

# REALIZING THE RIGHT TO FOOD LEGAL STRATEGIES AND APPROACHES

## EXECUTIVE SUMMARY



“This is a very timely publication. It brings together, in a highly readable text, the various pathways through which the right to food migrated from the conference rooms of international summits, where it is referred to as part of the final declarations as useless in practice as generous in intent, to the courthouses. This has occurred under various forms in all regions of the world. I have no doubt that it will inspire further efforts by the right to food advocates, to further strengthen their role in eradicating hunger and malnutrition.”

Olivier De Schutter, UN Special Rapporteur on the Right to Food (2008-2014) and Member of the Committee on Economic, Social and Cultural Rights (2015-2019)

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## INTRODUCTION

IDLO's study *Realizing the Right to Food: Legal Strategies and Approaches* has been developed as a practical and substantive resource on using litigation as a means to advance the realization of the right to food. The study is divided into three main sections, exploring how the right to food is defined in international, regional and national legal instruments, and the normative content and state obligations arising from the right (Part I); surveying key factors facing advocates, practitioners and prospective claimants wishing to litigate the right to food (Part II); and presenting examples of adjudication of the right to food in practice, with specific case law from various countries and regional mechanisms (Part III).

Throughout these parts, the study canvasses the legal basis of the right to food, identifying procedures for bringing claims, how courts have adjudicated the right and remedies awarded by the courts. Notably, the study adopts a broad approach to right to food litigation, which extends beyond claims founded on an explicit, constitutionally recognized right to food, to encompass claims based on related human rights or elements and components of the right to food. Concrete examples from different countries and regional and international systems are used to show key lessons and strategic entry points on right to food litigation.

### JUSTICIABILITY OF ESC RIGHTS INCLUDING THE RIGHT TO FOOD

Some constitutions define Economic, Social and Cultural Rights (ESC rights) as expressly justiciable, as well as mechanisms for bringing claims when such rights are denied. While in countries such as Colombia and South Africa, courts themselves have also expressly ruled on the justiciable nature of ESC rights, courts in other countries exercise considerable caution when approaching the subject. This can in part be traced to the long-standing debate on the justiciability of ESC rights. Concerns in this regard include the fact that ESC rights are often considered too vague and imprecise to be adjudicated, that judicial protection of such rights would entail intrusion by judges into areas traditionally reserved to the elected branches of government, and that courts do not have the capacity to adjudicate complex social claims and make appropriate orders. Many of these concerns have been largely rejected in recent scholarship as being over-simplified and the quantity of case law dealing with ESC rights over the past twenty years makes it difficult to argue that such rights are not justiciable.<sup>1</sup> The case law analyzed in this study provides ample proof that courts can and *do* adjudicate ESC rights or aspects of such rights. Concerns over democratic legitimacy and institutional competence do surface in many judgments, but far from constituting a deterrent, they are often explicitly addressed in judicial reasoning. For this reason, this study is based on the position that the debate about *whether* ESC rights are justiciable has been replaced by a need to understand in greater detail *how* ESC rights, in particular the right to food, should be adjudicated.<sup>2</sup>

<sup>1</sup> See for instance M Langford, 'The Justiciability of Social Rights: From Practice to Theory' in M Langford (ed), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (2008) 3, 29.

<sup>2</sup> As suggested by B Porter, 'Justiciability of ESC Rights and the Right to Effective Remedies: Historic Challenges and New Opportunities' (paper presented at the Chinese Academy of Sciences, Beijing, 21 March 2008, 4).

## PART I: THE RIGHT TO FOOD IN INTERNATIONAL LAW

The right to food was recognized as part of the right to an adequate standard of living in Article 25(1) of the 1948 *Universal Declaration of Human Rights*,<sup>3</sup> and was subsequently included in Article 11 of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR), the first legally binding instrument that deals with the right in a comprehensive manner.<sup>4</sup> The ICESCR's Article 11 is the starting point to understanding the normative content of the right and the duties and obligations that flow from it, encompassing two essential components: the *right to adequate food* and the *fundamental right to be free from hunger*. The right to food is currently recognized in numerous international<sup>5</sup> and regional instruments.<sup>6</sup>

The United Nations (UN) Committee on Economic, Social and Cultural Rights (CESCR) adopted General Comment No 12 on the Right to Adequate Food, providing an authoritative interpretation of the normative content of the right and state obligations arising from it.<sup>7</sup> Freedom from hunger is considered the *minimum essential level* of the right to food that states must ensure the satisfaction of, regardless of economic and political conditions.<sup>8</sup> Furthermore, General Comment No 12 states that the right to adequate food “is realized when every man, woman and child, alone or in community with others, has physical and economic access at all times to adequate food or means for its procurement ... The right to adequate food will have to be realized progressively. However, states have a core obligation to take the necessary action to mitigate and alleviate hunger as provided for in paragraph 2 of article 11, even in times of natural or other disasters.”<sup>9</sup>

<sup>3</sup> Universal Declaration of Human Rights, opened for signature 10 December 1948, 999 UNTS 302, art 25(1) (entered into force 23 March 1976).

<sup>4</sup> International Covenant on Economic, Social and Cultural Rights, opened for signature 16 December 1966, 993 UNTS 3, entered into force 3 January 1976).

<sup>5</sup> For instance the Convention on the Elimination of All Forms of Discrimination against Women, opened for signature 18 December 1979, 1249 UNTS 13, arts 12 and 14 (entered into force 3 September 1981); Convention on the Rights of the Child, opened for signature 20 November 1989, 1577 UNTS 3, arts 24 and 27 (entered into force 2 September 1990); and Convention on the Rights of Persons with Disabilities, opened for signature 28 June 1952, 210 UN TS 131 (entered into force 3 May 2008).

<sup>6</sup> For instance the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, opened for signature 17 November 1988, 28 ILM 156 (1989) (entered into force 16 November 1999) (Protocol of San Salvador); and the African Charter on the Rights and Welfare of the Child, opened for signature 11 July 1990, OAU Doc. CAB/LEG/24.9/49 (1990), art 14 (entered into force 29 November 1999) (African Charter).

<sup>7</sup> United Nations Committee on Economic, Social and Cultural Rights (CESCR), General Comment No 12: The Right to Adequate Food, 12 May 1999, ESCOR [2000] Supp 2, 102. (General Comment No 12).

<sup>8</sup> *Ibid* para 17.

<sup>9</sup> *Ibid* para 6.

### ESSENTIAL ELEMENTS OF THE RIGHT TO FOOD

The essential elements of the right to food are defined in CESCR General Comment No 12:

- *Adequacy* refers to both the quantity and quality of food, in terms of food safety and nutrition value, as well as *cultural or consumer acceptability*.
- *Accessibility* includes economic accessibility to procure food without compromising other necessities, and physical accessibility of adequate food to everyone, including physically vulnerable individuals, of both present and future generations (*sustainability*).
- *Availability* refers to the possibilities of either feeding oneself directly from productive land or other natural resources, or purchasing it from the market, presuming well-functioning distribution, processing and market systems.

