerning living conditions in the institution».

<sup>85</sup> It shall be underlined that only fourteen EU Member States that had ratified the revised European Social Charter, Finland, France, Ireland, Italy, Malta, The Netherlands, Portugal, Slovenia and Sweden had agreed to be bound by the provisions of Article 23. It means that the other thirteen remain bound by the provisions of the original European Social Charter, which contains no equivalent provisions to Article 23.

<sup>86</sup> See ECSR, Conclusions XIII-5, Finland, p. 304.

social protection (by Article 12), and to social and medical assistance (by Article 13), it has been considered possible to ensure, indirectly, the enjoyment of the right to adequate food as well.

It must be pointed out that unlike the rights protected by the ECHR, those guaranteed by the Social Charter may not be invoked before the European Court of Human Rights. In fact, the respect of the rights protected by the Charter shall be subject to the control of the European Committee of Social Rights (ECSR)<sup>87</sup>. Unfortunately, at the present moment, the Committee has never focused on the right to food or to adequate food<sup>88</sup>.

A major step forward the recognition of the right to food has been accomplished by the Council of Europe with Resolution no. 1957/2013 of the Parliamentary Assembly<sup>89</sup>. Even if it is just a recommendation without legally binding value, undoubtedly it is a worthy initiative because, for the first time, it referred expressly to the right to food and to adequate food in the European context. Moreover, since the European Court of Human Rights usually takes into account the guidelines of the Parliamentary Assembly, it might provide an oriented interpretation of the rights protected by the ECHR.

What is of particular significance is the express recognition of the right to food as a human right. In this respect, point 2 of the Resolution states that «Food is our most basic need and right. If we cannot secure access to sufficient, safe and nutritious food for present and future generations, our health, development and fundamental rights will be compromised. {...} The Parliamentary Assembly considers food security as one of the greatest challenges of the 21st century. This challenge concerns us all and problems of the like can only be solved with enough political will and the involvement of citizens». At point 5 it also states that «The demographic boom, together with modifications in people's diets, puts growing pressure on the environment and, ultimately, on food supplies. Climate change, land abuse, chemical pollution and the exhaustion of natural resources in turn harm the quality and quantity of food production. Agriculture will remain central to achieving food security, but it needs to embrace more sustainable practices». And, at point 7, «The importance of food safety as a vital component of food security should not be underestimated».

In view of the above considerations, measures that the Assembly urges member States to adopt in order to ensure an effective recognition and implementation of the right to food and to adequate food are varied. As concerns affordability of food: strengthen solidarity mechanisms to combat poverty, which obstructs access to food by all the vulnerable group, such as elderly people; support the minimum human rights principles applicable to large-scale land acquisitions or leases identified by the United Nations Human Rights Council, and seek the broadest geographical coverage for their application through development co-operation programmes and international trade agreements; promote food security by establishing a new universal framework, integrating the Millennium Development Goals and the Sustainable Development Goals. In respect of regulatory mechanisms: ensure full implementation of the human right to adequate food by recognising, in national legislation, the enforceability of this right<sup>90</sup>, together with the related human right of access to clean water; seek to harmonise the use of the precautionary principle, across Europe and beyond, in respect of food supplies, with a view to ensuring adequate protection of public health<sup>91</sup>.

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<sup>87</sup> This mechanism is based essentially on the report that the member States shall provide every two years.

<sup>88</sup> C. GOLAY, *The fight for the right to food*, in J. ZIEGLER, C. GOLAY, C. MAHON, S. WAY, London, 2011, *passim*.

<sup>89</sup> Resolution 1957 (2013) Final version, *Food security – a permanent challenge for us all, text adopted by the Parliamentary Assembly of the Council of Europe*, on 3 October 2013 (35<sup>th</sup> Sitting).

<sup>90</sup> See *infra* par. 4.

<sup>91</sup> See <http://www.assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=20227&clang=en>.

It shall be pointed out that this Resolution is one of the so called *soft law*-making instruments. Hence, in order to guarantee a broad application of those principles, it seems appropriate and desirable that the individual States may provide in their national legislation, possibly at a constitutional level, the right to food and to an adequate food.

#### 4. *The justiciability of the right to food*

The justiciability of a right consists in its capacity to be invoked before judicial or quasi-judicial bodies so as to obtain their protection when faced with a concrete case of violation.

