

REALIZING THE RIGHT TO FOOD LEGAL STRATEGIES AND APPROACHES



“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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Abbreviation of Term or Term	Complete Term and/or Definition
African Charter	<i>African Charter on Human and Peoples' Rights.</i> Regional human rights treaty that guarantees comprehensive rights including civil, political, socioeconomic, and cultural rights in Africa.
American Convention	<i>American Convention on Human Rights.</i> International human rights instrument adopted by countries in the western hemisphere and with the purpose to consolidate, within the framework of democratic institutions, a system of personal liberty and social justice based on respect for the essential rights of man. It was later supplemented with the Protocol of San Salvador.
African Commission	<i>African Commission on Human and Peoples' Rights.</i> Quasi-judicial body aimed at promoting and protecting human rights and collective peoples' rights throughout the African continent as well as interpreting the African Charter. It also considers individual complaints of violations of the African Charter.
African Court	<i>African Court on Human and Peoples' Rights.</i> Regional court created to judge African Union States' compliance with the African Charter.
African Children's Charter	<i>African Charter on the Rights and Welfare of the Child.</i> Regional human rights treaty that protects the rights of children in Africa.
American Declaration	<i>American Declaration on the Rights and Duties of Man.</i> World's first international human rights instrument adopted by the nations of the Americas. Although not a legally-binding treaty, the jurisprudence of both the Inter-American Court and the Inter-American Commission hold it to be a source of binding obligations for the OAS member states.
Amicus curiae	Literally translated as "friend of the court," amicus curiae is a person or party who provides helpful supplementary information to the court, in the form of a legal brief, on a matter that bears on the case.
Amparo procedure	Procedure by which 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 objective is to enable speedy access to justice for victims or potential victims of human rights violations.
CEDAW	<i>Convention on the Elimination of All Forms of Discrimination against Women.</i> International treaty that codifies states' duties to eliminate all forms of discrimination against women.
CERD	<i>Committee for the Elimination of Racial Discrimination.</i> UN body of independent experts that monitors implementation of the Convention on the Elimination of All Forms of Racial Discrimination by its state parties.
CESCR	<i>Committee on Economic, Social and Cultural Rights.</i> UN body charged with monitoring states' compliance with the ICESCR.
COHRE	<i>Centre on Housing Rights and Evictions.</i> NGO which has three regional platforms covering Africa, Asia-Pacific and the Americas in the pursuit of the goal of housing rights.
CONSEA	<i>National Council on Food and Nutrition Security of Brazil.</i> Organization that brings together government and civil society and monitors Brazilian policy on food and nutrition.
CRC	<i>Convention on the Rights of the Child.</i> International treaty that codifies the human rights of children. It is also commonly referred to as the "Children's Rights Convention."

Declaration	Remedy which includes a judge “declaring” what the law is and possibly finding a violation of rights. It is loosely worded, thus allowing governments to select the precise means to redress a given situation.
European Convention	<i>European Convention on Human Rights.</i> International treaty aimed at protecting human rights and fundamental freedoms in Europe. The convention established the European Court.
European Court	<i>European Court of Human Rights.</i> International court established by the European Convention that hears applications alleging that a contracting state has breached one or more of the human rights provisions concerning civil and political rights set out in the European Convention. An application can be provided by an individual, a group of individuals, or one or more of the other contracting states, and in addition to judgments, the court can also issue advisory opinions.
ESC rights	<i>Economic, social and cultural rights.</i> Socio-economic human rights, such as the right to education, housing, adequate standard of living, and the right to health. These rights are recognized and protected in international and regional human rights instruments.
European Committee	Committee of experts established under the European Social Charter that monitors whether the national legal order of a member state conforms to the European Social Charter by examining country reports.
European Social Charter	Council of Europe treaty which sets out human rights and freedoms and establishes a supervisory mechanism guaranteeing their respect by state parties.
FAO	<i>Food and Agricultural Organization.</i> UN organization that leads the international efforts to defeat hunger. Serving both developed and developing countries its goal is achieving food security for all and to make sure people have regular access to enough high-quality food to lead active, healthy lives.
FAO Voluntary Guidelines	Guidelines created by the FAO which set out national-level actions to create an environment where people are able to feed themselves with dignity. States are called on these when developing legislation, strategies, policies, and programs aimed at realizing the right to food at the domestic level.
FIAN	<i>Foodfirst Information and Action Network.</i> International human rights organization with mission to promote the right to food.
FPIC	<i>Free, prior and informed consent.</i> Principle recognized in several international instruments which allows indigenous peoples free, prior and informed consent to externally-imposed policies and activities that affect their livelihoods or wellbeing, particularly their lands or territories and other resources, and in connection with the development, utilization, or exploitation of mineral, water, or other resources.
GA	<i>United Nations General Assembly.</i> Main deliberative, policymaking and representative organ of the UN.
Human Rights Council	Inter-governmental body within the UN responsible for the promotion and protection of human rights around the world.
Inter-American Commission	<i>Inter-American Commission on Human Rights.</i> Quasi-judicial mechanism system mandated to promote, defend, and monitor human rights in member states of the OAS. The Commission can receive petitions from individuals, groups, or NGOs alleging violations of the American Convention.
Inter-American Court	<i>Inter-American Court of Human Rights.</i> Judicial mechanism that adjudicates on compliance with the American Convention. Only the states parties and the Inter-American Commission have the right to submit a case to the court: there is no individual petition procedure.

ICCPR	<p><i>International Covenant on Civil and Political Rights.</i></p> <p>Multilateral treaty adopted by the UN GA and commits its parties to respect the civil and political rights of individuals, including the right to life, freedom of religion, freedom of speech, freedom of assembly, electoral rights and rights to due process and fair trial. Along with the ICESCR and the Universal Declaration it makes up the International Bill of Human Rights.</p>
ICESCR	<p><i>International Covenant on Economic, Social and Cultural Rights.</i></p> <p>International treaty that codifies states' duties to guarantee economic, social, and cultural rights. It is part of the International Bill of Human Rights along with the ICCPR and the Universal Declaration.</p>
IDP	<p><i>Internally displaced persons.</i></p> <p>Persons forced to flee their homes but who remain within their country's borders.</p>
ILO	<p><i>International Labour Organization.</i></p> <p>UN agency dealing with labour issues, particularly international labour standards and decent work for all.</p>
Mandamus	<p>Judicial writ which orders a public agency or governmental body to perform an act required by law when it has neglected or refused to do so.</p>
Mandatory injunctive	<p>Judicial remedy issued to prohibit a party from doing or continuing to do a certain relief activity.</p>
Mandatory order	<p>Judicial remedy which is used often where governments are inactive or incompetent and in which the court must compel public authorities to fulfill their duties. A mandatory order addresses wrongful failure to act.</p>
NHRI	<p><i>National human rights institution.</i></p> <p>State body with a constitutional or legislative mandate to protect and promote human rights. Although sometimes funded by the state, they operate independently from government.</p>
NGO	<p><i>Non-governmental organization.</i></p> <p>Legally constituted corporation created by natural or legal people that operates independently from any form of government. The term normally refers to organizations that are not a part of a government and are not conventional for-profit businesses.</p>
OAS	<p><i>Organization of American States.</i></p> <p>Continental organization created which constitutes the main political, juridical, and social governmental forum of the Americas. The Organization uses a four-pronged approach to effectively implement its essential purposes, based on its main pillars: democracy, human rights, security, and development.</p>
Ombudsperson	<p>Public official who acts as an impartial intermediary between the public and the government or a bureaucracy. His or her power lies in the ability to investigate complaints of wrongdoing and then notify the public or the relevant government agencies, or both, of the findings. An ombudsperson cannot change or make laws, enforce any recommendations, or change administrative actions or decisions.</p>
OHCHR	<p><i>Office of the High Commissioner for Human Rights.</i></p> <p>UN agency that works to promote and protect human rights that are guaranteed under international law and stipulated in the Universal Declaration.</p>
OP-ICESCR	<p><i>Optional Protocol to the International Covenant on Economic, Social and Cultural Rights.</i></p> <p>International treaty establishing an individual complaint and inquiry mechanisms for the ICESCR.</p>
Paris Principles	<p>Set of principles adopted by the UN Human Rights Commission relating to the role and duties of NHRIs. Compliance with the Paris Principles is the central requirement of the accreditation process that regulates NHRI access to the UN Human Rights Council and other bodies.</p>
PIL	<p><i>Public interest litigation.</i></p> <p>Procedure in which the applicant does not necessarily have to be a victim or represent all victims, but submits a case based on the premise that he or she represents the collective or public interest.</p>
Protocol of San Salvador	<p>Additional protocol to the American Convention in the area of economic, social and cultural rights added in 1988.</p>

Maputo Protocol	<p><i>Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.</i></p> <p>Adopted by the African Union in the form of a protocol to the African Charter it guarantees comprehensive rights to women including the right to take part in the political process, to social and political equality with men, to control their reproductive health, and an end to female genital mutilation.</p>
Reading in technique	<p>Technique used by judges to modify legislation without striking it down or formally amending it.</p>
Rome Declaration	<p><i>Rome Declaration on World Food Security.</i></p> <p>Document adopted at the 1996 WFS and which reaffirms the right of everyone to have access to safe and nutritious food consistent with the right to adequate food and the fundamental right of everyone to be free from hunger.</p>
Universal Declaration	<p><i>Universal Declaration of Human Rights.</i></p> <p>UN human rights instrument that forms the foundation of modern international human rights law. Along with the ICCPR and the ICESCR it makes up the International Bill of Human Rights.</p>
UN	<p><i>United Nations.</i></p> <p>Intergovernmental organization whose aims include promoting and facilitating cooperation in international law, international security, economic development, social progress, human rights, civil rights, civil liberties, political freedoms, democracy and the achievement of lasting world peace.</p>
WFS	<p><i>World Food Summit.</i></p> <p>Conferences convened by the FAO and aimed at renewing global commitment to the fight against hunger.</p>

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FOREWORD

The right to food, as a justiciable, legally enforceable right, is a relatively recent invention. The movement towards the full recognition of its potential went through three successive phases. For almost fifty years, following the adoption of the Universal Declaration of Human Rights in 1948, the right to food was part of the corpus of international human rights law, but it was seen as of rather symbolic value. To the extent there were any obligations attached to its proclamation, they were understood as subject to progressive realization and dependent on whichever international assistance and cooperation the State could obtain: such obligations were neither concrete nor immediate, and victims of hunger could hardly invoke the right to food against the governments who were not acting swiftly enough to improve their situation.

