

## Chapter 6

# The Netherlands and the Making of the Voluntary Guidelines on the Right to Food

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### I. Introduction

It is not possible to report on the behaviour of a specific country during the negotiations of a very important human rights document such as the Voluntary Guidelines on the Right to Food (hereafter Right to Food Guidelines), without including some analysis of the eighteen month long intergovernmental process<sup>198</sup> in 2003 and 2004, and some reflections on the hindsight view of some of the events leading up to the formation of an international organisation like the UN. The situation before the establishment of the UN was unthinkable atrocities against humanity. The misery in the 1930's in the USA and Europe and the events and consequences, including the abuse of power, of the Second World War were devastating. Those events, one may say, led to the creation of the United Nations.

Two people in particular turned out to be very important for the events in the period until human rights were born. These were President F.D. Roosevelt, and his wife Eleanor Roosevelt, both with visions and political wisdom of rare proportions. In his inaugural speech in 1937 President Roosevelt said:

*'The test of our progress is not whether we add more to the abundance of those who have much; it is whether we provide enough for those who have too little.'*

In his inaugural speech in 1941 he presented the famous four freedoms, freedom from want, freedom from fear, freedom of speech and freedom of faith. He was persuaded to take another turn as the president of the USA because of the special situation created by the World War II, and in his inaugural speech in 1944 he stated that:

*'We have come to a clear realization of the fact that true individual freedom cannot exist without economic security and independence. 'Necessitous men are not free men.' People who are out of a job are the stuff of which*

<sup>198</sup> IGWG: Intergovernmental Working Group for the Elaboration of a Set of Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security.

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*dictatorships are made. In our day these economic truths have become accepted as self-evident.'*

In 1948 the United Nations launched a far-reaching project for the recognition and realisation of human rights by adopting the Universal Declaration of Human Rights (UDHR). It encompasses economic, social and cultural rights. These rights were not universally recognised in 1948, and far from universally respected – they were rights to be achieved through national and international efforts as reflected in the UDHR (Eide, 2005). The awareness and recognition of civil and political rights improved greatly through the 1990's in particular, albeit in the face of severe challenges due to ethnic conflicts. After the attack on the World Trade Center in New York this awareness increased even more. To some extent this has led to a war on terror, with some known cases of serious violations of basic human rights (Eide, 2005). Economic, social and cultural rights as described in the UDHR and further specified in the International Covenant on Economic, Social and Cultural Rights have been less accepted as 'real human rights', but some academics started to work on giving content to the right to adequate food.

An important international event which provided incitement to further development was the World Food Summit (WFS) in 1996, with FAO providing the secretarial function. There the members of the WFS agreed to clarify the content of the right to adequate food (Rome Declaration and Plan of action, Commitment 7, Objective 4(e)).

However, less than a year after the Summit, a Draft International Code of Conduct on the Right to Food as a Human Right became available, drafted by a small group of non-governmental organisations (NGOs) and endorsed, by September 1997, by more than eight hundred NGOs (Oshaug, 2005).

It soon became clear that a proposal for a binding instrument would have no chance of being adopted. But already at the preparatory negotiations before the World Food Summit in 1996 it became evident that even the term 'code of conduct' would be strongly rejected by several delegations. Therefore a different strategy was adopted: namely to request 'a better definition of the content of the human right to adequate food' (Eide and Kracht, 2005). With such a call coming out of the Summit there would be time over in which to make further efforts.

The interim period saw the birth of a number of initiatives and important documents inspired by the Draft Code of Conduct (Oshaug, 2005; Oshaug and Eide, 2003). The World Food Summit: *five years later* (WFS:*fyl*), held in Rome 12-16 June 2002, provided another opportunity to address the issue of a code of conduct on the right to adequate food. The negotiations during the preparatory week 3-9 June in 2002 on a consensus text for the Summit were intense up to the last minute, with one issue still not agreed upon at the formal closure of that meeting: i.e.

whether to include a recommendation for a voluntary code of conduct for guiding the implementation policies and programmes aimed at achieving the human right to adequate food, or just one focusing on food security (as defined by the WFS in 1996). The United States did not want any reference to the human right to adequate food. This country was also against starting a process towards a code of conduct, and never changed in substance their suggestion for the text of this paragraph during the negotiations.<sup>199</sup> USA was partly supported by the European Union (chaired by Spain). To cut a long story short, the decision was made to establish an Intergovernmental Working Group, to elaborate, in a period of two years, a set of voluntary guidelines to support Member States' efforts to achieve the progressive realisation of the right to adequate food in the context of national food security (for further details see Oshaug, 2005).<sup>200</sup>

At the formal meeting of the WFS/fyl on Monday 10 June, the High Commissioner for Human Rights, Mary Robinson, in her statement at the Summit proper presented the main features of the General Comment 12 (Robinson, 2002).