Despite the ongoing debate in the international legal literature regarding the justiciability of the social, economic and civil rights<sup>92</sup>, the UN Committee on Economic, Social and Cultural Rights (CESCR) in its General Comment No. 12 has stated that “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”<sup>93</sup>.

As we have seen below, the right to food is justiciable both at the international and domestic level. In the international sphere, a State party of international treaties under which the access to food is protected as a human right may be called to account for the violation of such a right, both at the international and national. The domestic judicial protection of the right to food can be ensured in two different ways, namely by the direct applicability of international law at the national level or by the constitutionalisation of the right to food.

##### 4.1. *The international law perspective*

The right to food for all individuals is explicitly recognised at the universal level by the International Covenant on Social, Economic and Cultural Rights (ICESCR), whose fundamental importance must be attached also to the quasi-universal adherence to it. The right to food for some vulnerable individuals or groups is protected by several conventions with a universal or regional vocation. There is no similar convention dealing with the elders, even though some regional treaties include specific provisions concerning the rights of elderly people. In addition, the right to food, as a constituent element of a broader right, such as the right to an adequate standard of living or the right to life, is guaranteed by the International Covenant on Civil and Political Rights (ICCPR) and other instruments within the regional human rights systems.

These treaties do more than recognising the right to food, if only because they make available for the individuals remedies in the event that their right to food is not guaranteed by a State party. A distinction must be drawn between quasi-judicial remedies and judicial ones. Moreover, in the context of judicial or quasi-judicial remedies, the protection of the right to food can be direct or solely indirect, i.e. by framing the violation of the right to food as a violation of other rights.

At a universal level, the remedies available to individuals are quasi-judicial in nature. In this regard, an important role is played by the bodies of independent experts which have the mandate to monitor the implementation by States parties of the rights enshrined in the

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<sup>92</sup> See E.W. VIERDAG, *The Legal Nature of the Rights Granted by the International Covenant on Economic, Social and Cultural Rights*, in Netherlands Yearbook of International Law, 1978, p. 69 ff.; C. TOMUSCHAT, *An Optional Protocol for the International Covenant on Social, Economic and Cultural Rights?*, in Weltinnenrecht – Liber Amicorum Jost Delbrück, Berlin, 2005, p. 815 ff.; M.J. DENNIS, D.P. STEWART, *Justitiability of Economic, Social and Cultural Rights: Should There be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing, and Health?*, in American Journal of International Law, 2004, p. 462 ff.

<sup>93</sup> Par.32.

ICCPR and in the ICESCR, namely the UN Human Rights Committee (HRC)<sup>94</sup> and the CESCR<sup>95</sup>.

The 1966 Optional protocol to the ICCPR (1966 OP) and the 2008 Optional protocol to the ICESCR (2008 OP)<sup>96</sup> give to individuals the right to submit complaints in respect of treaty violation, (respectively, of the ICCPR and the ICESCR) by a State party to such protocols. Individuals who complain about a violation of the right to food by a State party may submit a written communication to the HRC or to the CESCR for consideration<sup>97</sup> after exhausting all domestic legal remedies<sup>98</sup>. Such a communication is put by the HRC or by the CESCR to the attention of the State Party assumed to be responsible of the violation of the ICCPR or the ICESCR<sup>99</sup>, in order that it can submit written explanations or statements clarifying the matter and the remedy, if any, that has been taken by it<sup>100</sup>. The procedure before the Committees terminates with the transmission of the official views and recommendations of the HRC or the CESCR to the concerned parties<sup>101</sup>. The only obligation incumbent on the State party is to give due consideration to the views and the recommendations of either Committee<sup>102</sup>.

At a regional level, there are judicial remedies in case of breaches of the right to food by a State party. As we have already seen, in the context of regional human rights systems, the right of individuals to food is indirectly protected by the instruments which concern civil and political rights, such as the European Convention on Human Rights, the African Charter on Human and People's Rights and the American Convention on Human Rights<sup>103</sup>. What is important to emphasise now, and without going into too much detail, is the fact that in the Americas, Africa and Europe the key feature of each system is the availability of a complaints mechanism through which individuals, under certain conditions, can seek justice and reparation for human rights violations committed by a State party. The regional human rights courts determine whether the State is responsible for the alleged violation and, if so, what the government should do to repair the damage<sup>104</sup>.

