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# The right to food and substantive equality as complementary frameworks in addressing women's food insecurity

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## Abstract

In international human rights law, the right to food has become a widely accepted legal and normative framework for tackling the problem of food insecurity. However, as currently formulated, the right to food is insufficient as a framework to tackle gender-specific barriers that impede women's access to food, which has contributed to the persistence of women's food insecurity globally. While the equal enjoyment of the right to food is guaranteed by the non-discrimination and equality provisions in international law, this notion of equality, associated with the formal equality approach, fails to recognise and address women's historical experience of systemic discrimination. This article argues that women's food insecurity should be approached from a broader formulation of the right to food that is informed by a substantive equality perspective, drawing from contemporary interpretations and elucidations by human rights bodies which have pushed for a more substantive notion of equality.

**Keywords:** human rights law; substantive equality; right to food; women's rights

## 1 Introduction

Food insecurity remains one of the most enduring global challenges, and it continues to worsen due to the coronavirus pandemic.<sup>1</sup> Globally, despite various efforts to address hunger and food insecurity, there has been little progress overall in reducing the number of food-insecure individuals. This is due, in part, to a lack of clear common standards in the design and implementation of food policies and interventions, and a lack of accountability for State and donor failures to follow through on commitments to eradicate hunger (De Schutter, 2009). Further, earlier approaches to food insecurity, which focused on increasing food availability based on the perception that hunger was a result of a lack of available food, have proven largely ineffective. In the 1980s, Sen highlighted that hunger is not principally a problem of lack of available food supply, but rather a problem of inability to establish *entitlement* to enough food (Sen, 1983). There has since been a strong degree of consensus among academics that hunger subsists not for lack of sufficient resources, but for lack of *access* to available resources.<sup>2</sup> The total amount of food, if distributed equitably, would be enough for the entire global population (D'odorico *et al.*, 2019). The ability to access adequate food or the resources to produce or procure food is greatly influenced by a range of socio-economic inequalities in the food regime.

<sup>1</sup>The 2021 State of Food Security and Nutrition in the World report estimates that between 720 and 811 million people went hungry in 2020, the year the COVID-19 pandemic spread across the globe. (FAO, IFAD, UNICEF, WFP and WHO, 2021).

<sup>2</sup>See e.g. Alston (1984); Eide (1987); Niada (2006); De Schutter (2009).

In international human rights law, the human right to food has become a widely accepted legal and normative framework for tackling food insecurity.<sup>3</sup> The international community has widely endorsed the right to food as a human right enshrined in legally binding instruments and reaffirmed in numerous declarations (Alston, 1984; Niada, 2006). This means that taking action to address hunger and food insecurity is an international obligation on the basis of which states can be held accountable. However, in order to fully tackle underlying inequalities affecting peoples' ability to access food or the resources to produce food, the right to food needs to be approached from an equality perspective. In this article, I focus in particular on gender-based inequalities that impede women's ability to access food. Due to pervasive and intersecting forms of past and present inequalities that limit their access to resources, either to produce or to procure food, women experience hunger and food insecurity disproportionately.<sup>4</sup>

The main argument in this article is that women's food insecurity should be approached from a broader formulation of the right to food that is informed by an equality perspective. Inequality and food insecurity are inextricably linked, and should thus be tackled together. But an equality perspective should go beyond formal notions of equality that merely prohibit discrimination or advocate equal treatment between women and men. To fully advance women's right to food, this right needs to be complemented by a substantive equality perspective that acknowledges and seeks to address historical and deep-seated forms of gender-based inequality affecting women's access to food.

The article proceeds as follows. In section 2, I provide a summary of the development of the right to food under international human rights law. I briefly synthesise the importance of the right to food as a framework for addressing food insecurity, while at the same time underscoring the need for an equality perspective to inform the right to food. Section 3 focuses on the principle of non-discrimination and equality under international human rights law. I outline the limitations of the traditional view of equality, associated with formal notions of equality. From there, I unpack a conceptualisation of substantive equality that can complement the right to food in addressing women's food insecurity, which I develop further in the next section. Section 4 interrogates the manner in which human rights bodies, particularly the Committee on the Elimination of Discrimination against Women (CEDAW Committee), and to a lesser extent, the Committee on Economic, Social and Cultural Rights (CESCR) and the Special Rapporteur on the Right to Food, have interpreted and pushed for a substantive notion of equality. I draw upon these interpretations to come up with the conception of substantive equality I propose in this article. In section 5, I then examine the linkages between substantive equality and the right to food, and demonstrate how they work together as frameworks to address women's food insecurity.

## 2 The development of the right to food under international law

The right to food has been a part of the corpus of the international human rights law since the adoption of the Universal Declaration of Human Rights (UDHR) in 1948. The right was first recognised in Article 25(1) of the UDHR as part of the right to an adequate standard of living. Subsequently, it was codified in Article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), the first legally binding instrument that deals comprehensively with the right to food. Article 11 provides:

'1. The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing,

<sup>3</sup>As Niada asserts, the right has evolved into 'a consistent, comprehensive, internationally sanctioned standard that cannot be eluded by the actors of the international community' (Niada, 2006, p. 136).

<sup>4</sup>See Human Rights Council, Study on discrimination in the context of the right to food (2010) para. 33; Report of the Special Rapporteur on the right to food (2015) paras. 3–6; Committee on the Elimination of Discrimination against Women, General Recommendation No. 34 (2016) para. 14.

and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international cooperation based on free consent.

2. The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed:

- (a) To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources;
- (b) Taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need.<sup>5</sup>

Article 11 therefore identifies two distinct components of the right to food: the *right to adequate food* as a part of the right to an adequate standard of living under Article 11(1) and the *fundamental right to be free from hunger* under Article 11(2).

Article 11 is the starting point for any discussion on the normative content of the right to food, as it defines the right in its broadest terms and outlines the obligations that flow from it. However, the drafting of Article 11 has been criticised as vague, and the scope and nature of the obligations that link to that right have been described as unclear.<sup>6</sup> Calls for clarification of the right to food culminated in the 1996 World Food Summit (WFS) in Rome, during which heads of state called for clarification of the normative implications of the right. In 1999, the CESCR, the treaty body established to monitor the implementation of the Convention, adopted General Comment No. 12 to clarify the content of paragraphs 1 and 2 of Article 11. The adoption of General Comment No. 12 marked a pivotal moment in the development of the right to food and its systematisation at the international level, as it illuminates key aspects of the scope and normative content of the right to food. While general comments of CESCR, as with other decisions, reports and concluding observations of other treaty bodies, are not legally binding, they provide authoritative interpretations of the rights contained in the treaty (Skogly and Gibney, 2002; Joseph, 2013).