Many stakeholders considered the agreement resulting in paragraph 10 in the document coming out of WFS/fyl, which included establishing an intergovernmental working group on elaborating a set of voluntary guidelines, a lost cause. They thought that agreeing on 'voluntary guidelines' was tantamount to giving up the fight for a useful tool on how to make human rights based policies to fight hunger, food insecurity and malnutrition. Others thought that, on the contrary, this was in fact a victory since the process of continuing the work on the right to adequate food was now assured, and General Comment No. 12 on the right to adequate food would provide a very good basis for that continuation.<sup>201</sup>

This was the situation when the Intergovernmental Working Group on the Right to Food (IGWG) met for the first time on 25 March 2003 in Rome. Within less than two years the working group would present agreed guidelines to FAO's Committee on World Food Security (CFS) before their final approval by the FAO Council in

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<sup>199</sup> USA's proposal 8 June 2002: 'We believe that voluntary guidelines may help countries to develop and strengthen policies directed at achieving food security. We ask the CFS to consider an appropriate mechanism to elaborate such guidelines, bearing in mind the importance of full stakeholder participation including civil society and the private sector and the need for consensus decision-making on such guidelines.'

<sup>200</sup> Paragraph 10 of the final Declaration states: We invite the FAO Council to establish at its One Hundred and Twenty-third session an Intergovernmental Working Group, with the participation of stakeholders, in the context of the WFS follow-up, to elaborate, in a period of two years, a set of voluntary guidelines to support Member States' efforts to achieve the progressive realisation of the right to adequate food in the context of national food security; we ask the FAO, in close collaboration with relevant treaty bodies, agencies and programmes of the UN system, to assist the Intergovernmental Working Group, which shall report on its work to the Committee on World Food Security.

<sup>201</sup> In fact the only objective of the WFS fulfilled at the time was Objective 7.4, which materialised as General Comment No. 12 to the ICESCR.

the autumn of 2004. The special feature of this decision was that, for the first time in history, a tool intended to help countries to formulate human rights based policies was to be negotiated in an intergovernmental setting.

Prior to the first meeting, the secretariat, through a coordinating *ad hoc* unit established by FAO for the IGWG process, had prepared a synthesis report of submissions from a large number of stakeholders (FAO, 2003a). This report points out that the 123<sup>rd</sup> Session of the FAO Council (28 October–01 November 2002) decided to establish the IGWG. This gave a mandate to the Secretariat of the Working Group to prepare a synthesis report of the submissions sent by governments and stakeholders for the first session of the IGWG. This report was presented to the first session of the IGWG as a basis for the deliberations. It was clear then that the contribution from the member countries was modest. The function of the synthesis report was to show the various inputs to the IGWG. The idea was that this would facilitate the discussions. Primarily the purpose of a future Right to Food Guideline was that countries would get access to a practical tool or road map to assist in the implementation of existing legal obligations regarding the right to adequate food and in pursuit of the goals established by the WFS, the Millennium Summit and other major international conferences. The document should thus serve to guide administrative and legislative agendas and systematically identify legal and policy measures and programmes to achieve the realisation of the right to adequate food in all countries (see Oshaug, 2005, for further elaboration).

Many submissions underlined the need to ensure transparency, accountability, decentralisation and participation in food security policies and interventions, and to assist in coordination between different levels and institutions of governments. Furthermore, the Guidelines should be clear and simple, worded in such a way that all stakeholders could identify with them, and they should add value to existing tools. Most submissions stressed the importance of GC12, and some also noted the relevance of the recent General Comment No. 15 on the right to water<sup>202</sup>. There was a general agreement that the Guidelines should be comprehensive, and cover all categories of obligations, i.e. to respect, protect and fulfil the right to adequate food. The need to address long-term development, self-reliance and the immediate needs of those presently hungry or malnourished, was also widely acknowledged (FAO, 2003a).

This, then, was the basis on which the IGWG would start its long and difficult work on elaborating the Guidelines that were to be finalised in September the following year. As the work progressed it turned out that those heavily engaged in the negotiations took on a considerable responsibility, in keeping the process focused and on track so it would finally be a useful practical tool for governments in the fight against hunger, malnutrition and poverty. In this context the role of

<sup>202</sup> CESCR 2002.

the Netherlands became very important, in particular in the period when it held the presidency of the European Union.