The 1996 World Food Summit provided a first breakthrough. The Heads of State and Government who convened in Rome had become aware that past efforts had failed to reduce the number of hungry people, and that something more needed to be done. In the 1980s, Amartya Sen had highlighted that lack of food availability was less central in the explanation of hunger than lack of accessibility: this amounted to putting accountability at the center of the discussion of hunger and malnutrition. In parallel, Asbjorn Eide and others sought to clarify the duties of States to respect, protect and fulfill the right to food, thereby demonstrating that the right to food could be given concrete implications. Influenced perhaps by these conceptual advances, the governments requested at the World Food Summit that the normative implications of the right to food be clarified. It was a symbol: it should be transformed into an operational tool.

Since then, the right to food has been remarkably gaining in visibility. Following the 1996 World Food Summit, the Committee on Economic, Social and Cultural Rights began work on what was published in 1999 as its General Comment No. 12 on the right to food, building on Eide's typology.¹ And in 2002, the third World Food Summit (called "WFS+5") launched the negotiation of a set of recommendations which became the *Voluntary Guidelines to support the progressive realization of the right to adequate food in the context of national food security*. Negotiated within the Committee on World Food Security (CFS), an intergovernmental committee of the United Nations Food and Agriculture Organization (FAO), the guidelines were finally adopted by the Member States meeting within the FAO Council, on 23 November 2004. For

the first time ever, governments had agreed on a set of recommendations to implement a social right.

The right to food is now better understood, and as documented in this important publication, it has become actionable. All three duties of the State -- to respect, to protect, and to fulfill the right -- have led to litigation before domestic courts, with increasingly encouraging outcomes. The *duty to respect* requires from the State that it refrain from interfering with the existing levels of enjoyment of the right to food and that it guarantees existing entitlements, for instance by ensuring that those who produce their own food be secured in their access to the resources, including land and water, on which they depend, or by ensuring that those who could have access to income-generating activities allowing them to purchase food are not denied such access. In the case of *Kenneth George and Others v. Minister of Environmental Affairs & Tourism*, the High Court in South Africa ordered a revision of the Marine Living Resources Act, requiring the development of a new framework taking into account "international and national legal obligations and policy directives to accommodate the socio-economic rights of [small-scale] fishers and to ensure equitable access to marine resources for those fishers."² This resulted in the adoption of a new Small-Scale Fisheries Policy in May 2012, which recognizes the importance of small-scale fisheries in contributing to food security and as serving as a critical safety net against poverty.³ In Honduras, the Sectional Court of Appeal in San Pedro Sula granted a constitutional remedy ("*recurso de amparo*") in order to prevent the eviction of a group of small-scale farmers, referring to the obligation of the State to protect the right to food under the International Covenant on Economic, Social and Cultural Rights and referring to General Comment No. 7 (on forced evictions) of the Committee on Economic, Social and Cultural Rights. The African Commission on Human and Peoples' Rights has protected the resources on which the Ogoni people depend for their livelihoods, against the damage caused by oil companies operating on their territories⁴; this position was reaffirmed in 2012 by the ECOWAS Court of Justice.⁵ In all these cases, courts or quasi-judicial bodies have protected the right to food by prohibiting measures that would have interfered with the production of their own food by individuals or communities.

In contrast to the duty to respect, the *duty to protect* imposes positive obligations on the authorities. It requires that the State ensures that enterprises or individuals do not deprive

¹ E/C.12/1999/5.

² Case EC1/05, High Court of South Africa (Cape of Good Hope Provincial Division).

³ See also the position of the Human Rights Committee, noting that if managed inequitably, a system of fishing quotas may result in discrimination in violation of article 26 of the International Covenant on Civil and Political Rights: Human Rights Committee, Haraldsson and Sveinsson v. Iceland, Communication No.

1306/2004, dec. of 24 Oct. 2007, CCPR/C/91/D/1306/2004 (about the Iceland Fisheries Management Act No. 38/1990).

⁴ African Commission on Human and Peoples' 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/AO44/1 of 27 May 2002.

⁵ Court of Justice of the Economic Community of West African States, SERAP v. Nigeria, dec. of 14 Nov. 2012.

individuals of their access to adequate food, by adopting an adequate regulatory framework.⁶ Though the Legislative and the Executive are primarily responsible for establishing such a framework, courts too may play a role, by intervening where private actors adopt conduct that violates the right to food. For instance, the High Court of Uganda at Kampala ordered on 28 March 2013 that compensation be paid to 2,041 individuals who had been evicted from their land in August 2001, when the government of Uganda gave the land to a German company to establish a coffee plantation. The Court stated that the investors "had a duty to ensure that our indigenous people were not exploited. They should have respected the human rights and values of people and as honorable businessman and investors they should have not moved into the lands unless they had satisfied themselves that the tenants were properly compensated, relocated and adequate notice was given to them."⁷ This illustrates how courts are in a position to impose on companies that, consistent with their responsibility to respect human rights, they have in place a "human rights due-diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights", as stipulated in the Guiding Principles on Business and Human Rights, endorsed in 2011 by the Human Rights Council.⁸

The *duty to fulfill*, finally, has two components. First, States must "proactively engage in activities intended to strengthen people's access to and utilization of resources and means to ensure their livelihood, including food security".⁹ It is sometimes believed that, due to the fact that certain dimensions of the right to adequate food can only be progressively realized, courts have no role to play in adjudicating claims that allege that the measures adopted by the State to discharge this third-level obligation are insufficient. This betrays a fundamental misunderstanding about the notion of progressive realization. Progressive realization is the opposite of passivity. It requires steps that are deliberate, concrete and targeted towards the fulfillment of economic and social rights¹⁰: the aim should be to "move as expeditiously and effectively as possible" towards the full realization of the right of the Covenant.¹¹

The so-called "right to food" case in India provides an example. Following the filing in the public interest of Petition (Civil) No. 196/2001, *People's Union for Civil Liberties v. Union of India & Others (PUCL)*, the Indian Supreme Court derived from the right to life mentioned in Article 21 of the Constitution a series of requirements articulating how various social programs should be expanded and implemented in order to ensure that the population is guaranteed a basic nutritional floor. This is to this date the most spectacular case of a court protecting the right to food. The Court built on eight schemes that included, in particular, feeding programs for infants, pregnant and nursing mothers, and adolescent girls (the Integrated Child Development Services Scheme (ICDS)); mid-day school-meal programs for school-age children; subsidized cereals through a

nationwide network of fair price shops (the Targeted Public Distribution Scheme (TPDS)); pensions for the aged; and a cash-for-work program for the able-bodied, under the 2005 Mahatma Gandhi Rural Employment Guarantee Act (MNREGA).

The Court ordered that the benefits provided under such schemes could not be withdrawn, in effect "converting food, livelihood and social security schemes which are vital to food security of vulnerable citizens, into entitlements or rights".¹² The Court also established two independent Commissioners to monitor the implementation of programs fulfilling the right to food throughout the country: with the support of the large network of members of the Right to Food Campaign, the Commissioners submitted reports and recommendations allowing the Court to supervise implementation of its orders and taking further steps in supporting the right to food. Third, the Court expanded on, and strengthened, existing schemes, to ensure that they provide an effective protection against hunger: for instance, it ordered that school meals be locally produced and cooked and hot, when in the past children were fed with dry snacks or grain, and that preference be given, in the hiring of cooks, to *Dahlit* women; it raised the level of old age pensions; and, consistent with the idea that the schemes implement a constitutional right, it ordered their universalization, dramatically expanding the number of beneficiaries.

This is not the only case relevant to the right to food where a domestic court strengthened existing social programs, to make them more universal in their reach or to transform them from being mere benefits, granted on the basis of charity, into constitutionally protected rights. In the United States, the Supreme Court invalidated a 1971 amendment to the 1964 Food Stamp Act that sought to exclude from the food assistance program households containing one or more unrelated persons, an exclusion which the Court found to be without rational foundation since it would exclude those in need who seek to share housing costs.¹³ The judgment in fact extends the scope of eligibility under the Food Stamp Act beyond Congressional intent. In making its assessment, the Supreme Court referred to the purpose of the Act, which was "to safeguard the health and well-being of the Nation's population and raise levels of nutrition among low-income households": it noted that "the limited food purchasing power of low-income households contributes to hunger and malnutrition among members of such households". The challenged distinction between households was found to be unrelated to this objective, and therefore struck down as discriminatory.

The second component of the duty to fulfill is that, in situations of natural disaster or conflict, or "whenever an individual or group is unable, for reasons beyond their control, to enjoy the right to adequate food by the means at their disposal, States have the obligation to fulfill (provide) that right

⁶ E/C.12/1999/5, para. 15. Under the ICCPR, see General Comment No. 31 (CCPR/C/21/Rev.1/Add.13, 26 May 2004), para. 8.

⁷ *Baleke and Others v. Attorney General of Uganda and Others*, Civil Suit 179 of 2002.

⁸ A/HRC/17/31, paras. 6 and 17-21.

⁹ E/C.12/1999/5, para. 15.

¹⁰ E/1991/23, para. 2; E/C12/2007/1, para. 8.

¹¹ E/1991/23, para. 9.

¹² Harsh Mander, "Food from the Courts: The Indian Experience", *IDS-Bull.*, vol. 43 (July 2012), pp. 15-24, at p. 18.

¹³ *US Department of Agriculture v. Moreno*, 413 U.S. 528 (1973).

directly".¹⁴ This component of the right to food has been invoked successfully before courts in recent years. In Mexico, relying on the recent amendment to Article 4 of the Constitution, one homeless person obtained on 22 March 2012 an injunction from the First District Administrative Judge of the Federal District, directed in particular to the Secretariat for Social Development and the National Coordination of the *Desarrollo Humano Oportunidades* program for the failure of the authorities to comply with their obligation to protection the rights to health, to food and to housing.

Thus, courts in all regions have intervened to strengthen the right to food, using a variety of techniques covering the different dimensions of the right. And governments in turn have acknowledged that the protection of the right to food can be key to the success of food security strategies. At the World Summit on Food Security that convened in Rome on 16-18 November 2009, the Heads of State and Government agreed on the Five Rome Principles on Sustainable Global Food Security (WSFS 2009/2), and they committed to "strive for a comprehensive twin-track approach to food security that consists of 1) direct action to immediately tackle hunger for the most vulnerable, and 2) medium- and long-term sustainable agricultural, food security, nutrition and rural development programs to eliminate the root causes of hunger and poverty, including through the progressive realization of the right to adequate food". They reaffirmed "the right of everyone to have access to safe, sufficient and nutritious food, consistent with the progressive realization of the right to adequate food in the context of national food security" (para. 16), as well as the urgency of moving towards a world free from hunger in which the Right to Food Guidelines are fully implemented.