Aside from the UDHR and the ICESCR, the right to food has been incorporated into various other international instruments. For instance, CEDAW deals with nutritional aspects of the right to food, requiring states to provide adequate nutrition during pregnancy and lactation.<sup>7</sup> While Article 14 of CEDAW, elaborating on the rights of rural women, does not explicitly mention the right to food, it otherwise deals with key components of the right, such as access to land and agricultural credit. Similarly, the Convention on the Rights of the Child (CRC) includes provisions on nutrition in the context of children's rights to health (specifically, to combat disease and malnutrition through, inter alia, adequate nutritious foods, Article 24) and an adequate standard of living (Article 27). The Convention on the Rights of Persons with Disabilities (CPRD) recognises the right to food of persons with disabilities in the context of their rights to health (Article 25) and an adequate standard of living (Article 28). The International Labour Organization's (ILO) Indigenous and Tribal Peoples Convention deals with the right of indigenous peoples over the lands to which they have traditionally had access for their subsistence (Articles 14 to 19).

<sup>5</sup>Art. 11, ICESCR.

<sup>6</sup>Sengupta discusses in detail the vagueness of the right, stating that Art. 11 is 'vague, and does not clearly bring out the normative contents of the right, nor does it identify the obligations corresponding to that right'. Sengupta (2007) p. 114. See also Alston (1984) p. 49; Eide (1987) p. 16.

<sup>7</sup>Art. 12, CEDAW.

Food as a human right has also been recognised and repeatedly reaffirmed in soft law instruments, usually adopted unanimously by members of the international community. The 1974 Universal Declaration on the Eradication of Hunger and Malnutrition affirms the inalienable right of everyone to be free from hunger and malnutrition.<sup>8</sup> The 1984 World Food Security Compact affirms the ‘fundamental right of everyone to be free from hunger’.<sup>9</sup> These earlier declarations refer to ‘the right to be free from hunger’. Succeeding instruments, however, encompass the broader right to adequate food. The Rome Declaration on World Food Security, for example, adopted during the 1996 World Food Summit, is explicit in affirming the right to safe and nutritious food, ‘consistent with the right to adequate food and the fundamental right of everyone to be free from hunger’.<sup>10</sup> The 2002 Johannesburg Declaration on Sustainable Development underscores the importance of increasing access to food and other basic requirements, and reaffirms the States’ commitments to fight against chronic hunger and malnutrition and other threats to sustainable development.<sup>11</sup>

The adoption of the Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security in 2004 represents an important milestone in the development of the right to food. The Voluntary Guidelines were the first time that human rights had been discussed comprehensively within the Food and Agriculture Organization (FAO), the specialised agency of the United Nations (UN) specifically mandated to lead international efforts to defeat hunger. Moreover, it was the first attempt by states to agree on a set of recommendations to be undertaken for its realisation (Diouf, 2005). The Guidelines provide interpretation and guidance for the implementation of the right to food. While voluntary, the Guidelines ‘have strong recommendatory force for States that are already bound by provisions of international law’ (FAO, 2006, p. 98). The Guidelines were adopted unanimously by FAO Member States, and various governments have reiterated their commitments in many formal settings over the years.<sup>12</sup> The 2030 Agenda for Sustainable Development, also unanimously adopted by all UN members in 2015, commits States to end hunger and achieve food security as Goal no. 2 of its 17 Sustainable Development Goals (SDGs).<sup>13</sup> While the goal does not directly reference the right to food, the 2030 Agenda is explicitly grounded on human rights, and affirms that the purpose of the SDGs is to ‘realize the human rights of all and to achieve gender equality and the empowerment of all women and girls’.<sup>14</sup>

The right to food has also been incorporated into the national Constitutions of about fifty-six countries around the world.<sup>15</sup> Further, in many countries, the right to food has been afforded protection

<sup>8</sup>World Food Conference, Universal Declaration on the Eradication of Hunger and Malnutrition (1974), para. 1.

<sup>9</sup>World Food Security Compact (1985) item V.E, para. 169.

<sup>10</sup>FAO, Rome Declaration on World Food Security (1996). A detailed Plan of Action of the World Food Summit, dubbed as the ‘first coherent plan of action intended to make the right to food a reality’ (Ziegler, 2001, para. 24) was also adopted during the summit. The Plan of Action explicitly grounds the concept of the right to food on Art. 11 of the ICESCR (FAO, 1996).

<sup>11</sup>United Nations (2002) Johannesburg Declaration on Sustainable Development, paras. 18–19.

<sup>12</sup>The Right to Food Guidelines have been reaffirmed in various resolutions, including: GA Res 60/165, UN Doc A/RES/60/165 (2 March 2006) para. 22; GA Res 61/163, UN Doc A/RES/61/163 (21 February 2007, adopted 19 December 2006) para. 26; GA Res 25/14, UN Doc A/HRC/RES/25/14 (15 April 2014); Human Rights Council, Resolution 7/14. The right to food, UN Doc A/HRC/RES/7/14 (27 March 2008) para. 33; Human Rights Council, Resolution 10/12. The right to food, 10<sup>th</sup> sess, UN Doc A/HRC/RES/10/12 (26 March 2009) para. 34.

<sup>13</sup>Transforming our world: the 2030 Agenda for Sustainable Development (2015). The 2030 Agenda is unequivocal in declaring that it is guided by the purposes and principles of the UN Charter, including full respect for international law, and repeatedly emphasises that it is grounded in the UDHR, international human rights treaties, and informed by other international instruments. *Ibid.*, 4[10].

<sup>14</sup>*Ibid.*, Preamble.

<sup>15</sup>Knuth and Vidar (2011). The study notes that of the 56 countries, 33 make explicit references to the right to food in their constitution, either as a self-standing right, as a right of specific segments of the population, or as a directive principle of State policy. Other countries recognise broader rights that include the right to food, such as ‘the right to a dignified standard of living, including appropriate food’ in Art. 21 of the Belarus Constitution. Further, of the 56 countries, 36 are categorised as developing while 12 are least developed countries and among those most affected by hunger and malnutrition.

through the judiciary.<sup>16</sup> For example, in the landmark case of *People's Union for Civil Liberties v. Union of India*, dubbed as 'the most spectacular case of a court protecting the right to food' (IDLO, 2014, p. 14), the Supreme Court of India was asked to enforce a constitutional right to food under Article 21 of the Constitution of India, as a legal right of every person in the country.<sup>17</sup> The Court, interpreting the right to life with dignity to include the right to food, directed the federal and state governments to maintain and expand various food and social security schemes, identified how these schemes were to be implemented and established monitoring mechanisms to ensure compliance with the orders (Mander, 2012, p. 18).

The nature and content of the right to food, and the corresponding obligations that flow from the right, have become much clearer and better understood than when it was first enshrined in the ICESCR. It has also been widely endorsed and has 'been accorded universal recognition as a human right' (Alston, 1984, p.9). According to Alston, the right to food is 'firmly entrenched as a basic norm', recognised by all states in the international community (Alston, 1984, p.14). Thus, as a human right representing universally recognised norms, shared values, and legal obligations, the right to food is a valuable tool for addressing the global problem of hunger and food insecurity.