The UN Special Rapporteur on the Right to Food also elaborated on the normative content of the right, introducing the notion of *human dignity*: “the right to have regular, permanent and free access, either directly or by means of financial purchases, to quantitatively and qualitatively adequate and sufficient food corresponding to the cultural traditions of the people to which the consumer belongs, and which ensures a physical and mental, individual and collective, fulfilling and dignified life free of fear.”<sup>10</sup>

General Comment No 12 also clarifies the nature of state obligations arising from the right to food, including general obligations related to progressive realization of the right, as well as specific obligations. As with other human rights, three categories of specific obligations are identified – duties to respect, to protect and to fulfill the right to food:<sup>11</sup>

- The obligation to *respect* imposes a negative obligation requiring states not to take any measures that would result in preventing individuals from having access to food, such as suspending legislation or policies that provide people with access to food, unless fully justified.
- The duty to *protect* imposes a positive obligation to states to safeguard enjoyment of the right to food against interference by third parties, for example enacting consumer protection and food safety legislation to ensure that food that reaches the market is free from harmful substances.<sup>12</sup>
- The obligation to *fulfill* is made up of both an obligation to *facilitate* people’s ability to access means and resources to

<sup>10</sup> J Ziegler, United Nations Commission on Human Rights, *Report by the Special Rapporteur on the Right to Food*, Doc. U.N. E/CN.4/2001/53, 7 February 2001, para 14.

<sup>11</sup> General Comment No 12, above n 7.

<sup>12</sup> J Ziegler, *Preliminary Report of the Special Rapporteur of the Commission on Human Rights on the Right to Food*, UN Doc. A/56/210, 23 July 2001, para 28-29.

secure their livelihood, in particular for vulnerable groups; and to *provide* for the enjoyment of the right to food for those unable to do so - for instance, a state would fail to comply with the obligation to fulfill if it allowed people to starve when they were in need and had no way of providing for themselves.<sup>13</sup>

## PART II: DIMENSIONS OF RIGHT TO FOOD LITIGATION

When states commit to the realization of the right to food, through ratification of international treaties or in their domestic constitutions or legislation, they are bound by a set of obligations and should be held accountable if they fail to meet them. Accountability is an essential element of making the right to food and its corresponding obligations meaningful. One way of ensuring accountability is through litigation. In such an approach, the right to food is recognized as a 'justiciable right', i.e. right that can be interpreted by courts and be the subject of litigation.<sup>14</sup> Given the complexity of litigating ESC rights, including the right to food, this study highlights only a number of key dimensions: the recognition of a legal basis of the right to food; the identification of procedures for bringing a claim in court; the manner in which courts have adjudicated the right; and the remedies awarded in successful cases.

### Establishing the legal basis for the right to food

To bring a claim relating to the right to food, it must first be established that the right exists in law. Depending on the nature of the claim, the legal basis of the right might be found in the domestic legal system, in regional legal frameworks, through international law, or a combination of these. At the national level, the right to food has been introduced in different ways:

- Constitutional protection: while the right to food is recognized explicitly as a self-standing right in national constitutions of twenty-three countries, other constitutions that do not include a self-standing provision might contain broader rights under which the right to food may be listed as an explicit element, such as the right to an adequate standard of living, the right to live in dignity and the right to development; constitutions also guarantee the right to food for specific groups like children, indigenous peoples and prisoners; finally ESC rights can also be found in 'directive principles' of constitutions, described as "the values to which a society aspires although at the time of drafting they may not reflect a broad societal reality," and which guide

governmental action but do not necessarily provide individual or justiciable rights.<sup>15</sup>

- Judicial interpretation: judges in national and regional systems have often linked ESC rights to civil and political rights as a way of ensuring protection. A frequently cited example is the recognition of the right to food as inherent in the right to life, an approach adopted by the Indian Supreme Court in *Francis Coralie Mullin v Administrator*<sup>16</sup>, and in the Irish court in *G v An Bord Uchtála*.<sup>17</sup>
- Implementing legislation (ordinary statutory law, secondary or delegated legislation and regulations) that develops further constitutional ESC rights provisions: these can range from an overarching framework law, or sectorial legislation (such as legislation on agriculture, fisheries, or environment). The Food and Agriculture Organization of the United Nations (FAO) Guide on Legislating for the Right to Food contains a comprehensive overview of available approaches to developing national legislation.<sup>18</sup>

### THE RIGHT TO FOOD IN SELECT NATIONAL CONSTITUTIONS

While in some constitutions the right to food is unqualified, others have provisions specifying that fulfilment of the right is subject to progressive realization and available resources, or protected under other constitutional rights such as the right to life or the right to a dignified existence. Examples of the right to food in national constitutions include:

- Section 27 of the South African Constitution provides the right to "sufficient food and water" and requires the state to take reasonable measures to "achieve the progressive realization . . . of these rights."<sup>19</sup>
- Brazil's Constitution enshrines the right to food as a protected right under Article 6.<sup>20</sup>
- Mexico's Constitution states, "every person has the right to food that is nutritious, sufficient, and of quality. The state shall guarantee this right."<sup>21</sup>
- Article 21 of the Constitution of Belarus provides that "[e]very individual shall exercise the right to a dignified standard of living, including appropriate food, clothing, housing and likewise a continuous improvement of necessary living conditions."<sup>22</sup>
- Article 24 of the Surinamese Constitution provides

<sup>15</sup> L Knuth and M Vidar, *Constitutional and Legal Protection of the Right to Food Around the World* (2011) FAO Right to Food Studies <[www.fao.org/docrep/016/ap554e/ap554e.pdf](http://www.fao.org/docrep/016/ap554e/ap554e.pdf)> at 10 December 2012, 16 -21.

<sup>16</sup> *Francis Coralie Mullin v Administrator, Union Territory of Delhi* (1981) 2 SCR 516.

<sup>17</sup> FAO, *Methodological Toolbox on the Right to Food – Guide on Legislating for the Right to Food* (2009) Right to Food Studies <<http://www.fao.org/3/a-i0815e.pdf>> at 5 August 2015, 445.

<sup>18</sup> *Ibid.*

<sup>19</sup> *Constitution of the Republic of South Africa 1996*, s 28.

<sup>20</sup> *Constitution of Brazil 1998* (as amended to 2012) art 6. Other social rights protected under art 6 are education, health, work, housing, leisure, security, social security, protection of motherhood and childhood, and assistance to the destitute.

<sup>21</sup> *Constitution of the Mexican United States 1917* (as amended to 2010).

<sup>22</sup> Knuth and Vidar, above n 15, 16.