This is a very timely publication. It brings together, in a highly readable text, the various pathways through which the right to food has migrated from the conference rooms of international summits, where it is referred to as a part of 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 right to food advocates, to further strengthen their role in eradicating hunger and malnutrition. What is scandalous about these scourges is that, unlike natural disasters, they are man-made. But that is also why there is hope: what mistaken policies have created, we can undo.

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¹⁴ E/C.12/1999/5, para. 15.

INTRODUCTION

Economic, social and cultural rights (ESC rights) are being successfully adjudicated in national courts all over the world, as well as in regional and international human rights systems. Although there are fewer “right-to-food” cases compared with case law on other ESC rights, such as the right to health and the right to housing, there is a wealth of international, regional and national experience to draw on when considering different strategies to further the right to food.

IDLO’s study *Realizing the Right to Food: Legal Strategies and Approaches* has been developed as a practical and substantive resource on using legal strategies and approaches to advance the realization of the right to food. By examining relevant national, regional, and international case law, it provides key lessons and identifies possible entry points for these approaches. The study is intended to be used by anyone working to promote and protect the right to food. This includes, but is not limited to:

- › Legal professionals (lawyers, judges, paralegals, law students);
- › Civil society actors (non-governmental organizations (NGOs), activists, community organizations, advocacy groups, coalitions and networks); and
- › Universities, think tanks and research centers.

The study is divided into three main sections, starting with an introduction on how the right to food is defined in international, regional and national legal instruments, and exploring the normative content and state obligations arising from the right (Part I). The next section provides a survey of the key factors facing advocates, practitioners and prospective claimants wishing to litigate the right to food (Part II). The final section focuses on adjudication of the right to food in practice, with specific case law from various countries throughout the world (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 strategic legal entry points on litigation of the right to food.

Legal strategies such as litigation are only one means to ensure that states comply with their duties in connection with the right to food. Although the focus of this study, it must be stressed that 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.¹⁵

¹⁵ C Courtis, ‘The Right to Food as a Justiciable Right: Challenges and Strategies’ (2007) 11 Max Planck Yearbook of United Nations Law 317.

PART I: THE RIGHT TO FOOD IN INTERNATIONAL LAW

1.1. OVERVIEW OF THE LEGAL FRAMEWORK

1.1.1. THE INTERNATIONAL LEVEL

The right to food was first recognized in Article 25(1) of the 1948 Universal Declaration of Human Rights (Universal Declaration) as part of the right to an adequate standard of living.¹⁶ The right to food 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 to food in a comprehensive manner.¹⁷ The ICESCR was adopted by the United Nations General Assembly (GA) in 1966 and entered into force in 1976. Article 11 is the starting point to understanding the normative content of the right and the duties and obligations that flow from it. The article also identifies two essential components of the right to food: the *right to adequate food* and the *fundamental right to be free from hunger*.

Other international treaties contain provisions relating to the right to food. Two articles in the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) are concerned with the right to food. Article 12 of CEDAW deals with adequate nutrition during pregnancy and lactation, and Article 14 protects women's access to land, credit, income and social security programs.¹⁸ Although Article 14 does not explicitly mention the right to food, the provision touches upon key components of the right. The Convention on the Rights of the Child (CRC) devotes specific attention to the protection of the right to food in two articles. Article 27 recognizes the right of children to an adequate standard of living. Article 24, which relates to the right to health, calls for appropriate measures to combat disease and malnutrition, including through the provision of nutritious food and safe drinking water.¹⁹ The most recent treaty to address the right to food is the Convention on the Rights of Persons with Disabilities, which came into force in 2008.²⁰ The right to food is recognized in the context of the right to health under Article

25 and in the context of the right to an adequate standard of living and social protection in Article 28.²¹

ARTICLE 11 OF THE ICESCR ON THE RIGHT TO FOOD

1. The states parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The states parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.
2. The states parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programs, which are needed:
 - (a) To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources;
 - (b) Taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need.

1.1.2. THE REGIONAL LEVEL

At the regional level, the European Convention on Human Rights (European Convention)²² and the American Convention on Human Rights (American Convention)²³ primarily contain civil and political rights. However, the 1988 Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador) explicitly contains the right to food.²⁴ Article 12 of

¹⁶ Universal Declaration of Human Rights, opened for signature 10 December 1948, 999 UNTS 302, art 25(1) (entered into force 23 March 1976). (Universal Declaration). Art 25(1) reads: "Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control."

¹⁷ International Covenant on Economic, Social and Cultural Rights, opened for signature 16 December 1966, 993 UNTS 3, art 11 (entered into force 3 January 1976). (ICESCR).

¹⁸ 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). (CEDAW). See also L Cotula, 'Gender and Law – Women's Rights in Agriculture' (2007) FAO Legislative Study 76.

¹⁹ 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).

²⁰ Convention on the Rights of Persons with Disabilities, opened for signature 28 June 1952, 210 UNTS 131 (entered into force 3 May 2008).

²¹ Ibid arts 25 and 28.

²² Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature 4 November 1950, 213 UNTS 222 (entered into force 3 September 1953).

²³ American Convention on Human Rights, opened for signature 21 November 1969, 1144 UNTS 123 (entered into force 18 July 1978).

²⁴ 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). Only 16 states within the Organization of American States have ratified the

the Protocol establishes that “everyone has the right to adequate nutrition which guarantees the possibility of enjoying the highest level of physical, emotional and intellectual development” and provides that “[i]n order to promote the exercise of this right and eradicate malnutrition, the states parties undertake to improve methods of production, supply and distribution of food, and to this end, agree to promote greater international cooperation in support of the relevant national policies.”²⁵ In the Inter-American system the right to food is also contained in Article 9 of the American Declaration of the Rights and Duties of Man (American Declaration). In contrast, the European Social Charter does not explicitly contain the right to food.²⁶ Under the African regional system, the African Charter on Human and Peoples’ Rights (African Charter) does not refer explicitly to the right to food.²⁷ However, Article 14 of the African Charter on the Rights and Welfare of the Child (African Children’s Charter) recognizes children’s right to nutrition in the right to health and health services.²⁸ The Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (Maputo Protocol) also recognizes the right to food in Article 15 and addresses the right to nutrition for pregnant and breastfeeding women in Article 14.²⁹

1.1.3. SOFT LAW INSTRUMENTS

In addition to the international treaties outlined above, several non-binding instruments have shaped the content of the right to food. These instruments reflect significant milestones for the development and evolution of the right at the international level and are important when analyzing the right to food. The first of these instruments was adopted in 1996 when 180 states gathered at the World Food Summit (WFS) to redefine international policy to fight hunger, and committed to halving the number of undernourished people by 2015. The WFS adopted the Rome Declaration on World Food Security (Rome Declaration), which reaffirms “the right of everyone to have access to safe and nutritious food, consistent with the right to adequate food and the fundamental right of everyone to be free from hunger” and sets out measurable commitments.³⁰ In addition, the WFS adopted the Plan of Action of the World Food Summit, which outlines objectives

and actions necessary for the implementation of the commitments in the Rome Declaration.³¹

In 1999, the United Nations Committee on Economic, Social and Cultural Rights (CESCR) adopted General Comment No. 12 on the right to adequate food, which sets out the normative content of the right and state obligations.³² Although the CESCR’s general comments are not legally binding, they provide authoritative interpretations of the rights contained in the ICESCR. The year 2000 marked the establishment of a United Nations Special Rapporteur on the Right to Food by the former Commission on Human Rights (now the Human Rights Council).³³ The role of the UN Special Rapporteur is to monitor state compliance with obligations to respect, protect and fulfill the right to food. The Special Rapporteur’s monitoring and accountability functions will be discussed further in Part II.

At the 2002 WFS, 179 states reaffirmed their commitment to the right to food. They requested that a Food and Agriculture Organization (FAO) intergovernmental working group develop voluntary guidelines to support the progressive realization of the right to adequate food in the context of national food security. The purpose of this was to provide practical guidance for achieving the goals established in the earlier 1996 WFS declarations. The FAO intergovernmental working group drafted the FAO Right to Food Guidelines, and these were unanimously adopted by the FAO Council in November 2004.³⁴ The Right to Food Guidelines set out national level actions to create an environment where people are able to feed themselves with dignity. States are called upon to apply the Right to Food Guidelines when developing legislation, strategies, policies and programs aimed at realizing the right to food at the domestic level.³⁵ Other relevant FAO guidelines have been adopted subsequently, and include the 2012 Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of

Protocol of San Salvador. See further: <http://www.oas.org/juridico/english/signs/a-52.html> at 25 June 2013.

²⁵ Ibid art 14. Arts 15 and 17 protect the right to food of children and the elderly. However, with the exceptions of the right to education and the right to organize and join unions, the rights recognized in the Protocol of San Salvador cannot be the subject of adjudication before the Inter-American Commission or Court on Human Rights. (Article 19(6) of the Protocol of San Salvador).

²⁶ European Social Charter, opened for signature 18 October 1961, 529 UNTS 89 (entered into force 26 February 1965).

²⁷ As discussed below, the African Commission on Human and Peoples’ Rights has recognized that the African Charter implicitly contains the right to food in provisions relating to the right to life, the right to health and the right to development. See Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights v Nigeria (2001) Communication 155/96.

²⁸ 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).

²⁹ Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, adopted by the 2nd Ordinary

Session of the Assembly of the Union, Maputo, 13 September 2000, CAB/LEG/66.6 (entered into force 25 November 2005).

³⁰ FAO, Rome Declaration on World Food Security and World Food Summit Plan of Action (1998) Corporate Document Repository <http://www.fao.org/DOCREP/003/W3613E/W3613E00.HTM> at 25 June 2013.

³¹ Ibid.

³² 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).

³³ United Nations Special Rapporteur on the Right to Food, <http://www.srfood.org/> at 29 April 2013.

³⁴ FAO, Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security (adopted in November 2004).

³⁵ 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/docrep/014/i0815e/i0815e.pdf> at 25 June 2013, 12.