However, the right to food, as currently formulated, is insufficient as a framework to tackle gender-specific barriers that impede women's access to food. Women's access to adequate food is undermined by pervasive and intersecting forms of past and present inequalities at the household, community, national, and the global level. This may be influenced by unequal power relations affecting the allocation of food within the households, their ability to access resources, and their opportunities to participate in productive activities.<sup>18</sup> Thus, women experience poverty and hunger disproportionately despite their crucial roles in food production, as small-scale food producers or farm workers.<sup>19</sup> Currently, women and girls comprise 60 percent of about 811 million people in the world who are food insecure.<sup>20</sup>

The existence of these gender-based barriers is not explicitly recognised in the current iterations of the right to food. The CEDAW acknowledges women's need for adequate nutrition only within the context of pregnancy and lactation, thus taking a 'protective' rather than a human rights approach.<sup>21</sup> The Convention on the Rights of the Child, while recognising the state's duty to provide adequate food to combat malnutrition, does not recognise any gender differences in nutritional intake. Certainly, the equal enjoyment of the right to food is guaranteed by the non-discrimination and equality provisions in the ICESCR.<sup>22</sup> Article 2(2) of the ICESCR requires states to guarantee that Covenant rights will be 'exercised without discrimination of any kind', including as to sex. Article 3 explicitly affirms the equal rights of men and women to the enjoyment of all the rights in the Covenant. However, this principle of non-discrimination and equality, as traditionally interpreted, fails to recognise women's historical experience of systemic discrimination. Similarly, while General Comment no. 12 mentions the need to ensure equal access to resources, particularly for women, it does not acknowledge the need to address women's already disadvantaged position that limits their access to food in the first place.<sup>23</sup> These notions of equality, associated with formal equality approach, is elaborated in the next section.

<sup>16</sup>International Development Law Organization (2014) provides a comprehensive discussion on adjudication in relation to the right to food.

<sup>17</sup>*PUCI v. Union of India & Others* (2001), discussed in detail in Mander (2012).

<sup>18</sup>Human Rights Council (2010) 10–11 [33–39].

<sup>19</sup>Female farmers are responsible for planting and harvesting more than 50% of the world's food. In Asia, women constitute 50–90% of the labour force dedicated to rice production. Human Rights Council (2015) 3–4.

<sup>20</sup>World Food Programme (nd). The 2021 State of Food Security and Nutrition report notes that the gender gap in food insecurity increased significantly in the year of the COVID-19 pandemic, with the prevalence of moderate or severe food insecurity being 10% higher among women than men, compared with 6% in 2019 (FAO, IFAD, UNICEF, WFP and WHO, 2021).

<sup>21</sup>As Observed by Otto, assistance in relation to pregnancy and maternity takes a 'protective' rather than a rights approach and relegates women to a special category characterised by dependency and vulnerability (Otto, 2002 p. 22).

<sup>22</sup>Art. 2(2), Art. 3, ICESCR.

<sup>23</sup>CESCR (1999), General Comment no. 12, para. 26.

### 3 The principle of non-discrimination and equality in international human rights law

Under international human rights law, the principle of equality is articulated through the dynamic of non-discrimination and equality. Traditionally, ‘non-discrimination’ and ‘equality’ have been used interchangeably, as the negative and positive aspects of the same principle (Moeckli, 2013).<sup>24</sup> This dual concept of non-discrimination and equality is a fundamental tenet of international human rights law.<sup>25</sup> It is based on the idea that all human beings are created equal, best captured in Article 1 of the Universal Declaration of Human Rights: ‘All human beings are born free and equal in dignity and rights.’<sup>26</sup>

The ICESCR does not define ‘discrimination’. However, common definitions of this term can be found in other international human rights instruments, which has led to the view that it is a ‘composite concept’ comprising the following elements: (i) differential treatment; (ii) which is based on certain prohibited grounds; (iii) and has a certain purpose or effect; (iv) in certain fields (such as in economic, political, social, or any other fields) (Craven, 1995, p. 163). The CESCR’s definition of discrimination, as applied in relation to ICESCR rights, includes the first three elements, although it does not mention any fields. General Comment No. 20<sup>27</sup> provides:

[D]iscrimination constitutes any distinction, exclusion, restriction or preference or other differential treatment that is directly or indirectly based on the prohibited grounds of discrimination and which has the intention or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of Covenant rights.<sup>28</sup>

The definition covers both direct discrimination, which occurs when a person is ‘treated less favourably than another person in a similar situation for a reason related to a prohibited ground’; and indirect discrimination, which occurs when laws, policies or practices that appear neutral have a disproportionate impact on the exercise of Covenant rights.<sup>29</sup>

Non-discrimination and equality are immediate obligations that apply to each of the human rights.<sup>30</sup> Thus, while the fulfilment of the right to adequate food is subject to progressive realisation, any discrimination in ensuring the respect for, protection, and fulfilment of the right to food constitutes a violation of human rights.<sup>31</sup> However, the principle of non-discrimination and equality as originally articulated under international law is a requirement to treat everyone equally without discrimination, which is associated with the formal equality approach. As Kong remarks:

<sup>24</sup>Otto, however, asserts that the norms of equality and non-discrimination, like all human rights, both have negative and positive dimensions. She discusses the relationship between these two concepts, explaining specifically Arts. 2(2) and 3 in the ICESCR, which match Arts. 2(1) and 3 in the ICCPR. Art. 2(2) of the ICESCR requires states parties to guarantee that Covenant rights ‘will be exercised without discrimination of any kind’, while Art. 3 requires states to ensure the equal enjoyment by men and women to Covenant rights. The presence of Art. 3 was ‘a reaffirmation of the commitment to prohibit sex discrimination in article 2(2), deemed necessary because of widespread and often brazen resistance to women’s enjoyment of human rights’. (Otto, 2002 p. 35–37).

<sup>25</sup>The UN Charter affirms in its Preamble the ‘equal rights of men and women and of nations large and small’, and declares as one of its purposes the promotion and encouragement of ‘respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion’. Charter of the United Nations, Preamble, Art. 1(3). Art. 2 of the UDHR also states that everyone is entitled to all the rights and freedoms set forth in the Declaration, without distinction of any kind. Art. 2, UDHR.

<sup>26</sup>Art. 1, UDHR.

<sup>27</sup>General Comment No. 20 notes that a similar definition of ‘discrimination’ can be found in the International Convention on the Elimination of All Forms of Racial Discrimination (Art. 1); CEDAW (Art. 1); and CRPD (Art. 2).

<sup>28</sup>CESCR (2009), General Comment No. 20, para. 7.

<sup>29</sup>Ibid.

<sup>30</sup>CESCR (1990), General Comment No. 3, para. 9.

<sup>31</sup>CESCR (1999), General Comment No. 12, para.18.