<sup>13</sup> *Ibid* para 29.

<sup>14</sup> C Courtis, *Courts and the Legal Enforcement of Economic, Social and Cultural Rights. Comparative Experiences of Justiciability* (2008) Human Rights and Rule of Law Series No 2 <<http://www.unhcr.org/refworld/docid/4a7840562.html>> at 1 October 2012.

- › that “the state shall take care of the creation of conditions in which an optimal satisfaction of the basic needs for work, food, health care, education, energy, clothing and communication is obtained.”<sup>23</sup>
- › Article 44 of the Colombian Constitution states that children have the fundamental right to life, integrity, health and social security, and adequate food.<sup>24</sup>

## Bringing claims asserting the right to food

### i. Procedural aspects

Procedural mechanisms that allow individuals or groups to petition the courts to obtain redress for violations of the right to food are also needed. A range of procedural issues that present challenges and opportunities for ESC rights litigation can be identified:

- › In many countries, constitutional review is a key avenue for claiming and adjudicating human rights such as the right to food. If the legal basis for the right is found in ordinary domestic legislation, claims in ordinary and administrative courts could also be an avenue.
- › Issues of legal standing also have a considerable impact on right to food litigation. While in some countries a wider range of actors can initiate procedures for claims related to ESC rights, such as individuals, trade unions or other organizations, in many systems narrow standing rules are a major obstacle. An example are procedural rules which provide that only direct victims can bring claims, preventing civil society organizations to start litigation on behalf or in support of persons living in poverty and other vulnerable groups. A related issue is the ability to start collective claims. Some jurisdictions have procedures that allow class actions, where all victims of a violation may file a single claim together and other systems provide that courts can hear complaints in the ‘public interest’.<sup>25</sup>
- › Another important issue relates to the effect of a judgment and who is bound by it, as the collective nature of many ESC rights claims means that remedies often need to extend beyond the interested parties. However, in some jurisdictions this is not possible.

## BRAZIL’S FRAMEWORK LEGISLATION ON THE RIGHT TO FOOD

Brazil’s *Lei Orgânica de Segurança Alimentar e Nutricional* (National Food and Nutrition Security Framework Law) provides a solid example of framework legislation. The key provisions have been summarized by FAO as follows:<sup>26</sup>

1. Adequate food is a basic human right, inherent to human dignity and indispensable for the realization of the rights established by the Federal Constitution. The government shall adopt the policies and actions needed to promote and guarantee food and nutrition security.
2. The government shall respect, protect, promote, provide, inform, monitor, supervise and evaluate the realization of the human right to adequate food, as well as guarantee the institution of specific claim and recourse mechanisms.
3. The national food and nutrition security system seeks to formulate and implement policies and plans on food and nutrition security, motivate the integration of efforts between the government and civil society, as well as promote the examination, monitoring, and evaluation of Brazil’s food and nutrition security.

The law also provides for the establishment of the National System for Food and Nutrition including the National Council on Food and Nutrition Security (CONSEA), which monitors Brazilian policy on food and nutrition and is composed of thirty-six representatives of civil society alongside representatives of state ministers.

<sup>23</sup> *Constitution of the Republic of Suriname 1987* (as amended to 1992) art 24.

<sup>24</sup> *Constitution of the Republic of Colombia 1991* (as amended to 2011) art 44.

<sup>25</sup> M Sepulveda, ‘Improving Access to Justice for Persons Living in Poverty: Identifying the Obstacles and Barriers’ (2012) Bern Conference paper on file with author, 23.

<sup>26</sup> FAO, *Right to Food: Making it Happen Progress and Lessons Learned through Implementation* (2011) at <<http://www.fao.org/docrep/014/i2250e/i2250e.pdf>>, 66.

## EXAMPLES OF NATIONAL PROCEDURES

Several Latin American countries have adopted *amparo* (protection) procedures where any person may file a claim before the courts, including the Constitutional Court, to request measures to stop or prevent an unlawful act by a public authority violating a constitutionally protected right. The underlying objective of *amparo* procedures is to enable speedy access to justice for victims or potential victims of human rights violations.<sup>27</sup>

- › In Colombia, *tutela* actions can be filed before any judge and even without a lawyer. The petition needs to present only the basic facts of the case, without specific formal prerequisites.<sup>28</sup>
- › In Costa Rica, filing a claim has been described as so straightforward that cases have even been brought by children challenging educational decisions by school directors.<sup>29</sup>
- › In Argentina, the collective *amparo* procedure allows challenges against state or non-state conduct that results in discrimination or threatens or harms rights that protect the environment, fair competition, the consumer, and collective rights.<sup>30</sup>
- › In Brazil, *amparo* procedure is called *mandado de segurança*; a similar procedure allowing defense of collective interests is the *ação civil pública* (public civil action), which can be initiated in cases concerning environmental rights, consumer rights or any other ‘collective interest’;<sup>31</sup> it can be filed by the public prosecutor (*ministério público*) and other entities that are part of the public administration, as well as trade unions and non-governmental organizations (NGOs).<sup>32</sup>

### ii. Other avenues

National Human Rights Institutions (NHRIs), independent state bodies with a constitutional or legislative mandate to protect and promote human rights, are another important avenue to promote the right to food.<sup>33</sup> NHRIs can exist in the form of human rights commissions, ombudspersons, consultative and advisory bodies, public defenders or human rights institutes and centers. In 2012, there were over one

<sup>27</sup> See Golay, *The Right to Food and Access to Justice*, above n 13, 52. Countries that allow *amparo* procedures include Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, Venezuela, and Spain. Such procedures have different names in different systems, such as *acción de tutela* in Colombia, *acción de protección* in Chile and *mandado de segurança* in Brazil.

<sup>28</sup> R Uprimny, ‘The Experience of the Colombian Constitutional Court’ in F Coomans (ed), *Justiciability of Economic and Social Rights: Experiences from Domestic Systems* (2006) 360.

<sup>29</sup> See Courtis, *Courts and the Legal Enforcement of Economic, Social and Cultural Rights*, above n 14.

<sup>30</sup> *Constitution of Argentina 1994*, art 43, para 2.

<sup>31</sup> See V Burity et al, *Exigibilidade: Mechanisms to Claim the Human Right to Adequate Food in Brazil* (2011) 27.

<sup>32</sup> *Ibid.* citing *Law No 7.347 of 1985*.

<sup>33</sup> OHCHR, *National Human Rights Institutions: History, Principles, Roles and Responsibilities*, Professional Training Series No 4 (Rev.1) (2010).

hundred NHRIs, sixty-nine of which were accredited by the International Coordinating Committee of National Human Rights Institutions as being in compliance with the Paris Principles.<sup>34</sup> NHRIs should have a legal mandate to issue views, recommendations or even pursue remedies before the courts and receive complaints. Although their recommendations are usually not legally binding, they are often entrusted with the task of following up on such recommendations.