## 2. The intergovernmental process in the IGWG between 2003 and 2004

### 2.1 The first IGWG meeting

The task of the IGWG was to follow up decisions of WFS:fyl on the Right to Adequate Food (RtF). The philosophy of the negotiations was that '*Nothing is decided until all is agreed*'. In principle this meant that any of the country delegations could stop or delay the process (for more details of the process see Oshaug, 2005). This is against the FAO Constitution where it is an opening for voting, but it is in agreement with most negotiations within the UN system that usually one goes for consensus. The consequence is that most documents negotiated in such a setting would be watered down, because various countries could manipulate the content and not give up until they were satisfied. The concern in such situations is not for the dire situation of the poor and hungry, but for the consequences for domestic policy of each and every member country.

The Synthesis Report (FAO, 2003a) from the secretariat<sup>203</sup> established by FAO provided a good basis for the discussions of the first meeting of the IGWG. The opening statements by the various delegates were a good indication as to who supported useful, practically oriented guidelines, and those who thought that such guidelines were not needed or wanted, and thus would try to prevent their development. There was cautious optimism among supporters that Mr. Tony Hall was recently appointed as the US Ambassador in Rome, because he had earlier advocated for a convention on the human right to food. He opened the negotiations of the IGWG by taking the floor on behalf of the USA as the first country, by explaining what the USA was doing to fight food insecurity both internationally and domestically; he also made a reference to the Universal Declaration of Human Rights and that the right to food was mentioned there, and that the USA recognised the right to have access to food. He underlined that the right to food should therefore be interpreted as a goal and not a human right. Thus a rights-based approach should not be indicated in a possible future guideline. With the USA in the Bureau responsible for drafting a text based on consensus, this was not a good signal to the IGWG member countries, but rather an ominous omen for the possibility of getting guidelines at all.

<sup>203</sup> FAO had established an *ad hoc* secretariat for supporting the Bureau and the IGWG. It was composed of very able staff: Mr. Julian Thomas and Coordinator, Mr. G. Pucci, with the support of FAO Legal Council, Ms. M. Vidar, FAO Legal Office and Mr. F. Mischler, FAO Economic and Social Department. Carlos Lopez, Human Rights Officer, was seconded to the Ad Hoc secretariat from Office of the United Nations High Commissioner for Human Rights (OHCHR).

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After the first day the secretariat on behalf of the Bureau drafted a non-paper on *convergence* and *divergence* categories. This added to the issues already recorded in the Synthesis Report (FAO, 2003a); the NGOs and UN agencies also came with important constructive suggestions and comments. Many of the regions made good progress in coordinating their viewpoints. It turned out, however, that the European Regional Group did not function well.

Most of the time set aside for regional consultations was spent by the European Union on their internal coordination. Greece had the EU Presidency at that time and thus functioned as a Chair for the EU countries. The consequence was that at best only a few minutes were left to inform the rest of the European countries about the EU position. The representative of the European Region in the Bureau did his best to consolidate the various viewpoints, but frequently ended up presenting and defending the EU position. Throughout the work the IGWG Chair (the Iranian Ambassador) seemed a bit confused and referred to the EU when he in fact meant to refer to the European Region as a whole. The Chair of the European Region did thus not manage to talk fully on behalf of the Region. The Eastern European country candidates for EU membership in particular did not want to do anything to annoy the Chair of the EU and the EU Commission. It was therefore natural that the some of the countries outside the EU, such as Switzerland and Norway, started to collaborate and act together, and presented several common interventions (Oshaug, 2005).

Controversial issues soon became apparent, including the international dimension, justiciability, whether the guidelines should be for states only or also for other actors, and food as a human right in crisis and conflicts. Some countries insisted that there should be no reference to the general comments, not even to the GC12, no use of human rights language and no indication of human rights principles. These issues turned out to be controversial throughout the negotiations.

The Secretariat in their analysis presented in the Synthesis Report showed immediate optimism about achieving a consensus on several human rights issues related to food, an optimism that was refuted. There was no consensus on very many issues among the most vocal contestants, and at best only the viewpoints of those countries and stakeholders that were interested enough to send contributions to the Secretariat established for the negotiations were reflected. The prospects for achieving the mandate given to the IGWG by the WFS:*fjyl* via the FAO Council, seemed bleak from the beginning.

### 2.2 The second IGWG meeting

In the second meeting of the IGWG, the Bureau presented a first draft of a possible VG (FAO 2003b). However, to the surprise of the participants no negotiations of the text took place. Only presentations of viewpoints and suggestions for changes

were allowed. Many felt that at least the introduction and some difficult topics could have been negotiated initially, so as to be sure of what the really difficult issues were. The Bureau<sup>204</sup> maintained that given the newness and complexity of the draft as it was, the wide-ranging opinions about them, their political sensitivity and the limited time available for the negotiation, it was better to have a structured, systematic, and disciplined approach (FAO, 2003c).