'The obligation of non-discrimination in existing international human rights treaties which recognizes the right to food focuses only on formal equality, or at most, special treatment to particular groups. The non-discrimination obligation does not go further to impose a duty on States to promote social equality in a more comprehensive manner to realize the right to food.' (Kong, 2009, p. 551)

Formal equality refers to the idea that likes should be treated alike, or that things that are the same should be treated the same way. This notion is linked to the idea that equality requires consistent treatment of all who are similarly placed. The provisions within international human rights instruments that prohibit discrimination, that affirm that all human beings are equal and should be treated equally, or that provide that the law should apply to everyone equally, all embody this formal notion of equality. This model of equality has played a valuable role in bringing women into the realm of international law as 'humans' with full legal and civil capacity.<sup>32</sup> For instance, it underpins the recognition of women's equal rights to suffrage in various parts of the world, starting in New Zealand in 1893, and most recently in Saudi Arabia in 2015.<sup>33</sup> It remains to be of central importance in tackling direct discrimination through the repeal of discriminatory legislation and policies and adoption of laws to promote gender equality, such as in terms of equal treatment in the workplace, equal right to own property, and equal access to education, employment and government facilities.<sup>34</sup>

However, the limitations of the formal notion of equality have been interrogated by scholars.<sup>35</sup> One of the key criticisms is that, since the concept of consistent treatment embodies a notion of procedural justice which does not guarantee any particular outcome, 'it does not matter whether two parties are treated equally well or equally badly' (Barnard and Hepple, 2000, p. 563; Moeckli, 2013, p. 159). Thus, the principle is not violated if two parties are both deprived of a particular benefit (levelling down); or are both conferred the same benefits (levelling up) (Moeckli, 2013, p. 159). Further, equality as consistency only requires the equal application of the law, but is not concerned with any inherent arbitrariness or unfairness of the law. Consequently, laws that are *prima facie* unjust could be applied equally and may exacerbate already existing inequality. Fredman asserts that equal treatment is based on an assumption of conformity to a given norm: 'in order to qualify for equal treatment, the claimant must be considered to be "like" the comparator' (Fredman 2001, p.16). In the case of women, this means conforming to the 'male norm'. For example, women will only be entitled to equal remuneration if they can perform the same jobs and work the same number of hours as their male counterparts. This becomes particularly problematic when taking into account the gender division of household labour whereby women perform most of household and childcare responsibilities. To qualify for equal treatment, women will have to exert more effort, or to find other people to perform household responsibilities. Equality as consistency is also problematic in cases of pregnancy, as there are no appropriate male comparators for pregnant women; or in cases of low-paying occupations in which women are segregated, where there may be no male comparator doing the same work.

<sup>32</sup>For example, the recognition of the equal rights of men and women in the UN Charter represents the first instance in international law in which women were formally and fully recognised as 'humans' with full legal and civil capacity. With this recognition, women were no longer to be treated as properties of either their fathers or husbands, or dependants of men. (Charter of the United Nations, Preamble para. 2, Art. 1[3]. See Otto, 2018, p. 346).

<sup>33</sup>New Zealand was the first self-governing country in the world to recognise women's right to vote in parliamentary elections through the signing of the Electoral Act on 19 September 1893. Women in Saudi Arabia were permitted to vote and stand as candidates in municipal elections for the first time in 2015 (Lane and Kenny, 2018).

<sup>34</sup>For example, ILO's Equal Remuneration Convention was adopted in 1951, but similar provisions on the equal remuneration of women and men in performing work of equal value was adopted in India only in 1976 (amended in 1987 to include prohibition on discrimination in working conditions), and a similar prohibition on discrimination against women in the workplace was adopted in the Philippines only in 1988. Women and girls continue to suffer discriminatory laws and practices in various parts of the world, such as child marriages, lack of access to properties especially in Africa and about half the countries in Asia, and violence against women and girls. (See ILO, Equal Remuneration Convention 1951; Equal Remuneration Act, 1976/1987 (India); Republic Act No. 6725, 1988 (Philippines); UNAIDS, 2020).

<sup>35</sup>See e.g. Barnard and Hepple (2000); Fredman (2001); Clifford (2015).

This principle of equality as consistency requires women to conform to ‘male-oriented social structures’, without challenging the structures themselves (Fredman and Goldblatt, 2014, pp.7–8).

This approach to equality, on its own, is inadequate in addressing historical and well-entrenched patterns of disadvantage. Applying equal treatment to people who have already been disadvantaged may, in practice, reinforce the effects of disadvantage. For example, applying standardised aptitude tests as a requirement for employment may operate to disqualify women who have been deprived of access to quality education due to discrimination.<sup>36</sup> Interventions to improve agricultural productivity, including farm mechanisation, construction of farm-to-market roads, and improved access to finance, will not benefit women without addressing their specific limitations such as lack of training, mobility constraints, and limited bargaining power at home and in the community. Similarly, laws providing for equal rights to register lands may not benefit women who have low levels of literacy and are unable to understand land registration processes, or who lack independent financial resources to shoulder the cost of registration.<sup>37</sup> In such cases, unequal treatment, such as targeted training and capacity-building, or special assistance during actual registration, may be necessary to redress the disadvantage. As Sen has argued: ‘equal consideration for all may demand very unequal treatment in favour of the disadvantaged’ (Sen, 1995, p. 1).

To overcome the limitations of formal equality, scholars, judges, and lawmakers have generally tended to adopt the more wide-ranging notions of equality of opportunity and equality of results. *Equality of opportunity* aims to equalise the starting point for individuals from disadvantaged groups, to enable them to start at the same position in competing for economic, political, social, or other goods (Clifford, 2013). The metaphor usually used to illustrate this is that of competitors in a race, to demonstrate that equality cannot be achieved if individuals do not begin the race from the same starting points (Fredman, 2001). From a procedural point of view, equality of opportunity entails the removal of barriers preventing the advancement of disadvantaged groups, but does not guarantee that this will lead to a fairer outcome. This is so because offering equal opportunities does not necessarily guarantee that people will be in a position to take advantage of these opportunities, such as for those who lack the required qualifications due to past discrimination, or for women who have household obligations (Fredman, 2001). *Equality of results* is concerned with fairer distribution of goods and benefits, to alleviate the situation of those who have been historically disadvantaged in society (Clifford, 2013). Thus, specific measures are adopted, such as preferential treatment and quota provisions, to increase women’s participation in educational institutions, employment, and public office. However, improving the outcome need not entail an examination of the fundamental structures and institutions that perpetuate disadvantage. While an increase in the proportion of women in government is a positive change, it ‘might reflect only an increasingly successful assimilationist policy’, in which women who obtain the positions might have needed to conform to ‘male’ working patterns (Fredman, 2001, p. 20).

Equality of opportunity and equality of results both aim at improving the position of disadvantaged groups, and are important steps to correct inequitable outcomes that are the results of historical disadvantage. However, these do not address the structural conditions that create and perpetuate these inequalities. Scholars have developed a concept of *transformative equality* to ‘advance the position of disadvantaged groups through changing existing social structures and the way organisations and

<sup>36</sup>A similar situation was tackled in the US case of *Griggs v. Duke Power*, where an employer required the passing of a standardised test as a condition for employment, applying the tests to both whites and African-American applicants. However, the requirement operated to disqualify African-Americans who have long received inferior education in segregated schools. The court ruled that Title VII of the Civil Rights Act aimed to ‘achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to “freeze” the status quo of prior discriminatory employment practices’. *Griggs v. Duke Power Co.* (1971) 401 US 424, 429, 430.