## THE EXAMPLE OF THE SOUTH AFRICAN HUMAN RIGHTS COMMISSION

Under the South African Constitution, the South African Human Rights Commission must promote respect for, and a culture of, human rights, and monitor the protection, development and fulfilment of human rights.<sup>35</sup> Section 184(3) requires that “each year the Human Rights Commission must require relevant organs of state to provide the Commission with information on the measures that they have taken towards the realization of the rights in the Bill of Rights, concerning housing, health care, food, water, social security, education and the environment.” In addition, the Commission has investigative powers to enable it to discharge its mandate and may “take steps and secure appropriate redress where human rights have been violated.”

Legal strategies directed at other informal, e.g. traditional or customary, justice mechanisms must also be mentioned, as these mechanisms are the cornerstone of dispute resolution in many countries and widely used to resolve issues related to the right to food, such as ownership of land. However, engagement with such systems might present a number of challenges, as they may reflect structural inequalities, power asymmetries and discriminatory social norms that are dominant in certain societies, and may sit uneasily with human rights standards.<sup>36</sup>

### iii. Regional and international procedures

When domestic remedies are unavailable or ineffective, regional or international mechanisms may become important avenues to seek accountability. As one commentator noted, “strategy-conscious litigation must think about *both* levels

<sup>34</sup> The *Paris Principles* were endorsed by the Vienna World Conference in 1993. International Coordinating Committee of National Human Rights Institutions <<http://www.nhri.net/>> at 20 June 2013. UN General Assembly Resolution 48/134, UN Doc. A/RES/48/134, Forty-eighth session, Agenda Item 114 b, on the report of the Third Committee (A/48/632/Add.2).

<sup>35</sup> *Constitution of the Republic of South Africa*, above n 16. See further s 184(1)(c) under which the South African Human Rights Commission is mandated to monitor and assess the observance of human rights in South Africa <<http://www.sahrc.org.za/home/>> at 25 June 2013.

<sup>36</sup> See, for example, International Development Law Organization (IDLO), *Accessing Justice: Models, Strategies and Best Practices on Women’s Empowerment* (2013) <<http://www.idlo.int/Publications/Women-AccessToJustice.pdf>> at 25 June 2013 and J Ubink and T McInerney (eds), *Customary Justice: Perspectives on Legal Empowerment* (2011) IDLO <<http://www.idlo.int/Publications/CustomaryJustice3.pdf>> at 29 April 2013, 14.

from the very beginning.<sup>37</sup> Judicial and quasi-judicial avenues at the regional and international levels generally require the petitioner to exhaust all domestic remedies for the claim to be considered admissible, but this rule usually does not apply when domestic remedies are unreasonably prolonged or where domestic remedies are known to be ineffective.

#### Regional avenues:

- The European Committee of Social Rights is the quasi-judicial mechanism responsible for assessing conformity with the European Social Charter.<sup>38</sup> The European Court of Human Rights is the regional judicial mechanism that monitors compliance with the European Convention on Human Rights.<sup>39</sup> As the European Convention primarily concerns civil and political rights, the European Court has traditionally decided fewer cases dealing with violations of ESC rights. However, there is a growing body of case law where ESC rights or aspects of ESC rights are protected within the context of civil and political rights, such as the right to life.<sup>40</sup>
- The Inter-American Commission on Human Rights is the quasi-judicial mechanism mandated to promote, defend, and monitor human rights in member states of the Organization of American States (OAS). The Inter-American Court is the judicial mechanism that adjudicates on compliance with the American Convention on Human Rights.<sup>41</sup>
- The African Commission is the quasi-judicial body responsible for promoting and protecting human rights in the African region, under the African Charter on Human and Peoples' Rights.<sup>42</sup> The African Court, operational since 2006, was established by the African Union to complement the mandate of the African Commission and has jurisdiction in all cases concerning the interpretation and application of the African Charter and its Protocols as well as "any other relevant human rights instrument ratified by the states concerned."<sup>43</sup>

#### Other procedures:

- *Communication procedures for UN treaty bodies.* The *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (OP-ICESCR)*<sup>44</sup> creates an avenue for individuals and groups to submit communications on violations of the rights contained in the ICESCR, including Article 11 rights. The adoption and entry into force of the OP-ICESCR reaffirmed that at the international level ESC rights are justiciable human rights, and strengthened the principles of indivisibility, interdependence and interrelatedness of all human rights.
- *Reporting of the UN Special Procedures,* established by the UN Human Rights Council for monitoring the promotion and protection of human rights. The Special Procedures mandate-holders include special rapporteurs, independent experts, and working groups and may intervene in alleged human rights violations through communications (in the form of "urgent appeals" or "letters of allegation").<sup>45</sup> While such procedures are neither judicial nor quasi-judicial, they can still be an important tool to hold states accountable at the international level and to influence government action.<sup>46</sup> The UN Special Rapporteur on the Right to Food was first appointed by the UN Human Rights Commission in April 2000 and, following the replacement of the Commission with the Human Rights Council, the mandate was subsequently endorsed and renewed in 2007, 2010 and 2013.<sup>47</sup> Right to food advocates may also consider submitting complaints to other UN Special Procedures with related mandates, such as the Special Rapporteur on the Rights of Indigenous Peoples, the Special Rapporteur on Extreme Poverty and Human Rights or a special rapporteur with a country-specific mandate.<sup>48</sup>

<sup>37</sup> M Scheinin, 'Justiciability and the Indivisibility of Human Rights' in J Squires, M Langford and B Thiele (eds), *The Road to a Remedy: Current Issues in the Litigation of Economic, Social and Cultural Rights* (2006) 17, 25.

<sup>38</sup> *European Social Charter*, opened for signature 18 October 1961, 529 UNTS 89 (entered into force 26 February 1965). This mechanism only envisions collective complaints procedure, having no direct access for individuals.

<sup>39</sup> See the European Court of Human Rights <<http://www.echr.coe.int/Pages/home.aspx?p=home>>. Individuals, NGOs, or a group of individuals can submit complaints (or 'applications') directly to the European Court.

<sup>40</sup> For an overview of case law see L Clements and A Simmons, 'European Court of Human Rights' in M Langford (ed), *Social Rights Jurisprudence* (2009) 409.

<sup>41</sup> *American Convention on Human Rights*, opened for signature 21 November 1969, 1144 UNTS 123 (entered into force 18 July 1978), art 44. While any individual or group of individuals, as well as NGOs recognized in one or more member states, may lodge petitions with the Commission alleging a violation of the American Convention, only states parties and the Inter-American Commission have the right to submit a case to the court.