It should be recalled that the Additional protocol to the American Convention in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador), which recognises explicitly the right to food of the elders<sup>105</sup>, and the 1988 Additional Protocol of the European Social Charter (ESC), which deals more generally with the rights of the elders<sup>106</sup>, are part, respectively, of the European and of the Inter-American system of human rights. Unfortunately, however, the relevant courts are not empowered to adjudicate violations of such rights. According to Article 19, paragraph 6, of the Protocol of San Salvador, the

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<sup>94</sup> The establishment of the HRC is provided for in Article 18 of the ICCPR.

<sup>95</sup> The CESCR has been created by the resolution 1985/17 of the Economic and Social Council of the United Nations (ECOSOC) which was, under Article 17 of the ICESCR, the original supervisory body of its implementation.

<sup>96</sup> For a comment of the 2008 Optional protocol, see B.A. SIMMONS, *Should States ratify protocol? Process and consequences of the optional protocol of the ICESCR*, in Norwegian Journal of Human Rights, 2009, p. 64 ff.

<sup>97</sup> Article 2, 1966 OP; Article 2, 2008 OP.

<sup>98</sup> Article 5, par. 1(b), 1966 OP; Article 3, par. 1, 2008 OP.

<sup>99</sup> Article 4, par. 1, 1966 OP; Article 46, par. 1, 2008 OP.

<sup>100</sup> Article 4, par. 2, 1966 OP; Article 6, par. 2, 2008 OP.

<sup>101</sup> Article 5, par. 4, 1966 OP; Article 9, par. 1, 2008 OP.

<sup>102</sup> Article 3, par. 1, 2008 OP.

<sup>103</sup> See *supra* par. 2.1. and par 3.2.

<sup>104</sup> For an overview on the functioning of the mechanisms for the protection of human rights in the context of these systems, see F. GÓMEZ ISA, K. DE FEYTER (eds.), *International Protection of Human Rights. Achievement and Challenges*, Bilbao, 2006 and in particular the following contributions: J.A. CARILLO SALCEDO, *The European Convention on Human Rights*, p. 359 ff; A.A. CANÇADO TRINIDADE, *The Organizations of American States and Human Rights*, p. 473 ff.; C. HEYNS, M. KILLANDER, *The African Regional Human Rights System*, p. 509 ff.

<sup>105</sup> See *supra* par. 2.2.

<sup>106</sup> See *supra* par. 3.2.

rights recognised therein, with few exceptions, cannot be the subject of adjudication before the Inter-American Court. The same goes for the ESC, whose rights cannot be invoked before the European Court of Human Rights. It is apparent from the 1995 Additional Protocol Providing for a System of Collective Complaints, that the economic and social rights contained in the ECS are subjected to the non-judicial control of the European Committee of Social Rights.

#### 4.2. *The domestic law perspective*

The right to food is embedded in several international human rights instruments with a universal or regional vocation. When a State ratifies a treaty which recognises the right to food, it agrees to respect such a right at the national level. This does not imply that individuals, for the sole reason that a State is a party to a human rights treaty dealing with the right to food, may invoke this right before national courts. In fact, there are two aspects to consider<sup>107</sup>.

Firstly, the impact of international instruments in domestic systems varies significantly depending on whether the relationship between domestic law and international law is based on the monist view or on the dualist view. In the monist systems, such as the Netherlands, international law is incorporated directly into domestic law and international law treaties can be immediately applied. In the dualistic systems, such as the United Kingdom, international law is not automatically part of domestic law and it has to be incorporated into the national legal system.

Secondly, the direct applicability of international law in a national legal system also depends on the nature of the treaty provision in question. This means that in countries where international law is directly applicable, the right to food may be considered as not self-executing because it lacks sufficient precision. For example, a Dutch court, in a case concerning the right of rejected asylum seekers to food, has stated that the concept of “adequate food” is too vague to make Article 11 of the ICESCR directly applicable<sup>108</sup>.

In the light of the difficulties that national courts may encounter in the adjudication of the violation of loosely worded provisions, it is always advisable to find the legal basis of the right to food in the domestic legal systems by means of constitutional provisions and ordinary legislation.