<sup>37</sup>For example, in a study by Namubiru-Mwaura, although women in India and Pakistan have legal rights to own land, they rarely purchase land due to lack of financial resources and traditional gender roles (Namubiru-Mwaura, 2014, p. 6).

institutions function' (Clifford, 2013, p. 430). This proceeds from the recognition that the impediments to equality are well-entrenched in institutional and social structures, and thus, equality for women entails a change in the institutional structures that perpetuate women's subordination (Fredman and Goldblatt, 2014, p. 4). Transforming social structures is a long-term process, for instance through continuous education and awareness activities aimed at eliminating the stereotyped concepts of the roles of men and women. In the short-term, however, it is also necessary to address the different forms of disadvantage that women are already facing.

Clearly, there are different notions of equality that have been articulated so far, each having their advantages and limitations in addressing the different forms of inequality that women are facing. However, while there is a rich body of literature exploring the various definitions, nuances, and applications of the concept of equality, the notion of substantive equality, as applied specifically to the right to food, is under-explored. This article unpacks a conceptualisation of substantive equality as articulated in international human rights law and its institutions which, for the past years, have made significant efforts to address the limitations of the prevailing notions of equality. I then explicitly link this substantive equality to the right to food and explore their potential as complementary frameworks to address the enduring problem of women's food insecurity. Drawing from contemporary articulations of equality by treaty bodies, particularly the CEDAW Committee and the CESCR, this conception of substantive equality has three elements: *first*, an understanding of the different and intersecting forms of past and present inequalities that operate as obstacles to women's access to food. *Second*, measures and affirmative actions to redress these inequalities and to transform structures that cause and perpetuate women's disadvantage. *Third*, measures to ensure women's meaningful participation in decision-making processes on interventions that affect their lives. This three-element conceptualisation of substantive equality finds support in certain provisions of the CEDAW and in the authoritative interpretations of UN bodies, and thus can be justified from an international human rights law perspective.

#### 4 Conceptualising substantive equality under international law

The CEDAW is the primary international human rights instrument dealing with the protection and promotion of women's human rights. The Convention entered into force in 1981 as 'the first global and comprehensive legally binding international treaty aimed at the elimination of all forms of sex- and gender-based discrimination against women' (Šimonović, 2009, p. 1). Non-discrimination and equality are the backbone of CEDAW and inform each of the obligations set out in the Convention (Cusack & Lisa Pusey, 2013, p. 57). Its definition of discrimination is similar to the 'composite concept' of discrimination discussed above (comprising the four elements of: differential treatment, based on certain prohibited grounds, and has a certain purpose or effect, in certain fields):

'For the purposes of the present Convention, the term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.'<sup>38</sup>

However, the Convention was criticised for its formal equality approach in defining discrimination. Defining equality 'on a basis of equality with men' requires a comparison with a male standard, which means, as discussed above, that women must assimilate to the male norm in order to be afforded equal rights (Holtmaat, 2013, p. 103). According to Charlesworth *et al.*, the underlying assumption of the definition is that 'women and men are the same', which 'accepts the general

<sup>38</sup>Art. 1, CEDAW.

applicability of a male standard', thus promising 'a very limited form of equality: equality is defined as being like a man' (Charlesworth *et al.*, 1991, p. 632).

CEDAW was a product of its time and the nascent global women's human rights movement at that time, and it certainly has some limitations in advancing a more substantive notion of equality. Nonetheless, the CEDAW Committee, the treaty body responsible for monitoring the implementation of the Convention, has, in the last decades, interpreted and elucidated core elements of non-discrimination and equality in CEDAW. As the Committee emphasises, the Convention is a dynamic instrument that accommodates the development of international law:

'Since its first session in 1982, the Committee on the Elimination of Discrimination against Women and other actors at the national and international levels have contributed to the clarification and understanding of the substantive content of the Convention's articles, the specific nature of discrimination against women and the various instruments required for combating such discrimination.'<sup>39</sup>

Thus, in addition to key provisions of the CEDAW, the conception of substantive equality finds support in these clarifications of the CEDAW Committee, through its various general recommendations, as well as from general comments of the CESCR in relation to the non-discrimination and equality guarantees of the ICESCR.

Some salient elements of the CEDAW sowed the seeds of early conceptions of substantive equality. Firstly, CEDAW explicitly acknowledges the existence not only of biological differences, but of 'extensive discrimination against women',<sup>40</sup> including gender-based prejudices and stereotypes.<sup>41</sup> Secondly, the Convention imposes both negative obligations of non-interference on the state, as well as requiring that states take proactive measures to: (i) address women's biological needs;<sup>42</sup> (ii) eliminate discrimination and improve the de facto position of women, including by ensuring their full development and advancement;<sup>43</sup> and (iii) work towards structural change.<sup>44</sup> Structural change is advanced in the Covenant through, for instance, the modification of 'the traditional role of men and women in society and in the family', including in matters of marriage, family relations, and upbringing of children.<sup>45</sup>

To accelerate de facto equality between men and women, the Convention mandates the adoption of temporary special measures such as quotas to increase women's representation in politics and in the public and private sectors.<sup>46</sup> Article 4(1) of the Convention provides that 'temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination'. This seems to suggest that temporary special measures are an exception to equality. This is bolstered by the use of the terms 'special' and 'temporary'. The use of special measures has been controversial for appearing to breach the equal treatment principle by requiring preferential treatment (Fredman and Goldblatt, 2014). However, measures advantageous to women might be necessary to redress previous disadvantage. General Recommendation No. 25 clarifies that the application of temporary special measures is not an exception to equality but a necessary measure to remedy past discrimination, accelerate the improvement of the position of women, and realise de facto equality with men. The purpose is 'to effect the structural, social and cultural changes necessary to correct past and current forms and effects of discrimination against women'.<sup>47</sup>

<sup>39</sup>CEDAW Committee (2010), General Recommendation No. 28, para. 1.

<sup>40</sup>Preamble, CEDAW.

<sup>41</sup>Art. 5(a), CEDAW.

<sup>42</sup>Art. 11(2)(d) and 12(2), CEDAW.

<sup>43</sup>Arts. 2 and 3, CEDAW.

<sup>44</sup>Art. 5, CEDAW.

<sup>45</sup>Preamble, Art. 5(b), Art. 16, CEDAW.

<sup>46</sup>Art. 4(1), CEDAW.

<sup>47</sup>CEDAW Committee (2004), General Recommendation No. 25, para. 15.