<sup>42</sup> *African Charter on Human and Peoples' Rights*, opened for signature 27 June 1981, 1520 UNTS 217, art 30 (entered into force 21 October 1986). In executing its mandate, the African Commission can receive communications concerning violations of the African Charter by a state party. Anybody (individuals, groups, NGOs) can, on their own behalf or on behalf of someone else, submit a communication to the African Commission.

<sup>43</sup> *Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights*, opened for

signature 9 June 1998, OAU/LEG/MIN/AFCHPR/PROT.1 rev. 2 (1997), art 2 (entered into force 25 January 2004).

<sup>44</sup> *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, opened for signature 24 September 2009, UNGA Res 63/117 GAOR 63<sup>rd</sup> Session Supp 49 vol 1, 329 annex (entered into force 5 May 2013) (OP-ICESCR).

<sup>45</sup> OHCHR, *Special Procedures of the Commission of Human Rights: Urgent Appeals and Letters of Allegations on Human Rights Violations* (2004) CHR/NONE/2004/310, GE.04-16112; see further: <<http://www.ohchr.org/EN/HRBodies/SP/Pages/Communications.aspx>> at 25 June 2013.

<sup>46</sup> C Golay et al, 'The Impact of the UN Special Procedures on the Development and Implementation of Economic, Social and Cultural Rights' (2011) 15(2) *International Journal of Human Rights* 299, 309.

<sup>47</sup> See Commission on Human Rights Resolution 2000/10, *The Right to Food* (17 April 2000) OHCHR <<http://www.unhcr.ch/huridocda/huridoca.nsf/%28Symbol%29/E.CN.4.RES.2000.10.En?Opendocument>> at 25 June 2013; Human Rights Council Resolution A/HRC/RES/6/2, adopted 6th Session (27 September 2007); Human Rights Council Resolution A/HRC/RES/13/4, adopted 13th Session (14 April 2010); and Human Rights Council Resolution A/HRC/RES/22/9, adopted 22<sup>nd</sup> Session (9 April 2013).

<sup>48</sup> See United Nations Office of the High Commissioner of Human Rights on discussion of the 'Special Rapporteur on the Right to Food,' 'Special Rapporteur on Indigenous Peoples' and 'Special Rapporteur on Poverty': <<http://www.ohchr.org/EN/issues/food/Pages/FoodIndex.aspx>> at 25 June 2013.

## PART III: ADJUDICATION OF THE RIGHT TO FOOD IN PRACTICE

Relevant jurisprudence can provide examples and be used to inform strategies for advancing the right to food through litigation in different domestic and regional legal systems. The approach to litigation examined in this study hinges on what might be called ‘food rights’, which rests on the premise that the right to food itself can be understood as a bundle of rights to be realized on different levels,<sup>49</sup> composed of different aspects or components and that most of them open up possibilities for litigation and adjudication.<sup>50</sup> Cases highlighted in the study are organized into three categories:

- i. Cases involving failure to ensure the right to be free from hunger

Courts in several countries have shown little hesitation to step in to resolve situations in which survival was threatened due to government inaction or inefficiency in realizing the right to food. The majority of cases concern failures by government authorities to provide minimum levels of subsistence for affected individuals or communities, or, in other words, to ensure the fundamental right to be free from hunger.<sup>51</sup> Examples from Argentina,<sup>52</sup> Brazil,<sup>53</sup> Colombia,<sup>54</sup> and Nepal<sup>55</sup> illustrate how courts have tackled the failure to provide for such ‘minimum essential levels’ of protection with regard to the right to food.

### EXAMPLE OF RIGHT TO FOOD LITIGATION: INDIA

One of the most cited cases in relation to the right to food is the *People’s Union for Civil Liberties v Union of India*.<sup>56</sup> In 2001, following the third consecutive year of drought in several provinces and protracted state failure to provide minimum food requirements to affected communities, the human rights organization People’s Union for Civil Liberties filed a public interest petition with the Supreme Court. It was argued that the right to life under Article 21 of the Constitution includes the right to food, as recognized in the court’s jurisprudence, which in turn entails a state obligation to provide food to people in

drought-affected areas who cannot purchase or produce it themselves. In practice, petitioners sought enforcement of existing food distribution schemes and policies and of legislation that provided for the release of grain stocks in times of famine, noting that government’s failure to address hunger and starvation was particularly serious in light of surplus grain supplies which remained unused. The Court acknowledged that inefficiencies and failure to implement existing legislation and policies, rather than lack of resources, were the root causes of the problem. To tackle this situation, pending a final judgment, the Court issued several interim orders requesting the government to implement existing policies, schemes and legislation, and detailing measures to be taken, especially in relation to vulnerable groups, to ensure implementation. These orders transformed the government food schemes in question into *legal entitlements* provided by a constitutionally protected right to food and the beneficiaries of these programs into “stakeholders of justiciable rights.”<sup>57</sup>

- ii. Cases involving the means to produce or procure food

Courts have intervened to enforce obligations concerning the right to food when a given resource, such as land or water, is the main source of food availability and accessibility, where there are few other livelihood opportunities, and where the ability of markets to ensure access to food is limited.<sup>58</sup> Cases from Malaysia,<sup>59</sup> Colombia,<sup>60</sup> Kenya,<sup>61</sup> and the African Commission<sup>62</sup> provide examples of judicial interventions in securing access to land in cases when members of certain groups or communities have no alternative means of producing food or of gaining an income that can allow them to buy food. National courts in different systems have also intervened to protect fishing as a source of livelihood,<sup>63</sup> and where groups do not have sufficient economic means to obtain and afford food.<sup>64</sup>

<sup>49</sup> P Alston and K Tomasevski, *The Right to Food* (1984) 207.

<sup>50</sup> C Courtis, ‘The Right to Food as a Justiciable Right: Challenges and Strategies’ (2007) 11 *Max Planck Yearbook of United Nations Law* 317, 337.

<sup>51</sup> C Golay, *The Right to Food and Access to Justice: Examples at the National, Regional and International Levels* (2009) FAO Right to Food Publications <[www.geneva-academy.ch/docs/publications/ESCR/fao\\_en.pdf](http://www.geneva-academy.ch/docs/publications/ESCR/fao_en.pdf)> at 1 October 2012, 29.

<sup>52</sup> See for example: *Defensor del Pueblo Estado Nacional y otra (Provincia del Chaco)* (Supreme Court); and *Menores Comunidad Paynemil s/acción de amparo (Neuquén Provincial Court of Appeal)*.

<sup>53</sup> *Action No. 4.830/07, 2ª Vara da Infância e Juventude de Maceió (District Court for Childhood and Youth)*.

<sup>54</sup> *Acción de tutela instaurada por Abel Antonio Jaramillo y otros contra Red de Solidaridad Social y otros, Sentencia T-025 (Constitutional Court)*.