Furthermore, the Bureau maintained in the same minutes that the purpose of this second meeting of the IGWG was to identify and agree to broad areas of convergence and divergence, to address opposing views where opinions differed, and to establish mechanisms for negotiating the draft text outside the IGWG meetings. The discussions in the Bureau were apparently very difficult. The representatives that were best prepared and directed much of the negotiation were those representing North America. All the negotiations were conducted in English hampering the active participation of those not fluent in that language (particularly those from a Francophone culture). Many delegations questioned the wisdom of this approach and said that the IGWG would lose a lot of time by not starting with the negotiations, in particular on issues where consultations with the government sector in the home country would be needed.

It was acknowledged that the time given for developing the VG in just three meetings of the IGWG, was probably too short. It was therefore suggested that whenever regional FAO meetings were held, IGWG/VG would be included on the agenda. It is unclear to this author whether this has happened systematically, but it seems to have had a limited impact on the process.

The Bureau suggested an interesting new feature in view of UN negotiations. An open-ended in-session working group was established, chaired by the Chairman of the IGWG. It would include only four spokespersons from each of the seven geographical FAO regions, three representatives from NGOs/CVOs and representatives of UN agencies and intergovernmental organisations. The regions were to appoint spokespersons. The reason given for this arrangement was to facilitate an efficient exchange of views (FAO, 2003d). In a UN setting it is unusual to let other countries speak on behalf of one's own country unless that has been formally agreed otherwise.<sup>205</sup>

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<sup>204</sup> Between the first and second meeting of the IGWG the Bureau met seven times to deal with procedural and other matters related to the VG. However, in order to elaborate the first draft of the VG the Bureau met only twice (once in July and once in September) (FAO, 2003c).

<sup>205</sup> Examples of such arrangements where one spokesperson can speak on behalf of several countries are G77, GRULAC (Group of Latin American countries), Middle East Region, African Region, and Nordic Countries.

While most of the regions seemed to manage this arrangement well,<sup>206</sup> it created considerable problems for the European Region. Initially the European Union demanded all the seats for the European Region because they represented 25 countries (including 10 new applicant countries). They maintained that they wanted Italy (Chair) and Ireland (upcoming chair), and representatives of the Commission of the EU as spokespersons. Switzerland and Norway pointed out that the European Region consisted of 44 countries, and both Switzerland and Norway were not EU members but contributed financially to the IGWG. They had considerable interest in the process and were not ready to let other countries speak on their behalf. Gradually also Bulgaria, Croatia, Romania, San Marino and Turkey supported Switzerland and Norway in their demands. Within the EU there were also countries (in particular Germany<sup>207</sup>) that voiced support for letting non-EU members taking part in the informal discussions in the open-ended in-session working group. The result after long negotiations was that the European Region would be represented by Italy and Ireland, with Switzerland, Norway and Germany alternating on the remaining two seats.

The preparatory negotiation within the groups was intense. A considerable problem for the Chairman was controlling the discussion and making it more efficient. The responsibility for being effective and controlling the process was transferred to the regional groups, and in fact excluded many countries from taking an active part in the plenary negotiations. It also made it possible for the more interested and active countries to be more influential and having their viewpoints better reflected in the final text. In fact given the culture of consensus, such an approach restricted participation even further, and gave the sceptics and those negative to the human right to adequate food an advantage. One country could simply block the negotiations by saying that a suggested text was unacceptable.

This was the case in the European Union, where Germany was a proactive supporter of the human right to adequate food, while countries like UK, Denmark and Sweden, many times supported by the EU Commission, were sceptical and sometimes directly blocked consensus within the EU group on certain issues. The Netherlands were not very visible or active outside the EU-group in this process. In such a situation the text had to be re-negotiated to find compromises or simply to be deleted. The many bracketed paragraphs in later summary reports confirmed this.

Features of blockage surfaced. The controversial issues mentioned above remained (Oshaug, 2005). The resistance to having references to the General Comments was equally strong, particularly from the USA and Canada. The developing countries

<sup>206</sup> Maybe except for Asia which included a wide range of developing as well as developed countries. There were disagreements many times between the poorer Asian countries and Japan.

<sup>207</sup> Germany had considerable interest in the process, and had contributed financially and thus made it possible for FAO to manage the process of developing the VG.



wanted to have a reference to official development assistance (ODA), and increased access to global markets for food and agricultural commodities, while the richer countries pointed out that there are forums for these kinds of negotiations and they should not be dealt with in the IGWG.