National Food Security.³⁶ The Guiding Principles on Extreme Poverty and Human Rights, adopted by the UN Human Rights Council in 2012, are also highly relevant and contain a section entirely devoted to the right to food in the context of people living in extreme poverty, providing specific recommendations for states.³⁷

1.2. DEFINING THE RIGHT TO FOOD

The right to food is made up of two distinct components contained in Article 11 of the ICESCR: the right to adequate food and the fundamental right of everyone to be free from hunger. A number of sources, though not legally binding, further elaborate and interpret this right. General Comment No. 12 provides the following authoritative definition of the right to adequate food:

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 shall therefore not be interpreted in a narrow or restrictive sense which equates it with a minimum package of calories, proteins and other specific nutrients. 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.³⁸

The first UN Special Rapporteur on the Right to Food later elaborated on this, defining the right as:

...the right to have regular, permanent and free access, either directly or by means of financial purchases, to quantitatively and qualitatively adequate and sufficient food corresponding to the cultural traditions of the people to which the consumer belongs, and which ensures a physical and mental, individual and collective, fulfilling and dignified life free of fear.³⁹

Differing from General Comment No. 12, the Special Rapporteur's definition introduces the notion of *human dignity*.⁴⁰

ESSENTIAL ELEMENTS OF THE RIGHT TO FOOD

The essential elements of the right to food include adequacy, accessibility, availability, acceptability. These elements are defined in General Comment No. 12 as:

- > *Adequacy* refers to both the quantity and quality of food, in terms of food safety and nutrition value. This must be determined using prevailing social, economic, cultural, climatic, ecological and other conditions. It also refers to dietary needs of an individual from a health perspective.⁴¹
- > The adequacy standard also includes elements of *cultural or consumer acceptability* and essentially pertains to non-nutrient-based values attached to food and food consumption.⁴²
- > *Accessibility* takes into account both economic and physical accessibility. Economic accessibility means that an individual or a household must have the economic means to procure food without compromising other basic necessities. Physical accessibility implies that adequate food must be accessible to everyone, including physically vulnerable individuals, such as infants and young children, elderly people, the physically disabled, and persons with medical problems.⁴³ Food must be accessible for 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.⁴⁴

The right to be free from hunger has been defined as the right “to have access to the minimum essential food which is sufficient and adequate to ensure everyone is free from hunger and physical deterioration that would lead to death.”⁴⁵ A state is obliged “to ensure for everyone under its jurisdiction access to the minimum essential food which is sufficient, nutritionally adequate and safe, to ensure their freedom from hunger.”⁴⁶ Freedom from hunger is considered to be the *minimum essential level* of the right to food that states must ensure the satisfaction of, regardless of economic and political conditions.⁴⁷

³⁶ FAO, Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (adopted in May 2012).

³⁷ M Sepúlveda Carmona, Final Draft of the Guiding Principles on Extreme Poverty and Human Rights, Submitted by the Special Rapporteur on Extreme Poverty and Human Rights, UN Doc. A/HRC/21/39, 18 July 2012 <<http://www.ohchr.org/EN/Issues/Poverty/Pages/DGPIIntroduction.aspx>> at 25 June 2013.

³⁸ General Comment No 12, above n 32.

³⁹ 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.

⁴⁰ 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> at 1 October 2012, 12.

⁴¹ General Comment No 12, above n 32, paras 7 and 9; note that “dietary needs” refer to the diet as a whole, so that it contains a mix of nutrients for physical and mental growth, development and maintenance, and physical activity that are in compliance with human physiological needs at all stages throughout the life cycle and according to gender and occupation.

⁴² Ibid para 11.

⁴³ Ibid paras. 7, 13.

⁴⁴ Ibid para 12.

⁴⁵ Golay, The Right to Food and Access to Justice, above n 40, 14.

⁴⁶ General Comment No 12, above n 32, para 14.

⁴⁷ Ibid para 17 and FAO, Methodological Toolbox, above n 35, 15.

1.3. STATE OBLIGATIONS

The obligations that arise from the right to food can be divided into two broad categories: *general legal obligations* and *specific legal obligations*.

1.3.1. GENERAL OBLIGATIONS

The general obligation of states to progressively realize the right to food is found in Article 2(1) of the ICESCR. This general obligation can be divided into three further sub-obligations:⁴⁸

- > **The obligation to take all appropriate steps:** in its General Comment No. 3 on the nature of state party obligations under the ICESCR, the CESCR specified that such steps should be “deliberate, concrete and targeted.”⁴⁹ It is ultimately up to each state party to decide what kind of measures will be the most appropriate to ensure the realization of the right to food.⁵⁰ According to the FAO, these measures could include adopting legislation or implementing administrative, economic, financial, educational or social reforms.
- > **The obligation to take steps with a view to progressively achieving the full realization of the right to food:** this implies that the full realization of the right to food requires some measures to be taken immediately, while others are taken more gradually. The CESCR’s General Comment No. 3 clarifies that state parties have a duty to “move as expeditiously and effectively as possible” towards full realization of the rights contained in the covenant.⁵¹ The concept of progressive realization also includes the principle of non-retrogression, which entails not lowering the level of protection of a right that has already been achieved. According to the CESCR, any deliberately retrogressive measures with regard to a guaranteed human right require “the most careful consideration and need to be fully justified by reference to the totality of the rights provided for in the ICESCR and in the context of the full use of the maximum available resources.”⁵²
- > **The obligation to take steps through the efforts of states themselves and international assistance, to the maximum use of their available resources:** states are obliged to use the maximum available resources, including their own resources and those of the international community, to realize the right to food. If a state argues that it does not have the resources to at least meet its minimum core obligations, it must demonstrate that every effort has been made to use all the resources at its disposal to meet these minimum standards. The state must also demonstrate that it has made every effort to obtain international support to ensure the availability and accessibility of food. Articles 2(1) and 11 of the ICESCR

specifically refer to international cooperation and assistance as a mode to achieving the full realization of the right to food. Furthermore, CESCR General Comment No. 12 emphasizes the essential role of international cooperation in achieving the full realization of the right to food.⁵³

While the ICESCR allows for progressive realization, certain obligations apply immediately regardless of resource availability.⁵⁴ With regard to the right to food, these include the obligation to ensure non-discrimination and the obligation to ensure the fundamental right to be free from hunger.

The obligation not to discriminate contained in Articles 2(2) and 3 of the ICESCR requires each state party to ensure equal enjoyment by men and women of all the rights contained in the ICESCR, including the right to food. The obligation not to discriminate requires that the level of protection of the right to food is objectively and reasonably the same for everybody, irrespective of race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.⁵⁵ The obligation not to discriminate requires a state party to identify the most vulnerable groups within its jurisdiction and take proactive steps, usually referred to as ‘special measures’, to bring the level of enjoyment of the right to food of these groups in line with the rest of the population.⁵⁶

In addition to the obligation to progressively realize the right, states parties to the ICESCR have a *minimum core* obligation to ensure the satisfaction of, at the very least, the essential level of each right.⁵⁷ The obligation to ensure freedom from hunger, the minimum core obligation with regard to the right to food, requires a state party “to provide minimum basic resources to enable individuals to be free from threats to their survival, not to deny access to food and to make sure people do not starve at the very least and to provide food for those who are in danger of starving.”⁵⁸ State failure to satisfy at least this minimum level would lead to a *prima facie* violation of its obligations under the ICESCR. If a state argues that failure to meet such obligations is due to resource constraints, it must show that “every effort has been made to use all the resources at its disposal in an effort to satisfy, as a matter of priority, those minimum obligations.”⁵⁹

1.3.2. SPECIFIC OBLIGATIONS

The specific nature of state obligations is also clarified by CESCR General Comment No. 12. As with all other human

⁴⁸ Golay, *The Right to Food and Access to Justice*, above n 40, 14.

⁴⁹ United Nations Committee on Economic, Social and Cultural Rights (CESCR), General Comment No 3: The Nature of States Parties Obligations, 14 December 1990, ESCOR [1991] Supp 3, 83, para 9. (General Comment No 3).

⁵⁰ FAO, *Methodological Toolbox*, above n 35, 20.

⁵¹ General Comment No 3, above n 49, para 9.

⁵² *Ibid.*

⁵³ General Comment No 12, above n 32, para 36; General Comment No 3, above n 35.

⁵⁴ General Comment No 3, above n 49, para 5.

⁵⁵ ICESCR, above n 17, art 2.2.

⁵⁶ See also FAO, *The Right to Food Guidelines, Information Papers and Case Studies (2006)* guideline 8.7 on combating discrimination against women and ensuring their de facto realization of the right to food by strengthening their access to productive resources.

⁵⁷ General Comment No 3, above n 49, para 10.

⁵⁸ FAO, *Methodological Toolbox*, above n 35, 21.

⁵⁹ General Comment No 12, above n 32, 17.

rights, three categories of obligations are identified as specific obligations: duties to *respect*, to *protect* and to *fulfill*.⁶⁰

The obligation to *respect* the right to food requires states not to take any measures that would result in preventing individuals from having access to food. This negative obligation imposes limitations on state conduct that may threaten the right to food. Under this obligation, states cannot suspend legislation or policies that provide people with access to food, unless fully justified.⁶¹ The Special Rapporteur on the Right to Food has noted that violations of the obligation to *respect* could occur if a government arbitrarily evicted people from their land, especially if the land was their primary source of subsistence, or if the government suspended or repealed social security provisions without ensuring that vulnerable people had other means to provide for themselves.⁶² Another type of violation, for example, would be if the government knowingly introduced harmful substances into the food chain.⁶³

Under the duty to *protect*, states have a positive obligation to safeguard enjoyment of the right to food against interference by third parties (such as private individuals, private enterprises and other entities). This obligation involves regulating the conduct of such non-state actors by the state.⁶⁴ The Special

Rapporteur suggests that this obligation may be violated if a company polluted a community's land or water supply and the state took no action.⁶⁵ Under the obligation to *protect*, a state may also be required, for example, to enact consumer protection and food safety legislation to ensure that food which reaches the market is free from harmful substances.⁶⁶

The obligation to *fulfill* is made up of both an obligation to *facilitate* and an obligation to *provide*. The obligation to *facilitate* means that states must engage in activities intended to strengthen people's ability to access means and resources to secure their livelihood, for example by implementing agrarian reform programs or introducing minimum income regulation.⁶⁷ In particular, states are required to identify vulnerable groups and to implement policies to ensure their access to food or to the means of obtaining it.⁶⁸

Whenever an individual or group is unable to enjoy the right to adequate food by the means at their disposal, for reasons beyond their control, states have the obligation to *provide* it.⁶⁹ 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.⁷⁰

⁶⁰ Ibid. See also Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, UN Doc. E/C.12/2000/13, 2 October 2000.

⁶¹ General Comment No 12, above n 32, para 19.

⁶² 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 27.

⁶³ Ibid.

⁶⁴ Ibid para 28.

⁶⁵ Ibid.

⁶⁶ Ibid.

⁶⁷ OHCHR and FAO, Fact Sheet No 34: The Right to Adequate Food (2010) 18.

⁶⁸ Ziegler, Preliminary Report on the Right to Food, above n 62, para 29.

⁶⁹ General Comment No 12, above n 32, para 15.