<sup>55</sup> *Babujuddin Minhya & Ors v Government of Nepal & Ors (Supreme Court)*; *Prakash Mani Sharma and others on behalf of Forum for Protection of Public Interest (Pro Public) v Government of Nepal (Supreme Court)*.

<sup>56</sup> *People’s Union for Civil Liberties v Union of India* (2003) Writ Petition (Civil) No 196 of 2001 and Interim Orders.

<sup>57</sup> Human Rights Law Network, ‘Food Security & Judicial Activism in India’ (2007) *Human Rights Law Network*, cited in Golay, *The Right to Food and Access to Justice*, above n 13.

<sup>58</sup> L Cotula et al, ‘The Right to Food and Access to Natural Resources: Using Human Rights Arguments and Mechanisms to Improve Resource Access for the Rural Poor’ (2008) *FAO Right to Food Studies*, 23.

<sup>59</sup> *Kerajaan Negeri Johor & Another versus Adong bin Kuwau & Others* (2002).

<sup>60</sup> Constitutional Court of Colombia, *Sentencia T-267/11*, 8 April 2011.

<sup>61</sup> *Ibrahim Sangor Osman v Minister of State for Provincial Administration & Internal Security (High Court)*.

<sup>62</sup> *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* (2010) 276/O3.

<sup>63</sup> *Kenneth George and Others v Minister of Environmental Affairs & Tourism* (South Africa); *West Coast Rock Lobster Association v Minister of Environmental Affairs & Tourism*; The Supreme Court of Canada *R. v Côte; Jagannath v Union of India*, the Indian Supreme Court; Colombian Constitutional Court T-348/12.

<sup>64</sup> See for example: German Federal Constitutional Court judgment 1 BvL 10/10; *Toi Market case* (Kenya); and *Khathang Tema Baitsoholi and Another v Maseru City Council and Others* (Lesotho).

## EXAMPLE OF RIGHT TO FOOD LITIGATION: NIGERIA

In the case of *SERAC v Nigeria*<sup>65</sup> the African Commission determined that Nigeria's treatment of the Ogoni indigenous community had violated a number of rights explicitly enshrined in the African Charter, such as the right to life, the right to health, and the right to property. In addition, the government was found to have violated the right to food, a right implicitly contained in provisions such as the right to life (Article 4), the right to health (Article 16) and the right to economic, social and cultural development (Article 22). Specifically, the African Commission recalled that the African Charter and international law require Nigeria to protect existing food sources and to ensure access to adequate food for all citizens. The 'minimum core' of the right to food was interpreted as requiring the Nigerian government to refrain from destroying or contaminating food sources and not allowing private parties to do so. The African Commission therefore found that the government violated the Ogoni's right to food by destroying food sources through its security forces and state oil company, by allowing private oil companies to engage in such conduct and by raising "significant obstacles to Ogoni communities trying to feed themselves."

iii. Cases involving the protection of vulnerable, marginalized or disadvantaged groups

In countries with high levels of social inequality, vulnerable or marginalized groups often face additional hurdles in realizing their rights.<sup>66</sup> Courts have shown willingness to intervene in a number of right to food related cases where such groups have been marginalized, including for detainees,<sup>67</sup> indigenous peoples,<sup>68</sup> children,<sup>69</sup> and refugees, asylum-seekers, stateless persons and undocumented migrants.<sup>70</sup>

<sup>65</sup> *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights v Nigeria* (2001), para 9.

<sup>66</sup> M Langford, 'Domestic Adjudication and Economic, Social and Cultural Rights: A Socio-Legal Review' (2009) 11(6) *SUR International Journal on Human Rights*, 97.

<sup>67</sup> *Francis Coralie Mullin v Administrator* (India); *Nancy Kachingwe, Wellington Chibebhe & Others v Minister of Home Affairs* (2005) AHRLR 228 (ZwSC 2005) (Zimbabwe); See South Africa Litigation Centre, *Summary of Mwanza and Another v Attorney General*

<<http://www.southernafricalitigationcentre.org/cases/ongoing-cases/zambia-right-to-food-for-hiv-positive-prisoners/>> at 25 June 2013 (Zambia).

<sup>68</sup> Constitutional Court of Colombia, *SU-039/97*, 3 February 1997 (Colombia); *Maya Indigenous Community of the Toledo District v Belize* (2004) Case 12.053, Report No 40/04, Inter-Am. CHR, OEA/Ser.L/V/II.122 Doc. 5 rev. 1, 727; *Case of Kichwa Indigenous People of Sarayaku v Ecuador (Judgment)* (2012) IACtHR Series C No 245.

<sup>69</sup> Guatemala, *Juzgado de la niñez y la adolescencia e de Adolescentes en Conflicto con la Ley Penal del Departamento de Zacapa, Carpeta Judicial No 19003-00638-Of.1*, 3 April 2013.

<sup>70</sup> *V gegen Einwohnergemeinde X und Regierungsrat des Kantons Bern* (1995) BGE/ATF 121 I 367.

## EXAMPLE OF RIGHT TO FOOD LITIGATION: COLOMBIA

Colombia is an example of a country where courts have considered aspects related to the right to food of indigenous peoples. The Colombian Constitution states that the majority of civil and political rights are directly justiciable, but has no clear provision on the enforcement of ESC rights. The Constitutional Court developed the concept of *derecho fundamental por conexidad* (fundamental right by connection) extending the meaning of "fundamental rights" to include situations in which the ESC rights are so intertwined with fundamental rights that lack of immediate judicial protection would violate or threaten the enjoyment of the latter.<sup>71</sup> Moreover, the Constitutional Court has drawn on the German tradition to establish a 'right to a vital minimum' (*minimo vital*). Under this right, the state must take all measures to prevent individuals from being deprived of the most basic means to lead a dignified existence.<sup>72</sup> In an emblematic case, the Colombian Constitutional Court ruled on whether the government had violated the rights of the U'wa indigenous community by not carrying out an effective consultation before issuing a license for oil drilling on their land.<sup>73</sup> The court ordered the suspension of the license on the ground that the consultation process with the indigenous community concerning the oil exploration project had not been carried out in a serious and appropriate manner and a meeting to discuss the impact of exploration activities had not been convened prior to the granting of the license.

iv. Other possible entry points for litigation

General Comment No 12 outlines that food quality and safety are important components of the right to food and are closely interconnected with both the right to food and the right to health, as they are simultaneously components and elements upon which the realization of the two rights depends. Food-related claims in this remit can, therefore, be litigated via constitutionally protected rights, such as the right to life or the right to health. Quality and safety dimensions can also be viewed as self-standing components within the scope of private transactions, especially since private suppliers of food are expected - at the very least - to supply quality food even if they cannot be obliged in many cases to provide it in an affordable, accessible and culturally appropriate manner. For example, claims based on consumer protection legislation, or food safety laws that relate to the misleading labeling of food products, grounded first and foremost in domestic legislation, would fall within this category.