Many national constitutions take into account the right to food. However, constitutional recognition of the right to food can take different forms<sup>109</sup>.

First of all, the right to food can be recognised explicitly. Nevertheless, it is necessary to distinguish between the different ways in which this recognition takes place. In some cases the right to food is conceived as a self-standing right; in others it is an explicit element of another, broader human right. For example, Article 21 of the Constitution of Belarus provides that “Every individual shall exercise the right to a dignified standard of living, including *appropriate food* [emphasis added], clothing, housing and likewise continuous improvement of necessary living conditions”. Not always, moreover, the right to food is applicable to everyone. Some constitutions, in fact, guarantee the right to food for a

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<sup>107</sup> On these issues see L. KNUTH, M. VIDAR, *Constitutional and Legal Protection of the Right to Food Around the World* (2011), FAO Right to Food Studies, available at [www.fao.org/docrep/016/ap554e/ap554e.pdf](http://www.fao.org/docrep/016/ap554e/ap554e.pdf), p. 23 ff.

<sup>108</sup> F. VLEMMINX, *The Netherlands and the ICESCR: Why Didst Thou Promise Such a Beauteous Day?*, in F. COOMANS (eds.), *Justiciability of Economic and Social Rights: Experiences from Domestic System*, Antwerp-Oxford, 2006, p. 55.

<sup>109</sup> For an in-depth analyses see L. KNUTH, M. VIDAR, *Constitutional and Legal Protection of the Right to Food Around the World*, *op. cit.*, p. 13 ff.; O. DE SCHUTTER, *Realizing the Right to Food Legal Strategies and Approaches*, 2014, available at [www.idlo.int/sites/default/files/pdfs/publications/Realizing%20the%20Right%20to%20Food\\_Legal%20Strategies%20and%20Approaches\\_full-report\\_0.pdf](http://www.idlo.int/sites/default/files/pdfs/publications/Realizing%20the%20Right%20to%20Food_Legal%20Strategies%20and%20Approaches_full-report_0.pdf), p. 23 ff.

specific segment of the population. If these groups most commonly include the children, in at least one case the right to food targets the elders. Article 51 of the Constitution of Guatemala, entitled “Protection of Minors and the Elders”, reads as follow: “The State will protect the physical, mental and moral health of minors and the elders. It will guarantee them their right to food, public health, education, security and social insurance”.

The absence of the explicit constitutional inclusion does not mean that the right to food is not guaranteed. The right to food, in fact, can be recognised implicitly or indirectly. Specifically, one can talk about an implicit recognition when the right to food is an implicit element of other human rights, such as the right to an adequate standard of living and the right to development. On the other hand, the recognition of the right to food is indirect when it derives from the judicial interpretation of human rights under which the right to food is not necessarily an implicit element. This is the case with regard to the right to life or the right to be free from torture and other forms of ill-treatment.

In any event, constitutional provisions need to be developed in ordinary legislation in order to set out mechanisms for implementation and provide mechanisms for redress in the event of violation. The above mentioned FAO Guide on legislation for the right to food contains a comprehensive overview of available approaches to developing national legislation<sup>110</sup>.

##### *5. Food and elderly people: a difficult relationship. Strategies and initiatives in the European context*

Within the European Union population is ageing. According to recent projections, the number of Europeans aged 65 and over will almost double over the next 50 years, from 87 million in 2010 to 148 million in 2060<sup>111</sup>. In 2010 almost 17% of population was over 65 and this percentage will increase up to 30% of population by 2060, with a particularly rapid increase in numbers of over-80s as well.

Demographic ageing is one of the most serious challenges Europe is facing, especially as it comes at a time of increasing pressure on public budgets, a steady decline in the number of health personnel and growing demands from older people for care products and services<sup>112</sup>. Furthermore, older people have different healthcare requirements. In this respect, health systems will need to adapt to provide adequate care and remain financially sustainable.

Indeed, a lot of elderly people, in many cases, after they have retired will keep their physical and mental faculties while others show deterioration of their independence, either physical or mental. Moreover, an individualist society, built on hyper consumption and

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<sup>110</sup> See p. 53 ff.