⁷⁰ Ziegler, Preliminary Report on the Right to Food, above n 62, para 29.

PART II: DIMENSIONS OF RIGHT TO FOOD LITIGATION

When states commit to advancing 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 such obligations. 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', which involves its recognition as a right that can be interpreted by courts and be the subject of litigation.⁷¹ To encompass a broader definition, for the purposes of this study, the concept of 'justiciability' entails the possibility for the right to be invoked by an individual or a group before a judicial body or other independent authority that can determine its content in a concrete case, and decide the measures needed to remedy violations.⁷²

Being justiciable means individuals and groups claiming a violation of the right to food must be able to identify and articulate their claim in the legal system.⁷³ Secondly, judges must be responsive to that claim and capable of finding adequate means to address any violation of the right they find.⁷⁴ Finally, judges must be capable of devising effective remedies.⁷⁵ These considerations form the framework for the remainder of the study.⁷⁶

The complexity of litigating ESC rights, including the right to food, has necessarily limited the scope of this study, which highlights only a number of key dimensions. Such dimensions have been identified as 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.

2.1. THE JUSTICIABILITY OF ESC RIGHTS

Some constitutions, such as the Constitution of Kenya, define ESC rights as expressly justiciable and define mechanisms for bringing claims when such rights are denied.⁷⁷ Courts

themselves have also expressly ruled on the justiciable nature of ESC rights, such as in Colombia and South Africa.⁷⁸ Other courts, however, exercise considerable caution when approaching the adjudication of ESC rights, such as in Ireland.⁷⁹ In other systems, such as in Canada, ESC rights are only subject to limited judicial scrutiny.⁸⁰

Caution by judges in approaching ESC rights can in part be traced to the long-standing debate on the justiciability of such rights. It is sometimes argued that the rights are too vague and imprecise to be adjudicated. In addition, concerns are raised that judicial protection of such rights would entail intrusion by judges into areas traditionally reserved to the elected branches of government. The territory of the elected branches is perceived to be invaded when judges rule on matters of social policy and resource allocation.⁸¹ Concerns are also raised about the capacity of courts to adjudicate complex social claims and make appropriate orders. Many of these concerns have been largely rejected in recent scholarship as being oversimplified. The quantity of case law dealing with ESC rights that has emerged in national courts over the past 20 years makes it difficult to argue that such rights are not justiciable.⁸² The claim that ESC rights are too vague also sits uneasily with the fact that most human rights, including civil and political rights, are articulated in broad language. As one commentator put it, if vagueness were the reason not to subject ESC rights to adjudication, then one would have to dispense with most Bills of Rights.⁸³

Many counter-arguments have been advanced against the objection that adjudication of ESC rights is anti-democratic.⁸⁴ One argument is that where courts have been granted the power of judicial review, they are simply doing what is expected of them, regardless of whether the subject matter involves ESC rights. One rationale for granting such review is derived from the need to ensure that the rights of minorities and other vulnerable groups are not violated by a majoritarian decision-making body. Another rationale is that separation of powers in modern democracies is never watertight, and the

⁷¹ C Courtis, *Courts and the Legal Enforcement 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.

⁷² C Golay, *Vers la justiciable du droit à l'alimentation* (2002).

⁷³ 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, 25).

⁷⁴ *Ibid.*

⁷⁵ *Ibid.*

⁷⁶ M Langford, 'Domestic Adjudication and Economic, Social and Cultural Rights: A Socio-Legal Review' (2009) 11(6) *SUR International Journal on Human Rights* 91, 107. This framework should not be interpreted as reducing litigation to a purely remedial function. It is acknowledged that litigation can also play other important roles, such as creating judicial precedents, influencing legal and policy developments, providing mobilizing spaces for civil

society, and raising awareness, even in the event of an unsuccessful outcome.

⁷⁷ Constitution of the Republic of Kenya 1969 (as amended to 2010) ss 21 and 22.

⁷⁸ See below section 2.2.1.4.

⁷⁹ A Nolan, 'Ireland' in M Langford (ed), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (2008).

⁸⁰ B Porter, 'Canada' in M Langford (ed), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (2008).

⁸¹ Langford, *Domestic Adjudication*, above n 76, 91.

⁸² 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.

⁸³ J King, *Judging Social Rights* (2012) 5.

⁸⁴ Langford, *The Justiciability of Social Rights*, above n 82, 31.

division of functions among branches is often much more nuanced.⁸⁵

A related concern is that courts lack the “institutional capacity” to deal with violations of ESC rights. Two aspects of this argument can be highlighted. First, it has been argued that judges may lack the experience and skill to interpret and process specialized information of a financial or political nature and are, therefore, incapable of adjudicating ESC rights claims. Second, it is argued that courts are not equipped to take decisions with complex ramifications extending beyond the parties and the factual situation before the court.⁸⁶ However, this is not a particularly strong argument against the justiciability of ESC rights since these concerns equally apply to obligations stemming from civil and political rights that require implementation of certain policies and services. Examples of complex, wide-ranging litigation in the fields of property and commercial and environmental law, could be easily attacked on similar grounds.⁸⁷ Moreover, as scholars have noted, “courts create their own competence. The courage to be creative depends on a conviction that the values at stake are legitimate concerns for the judiciary.”⁸⁸

The case law analyzed in Parts II and III 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.⁸⁹ Judges in different countries develop new procedures and creative forms of adjudication to overcome these problems. 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.⁹⁰

2.2. 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, regional legal frameworks, international law, or a combination of these. In relation to domestic systems, it is worth noting that Guideline 7 of the Right to Food Guidelines encourages states to “include provisions in their domestic law, which may include their

constitutions, bills of rights or legislation, to directly implement the progressive realization of the right to adequate food.”⁹¹ The following section focuses on identifying this legal basis in national legal systems, illustrated by examples from different countries. The legal basis of the right to food in international and regional legal frameworks will also be briefly addressed.

2.2.1. INCLUSION IN NATIONAL CONSTITUTIONS

At the national level, human rights provisions are normally contained in constitutions or bills of rights. In most systems, constitutions are the highest ranking source of law and all other legislation in that country must conform to the constitutional provisions. Where the constitution and other laws conflict, constitutional provisions will prevail. Depending on the legal system, constitutional protection of a right may mean that it can be used to challenge laws, other provisions or state conduct that may lead to violations of the right to food.⁹² In some constitutions, the right to food is unqualified, such as Brazil, while others have qualified provisions, which specify that fulfillment of the right is subject to progressive realization and available resources, such as South Africa. In other countries, as described below, the right to food is protected under other constitutional rights such as the right to life or the right to a dignified existence, for example in India.

Constitutional protection is often referred to as the strongest legal basis for the right to food at the domestic level. This is partly due to the fact that, in the vast majority of legal systems, it is more difficult to amend constitutions than ordinary laws, making it difficult to remove a constitutionally entrenched right. However, the effective protection afforded to a constitutionally protected right to food will ultimately depend on the mechanisms available to claim the right and on judicial interpretation (discussed in section 2.3).

A 2011 FAO study provides a comprehensive overview of the different layers of constitutional protection around the world.⁹³ The next sections draw on this study to explain three key forms of constitutional inclusion: explicit recognition as a self-standing right, recognition as part of another human right, and recognition as a directive principle of state policy.

⁸⁵ All these counter-arguments are raised by Langford, *Domestic Adjudication*, above n 76, 91.

⁸⁶ A Nolan et al, *The Justiciability of Social and Economic Rights: An Updated Appraisal*, Center for Human Rights and Global Justice Working Paper No 15 (2007) 14.

⁸⁷ Courtis, *Courts and the Legal Enforcement of Economic, Social and Cultural Rights*, above n 71.

⁸⁸ C Scott and P Macklem, ‘Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution’ (1992) 141(1) *University of Pennsylvania Law Review* 1, 35-36.

⁸⁹ See for example *Defensor del Pueblo de la Nación c Estado Nacional y otra (Provincia del Chaco)* (2007) Fallos: 330:4134 D. 587. XLIII.ORIGINARIO, discussed below in section 3.1.1.1.

⁹⁰ 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).

⁹¹ FAO, *Voluntary Guidelines-Right to Food*, above n 34, guideline 7.

⁹² O De Schutter, *Countries Tackling Hunger with a Right to Food Approach: Briefing Note 01’* (2010) Special Rapporteur on The Right to Food <www.srfood.org/images/stories/pdf/otherdocuments/20100514_briefing-note-01_en.pdf> at 25 June 2013.

⁹³ 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> at 10 December 2012.

2.2.1.1. EXPLICIT RECOGNITION AS A SELF-STANDING RIGHT

The right to food is recognized explicitly, as a self-standing right, in 23 countries.⁹⁴ For example, 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.”⁹⁵ Section 28 further explicitly guarantees every child the right to “basic nutrition.”⁹⁶ Brazil’s constitution also clearly enshrines the right to food following an amendment introduced by the Brazilian legislature in 2010 which amended Article 6 to include food as a protected right.⁹⁷ Mexico also amended its constitution in 2011 to read that “every person has the right to food that is nutritious, sufficient, and of quality. The state shall guarantee this right.”⁹⁸ Other examples of explicit recognition of the right to food include the constitutions of Bolivia, Ecuador, Kenya and Niger.

Other countries are also considering reform to include the right to food in their constitutions. In Nepal, for example, a Constituent Assembly was formed in 2008 to draft the new constitution. The draft article on the right to food provides that every citizen shall have the right to food, the right to security against the scarcity of food and the right to food sovereignty.⁹⁹ Nepal’s interim constitution contains the ‘right to food sovereignty’,¹⁰⁰ which has been interpreted by the Supreme Court of Nepal in terms of the right to food and the right to be free from hunger under the ICESCR.¹⁰¹ In Zambia, the April 2012 draft constitution provides that a person has the right to be free from hunger and have access to adequate food of acceptable quality.¹⁰²

2.2.1.2. RECOGNITION AS PART OF OTHER HUMAN RIGHTS

Other constitutions do not include a self-standing provision on the right to food, but contain broader rights under which the right to food may be listed as an explicit element. Examples of these broader rights include the right to an adequate standard of living, the right to live in dignity, and the right to development. For example, 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.”¹⁰³ Article 24 of the Suriname Constitution provides 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.”¹⁰⁴ Other examples include the constitutions of the Democratic Republic of the Congo, Malawi, Moldova and Ukraine.¹⁰⁵

Other constitutions guarantee the right to food for specific groups, most commonly children, indigenous peoples, and prisoners. Article 44 of the Colombian Constitution states that children have the fundamental right to life, integrity, health and social security, and adequate food.¹⁰⁶ Further examples of this kind of protection for children highlighted by the FAO include the constitutions of Cuba, Guatemala, Honduras, Panama, and Paraguay.¹⁰⁷ Other groups are afforded similar protection to their right to food, including under the Costa Rican Constitution, which protects the right to food of indigenous children specifically,¹⁰⁸ and the South African Constitution which specifies the right to food of prisoners and detainees.¹⁰⁹ The Brazilian Constitution contains a provision on urban and rural workers that refers to the right to food.¹¹⁰

2.2.1.3. DIRECTIVE PRINCIPLES

ESC rights can also be found in “directive principles” of constitutions. Such principles can be described as “the values to which a society aspires although at the time of drafting they may not reflect a broad societal reality,” which guide governmental action but do not necessarily provide individual or justiciable rights.¹¹¹ The FAO study identified 13 countries including the right to food in such provisions, such as Bangladesh, Sri Lanka and Nigeria.¹¹² This inclusion of the right to food in a constitution does not provide the same legal basis as guaranteeing the right explicitly. However, directive principles can play an important role in judicial interpretation.