<sup>71</sup> M Sepulveda, 'Colombia-The Constitutional Court's Role in Addressing Social Injustice' in M Langford (ed), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (2008) 144, 147 and R Uprimny, 'The Experience of the Colombian Constitutional Court' in F Coomans (ed), *Justiciability of Economic and Social Rights: Experiences from Domestic Systems* (2006) 367-369.

<sup>72</sup> See Sepulveda, Colombia, above n 71, 147.

<sup>73</sup> Constitutional Court of Colombia, *SU-039/97*, 3 February 1997, cited in C Courtis, 'Notes on the Implementation by Latin American Courts of the ILO Convention 169 on Indigenous Peoples' (2009) 6(10) *Sur: International Journal on Human Rights*, 65-66.

## Remedies available for violations of the right to food

General Comment No 12 states that victims of violations of the right to food are entitled to adequate reparation, “which may take the form of restitution, compensation, satisfaction, or guarantees of non-repetition.”<sup>74</sup> At the national level, however, one of the main objections to the justiciability of ESC rights rests on the argument that judges face difficulties in formulating remedies if violations are found. Critics often argue that civil and political rights entail ‘negative’ remedies that have no impact on resource allocation or budgetary considerations. This argument has been largely discredited, as civil and political rights cases often require equally complex remedies with distributive implications.<sup>75</sup> While ESC rights cases may require simple remedies which do not involve significant government expenditure, determining remedies for violations of ESC rights is not necessarily an easy task. Judges will often need to respond to systemic and broad reaching problems. Practical examples from different national and regional systems illustrate how judges have been able to formulate (often innovative) remedies.

### i. Domestic examples

Available remedies depend on the facts of the case, as well as the legal, political and social context in which judges operate. A number of constitutions contain provisions on remedies, including damages, costs, declarations and injunctions, but judges are also given considerable discretion in determining other appropriate forms.<sup>76</sup> In some cases, courts have used more traditional remedies such as compensation, restitution and declarations, while in others detailed orders have been issued.

#### REMEDIES IN DOMESTIC RIGHT TO FOOD CASES

In the Kenyan *Ibrahim Sangor Osman* case, the court issued a mandatory injunction ordering the state to return the petitioners to the land from which they were evicted, and to reconstruct their homes and/or provide alternative housing and other facilities, including schools. The court also issued a permanent injunction to restrain the government from similar conduct in the future (guarantee of non-repetition) and awarded damages to each petitioner (compensation).<sup>77</sup>

In the Brazilian *Maceió Municipality* case, the court ordered several steps to remedy the violations of the right to food, housing, health, and education of the children of impoverished communities of that city. First, the court set a

sixty-day deadline for the municipality to extend social services to the residents of the affected communities. The court also required the municipality to submit proposals for the implementation of a wide range of public policies and actions, including establishing a multidisciplinary commission to analyze the socio-economic profile of children and adolescents within thirty days; ensuring sufficient shelter for children of less than eighteen years within thirty days; offering day nurseries for infants of less than six years within thirty days; ensuring the enrollment of all children and adolescents at primary school age within thirty days; proposing short, medium and long-term solutions to the community within ninety days; ensuring that sufficient resources are allocated to these solutions in the municipality’s budget and preparing a contingency plan if resources cannot be found.<sup>78</sup>

In the Indian *People’s Union for Civil Liberties* case the court found it necessary to ensure relief for those most in need, which took the shape of more than one hundred court orders with a very wide reach and a considerable amount of detail. One order redefined nutrition-related government schemes as constitutionally protected legal entitlements and set out how those schemes had to be implemented.<sup>79</sup> The court ordered, *inter alia*, that all state governments provide cooked mid-day meals for all children in government schools or government-assisted school programs.

In a Guatemalan case concerning child malnutrition, a similarly detailed set of orders was issued by the court.<sup>80</sup> Several authorities were requested to carry out a number of specific actions. For example, the Ministry of Agriculture was required to guarantee the availability of specific foodstuffs of sufficient quantity and quality to the cited children and their families, until the situation of malnutrition is resolved. The Ministry of Health was required to take a number of actions including “strict monitoring” of the children’s nutritional status. The Ministry of Social Development was asked to guarantee access by the children’s families to social benefits programs and to grants for food purchases covering not just basic foodstuffs but also food supplements. On a more general level, the court ordered that the Camotán Municipality take the necessary administrative and financial steps to ensure that the children and their families be able to access safe drinking water, highlighting that any such steps would provide benefits for all municipality inhabitants. Finally, the court ordered the Guatemalan Secretariat for Food and Nutritional Security to develop a “Protocol for the enjoyment of the right to food.”

<sup>74</sup> General Comment No 12, above n 7, para 32.

<sup>75</sup> K Roach, ‘The Challenges of Crafting Remedies for Violations of Socio-Economic Rights’ in M Langford (ed), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (2008) 46, 58.

<sup>76</sup> *Ibid* 58.

<sup>77</sup> *Ibrahim Sangor Osman v Minister of State for Provincial Administration & Internal Security* (High Court), 20.

<sup>78</sup> *Action No 4.830/07*, above n 53, 70.

<sup>79</sup> Human Rights Law Network, ‘Food Security & Judicial Activism in India’ (2007) *Human Rights Law Network*, cited in Golay, *The Right to Food and Access to Justice*, above n 13.

<sup>80</sup> *Carpeta Judicial No 19003-00638-Of.º*, above n 69.

## ii. Regional examples

The quasi-judicial regional bodies, such as the African Commission and the Inter-American Commission, as well as the United Nations human rights bodies that allow for complaints procedures, often recommend remedies. However, strictly speaking, such remedies have no binding legal effect. Regional human rights courts are empowered to issue binding remedies. The Inter-American Court provides an interesting example of remedial options to right to food violations at the regional level. In addition to traditional remedies, such as compensation, the Inter-American Court has increasingly ordered a variety of non-monetary remedies, including creative forms of restitution, rehabilitation, apologies, memorials, guarantees of non-repetition, legislative reform, training programs and community development schemes.<sup>81</sup>

### REMEDIES IN REGIONAL RIGHT TO FOOD CASES

In *Sawhoyamaya v Paraguay*, the Inter-American Court awarded compensation for material and non-material damages, and required the state to enact legislative, administrative, and other measures to establish a mechanism to claim the restitution of indigenous communities' ancestral lands. The court further requested that the state create a community development fund to implement educational, housing, agricultural, and health projects.<sup>82</sup>

In *SERAC v Nigeria* the African Commission called on the Nigerian government to adopt a series of measures, including paying compensation and cleaning up polluted or damaged soil and rivers.<sup>83</sup> The commission also called for social and environmental impact assessments before future oil projects are considered, and urged the Nigerian government to provide information on health and environmental risks and to ensure access to regulatory and decision-making bodies for communities subject to potential impacts from oil operations.