Under Article 5(a) of CEDAW, measures to improve women's position include the elimination of prejudice and stereotypes which are based on the idea of women's inferiority to men. Experts such as Fredman and Goldblatt (2014) have emphasised the importance of addressing stigma, prejudice and stereotyping as an important element in order to achieve substantive gender equality. They note that gender-based stereotypes that overemphasise women's traditional role as wives and mothers undermine their social status and opportunities for productive work. The Special Rapporteur on the right to food observes that social norms or customs and stereotypes regarding the roles and responsibilities of women and men adversely impact women's access to productive resources and economic opportunities, as well as their bargaining position within the household and the community (HRC, 2012). The CEDAW Committee has also repeatedly emphasised the obligation of states to implement measures to address the persistence of gender-based stereotypes.<sup>48</sup>

General Recommendation No. 25 is unequivocal in affirming substantive equality over formal equality, explicitly declaring that the Convention goes beyond the concept of discrimination used in many national and international legal instruments.<sup>49</sup> It emphasises that it is not enough to guarantee women's treatment is identical to that of men to achieve their de facto equality (interpreted by the Committee as substantive equality) with men.<sup>50</sup> It also clearly expresses the key ingredients of a concept of substantive equality. First, it reiterates that women have suffered and continue to suffer from various forms of gender-based discrimination.<sup>51</sup> Second, it thus calls for analysing and addressing the underlying causes of inequality and discrimination against women, as a necessary step towards improving the position of women.<sup>52</sup> Third, it stresses the need for an enabling environment to empower women to achieve equality of results.<sup>53</sup>

On the part of the CDESCR, its General Comment No. 16 adopts a broad view that further develops the ICESCR's equality provisions, reiterating that guarantees of equality and non-discrimination in international human rights treaties mandate both de jure (formal) and de facto (substantive) equality.<sup>54</sup> It stresses that substantive equality is concerned with ensuring that laws, policies, and practices 'do not maintain, but rather alleviate, the inherent disadvantage that particular groups experience'.<sup>55</sup>

The Committee urges States parties to consider 'that such laws, policies and practice can fail to address or even perpetuate inequality between men and women because they do not take account of existing economic, social and cultural inequalities, particularly those experienced by women'.<sup>56</sup>

CDESCR General Comment No. 20 emphasises the elimination of systemic discrimination:

'The Committee has regularly found that discrimination against some groups is pervasive and persistent and deeply entrenched in social behaviour and organization, often involving unchallenged or indirect discrimination. Such systemic discrimination can be understood as legal rules, policies, practices or predominant cultural attitudes in either the public or private sector which create relative disadvantages for some groups, and privileges for other groups.'<sup>57</sup>

These current interpretations of treaty obligations by the relevant treaty bodies with respect to equality and non-discrimination support the three-element conceptualisation of substantive equality I discuss

<sup>48</sup>See CEDAW Committee, General Recommendation No. 25, paras. 7, 38; CEDAW Committee (2010), General Recommendation No. 28, para. 9.

<sup>49</sup>CEDAW Committee, General Recommendation No. 25, para. 5.

<sup>50</sup>Ibid., para. 8.

<sup>51</sup>Ibid., para. 5.

<sup>52</sup>Ibid., paras. 8, 10.

<sup>53</sup>The Committee asserts that equality of results is 'the logical corollary of de facto or substantive equality'. Ibid., paras. 8, 9.

<sup>54</sup>CDESCR (2005), General Comment No. 16, para. 7.

<sup>55</sup>Ibid.

<sup>56</sup>Ibid., para 8.

<sup>57</sup>CDESCR, General Comment No. 20, para. 12.

above. The next section more explicitly articulates the interconnections and complementarities between substantive equality and the right to food.

## 5 Substantive equality and the right to food: interrelationships and complementarities

This section brings together the relevant provisions in the ICESCR and CEDAW, the interpretations and elucidations of their respective treaty bodies, and the conceptualisation of substantive equality as developed in this thesis, to sketch the interrelationships and complementarities of the right to food and substantive equality. Aside from General Comments by the CESCR and General Recommendations by the CEDAW Committee, this section also looks at the latter's Concluding Observations to provide illustrations of how the Committee addresses discrimination and inequalities faced by rural women in accessing food, land and other resources, in certain jurisdictions. The section is structured around the three elements of substantive equality mentioned above.

### 5.1 Recognising the intersecting forms of inequality that affect women's access to food

The CEDAW elaborates on economic, social and cultural rights in relation specifically to women's experience, and provides a comprehensive framework for pursuing women's human rights. However, the Convention does not elaborate on a right to food. Although it recognises in its Preamble that women have the least access to food, health, education, and other essentials in situations of poverty, the matter of food is not addressed in any of its substantive provisions (unlike, for instance, health or education). Unlike the ICESCR which includes food as a part of the right to adequate standard of living, CEDAW mentions only 'housing, sanitation, electricity and water supply, transport and communications' in relation to adequate living conditions.<sup>58</sup> Article 12 of the CEDAW mentions adequate nutrition, but only in relation to pregnancy and lactation, thus limiting any explicit reference to food in the Convention to women's reproductive role as mothers.<sup>59</sup> Nevertheless, food is indirectly referred to in Article 14 on the rights of rural women.<sup>60</sup> In dealing with elimination of discrimination against rural women, the measures mandated in Article 14 aim to improve the situation of women as food producers, and to ensure that women participate in and benefit from rural development.<sup>61</sup>

Many of the CEDAW Committee's pronouncements in relation to women's right to food are linked to the discussion on rural women and the issue of access to land.<sup>62</sup> The 'rural woman', as a distinct subject of international human rights law, 'is tightly bound to the issue of food security' (Martignoni, 2018, p. 400).<sup>63</sup> Freeman *et al.* (2012, p. 358) note that a primary issue that disproportionately impacts rural women is that of 'discrimination in accessing land and, by implication, the enjoyment of the right to food'. As observed by the Special Rapporteur on the Right to Food, people's access to land 'determines both their access to food and the general availability of food to communities' (HRC, 2020, p. 6). Martignoni (2018) further remarks that land rights are widely considered as key prerequisites for food production and for providing access to income earning opportunities through the sale of agricultural commodities. Access to land therefore is a recurring theme in CEDAW Committee's recommendations and concluding observations.

In elaborating on the rights of rural women, the CEDAW Committee emphasises both the important role of women in achieving food security, and their vulnerability to food insecurity.<sup>64</sup> General

<sup>58</sup>Art. 14(2)(h), CEDAW.

<sup>59</sup>*Ibid.*, Art. 12(2).

<sup>60</sup>*Ibid.*, Art. 2.

<sup>61</sup>*Ibid.*, Art. 14(2).

<sup>62</sup>See e.g. CEDAW Committee, Concluding Observations on Senegal (2015), paras. 32–33; CEDAW Committee, Concluding Observations on Malawi (2015), paras. 42–43; CEDAW Committee, Concluding Observations on Indonesia (2012), para. 45(a); CEDAW Committee, Concluding Observations on Tanzania (2008), para. 43.

<sup>63</sup>Note that in 2007, the UN General Assembly established an International Day of Rural Women, in recognition of their critical role and contribution in improving food security, enhancing agricultural and rural development, and eradicating rural poverty. UN GA Res 62/136, Improvement of the situation of women in rural areas (18 December 2007), para. 8.