Some courts have used such principles and transformed them into constitutional protections and tools to advance socio-economic objectives.¹¹³ One example of this can be found in

⁹⁴ Ibid.

⁹⁵ Constitution of the Republic of South Africa 1996, s 28.

⁹⁶ Ibid.

⁹⁷ 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.

⁹⁸ Constitution of the Mexican United States 1917 (as amended to 2010).

⁹⁹ See M Langford and N Bhattarai, ‘Constitutional Rights and Social Exclusion in Nepal’ (2011) 18 International Journal on Minority and Group Rights 387, 407.

¹⁰⁰ Interim Constitution of Nepal 2007, art 18(3).

¹⁰¹ Babujuddin Minhya & Ors v Government of Nepal & Ors (2009) Writ No WO-0338 of 2064, cited in Langford and Bhattarai, Constitutional Rights and Social Exclusion, above n 85,401.

¹⁰² First Draft Constitution of the Republic of Zambia 2012, art 62(1)(c). See also O De Schutter, From Charity to Entitlement: Implementing

the Right to Food in Southern and Eastern Africa: Briefing Note 05 (June 2012) Special Rapporteur on the Right to Food

http://www.srfood.org/images/stories/pdf/otherdocuments/2010620_briefing_note_05_en.pdf at 25 June 2013.

¹⁰³ Knuth and Vidar, above n 93, 16.

¹⁰⁴ Constitution of the Republic of Suriname 1987 (as amended to 1992) art 24.

¹⁰⁵ Knuth and Vidar, above n 93, 16-17.

¹⁰⁶ Republic of Colombia Constitution 1991 (as amended to 2011) art 44.

¹⁰⁷ Knuth and Vidar, above n 93, 21.

¹⁰⁸ Ibid.

¹⁰⁹ Constitution of South Africa, above n 95, s 35.2(e).

¹¹⁰ Knuth and Vidar, above n 93, 33.

¹¹¹ Ibid.

¹¹² Ibid 18-20.

¹¹³ FAO, Methodological Toolbox, above n 35, 57.

Article 47 of the Indian Constitution.¹¹⁴ The Indian Supreme Court held in *Olga Tellis v Bombay Municipal Corporation*, “that the Directive Principles, though not enforceable by any court, are nevertheless fundamental in the governance of the country.”¹¹⁵ In subsequent case law, the court interpreted the right to life with human dignity (Article 21) and the directive principle instructing the government to raise the level of nutrition of its people (Article 47) as enforcing the right to food.¹¹⁶

2.2.1.4. IMPLICIT RECOGNITION THROUGH JUDICIAL INTERPRETATION

The absence of explicit constitutional inclusion does not mean that the right to food is not protected. For example, the right to food has also been afforded constitutional protection through judicial interpretation. Other human rights interpreted to implicitly protect the right to food include the right to an adequate standard of living, the right to a dignified life, and the right to a minimum wage. Judges in national and regional systems have often linked ESC rights to *civil and political rights* as a way of guaranteeing protection. For example, judicial protection of the right to health has been achieved through the right to be free from torture and inhuman and degrading treatment or punishment, the right to respect private and family life, the right to personal integrity and the prohibition of discrimination.

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, as noted above. In *Francis Coralie Mullin v Administrator*, the Indian Supreme Court found that “the right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessities of life, such as adequate nutrition.”¹¹⁷ Courts in Bangladesh have adopted a similar practice. In *Dr Mohiuddin Farooque v Bangladesh and Others*, for example, the Supreme Court of Bangladesh interpreted the constitutional articles enshrining the right to life to hold that the government should remove threats posed by powdered milk which exhibited unacceptable levels of radiation.¹¹⁸ The court stated that the right to life includes the protection of health and “normal longevity of an ordinary human being,” and that these can be threatened by the marketing and consumption of food and drink which are harmful to health.¹¹⁹ In *G v An Bord Uchtála*, the Irish court referred to the right to life as necessarily implying “the right to be born, the right to preserve and defend, and to have

preserved and defended, that life and the right to maintain that life at a proper human standard in matters of food, clothing and habitation.”¹²⁰

German courts have ruled that the constitutionally protected principles of the welfare state and human dignity entail concrete obligations to provide an ‘existential’ or ‘vital’ minimum which includes access to food, housing and social assistance to persons in need.¹²¹ Similarly, Swiss courts have recognized and protected the right to a ‘minimum subsistence level’ (*conditions minimales d’existence*), both for Swiss nationals and foreigners.¹²²

In Colombia, the constitution includes a list of fundamental rights, and states that the majority of civil and political rights are directly justiciable. However, the constitution has no clear provision on the enforcement of ESC rights. Here, 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.¹²³ 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.¹²⁴

At the regional level, as outlined in Part I above, ESC rights are not explicitly included in the European Convention and the American Convention. Yet, both the European Court of Human Rights (European Court) and Inter-American Court of Human Rights (Inter-American Court) have afforded indirect protection of some ESC rights through expansive interpretations of civil and political rights.¹²⁵ In the African regional human rights system, the African Charter does not contain the right to food explicitly either. However, in *SERAC v Nigeria*, discussed below, the African Commission on Human and Peoples’ Rights (African Commission) found that the right to food was inextricably linked to the rights to life and dignity, which are protected by the African Charter, and therefore implicitly included.¹²⁶

In jurisdictions without an explicit constitutional basis for ESC rights, relying on the interdependence of human rights may be

¹¹⁴ Constitution of the Republic of India 1949 (as amended to 2012) art 44.

¹¹⁵ *Olga Tellis v Bombay Municipal Corporation* (1985) 2 Supp SCR 51.

¹¹⁶ M J McDermott, ‘Constitutionalizing an Enforceable Right to Food: A Tool for Combating Hunger’ (2012) 35(2) *Boston College International and Comparative Law Review* 543.

¹¹⁷ *Francis Coralie Mullin v Administrator, Union Territory of Delhi* (1981) 2 SCR 516.

¹¹⁸ *Dr Mohiuddin Farooque v Bangladesh and Others* (1998) 50 DLR 84.

¹¹⁹ *Ibid.*

¹²⁰ FAO, *Methodological Toolbox*, above n 35, 445.

¹²¹ See Courtis, *Courts and the Legal Enforcement of Economic, Social and Cultural Rights*, above n 57, 24-25.

¹²² *Ibid.*

¹²³ 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.

¹²⁴ *Ibid* 147.

¹²⁵ For examples in the Inter-American system see J Cavallaro and S Brewer, ‘The Virtue of Following: The Role of Inter-American Litigation in Campaigns for Social Justice’ (2008) 5(8) *SUR International Journal on Human Rights* 85, 92.

¹²⁶ *SERAC and the Center for Economic and Social Rights v Nigeria*, above n 13.

a valuable strategy to further the realization of the right to food through litigation. As one commentator has said, this approach “does not mean reducing economic and social rights to a particular aspect of civil and political rights. Rather, it assists in releasing the potential justiciability of economic, social and cultural rights themselves, the effects of which are then visible more broadly than merely in the area which served as the opening.”¹²⁷

2.2.2. DIRECT APPLICABILITY OF INTERNATIONAL LAW AT THE NATIONAL LEVEL

The legal basis for the right to food has also been recognized through the incorporation of international or regional treaties within the domestic legal framework. In General Comment No. 9, CESCR calls on countries to make the rights contained in the ICESCR applicable and justiciable at the domestic level. However, the status and impact of international instruments in domestic systems varies significantly. In *monist* systems, such as France and the Netherlands, international law is incorporated directly into domestic law and international law treaties can be immediately applied. In *dualist* systems, international law is not automatically part of domestic law and further steps have to be taken to incorporate it in the national legal system. The UK and Australia are examples of dualist systems. Several constitutions explicitly provide for the applicability of international treaties and their status within domestic law. In some systems, the status of international treaties is higher or equal to the national constitution. In others, the constitution may provide that treaties are directly applicable and have primacy over national law.¹²⁸

In Argentina, ratified treaties are considered part of domestic law and are directly applicable by domestic courts.¹²⁹ In the hierarchy of legal sources, such treaties are granted a ‘superior status’ in relation to domestic statutes and some are placed on equal footing with the constitution. Ten major international treaties, including the ICESCR, are considered to be part of the Constitution of Argentina and can be relied on by individuals. However, judges in Argentina have been more willing to directly apply provisions containing clear obligations with respect to the state and third parties, while displaying caution

towards the adjudication of more loosely worded provisions.¹³⁰

The direct applicability of international law in a national legal system, therefore, also depends on the nature and wording of the treaty provision.¹³¹ Some international treaty provisions, referred to as ‘non-self-executing’ provisions, may require implementing legislation before they can be applied by national judges. Courts in the Netherlands, for example, although operating in a monist system, have ruled that certain treaty provisions relating to ESC rights, such as some of those contained in the ICESCR, are not self-executing.¹³² The Dutch judiciary has traditionally questioned the legal accuracy, consistency and soundness of ESC rights.¹³³ For example, in a case concerning the right to food of rejected asylum seekers, the court stated that the concept of ‘adequate food’ was too vague to make Article 11 of the ICESCR directly applicable.¹³⁴

Despite differences in their status and recognition in domestic law, the growing awareness of international legal standards by domestic judges has resulted in international instruments being increasingly relied on in domestic adjudication. As explained by the Centre for Housing Rights and Evictions, international instruments can be used to address legal uncertainty if there is a gap in a law, or where there is a presumption that laws should be interpreted, as far as possible, to achieve consistency with international human rights.¹³⁵ Where status and recognition are clear, domestic courts often rely on the provisions directly. For example, in a Kenyan case, the court reiterated that any treaty ratified by Kenya is part of Kenyan law and the court’s decision was based on the Kenyan Constitution, but also on the ICESCR and the African Charter.¹³⁶ This case and further examples are outlined below in Part III.