<sup>111</sup> See <http://ec.europa.eu/eurostat>. In 2010, the ECOFIN Council gave the Economic Policy Committee (EPC) a mandate to update its common exercise of age-related expenditure projections by the autumn of 2012 on the basis of a new population projection by Eurostat. The long-term age-related expenditure projections provide an indication of the timing and scale of changes in economic developments that could result from an ageing population in a ‘no-policy change’ scenario. The projections show where (in which countries), when, and to what extent ageing pressures will accelerate as the baby-boom generation retires and average life span in the EU continues to increase. Hence, the updated projections of age-related expenditure and the associated sustainability assessments will provide important insights on both the economic impact of ageing and the risks to the long-term sustainability of Member States’ public finances reflecting new economic environment, affected by a durable impact of the current crisis, and further reform effort by EU MS. This first report provides a description of underlying macroeconomic assumptions and projection methodologies of the age-related expenditure projections for all Member States. On the basis of these underlying assumptions and methodologies, age-related expenditures covering pensions, health care, long-term care, education and unemployment transfers will be calculated and presented to the ECOFIN Council in May 2012. (European Economy 4. September 2011. Brussels. 309pp. [http://ec.europa.eu/economy\\_finance/publications/european\\_economy/2011/pdf/ee-2011-4\\_en.pdf](http://ec.europa.eu/economy_finance/publications/european_economy/2011/pdf/ee-2011-4_en.pdf)).

<sup>112</sup> See [https://ec.europa.eu/health/sites/health/files/ageing/docs/com\\_2012\\_83\\_en.pdf](https://ec.europa.eu/health/sites/health/files/ageing/docs/com_2012_83_en.pdf).

arbitrary urban sprawl<sup>113</sup> are going to jeopardize the welfare state with primary repercussions on the elderly. Since that from the one hand the globalization of the markets and on the other hand the development of technologies and production processes have represented an unavoidable change on the approach to food, passing from a rural context<sup>114</sup> (in which usually the elderly are more used to recognise themselves) to an industrial one<sup>115</sup>. To the present day, generally, people leave longer, but for the elderly usually the perspective is of being more alone<sup>116</sup>.

Specifically referring to food, the elderly are frequently suffering from malnourishment, and particularly those who have problems masticating or swallowing. In care homes, a lot of elderly people require a special diet. Moreover, usually for the elderly solitude, abandon, financial issues, mental and psychological problems may make an adequate nutrition a serious challenge. Hence food for elderly people must be appetizing as well whereas meals may represent a crucial moment of social life.

In accordance with this framework, regarding European food policies for elderly people, there are two targets that must be achieved. First, household food security, that means guaranteeing safe food and drinking water, which is a crucial determinant of population health, and secondly food education as vehicle to promote an oriented culture for sustainable consumption of food that meet dietary specific needs, produced and distributed ensuring respect for human rights and the environment<sup>117</sup>.

A common food policy shall be an urgent priority for the European Union. That means a major re-alignment, in which European institutions may play an essential role.

In the achievement of those targets, focused on food policy and older people situations, two initiatives seem particularly interesting.

First, the triennial research program “Towards a Common Food Policy for the European Union”<sup>118</sup>. This is a research programme which aims to support the reform of the European Common Agricultural Policy (CAP) by proposing a radical shift in direction and the integration of agricultural issues in a broader systemic view. The suggested direction is to support the creation of a food policy that should integrate the CAP, which is focused on agriculture, with other policy areas such as environmental, social, financial and trading in a long-term sustainability perspective, with food as a reference point.

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<sup>113</sup> See, A. CALORI, A. MAGARINI, *Food and the Cities, Politiche del cibo per città sostenibili*, Milan, 2015, *passim*.

<sup>114</sup> See, T. JAN DOUWE VAN DER PLOEG, H. RENTING, G. BRUNORI, K. KNICKEL, J. MANNION, T. MARSDEN, K. DE ROEST, E. SEVILLA-GUZMÁN, F. VENTURA, *Rural Development: From Practices and Policies towards Theory*, in *Sociologia Ruralis*, Vol 40, No 4, 2000, pp. 391-406. Text available at [https://www.researchgate.net/profile/Karlheinz\\_Knickel2/publication/40138827\\_Rural\\_Development\\_From\\_Practices\\_and\\_Policies\\_towards\\_Theory/links/02e7e52ef6cc111dfa00000/Rural-Development-From-Practices-and-Policies-towards-Theory.pdf](https://www.researchgate.net/profile/Karlheinz_Knickel2/publication/40138827_Rural_Development_From_Practices_and_Policies_towards_Theory/links/02e7e52ef6cc111dfa00000/Rural-Development-From-Practices-and-Policies-towards-Theory.pdf).