<sup>64</sup>CEDAW Committee, General Recommendation No. 34, para. 63.

Recommendation No. 34 stresses that rural women ‘continue to face systematic and persistent barriers to the full enjoyment of their human rights’, including systemic discrimination in access to land and natural resources.<sup>65</sup> Barriers also include ‘unpaid work burden owing to stereotyped gender roles, inequality within the household and the lack of infrastructure and services, including with respect to food production and care work’.<sup>66</sup> General Recommendation No. 34 also discusses food and nutrition in relation to rural women’s health, as well as in relation to the specific nutritional needs of pregnant and lactating rural women.<sup>67</sup> In addition, the General Recommendation acknowledges the intersectionality of discrimination that many rural women face based on their ethnicity, religion, or on the basis of being migrants, landless, and heads of household.<sup>68</sup>

In several Concluding Observations, the CEDAW Committee has also expressed concern at the disadvantaged position of women in rural areas, who are disproportionately affected by food insecurity due to discriminatory customs and traditions that hinder women from inheriting or acquiring land and other resources, and accessing credit and community services.<sup>69</sup> In its Concluding Observations on Nepal, the Committee also expressed concern about discrimination against women and girl children in terms of food distribution within the household.<sup>70</sup>

The CEDAW Committee’s General Recommendation no. 37 on climate change highlights the gendered effects of food, land and water insecurity, noting that women are more likely to suffer from malnutrition in times of food scarcity.<sup>71</sup> Further:

‘Women, particularly rural and indigenous women, are directly affected by disasters and climate change as food producers and as agricultural workers due to the fact that they make up the majority of the world’s small-holder and subsistence farmers and a significant proportion of farm workers. As a result of discriminatory laws and social norms, women have limited access to secure land tenure and their farmlands tend to be of inferior quality and more prone to flooding, erosion or other adverse climatic events.’<sup>72</sup>

On the part of the CESCR, its General Comment No. 12 on the right to adequate food simply prohibits discrimination in access to food, without elaborating on the underlying historical and deep-seated patterns of disadvantage affecting access to food. Nonetheless, General Comment No. 16, elaborating on the equality provision (Article 3) of the ICESCR, provides:

‘Women are often denied equal enjoyment of their human rights, in particular by virtue of the lesser status ascribed to them by tradition and custom, or as a result of overt or covert discrimination. Many women experience distinct forms of discrimination due to the intersection of sex with such factors as race, colour, language, religion, political and other opinion, national or social origin, property, birth, or other status, such as age, ethnicity, disability, marital, refugee or migrant status, resulting in compounded disadvantage.’<sup>73</sup>

Thus, General Comment No. 16 explicitly recognises the intersecting factors negatively affecting women’s enjoyment of economic, social and cultural rights, including the right to food.

<sup>65</sup>Ibid., paras. 4, 5.

<sup>66</sup>Ibid.

<sup>67</sup>Ibid., paras. 37, 39d, 65.

<sup>68</sup>Ibid., para. 14.

<sup>69</sup>CEDAW Committee, Concluding observations on the Philippines (2016), para. 43; CEDAW Committee, Concluding Observations on Zimbabwe (2012), para. 35; CEDAW Committee, Concluding Observations on Sierra Leone (2007), para. 36; CEDAW Committee, Concluding Observations on Tanzania (2008), para. 43.

<sup>70</sup>CEDAW Committee, Concluding observations on Nepal (2011), para. 37.

<sup>71</sup>CEDAW Committee, General Recommendation No. 37, para 69.

<sup>72</sup>Ibid., para. 70

<sup>73</sup>CESCR, General Comment No. 16, para. 5.

## 5.2 Redressing disadvantage

Once it has been established that women's access to food is hampered by historical and well-entrenched patterns of disadvantage, states have an obligation to take measures to redress the disadvantage. This is consistent with the obligation of states to pursue without delay a policy of eliminating discrimination against women, and to accelerate de facto equality between men and women.<sup>74</sup>

CEDAW sets out policies and measures aimed at improving the situation of women as food producers. For example, Article 14 includes provisions to ensure women's 'access to agricultural credit and loans, marketing facilities, appropriate technology and equal treatment in land and agrarian reform as well as in land resettlement schemes'.<sup>75</sup> Article 14 also mandates that states ensure women's access to community and extension services, as well as to formal and non-formal education. This is important because precisely one of the causes of women's food insecurity is lack of access to productive resources, technology, training, extension services, and marketing facilities. CEDAW Committee's General Recommendations elaborate on the obligation of states to fulfil rural women's rights, including the right to food.

General Recommendation No. 34 provides clear and specific measures to address the difficulties and particular problems faced by rural women, such as through: giving priority to rural women's equal rights to land when undertaking land and agrarian reforms; ensuring that rural women have authority to manage and control their natural resources; implementing capacity-building programmes to improve women's financial and business skills; developing agricultural extension programmes and advisory services to support rural women's economic and entrepreneurial skills; and ensuring rural women's access to credit, community-managed and mobile financial services, technology, markets, and marketing facilities.<sup>76</sup>

The issue of discriminatory practices and stereotypes, particularly in relation to women's access to land and other resources, is addressed by the CEDAW Committee in many instances. General Recommendation No. 34 provides:

[States] should eliminate discriminatory stereotypes, including those that compromise the equal rights of rural women to land, water and other natural resources. In this regard, States parties should adopt a range of measures, including outreach and support programmes, awareness-raising and media campaigns, in collaboration with traditional leaders and civil society, to eliminate harmful practices and stereotypes.<sup>77</sup>

The Committee has also stressed the states' obligations to eliminate discrimination with respect to land ownership and inheritance in several Concluding Observations, such as in Papua New Guinea, Tanzania, and Sierra Leone.<sup>78</sup> The Committee recommends enacting legislation that promotes women's equal access to land and eliminates discriminatory inheritance practices; and conducting awareness-raising campaigns about women's land and property rights.<sup>79</sup>

The issue of gender and food insecurity in relation to climate change is addressed in General Recommendation No. 37, which enjoins states-parties to promote and protect women's equal rights to food, land and natural resources, even during times of scarcity.<sup>80</sup> Actions provided in the document include identifying and supporting sustainable livelihoods, developing gender-responsive services such

<sup>74</sup>Art 2, Art 4(1), CEDAW

<sup>75</sup>Art. 14(2)(g), CEDAW.

<sup>76</sup>CEDAW Committee (2016), General Recommendation No. 34, paras. 64–78.

<sup>77</sup>Ibid., para. 23.

<sup>78</sup>CEDAW Committee, Concluding Observations on Papua New Guinea, (2010) para. 46; CEDAW Committee, Concluding Observations on Tanzania (2008) para. 44; CEDAW Committee, Concluding Observations on Sierra Leone (2007) para. 37.