2.2.3. NATIONAL LEGISLATION

While undoubtedly important, constitutional protections are not sufficient on their own. This has been highlighted by the UN Special Rapporteur on the Right to Food.¹³⁷ According to the Special Rapporteur, constitutional ESC rights provisions often need to be developed further in specific implementing legislation and regulations “that set out in more detail mechanisms for implementation, assign specific

¹²⁷ 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, 23.

¹²⁸ Knuth and Vidar, above n 93, 29.

¹²⁹ C Courtis, ‘Socio-Economic Rights before the Courts in Argentina’ in F Coomans (ed), *Justiciability of Economic and Social Rights: Experiences from Domestic Systems* (2006) 309, 314.

¹³⁰ *Ibid* 315.

¹³¹ Knuth and Vidar, above n 93, 23.

¹³² F Vlemminx, ‘The Netherlands and the ICESCR: Why Didst Thou Promise Such a Beauteous Day?’ in F Coomans (ed), *Justiciability of Economic and Social Rights: Experiences from Domestic System* (2006) 43-65.

¹³³ *Ibid* 45.

¹³⁴ *Ibid* 55, citing judgment by the District Court of The Hague, 6 September 2000, Rawb 2001.

¹³⁵ M Langford and A Nolan, *Litigating Economic, Social and Cultural Rights: Legal Practitioners Dossier* (2006) Geneva: Centre on Housing Rights & Evictions <http://www.equalinrights.org/uploads/tx_wizzresources/COHRE_2006_Litigating_ESCRs_Practitioners_Dossier.pdf> at 1 October 2012, 13.

¹³⁶ *Ibrahim Sangor Osman v Minister of State for Provincial Administration & Internal Security* (2011) eKLR Constitutional Petition No 2 of 2011 <http://www.serisa.org/images/stories/osman_judgment.pdf> at 25 June 2013. See further African Charter on Human and Peoples’ Rights, opened for signature 27 June 1981, 1520 UNTS 217, art 16 (entered into force 21 October 1981).

¹³⁷ O De Schutter, *A Rights Revolution: Implementing the Right to Food in Latin America and the Caribbean: Briefing Note 6* (2012) Special Rapporteur on The Right to Food <http://www.ohchr.org/Documents/Issues/Food/SRRTF%20BNO6_LAC_en.pdf> at 25 June 2013, 4.

responsibilities, and provide for redress mechanisms in the event of violations.”¹³⁸ Ordinary legislation is often more precise than constitutional provisions.¹³⁹

The right to food in national legislation can range from adopting an overarching framework law, or including it in sectoral legislation (such as legislation on agriculture, fisheries, or environment). This may be through ordinary statutory law or in secondary or delegated legislation or regulations. The FAO Guide on Legislating for the Right to Food contains a comprehensive overview of available approaches to developing national legislation.¹⁴⁰

2.2.3.1. FRAMEWORK LEGISLATION

Framework legislation recognizing the right to food usually sets out state obligations to respect, protect and fulfill the right to food, as well as determining measures to progressively realize the right and provide avenues for redress.¹⁴¹ Such legislation defines the scope and content of the right, and can include obligations for other actors, including the private sector, as well as the state.¹⁴²

A number of countries have introduced framework legislation based on the right to food or food security, including Brazil, Guatemala, Ecuador, Argentina, Bolivia, and Nicaragua. Others are in the process of adopting such legislation, including Mozambique, Uganda and Malawi.¹⁴³

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 the FAO as follows:

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 for the population.
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.¹⁴⁴

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.¹⁴⁵

2.2.3.2. SECTOR-SPECIFIC LEGISLATION

Instead of framework legislation, some countries have introduced explicit references to the right to food in legislation regulating specific sectors (i.e. agricultural sector laws) such as Mali's 2006 *Loi d'orientation agricole* (Agricultural Policy Act) or Mexico's *Ley General de Desarrollo Social* (Social Development Law). Mali's Agricultural Policy Act explicitly refers to the right to food, food security and food sovereignty.¹⁴⁶ Food sovereignty is defined as “the right of a State to define and implement an independent food and agriculture policy guaranteeing sustainable agriculture based on local production and the accountability of producers who dispose of the appropriate resources to that effect, notably land, water, credit and markets.”¹⁴⁷ While sector-specific legislation cannot be invoked in the same manner as constitutional law, its provisions can be invoked to compel government authorities to adopt measures for realizing the right to food.¹⁴⁸

2.3. BRINGING CLAIMS ASSERTING THE RIGHT TO FOOD

In addition to needing a legal basis to bring a right to food claim, there must be procedural mechanisms that allow individuals or groups to petition the courts to obtain redress for violations of the right. In the language of human rights, ensuring effective recourse for a person who alleges a rights violation is often referred to as *the right to an effective remedy*. Article 8 of the Universal Declaration states that “[e]veryone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him [or her] by the constitution or by law.”¹⁴⁹ The CESCR's General Comment No. 9 makes clear that “appropriate means of redress, or remedies, must be available to any aggrieved individual or group, and appropriate means of ensuring governmental accountability must be put in place.”¹⁵⁰

¹³⁸ Ibid.

¹³⁹ F Coomans, ‘Some Introductory Remarks on the Justiciability of Economic Social and Cultural Rights in a Comparative Constitutional Context’ in F Coomans (ed), *Justiciability of Economic and Social Rights: Experiences from Domestic Systems* (2006) 7, 8.

¹⁴⁰ FAO, *Methodological Toolbox*, above n 35.

¹⁴¹ See *ibid* 53-65.

¹⁴² For example, the Indonesia Food Act N. 7 of 1996 (revised in 2012) which was drafted with the support of the FAO, includes provisions related to food quality and nutrition, food production and processing and sets out institutional responsibilities. FAO, *The Right to Food in Practice: Implementation at the National Level* (2006) 15-16.

¹⁴³ De Schutter, *Briefing Note 05*, above n 102, 9.

¹⁴⁴ 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.

¹⁴⁵ Ibid.

¹⁴⁶ 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* 37.

¹⁴⁷ Ibid.

¹⁴⁸ Ibid.

¹⁴⁹ Universal Declaration, above n 16, art 8.

¹⁵⁰ ICESCR, above n 17.

For those pursuing right to food litigation, it is critical to identify available legal mechanisms and choose the appropriate venue for bringing the claim. This section explores judicial mechanisms that provide concrete possibilities for challenging legal instruments, policies or conduct that lead to violations of the right to food. In countries without effective mechanisms for claiming rights in court, non-judicial avenues are clearly important and will also be briefly discussed. Judicial procedures that allow for ESC rights to be invoked before regional courts will also be mentioned, in addition to quasi-judicial mechanisms available at the regional and international levels.

2.3.1. PROCEDURAL ASPECTS OF LITIGATING THE RIGHT TO FOOD

It is beyond the scope of the study to give a detailed examination of all the ways rights can be claimed in different countries, given the marked differences between legal systems and constitutional traditions. However, it is widely acknowledged that the absence or presence of certain procedures has a significant impact on litigating ESC rights.¹⁵¹ In this regard, a range of procedural issues that present challenges and opportunities for ESC rights litigation in a selection of legal systems can be identified. The following questions are examples of such issues.

2.3.1.1. WHAT KINDS OF CLAIMS CAN BE HEARD AND BY WHAT COURTS?

In many legal systems, constitutional review is a key avenue for claiming and adjudicating human rights. In such claims, judges assess the legality and legitimacy of state action in relation to fundamental rights contained in constitutional texts. Constitutional review can take several different forms and varies greatly from country to country.¹⁵² Constitutional review can be 'abstract' or 'concrete.' Through abstract review procedures, political institutions (i.e. executives or parliamentary minorities) challenge the constitutionality of given laws and request the constitutional court to perform a conformity assessment.¹⁵³ This kind of review is not linked to a specific case or grievance. 'Concrete review,' on the other hand, applies to existing legal cases and factual situations. In many countries, ordinary judges may, in the course of litigation, refer questions to the constitutional court, asking whether or not a given law, judgment or administrative act is constitutional.¹⁵⁴

The form of review which allows individuals - and in certain cases groups - to bring claims in court directly is the 'constitutional complaint.' In different forms, individuals or groups may go before the constitutional court or other courts to claim a violation of their constitutionally protected human rights.¹⁵⁵ Some systems require that all judicial appeals be exhausted before a claim can be filed with the constitutional court.¹⁵⁶ However, in certain countries, such as Hungary, anyone may petition the constitutional court directly.¹⁵⁷

In some countries, only the constitutional court (often the highest court in the system) can hear a constitutional complaint, while in other countries lower courts can hear such claims, subject to final review by the constitutional court. In South Africa, for example, the High Courts and Supreme Court of Appeal can hear constitutional complaints based on the Bill of Rights, although there are also matters over which the Constitutional Court has exclusive jurisdiction.¹⁵⁸

If the legal basis for the right is found in ordinary domestic legislation (as outlined in the previous section), this could also be used to bring claims in ordinary courts. Finally, procedures for reviewing the acts of the government ('administrative review procedures') could be an avenue for invoking aspects of the right to food in administrative courts.

2.3.1.2. WHO CAN BRING A CLAIM AND ON WHOSE BEHALF?

Legal standing, or the ability to bring a case before the courts, is the gateway for accessing judicial mechanisms.¹⁵⁹

As mentioned above, abstract review can usually only be brought by a limited number of political actors. In some countries, however, a wider range of actors can initiate this procedure, such as trade unions or other organizations,¹⁶⁰ and in some cases even individuals.¹⁶¹ In countries that allow judicial referrals to the constitutional court during litigation, these procedures are initiated by judges.

Standing rules clearly have considerable impact on the accessibility of constitutional complaints by individuals or groups. Some systems are characterized by generous standing rules. Under the South African Constitution, for example, different categories of individuals and groups may approach the court to claim a violation of a right contained in the Bill of Rights.¹⁶² This includes, for example, anyone acting on behalf of another person who cannot act in their own name, anyone

¹⁵¹ R Gargarella et al, *Courts and Social Transformation in New Democracies - An Institutional Voice for the Poor?* (2006) 265.

¹⁵² For an overview see M Rosenfield and A Sajo (eds), *Oxford Handbook of Comparative Constitutional Law* (2012). See also Golay, *The Right to Food and Access to Justice*, above n 40, 50.