It was argued that the VG should not establish any new obligations, and some pointed out that the VG should not be weaker in substance than relevant existing documents. This was agreed, but several delegates, NGOs/CVOs and representatives from UN agencies<sup>208</sup> maintained that the draft text from the Bureau was actually a step backwards compared to existing international human rights norms. Some underlined that it must be recognised that the VG cannot make voluntary what is already obligatory.<sup>209</sup> Many maintained that the levels of obligation (respect, protect, fulfil) had to be included,<sup>210</sup> while the USA underlined that they were not prepared to accept any human rights language in the VG. Many delegations argued that a rights-based approach should be adopted,<sup>211</sup> and that the VG should reaffirm the universality, indivisibility and inter-relatedness of all human rights, and be consistent with and reflect relevant provisions of Human Rights Law.<sup>212</sup> It became apparent that the situation was becoming increasingly complex with every subsequent meeting.

### **2.3 The IGWG inter-sessional meeting**

It was clear already during the second meeting of the IGWG that at least one extra meeting was necessary for getting a negotiated agreed text within the time-frame given by the FAO Council in its 123<sup>rd</sup> Session in 2002. The Bureau decided therefore to have an inter-sessional meeting of the IGWG in February 2004.

The compilation of text proposals from earlier meetings gave a relatively good picture of the diversity of the discussion (FAO, 2004a). The arguments were numerous as to the structure and content of the foreseen document (Oshaug, 2005), including the human rights principle and reference to basic human rights instruments, specification of clear purpose/objectives, a clarification of the relationship between the right to adequate food and food security (essentially GC12), categories of state obligation,<sup>213</sup> and a part dealing with international dimensions.

<sup>208</sup> Jamaica/CARICOM (Caribbean Community) States, Venezuela, Switzerland, Norway, OHCHR, FIAN.

<sup>209</sup> Norway, Senegal, OHCHR, FIAN.

<sup>210</sup> Chile/GRULAC, Mexico, Norway, Special Rapporteur on the Right to Food.

<sup>211</sup> Afghanistan, Norway, Philippines, Special Rapporteur on the right to Food, CESC, FIAN.

<sup>212</sup> Italy/EU, and acceding countries, Norway, Senegal, CESC, OHCHR, FIAN.

<sup>213</sup> The USA did not recognise any value of, nor acknowledge, voluntary guidelines, and stated that references to human rights principles, or categories of obligation, could not be accepted because that was human rights language. Again they maintained that the guidelines should be about food security.

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In view of the very large number of proposals received, and the fact that no negotiations had taken place up till this inter-sessional meeting, the Bureau was delegated with the authority to consolidate the proposals without changing them. It was stressed that the Bureau<sup>214</sup> would have no negotiating or decision-making authority and that it should seek to ensure that proposals made would be reflected in the document (FAO, 2004b, for further discussion see Oshaug, 2005).

### 2.4 The third IGWG meeting

The third formal session<sup>215</sup> took place from 5<sup>th</sup> to 10<sup>th</sup> July 2004, although it was supposed to finish on the 9<sup>th</sup> July. However, given the amount of work, many doubted that the time devoted during this week would suffice, even with sessions every evening.

The purpose of this 3<sup>rd</sup> IGWG meeting was to negotiate an agreed text of the VG. The Bureau had produced a second draft of the VG even though there had been no negotiations up to this meeting (FAO, 2004c). Many considered therefore that the basic documents for the negotiations were the first draft and the subsequent reports from the earlier meetings, including the Compilation Document (FAO, 2004a), and written comments sent to the secretariat by member governments. The secretariat had also provided background papers on issues relevant to the topic.

The first controversy was organisation of the work. Three working groups were established: Working Group I, chaired by the first Vice-Chair of the IGWG, Ambassador Christian Monnoyer (Europe), was to deal with the Preface, the Introduction and Guideline 15 on Natural and Human-made Emergencies. Working Group II, chaired by Mr. Noel De Luna (Asia), was to deal with Part V, the International Framework. Working Group III chaired by Ambassador Mohammad Saeid Noori-Naeeni (Chair of the IGWG), was to negotiate the remaining Voluntary Guidelines (Parts II to IV, excluding VG 15). A 'Friends of the Chair Group'<sup>216</sup> was to be convened as required (FAO, 2004d).

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<sup>214</sup> The Bureau had changed in composition. Mr. Moussa Bocar Ly had taken the place for Africa, and the representative for the Pacific (New Zealand) had withdrawn from the Bureau and did not attend IGWG meetings.