## Implementation and enforcement of right to food decisions

The final question to address in right to food litigation is what happens after a judgment is delivered or an order is issued, including enforcement of the judgment, compliance with court orders and implementation of decisions. As noted, “[f]or progressive social rights judgments to have a social impact,

they must be authoritative, in the sense that they are accepted, *complied* with and implemented through legislative and executive/administrative action and translated into *systemic change* through social policy and political practice.”<sup>84</sup>

Approaches to ensure judgments are enforced include the exercise of supervisory jurisdiction,<sup>85</sup> the creation of court-appointed commissions and directorates to assist with monitoring compliance with, and implementation of, judgments.<sup>86</sup> Furthermore, it is widely acknowledged that litigation (and implementation of decisions) is more effective and can have greater impact when it occurs in conjunction with a broader advocacy strategy – including social mobilization, community organization, awareness and media campaigns and political lobbying, in particular for cases involving marginalized groups.<sup>87</sup> As such, prospective claimants and advocates must assess whether partnerships can be built with civil society organizations and other relevant stakeholders to strengthen support for their case.<sup>88</sup>

### SOCIAL MOVEMENTS AND IMPLEMENTATION OF COURT DECISIONS

Social movements may themselves be born out of the necessity to ensure implementation of court decisions, such as the Indian Right to Food Campaign, which emerged from the *People's Union for Civil Liberties* case.<sup>89</sup> The Campaign has been instrumental in monitoring compliance with court orders by providing information to the court, submitting new claims, and liaising between the court and the public.<sup>90</sup> Although the Campaign is clearly connected to the litigation and court case, it has now expanded to a network of nearly 1500 organizations, including NGOs, grassroots movements, trade unions, and private individuals. The Campaign's work covers advocacy for legislative action and ensuring implementation of Supreme Court orders.<sup>91</sup>

<sup>81</sup> For an overview of remedies awarded in the Inter-American system in ESC rights cases see T J Melish, 'The Inter-American Court of Human Rights' in M Langford (ed), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (2008) 400-405.

<sup>82</sup> *Sawhoyamaya Indigenous Community of the Enxet People v Paraguay* (2006) IACtHR Series C No 146, para 248(8).

<sup>83</sup> African Commission on Human and People's Rights, communication No. 155/96, *Social and Economic Rights Action Center, Center for Economic and Social Rights v. Nigeria*, 30th ord. session, Oct. 2001, ACDPR/COMM/A044/1 of 27 May 2002, paras 70-72.

<sup>84</sup> S Gloppen, 'Public Interest Litigation, Social Rights and Social Policy' (paper presented at the World Bank Conference 'New Frontiers of Social Policy,' Arusha, 12-15 December 2005), 6.

<sup>85</sup> *Minister of Health and Others v Treatment Action Campaign and Others* (2002) 5 SA 721 (CC).

<sup>86</sup> *People's Union for Civil Liberties v Union of India and Others* (2002) Interim Order of May 8, 2002. For an overview see Birchfield and Corsi, 'Between Starvation and Globalization: Realizing the Right to Food in India' (2010) 31 (4) *Michigan Journal of International Law* 691, 726-732.

<sup>87</sup> Langford, *Domestic Adjudication*, above n 66, 108.

<sup>88</sup> See International Network for Economic, Social and Cultural Rights and International Women's Rights Action Watch-Asia Pacific, *Claiming Women's Economic, Social and Cultural Rights* (2013) 94.

<sup>89</sup> For details see: Right to Food Campaign website <<http://www.righttofoodindia.org/index.html>> at 25 June 2013.

<sup>90</sup> See Birchfield and Corsi, *Between Starvation and Globalization*, above n 86, 727.

<sup>91</sup> FAO, *Right to Food: Making it Happen*, above n 25.

## CONCLUDING REMARKS

### STRATEGIC CONSIDERATIONS WHEN LITIGATING THE RIGHT TO FOOD

- › What is the legal basis for the claim of a violation?
- › What kinds of claims can be heard and by what courts?
- › Who can bring a claim and on whose behalf?
- › What are the effects of the judgment?
- › What kinds of remedies are available?
- › How can these remedies be effectively implemented?

Successfully litigating the right to food depends on a multitude of factors that are deeply embedded in a country's legal framework, its judicial tradition and the socio-legal context in which the claim is made. First of all, individuals and groups must be able to identify a legal basis for their claim of a violation of the right to food. Constitutional entrenchment of the right to food is important, but domestic legislative bases should also be explored. In addition, as illustrated, regional and international law may provide a solution. Examination of relevant national, regional and international case law provides key lessons and identifies possible entry points and challenges for right to food litigation.

Prospective claimants must be able to assert the right to food in the legal system, or have the right asserted on their behalf. A strategic decision for advocates, practitioners, and prospective claimants is determining the available and best procedures in their domestic legal system, regional systems, and international mechanisms. Such strategic choices are particularly important where there are possibilities of both individual and collective litigation.

Another fundamental element affecting litigation is how judges respond to such claims. Judges must accept that they are competent to decide the matters outlined in the claim, and be capable of finding adequate legal means to address the claim. In some systems, this may involve litigating ESC claims strategically within the civil and political rights framework. Several entry points for pursuing such a strategy can be identified within existing jurisprudence. This may involve framing violations of duties stemming from the right to food as violations of other rights, such as the right to life, respect for human dignity, the right to health, the right to an income, land rights, the respect for ethnic and cultural rights, and the right to non-discrimination, among others.

Furthermore, judges must be capable of awarding effective remedies for the violations. And, when judges *can* and *do* craft remedies for violations of the right to food or related rights, inadequate implementation of judicial decisions remains a fundamental hurdle for successful claimants and their representatives. In light of this, claimants and advocates need to plan follow-up activities to their claims from the very outset, by ensuring they have sufficient resources to undertake such tasks and by building partnerships with other stakeholders in order to garner widespread support for their case.

Finally, it should be noted that legal strategies are just one means to ensure that states comply with their duties in connection with the right to food, and litigation is complementary to other measures to advance the realization of the right. When determining the best strategy for advancing the right to food, the use of legal strategies should be carefully balanced against the advantages and disadvantages of other strategies, such as social mobilization, political negotiation and monitoring and civil society participation in the formulation and implementation of public policies.<sup>92</sup>

***The full version of this report can be found at [www.idlo.int](http://www.idlo.int).***

<sup>92</sup> C Courtis, 'The Right to Food as a Justiciable Right: Challenges and Strategies' (2007) 11 *Max Planck Yearbook of United Nations Law* 317.





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The International Development Law Organization (IDLO) enables governments and empowers people to reform laws and strengthen institutions to promote peace, justice, sustainable development and economic opportunity.