<sup>79</sup>CEDAW Committee, Concluding observations on the Democratic Republic of the Congo (2019), para. 41(c); CEDAW Committee, Concluding Observations on Tanzania (2008), para. 44.

<sup>80</sup>CEDAW Committee (2018), General Recommendation No. 37, para. 72(a).

as extension programmes to assist women farmers, and developing gender-responsive development plans and policies that integrate a human rights-based approach to guarantee sustainable access to adequate food.<sup>81</sup> General Recommendation No. 37 also reiterates the following state obligations under CEDAW as ‘of central importance in addressing women’s rights to land and productive resources that are vital for ensuring the right to food’: Article 12 on adequate nutrition during pregnancy and lactation; Article 14 on women’s equal rights in decision-making about food production; Article 2 on eliminating discrimination; Article 5(a) on modifying cultural patterns of behaviour based on discriminatory stereotypes; Article 15 on equality before the law and Article 16 on equality within marriage and family relation.<sup>82</sup>

On the part of the CESCR, General Comment No. 12 enjoins states to adopt legal or policy measures aimed at enhancing women’s opportunities as food producers, while recognising the need to prevent discrimination in access to food or resources for food.<sup>83</sup> The measures recommended also pertain to inheritance and ownership of land and other resources.<sup>84</sup> General Comment No. 16 offers a more substantive conception of equality in dealing with the right to food. Interpreting Article 11 of the ICESCR, it stresses that states not only ensure women have access to, or control over, means of production, but that states must address customary practices that impact women’s rights to food, such as where ‘women are not allowed to eat until the men are fully fed, or are only allowed less nutritious food’.<sup>85</sup>

### 5.3 Promoting women’s participation in decision-making processes

Women’s meaningful participation in decision-making processes is a crucial element of substantive equality. This is based, first, on the recognition that past discrimination has hindered women’s political participation, hence there is a need to compensate for their absence in political voice and to open up avenues for better participation in the future (Fredman, 2016). Second, participation has been recognised, both as a fundamental human right under international human rights law, and as a basic requirement of a human rights approach to development, valuable as a means of promoting development and the full exercise of human rights.<sup>86</sup> For participation to truly contribute to the attainment of substantive equality, it should involve the empowerment of women to have real influence and control over decisions, policies, and interventions that affect their lives.

CEDAW stresses the need for women’s participation in decision-making processes. Article 14 mandates the participation of rural women in the ‘elaboration and implementation of development planning at all levels’; in all community activities; and in the organisation of ‘self-help groups and co-operatives in order to obtain equal access to economic opportunities’.<sup>87</sup> While not directly related to food nor to participation, the provisions of the CEDAW relating to the equal rights of the spouses in matters relating to marriage and family life are particularly relevant in empowering women to participate in decision-making within the household, including in relation to food. For example, Article 16 (h) requires states to take measures to ensure that spouses have the same rights regarding the ‘ownership, acquisition, management, administration, enjoyment and disposition of property’.

The CEDAW Committee’s General Recommendation No. 34 outlines concrete measures to facilitate and ensure that rural women participate in and benefit from rural development, noting both their important role in agriculture and rural development and the impediments to their full participation.<sup>88</sup>

<sup>81</sup>CEDAW Committee, General Recommendation No. 37, para. 72(b), (c).

<sup>82</sup>CEDAW Committee, General Recommendation No. 37, para. 71.

<sup>83</sup>CESCR, General Comment No. 12, para. 26.

<sup>84</sup>Ibid.

<sup>85</sup>CESCR, General Comment No. 16, para. 28.

<sup>86</sup>See e.g. Art 21, UDHR; Art 25, ICCPR; Art 14, CEDAW; UN CHR, *Popular Participation in its Various Forms as an Important Factor in Development and in the Full Realization of Human Rights* (1985) 6[25b]; OHCHR, *The Principles and Guidelines for a Human Rights Approach to Poverty Reduction Strategies* (2006)14[64].

<sup>87</sup>Arts. 14 2(a), 2(f), 2(e), CEDAW.

<sup>88</sup>CEDAW Committee, General Recommendation No. 34, paras. 35, 53.

Measures to ensure the effective and meaningful participation of rural women in all levels of decision-making include: establishing quotas for rural women's representation in decision-making positions; developing action plans to address the practical barriers preventing women from participating in community life; raising awareness about the importance of women's participation in community decision-making; and ensuring rural women's participation in the development and implementation of all agricultural and rural development strategies.<sup>89</sup> General Recommendation No. 34 also stresses the need to consult women in the development of any strategies and measures, and to obtain their consent before the approval of any projects affecting rural lands or territories and resources.<sup>90</sup>

The CEDAW Committee has repeatedly emphasised the importance of women's participation and leadership in other avenues. In General Comment No. 37, participation and empowerment are discussed as key elements of gender-responsive disaster risk reduction and climate change responses.<sup>91</sup> The document urges states to develop programmes to ensure equal opportunities for women and girls to participate in, lead and engage in decision-making at various levels, particularly in the context of local and community planning and disaster risk responses. Rural women's participation in decision-making processes, including in community processes and development planning, are also emphasised in various Concluding Observations.<sup>92</sup>

## 6 Conclusion

The treaty bodies' interpretations of non-discrimination and equality guarantees contained in the ICESCR and CEDAW have not only clarified but also pushed for more comprehensive questioning of formal equality, and more demands on states to advance substantive equality. These interpretations buttress the conceptualisation of substantive equality I propose, and support the contention that the right to food and substantive equality can be linked more explicitly. First, the CEDAW Committee's General Recommendations and the CESCR's General Comments discussed above recognise, in varying levels, the pre-existing gender-based discrimination affecting women's access to food. These include not only legal or formal constraints such as discriminatory land ownership laws but also customary practices and attitudes that perpetuate substantive discrimination against women. Second, the documents mandate not only the need to eliminate discriminatory laws and policies, but also to adopt positive measures to guarantee full and equal access to economic resources, as well as to address customary practices hindering women's access to food. Third, they emphasise women's participation in the formulation and implementation of national strategies on the right to food, as well as in community activities, self-help groups, and agricultural cooperatives.

This article has shown that while the human right to food is a widely accepted legal and normative framework for tackling food insecurity, by itself, it has limitations in addressing gender-specific barriers affecting women's access to food. It is clear that the problem of women's food insecurity cannot be addressed without tackling the underlying inequalities affecting their access to food. Pursuing women's right to food cannot be separated from pursuing equality, because women's insecurity is primarily a question of inequality. It is my contention that approaching the problem of food insecurity from a broader formulation of the right to food that is informed by a substantive equality perspective will better enable food security interventions to contribute to the realisation of women's right to food.

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<sup>89</sup>Ibid., para. 54.

<sup>90</sup>Ibid., paras 25, 74, 80, 62d.

<sup>91</sup>CEDAW Committee, General Recommendation No. 37, paras. 32–36.

<sup>92</sup>See CEDAW Committee, Concluding Observations on Liberia (2009), para. 39; CEDAW Committee, Concluding Observations on Malawi (24 November 2015), para. 41.

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