<sup>215</sup> The attendance had gradually increased and was about the same as at the inter-sessional OEWG meeting. Delegates from 95 Members of FAO and the United Nations, observers from the Holy See and the Sovereign Order of Malta, one United Nations Agency, two representatives of the United Nations Special Rapporteur on the Right to Adequate Food, two representatives of the CESCRC, two intergovernmental organizations, and 12 international non-governmental organizations. Regional meetings and a Bureau meeting took place on 4<sup>th</sup> July. Again there was a change in the Bureau when Mr. Robert Harris was replaced by Mr. Richard W. Behrend (USA).

<sup>216</sup> This is a frequently used format in UN negotiations. It is an informal group, which can be given a mandate to negotiate certain difficult issues, but is expected to report back in plenary to the rest of the delegates before final formal decisions. It is often composed of the chairperson and main opponents.

While the Working Groups were open-ended, regions were encouraged to limit themselves to a maximum of six country spokespersons from each region, with the possibility of rotating these spokespersons. In addition, delegations were encouraged to conduct negotiations on the basis of regional positions. The advancing of new proposals was discouraged. The support of at least two regions was required to consider new proposals. Proposals were regarded as 'new' if they had not featured in the second drafted VG from the Bureau (FAO, 2004e) or in the Compilation Report (FAO, 2004a).

Now the bitter fruit of delayed negotiation and lost time was felt. There was an attempt to make up for lost time with strict organisation and chairing,<sup>217</sup> by limiting the number of speakers, and by urging everybody to show goodwill, a positive attitude, and restrain interventions to few and short statements.

The negotiations on the agreed text went well, with a good and positive spirit in all the working groups. The attitude of the USA delegation changed completely, from having uncompromising standpoints and arguments, to being more supportive, suggesting compromises where they could accept different solutions, and being more open and listening to arguments from other delegations.<sup>218</sup> On the negative side there was a considerable change in the attitude and willingness to compromise by the EU. The chair of the EU (the Netherlands) displayed a rigid position on several issues, in particular on Part V – the International Dimension. The Chair of the Working Group II pointed in particular to the negative attitude, rigidity and lack of political will of the EU. This created considerable problems for the negotiations in this group.

The negotiations broke down at about 02:30 hours on Saturday morning. The major reason was the rigidity of the Presidency of the EU (the Netherlands<sup>219</sup>) on the International Dimension, and the unwillingness of the G77 to accept compromise formulations by USA<sup>220</sup> and EU. To quote the Chair of the IGWG, nothing was approved before everything was approved. He also stated in the

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<sup>217</sup> In addition to the working groups mentioned a number of small fast-working groups were formed to address specific paragraphs in order to find an alternative text. That approach worked well on many occasions.

<sup>218</sup> The people in the US delegation were different. Apparently the hardliners of earlier delegations were replaced by professionals in negotiation, with a strategy, which appeared similar to a proposed approach by Fisher *et al.* (1991).

<sup>219</sup> The Netherlands was coached by UK, Sweden and the EU Commission, all known to be skeptical about the human right to adequate food. Germany on the other hand, which had been one of the steady and firm supporters (both financially and orally), did not engage in providing advice to the Netherlands during the negotiations.

<sup>220</sup> The USA suggested deleting many formulations in Guideline 15, such as references to 'human made', any reference to 'occupation', 'water', mention of international humanitarian law linked to responsibility of occupying powers, 'ongoing conflicts' and abiding by rules governing humanitarian assistance and protection of humanitarian personnel (FAO, 2004e).

Plenary on Saturday noon that with a little more political will, an agreed text could have been achieved. The negotiations had basically collapsed.

### 3. The role of the Netherlands

This situation of a collapse of the negotiations cannot be detached from the role of the European Union. From the perspective of rich countries, and for the outcome in general, one could say that the EU had many positive suggestions for improving the content of the draft guidelines as they progressed through the various stages of negotiations. A particular challenge to the EU Presidency was needed to coordinate the viewpoints of the various EU member countries so that they had a clear and agreed statement by the Presidency to the rest of the IGWG. When the EU group had finished their coordinating meetings, usually in the morning before the formal sessions started, there was no proper time for discussions with non-EU members. This created a considerable problem and frustrations in delegations of non-EU member countries such as Switzerland and Norway. At one point the EU suggested deleting the Nutrition Guideline from the draft VG since apparently those who suggested it believed in the trickle-down effect. After strong protests from some country delegations and NGOs that suggestion was withdrawn.