<sup>115</sup> See, C. BOTTARI, *Diritto al cibo e sicurezza alimentare*, in C. Bottari (eds.), *La sicurezza alimentare*, 2015, pp. 17-43.

<sup>116</sup> E. GUALANDI, *Mobilizing all Material and Human Resources*, in *Europe and its Elderly People, The Policies of Town and Regions: a Comparison, Working Documents and Conclusions*, Siena, Italy 14-16 October 1993, p. 7 ff.

<sup>117</sup> One example is Agroagriculture, see S. BOCCHI, M. MAGGI, *Agroecologia, sistemi agro-alimentari locali sostenibili, nuovi equilibri campagna-città*, in *Scienze del Territorio*, 2, 2014, pp. 95-100, pdf available at <http://www.fupress.net/index.php/SdT/article/viewFile/14325/13308>.

<sup>118</sup> The project is led by IPES-Food. It will last for three years, over 2016-2019, in which IPES-Food aims to promote a collaborative process of research and reflection to identify what tools would be required to deliver sustainable food systems in Europe. «The 'Common Food Policy' vision that emerges will offer a Plan B for the EU as it considers reforming the Common Agricultural Policy and other policy frameworks. Through a series of multi-stakeholder 'policy labs' in Brussels and around Europe, the process will bridge the different policy areas (agriculture, trade, environment, health, etc.) and different policy levels (EU, national, local) through which food systems are governed, identifying priorities for reform and bringing them together under a single roof. The sustainable food scoreboard that emerges will align various policies and incentives with the goal of delivering sustainable food systems, while building around the grassroots initiatives already reshaping food systems at the local level». See <http://www.ipes-food.org/towards-a-common-food-policy-for-the-eu-ipes-food-launches-three-year-process>.

Secondly, the draft European Charter on the rights and responsibilities of older people in Need of Long term Care (LTC) and Assistance. This standard-setting instrument was published in April 2010 by the European platform of older persons (AGE), an organisation of European NGOs concerned with issues relating to the treatment of older people, whose activities were subsidised by the European Commission's Daphne III programme<sup>119</sup>. Age members and the project partners stress that advancing in age must not involve any reduction of a person's rights, duties and responsibilities but highlights that a person may be in either a permanent or temporary state of incapacity and unable to protect their own rights. The Charter recognises that the vast majority of frail and vulnerable older people are women. In fact, two out of three people aged over 80 in Europe are women. More than a third of them suffer from Alzheimer's disease or dementia, making them even more vulnerable to abuse. The Charter underlines that health and long term care, including prevention and early intervention, should be considered not as a cost but as an investment that benefits all age groups. EU health care and long-term care services should be based on solidarity between generations, to reflect the provisions of the Lisbon Treaty which state that the EU "shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child"<sup>120</sup>.

Furthermore, during the last EXPO that took place in Milan in 2015, the Milan Charter has been drawn up<sup>121</sup>. The latter is a policy paper addressed to the mighty of the world to solve world hunger and to ensure that the right to food and to adequate food does not remain a utopian idea but becomes a reality well established in all national legislations. The preamble is particular ambitious because it addresses all men and women, as citizens of the world, to take their own responsibility in the fight for food, against inequality and food wastage<sup>122</sup>.

The Milan Charter underlines that 805 million of people are suffering from systematic starvation (Asia has the highest number with 525 million, followed by Africa with 227 million, South America and Caribbean with 37 million), while 2 million are facing undernourishment. Notwithstanding annual food wasting is over 1,3 billion tonnes of food, whilst almost 2 billion people are overweight or obese. However, this not means that the right to food imposes an obligation on the State to feed people. That is a completely wrong assumption, except in case of extreme emergency. The national governments shall respect and protect citizens' rights to enable them feeding with their own resources.