The role of Presidency of the EU (and thus the chair of EU-member countries during the negotiations in the IGWG) was demanding. The complex issues presented above show that a clear strategy and capacity were needed. That included an in-depth knowledge of what the right to adequate food means and implies, how that is related to the European Convention on Human Rights, a clarification about what could be accepted as content in a potential VG, what should be the negotiating positions, what should be the non-negotiating positions, who to link up with 'friends' or like minded groups/countries, alternative suggestions for text (shared with other member countries or groups), positions on being a broker, insights into other positions on human rights elsewhere, national government/State obligations<sup>221</sup>, and being an internal broker who could find collective compromise texts where member EU countries disagreed. It was very important to have negotiable flexible positions and not just rigid non-negotiable positions.

Often during the negotiations the EU played a broker position to find solutions to difficult questions which threatened to derail the negotiations. The problem with that role was that certain EU countries were hostile or negative to the whole idea of having guidelines on the human right to adequate food. It seemed that they did not look for ways as to how the work of the IGWG could be supportive of the European Convention on Human Rights. The issues seemed to be more about looking for what could not be accepted, and being as negative as possible to the

<sup>221</sup> The fact is that it is the national governments/States who ratify international human rights treaties, and not the EU as a body.

idea of the human right to adequate food. The negative countries seemed to have easy access to the Presidency, were listened to and had a direct impact on the positions presented by the EU Presidency. On the other side of the spectrum of negative, non-interested or indifferent countries was Germany who was a strong promoter of the VG. Germany was in the EU group and must thus have felt both frustrated and sidelined in many situations.<sup>222</sup>

The role of the Netherlands changed during the various phases of the total period of the negotiations. In the beginning the country took part in IGWG as an EU member. As mentioned above, during that period the Netherlands had a low profile in the EU group and did not distinguish themselves by taking any form of internal leading role. This author observed that there were limited contacts between EU member countries, Norway or other countries outside the EU. When the Netherlands took over the Presidency the role of the Netherlands changed. The country became the Chair of the EU delegation together with the EU Commission. That was a demanding role, in a very complex situation. It meant dealing with a complex issue requiring knowledge as to what the human right to adequate food actually meant, using that knowledge to link the negotiations to the European Convention on Human Rights, using that knowledge to guide the EU-member countries in internal discussion, and presenting that in plenary. Furthermore, there is an implication that this knowledge and insight can be used to negotiate, and not only as a statement that was agreed in the EU group during the preparatory meetings, which is what actually happened. The risk of failure was therefore considerable.

### **3.1 The international dimension**

As described above the negotiations broke down during the third meeting of the IGWG. The major reason identified here and stated by others during the negotiations was the rigidity of the Presidency of the EU (the Netherlands<sup>223</sup>) on the International Dimension, and the unwillingness between G77, USA and EU. Many wondered how this could happen, with supportive countries like Germany, Norway and Switzerland in the European region.

Many would maintain that there was no real negotiation and coordination within the European group but only within the EU Group, so it was considered that Europe lost out to those countries that were against having an agreed document (VG). It seems that a lack of real communication and coordination led to fragmentation that almost destroyed the entire work of the IGWG. The lack of an agreed text

<sup>222</sup> This is an assumption by the author.

<sup>223</sup> The Netherlands was coached by UK, Sweden and the EU Commission, all known to be skeptical about the human right to adequate food. Germany on the other hand, which had been one of the steady and firm supporters (both financially and orally), did not appear, as observed by this author, to be engaged in providing advice to the Netherlands during the negotiations.

on the international dimension,<sup>224</sup> which developing countries had such strong viewpoints on, had brought the negotiations to a standstill. The leadership of the Netherlands holding the Presidency had proved to be inadequate. The complexity of the situation was simply too difficult for the EU negotiator, and the capacity of the EU Presidency to negotiate seemed inadequate in such a complex situation.

### 3.2 The solution – the ‘Friends of the Chair’ Meeting, September 2004

Because the negotiations could not be completed during the third and last formal planned meeting of IGWG, it was decided to continue the negotiations parallel to the meeting of the CFS that would take place in Rome from 20<sup>th</sup> to 23<sup>rd</sup> September 2004. A last possible formal meeting was planned in October same year, since the issues left over from the third IGWG were considered so difficult that another final meeting would be necessary before the Guidelines could be presented to the FAO Council for final approval in November 2004. These issues included the international dimension, whether armed conflicts should be included in the same guidelines that addressed man-made emergencies and complex emergency situations, and the rule of law<sup>225</sup>.