As it has been pointed out by Olivier de Schutter<sup>123</sup> «the eradication of hunger and malnutrition is an achievable goal. However, it will not be enough to refine the logic of our food systems – it must instead be reversed». The author underlines that the greatest deficit in the food economy is the democratic one, because the current food systems are efficient only from the point of view of maximizing agribusiness profits. For that reason, what is necessary is a new democratic vision at local, national and international level.

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<sup>119</sup> AGE Platform Europe, European Charter of the Rights and Responsibilities of Older People in Need of Long-Term Care and Assistance, available at [www.age-platform.eu/images/stories/22204\\_AGE\\_charte\\_europeenne\\_EN\\_v4.pdf](http://www.age-platform.eu/images/stories/22204_AGE_charte_europeenne_EN_v4.pdf). See O'CINNEIDE, *Article 25*, in *The EU Charter of Fundamental Rights, A Commentary*, *op. cit.*, p. 695

<sup>120</sup> Article 3 of Treaty on European Union, in *OJ C 115*, 9.5.2008, p. 17 and at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12008M003>.

<sup>121</sup> The full text available at <http://carta.milano.it/the-milan-charter/>.

<sup>122</sup> «We, women and men, citizens of this planet, endorse this document, entitled the Milan Charter. In so doing, we make clear commitments concerning the right to food, which we believe should be treated as a fundamental human right. We consider a lack of access to sufficient, safe and nutritious food, clean water and energy to be a violation of human dignity. We believe that only our collective action as citizens, together with civil society, businesses and local, national and international institutions, will make it possible to overcome the major challenges related to food: combating under nutrition, malnutrition and waste, promoting equitable access to natural resources and ensuring sustainable management of production processes».

<sup>123</sup> Special Rapporteur on the right to food since May 2008.

In this respect, the right strategy is to promote a food democracy that must start from the bottom-up, at the level of villages, regions, cities and municipalities. Therefore, food security must be built around securing the ability of smallholder farmers to thrive.

Moreover, in his final diagnosis Olivier de Schutter underlines that “Democracy and diversity can mend broken food systems”<sup>124</sup> it has been underlined that cities must take food security into their own hands because in 2050, more than 6 billion people (more than two in three) will live in cities. «It is vital that these cities identify logistical challenges and pressure points in their food supply chains, and develop a variety of channels to procure their food, in line with the wishes, needs and ideas of their inhabitants». The social innovations show how urban consumers can be reconnected with local food producers, while at the same time reducing rural poverty and food insecurity. But these local initiatives may only succeed if they are supported and complemented at a national level, by the State governments.

## 6. Conclusions

Concerning the protection of the right to food and to adequate food there are several questions at issue, ranging from access to land to the opportunity to obtain a sufficient income. In accordance with the ICESCR, it is the responsibility of national governments to address those issues, by avoiding interfering with the private and social life of the people, individuating vulnerable groups and programming specific support policies while preventing misconduct by private individuals who hinder to people the possibility of achieving a safe and adequate nutrition (e.g. legislation concerning high quality standards, labour conditions, protection from abusive market actions).

Food issues for elderly people may be even more challenging. Loneliness, disease and difficulties in swallowing are problems that might be faced and that require a prevention strategy and not just an approach of acting in retrospect, when the damage has already occurred.

However, it must be said that in most cases the right to food and, particularly, to adequate food is not directly protected neither from an international or European point of view nor at a national constitutional level. Basically, it is granted an indirect protection as a means for the enjoyment of other basic rights, such as the right to life. Moreover, it seems particularly interesting that the countries where the right to food is protected at a constitutional level, as some African countries, are also the countries where food is the biggest issue. What this demonstrates is how difficult it is to uphold the concrete claim and the justiciability of the right to food.

On the other hand, it is also true that justiciability is not necessarily a panacea and there are other potential strategies for an advancement of the right to food<sup>125</sup>. In this sense, the both social and legal initiatives undertaken at European level provide an encouraging example.

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<sup>124</sup> Available at

<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14336&LangID=E>.

<sup>125</sup> In this sense C. COURTIS, *The Right to Food as a Justiciable Right: Challenges and Strategies*, in Max Planck Yearbook of United Nations Law, 2007, p. 337.