The time between the third IGWG and this meeting had been well used. The negotiators seemed well prepared, had clarified their positions, and as it turned out were willing to compromise. At the start of the negotiations at the Friends of the Chair Meeting, the EU<sup>226</sup> presented a possible solution to the international dimension. Their suggestion was to simplify the structure of the Voluntary Guidelines into three parts: Section 1 – Preface and Introduction, Section 2 – Enabling Environment, Assistance and Accountability, that would include a last guideline to function as a chapeau to Section 3, entitled International Measures, Actions and Commitments. This suggestion was accepted by the G77 group, creating a very positive atmosphere for the rest of the negotiations. All parties involved accepted a modified text by the G77 for the new and final guideline (Guideline 19). The draft VG was accepted by the CFS (FAO, 2004g).

This last session was blessed by the fact that all the participants had reflected well before coming to the meeting. Much time was spent on mutual backslapping, charm was employed by most of the active discussants, and the initial strongest opponent, the USA, continue to act as a broker and at the same time made sure that certain phrases such as ‘appropriate and in accordance with domestic law’

<sup>224</sup> A guideline on the international dimension was supported by several industrialised countries and in particular the Civil Society Organisations.

<sup>225</sup> These issues were negotiated in smaller groups in which Syria, Canada, Cuba, USA, Switzerland, Brazil and the Red Cross participated. The proposed guideline on rule of law (16bis in the last draft – FAO, 2004e) was at the suggestion of the African Group moved to Guideline 1, which got the title Democracy, Good Governance, Human Rights, and the Rule of Law (FAO, 2004f).

<sup>226</sup> Their main negotiator this time was Hans van Omen from the Netherlands.

were included in the text at the last minute. No one dared oppose this in the final minutes because of the relief everyone felt about finally getting an agreed text. The charm and last words from the USA remains in stark contrast to the first statement from Ambassador Hall and the fierce resistance to have any guidelines regarding the human right to adequate food at all.

### **3.3 What can be learned from this experience?**

International negotiations are demanding, particularly these, which were the first of their kind in which a human rights instrument was developed in a bilateral setting. The complex issues that the negotiations dealt with demanded a clear strategy and capacity<sup>227</sup>. It was clear from the total process that these negotiations did not fit the model of changing the main negotiator every 6 months as was the case for the EU<sup>228</sup>.

It seems also that an in-depth knowledge of what the human right to adequate food means and implies, and how this is related to the European Convention on Human Rights, would be a very hard act to fulfil for a changing presidency. In such a function it would be very hard to demand an adequate capacity of a rotating actor. There should be specific demands as regards the position of EU Presidency for an in-depth knowledge of the content of relevant international human rights instruments and how that could or should be reflected in a potential VG. As it turned out that was either not understood or actively opposed. As a minimum one should realise that one cannot make voluntary what are already recognised obligations for the State party to the ICESCR.

The question as to whom to link up with appeared to mean only delegations of EU members or member-to-be countries. One got the impression that there were contacts with the North American delegations, but in Europe such contacts outside the EU were limited and not actively pursued. Alternative suggestions for text which could be shared with other member countries or other active groups was not shared for the sake of finding a compromise text, but as a courtesy to show others the position of the EU. To change such a position would require new negotiations within the EU group. The EU today consists of both rich and poor countries. Internally in the Union there is a policy of solidarity, but in this setting the solidarity dimension was international and thus beyond Europe, and that seemed to be unacceptable.

<sup>227</sup> Capacity in this setting should be defined as used in Sabatini (2005): Motivation and acceptance of duty, authority, resources (economic resources, human resources, and organisational resources), capability to communicate, capability for rational decision-making and learning from experience.

<sup>228</sup> The Presidency, i.e. the Presidency of the Council of the European Union, is held by each Member State in turn for a period of six months. During this time, the Presidency is the 'face and voice' of the European Union, speaking on behalf of all Member States. ([www.eu2007.de/en/The\\_Council\\_Presidency/What\\_is\\_the\\_Presidency/index.html](http://www.eu2007.de/en/The_Council_Presidency/What_is_the_Presidency/index.html)).

## Chapter 6

There does not seem to be any form of flexibility, which would have been necessary for the Presidency to take on a role as negotiator in this situation. Thus the ability to be a broker, with insight into other delegations' positions with the purpose of finding a compromise text, was simply a theoretical possibility. Signals from the EU Presidency and texts intended to be part of the VG soon materialised as strict non-negotiable positions without any room for manoeuvre.

It could be said that the EU is not suitable for chairing such negotiations and the EU member countries and the EU Commission should have realised this before the negotiations started. The obligations and responsibilities for protecting and promoting human rights rest with the States' governments. They are the parties to the Covenant and not the EU.

In such situations it is simply not enough to have a Presidency that functions as 'the face and voice' of the European Union. Each member that has ratified the ICESCR must be allowed to speak on its own behalf.

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