¹⁵³ J Kokott and M Kaspar, 'Ensuring Constitutional Efficacy' in M Rosenfield and A Sajo (eds), *Oxford Handbook of Comparative Constitutional Law* (2012) 808 and A Stone Sweet, 'Constitutional Courts' in M Rosenfield and A Sajo (eds), *Oxford Handbook of Comparative Constitutional Law* (2012) 823.

¹⁵⁴ Stone Sweet, above n 153, 823.

¹⁵⁵ Countries that allow constitutional complaints include Germany, Poland, India, South Africa, Spain, Mexico, and Colombia. See Kokott and Kaspar, above n 153, 811.

¹⁵⁶ *Ibid* 812.

¹⁵⁷ Stone Sweet, above n 153, 824.

¹⁵⁸ S Liebenberg, 'South Africa - Adjudicating Social Rights Under a Transformative Constitution' in M Langford (ed), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (2008) 81.

¹⁵⁹ 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.

¹⁶⁰ For example in Poland.

¹⁶¹ For example in Hungary.

¹⁶² Constitution of the Republic of South Africa, above n 81, s 38.

acting as a member of, or in the interest of, a group or class of persons, anyone acting in the public interest and any association acting in the interest of its members.¹⁶³

In many systems, however, narrow standing rules are a major obstacle to bringing constitutional litigation relating to ESC rights.¹⁶⁴ An example is where procedural rules provide that only direct victims can bring claims. As such, civil society organizations may be prevented from taking a direct role in litigation or engaging in judicial proceedings on behalf or in support of persons living in poverty and other vulnerable groups who may lack the resources or capacity to do so themselves.¹⁶⁵ For example, in Switzerland, individual petitions can be filed before the Federal Supreme Court in cases of violations of fundamental rights. However, only individuals who have been direct victims of violations and who are acting in their personal interest can bring a claim.¹⁶⁶

A related issue is whether individuals facing common complaints can bring a collective claim. Some jurisdictions have procedures that allow class actions, where all victims of a violation may file a single claim together. In some systems, individuals may file a claim on behalf of a larger group, and those not wishing to join may remove themselves from the action.¹⁶⁷ Other systems provide that courts can hear complaints in the ‘public interest.’ The claimant is not required to be a victim or represent all victims, but can file the claim on the ground that he or she represents the collective or public interest.¹⁶⁸ Concrete examples will be discussed in section 2.3.3 below.

2.3.1.3. WHAT ARE THE EFFECTS OF A JUDGMENT?

Another important issue relates to the effects of a judgment, including who is bound by the judgment. The collective nature of many ESC rights claims means that for a judgment to have practical consequences, remedies ought to extend beyond the interests of the parties to legal proceedings. This may happen, where, for example the judgment establishes a precedent, as is the case in common law systems. It may also occur, for example, where it is determined in the judgment itself that the decision of a particular case will apply to all people concerned, whether or not they participated in the proceedings.¹⁶⁹

Yet, in many systems, this may not be possible. For example, in Switzerland, only individual remedies to direct victims acting in their personal interest can be awarded for violations of fundamental rights.¹⁷⁰ One commentator points out how collective litigation mechanisms where remedies are extended beyond the litigants can ensure that rights become meaningful for larger groups, even in cases where those whose rights are being violated are not aware of the violation (or the rights).¹⁷¹

Such considerations will in part determine whether the outcome of a case has wide-ranging effects on the right under scrutiny.

2.3.1.4. THE FORMAL REQUIREMENTS TO SUBMIT A CLAIM

The simplicity or complexity of formal requirements for submitting a claim are also very important. For instance, most countries require formal writs or petitions to initiate proceedings.

Other important factors include whether legal representation is required to file a claim; costs associated with filing the claim; and whether the parties are required to provide all the evidence or whether the judges themselves undertake investigations.

2.3.2. SELECTED 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.¹⁷² 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. The rights protected by *amparo* procedures are generally enshrined in the constitution or considered to have constitutional status, such as those contained in relevant international treaties. However, there are marked differences among *amparo* procedures in different countries, and not all systems allow for claims based on ESC rights.¹⁷³

A distinguishing feature of certain *amparo* procedures is that they are simple with few procedural formalities. For example, *tutela* actions in Colombia can be filed before any judge and the petition need present only the basic facts of the case, without specific formal prerequisites.¹⁷⁴ In Colombia, the complaint can be filed without the aid of a lawyer. A further example of a simplified *amparo* procedure is Costa Rica, where filing a claim has been described as so straightforward that cases have even been brought by children challenging

¹⁶³ Ibid.

¹⁶⁴ Sepulveda, *Improving Access to Justice*, above n 159, 23.

¹⁶⁵ Ibid.

¹⁶⁶ See Golay, *The Right to Food and Access to Justice*, above n 40.

¹⁶⁷ Langford and Nolan, *Litigating Economic, Social and Cultural Rights*, above n 135.

¹⁶⁸ Ibid.

¹⁶⁹ See C Fairstein, ‘Positive Remedies: The Argentinean Experience’ in J Squires, M Langford and B Thiele (eds), *Road to A Remedy: Current*

Issues in the Litigation of Economic, Social and Cultural Rights (2005) 139, 147.

¹⁷⁰ See Golay, *The Right to Food and Access to Justice*, above n 40, 49.

¹⁷¹ Sepulveda, *Improving Access to Justice*, above n 159, 23.

¹⁷² See Golay, *The Right to Food and Access to Justice*, above n 40, 52.

¹⁷³ See, A.M. Suarez Franco, *How to Promote Justiciability of the Right to Food in Central America: A Multidimensional Strategic Proposal* (2008).

¹⁷⁴ Uprimny, *The Experience*, above n 123, 360.

educational decisions by school directors.¹⁷⁵ Another fundamental aspect of *amparo* proceedings is that cases are usually decided within a short period. For example, the Colombian Constitution provides that *tutela* complaints must be ruled on within 10 days.¹⁷⁶

As to legal standing, certain Latin American systems authorize persons other than the parties or their representatives to file *amparo* complaints and grant standing to civil society or other bodies, such as national human rights institutions and public defenders. As will be discussed below, in section 2.3.3.1, in Argentina, the *defensor del pueblo de la nación* (ombudsperson) has standing to file *amparo* complaints, as does the Colombian ombudsperson in certain cases.¹⁷⁷

Some systems, such as Argentina and Brazil, allow for collective complaints to be filed. In Argentina, the *collective amparo* procedure stems from the constitution and 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.¹⁷⁸ In Brazil, a similar procedure allowing defense of collective interests is the *ação civil pública* (public civil action). Such an action can be initiated in cases concerning environmental rights, consumer rights or any other 'collective interest.'¹⁷⁹ A public civil action 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 NGOs.¹⁸⁰

In some systems, courts are authorized, normally by the constitution, legislation, or judicial practice, to receive complaints in the 'public interest.' Courts in India, Pakistan, Bangladesh, Sri Lanka and Nepal have developed public interest litigation (PIL) procedures that facilitate both individual and collective claims. In such cases, the applicant does not necessarily have to be a victim or represent all victims, but submits a case on the premise that he or she represents the collective or public interest.

In India, PIL jurisdiction was developed by the courts to reduce barriers identified in the formal legal system as hindering access to justice. Any person can bring a case before the High Court and the Supreme Court on behalf of and for the benefit of an unspecified number of people with a similar grievance.¹⁸¹ Formal requirements are further simplified; a letter or telegram

addressed to the court is sufficient to file the claim. Thus, any person or group can engage the court by simply writing a letter on behalf of others, eliminating formalities such as the requirement of a formal writ petition. These simplifications tackle obstacles relating to burdensome legal formalities, acknowledging that each stage of the legal process is daunting for a claimant without a high degree of legal knowledge and expertise.¹⁸² Court fees are also waived for public interest claims.¹⁸³ However, other South Asian countries which have adopted similar approaches (such as Pakistan¹⁸⁴) have encountered difficulties in handling the flood of litigation triggered by procedural simplification.

In Kenya, legal standing requirements are contained in Article 22 of the Constitution, and include the possibility to bring cases in the public interest. According to Article 22:

- (1) Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.
- (2) In addition to a person acting in their own interest, court proceedings under clause may be instituted by
 - (a) a person acting on behalf of another person who cannot act in their own name;
 - (b) a person acting as a member of, or in the interest of, a group or class of persons;
 - (c) a person acting in the public interest; or
 - (d) an association acting in the interest of one or more of its members.¹⁸⁵

Article 22(3) also specifies that the Chief Justice shall make rules to facilitate procedures, which satisfy the listed criteria, including keeping procedural formalities to a minimum and not charging fees for commencing proceedings, among others.¹⁸⁶

Other mechanisms that allow for persons other than the victims of violations to participate in court proceedings include appointing *amici curiae* (friends of the court),¹⁸⁷ commissioners to check facts, and expert committees to provide technical advice. These practices can be particularly useful when courts are addressing complex and highly technical issues that go beyond basic questions of fact and law that judges are accustomed to.¹⁸⁸ The participation of *amicus curiae* in litigation is, for example, a firmly established practice in South Africa.¹⁸⁹ To be admitted as *amici*, individuals and

¹⁷⁵ See Courtis, Courts and the Legal Enforcement of Economic, Social and Cultural Rights, above n 71.

¹⁷⁶ Uprimny, The Experience, above n 123, 360.

¹⁷⁷ See Sepulveda, Colombia, above n 123, 146.

¹⁷⁸ Constitution of Argentina 1994, art 43, para 2.

¹⁷⁹ See V Burity et al, *Exigibilidade: Mechanisms to Claim the Human Right to Adequate Food in Brazil* (2011) 27.

¹⁸⁰ Ibid citing Law No 7.347 of 1985.

¹⁸¹ See S Muralidhar, 'Judicial Enforcement of Economic and Social Rights: the Indian Scenario' in F Coomans (ed), *Justiciability of Economic and Social Rights: Experiences from Domestic Systems* (2006) 239-240.

¹⁸² Sepulveda, *Improving Access to Justice*, above n 159, 23.

¹⁸³ P Bhagwati and C Dias, 'The Judiciary In India: A Hunger and Thirst for Justice' (2012) 5 NUJS Law Review 171.

¹⁸⁴ See I Byrne and S Hossain, 'Economic and Social Rights Case Law of Bangladesh, Nepal, Pakistan and Sri Lanka' in M Langford (ed), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (2008).

¹⁸⁵ Constitution of the Republic of Kenya, above n 77, s 1.

¹⁸⁶ Ibid sub-ss 22(3)(a)-(e).

¹⁸⁷ To borrow S Gløppen's definition, 'friends of the court' have relevant expertise and are accepted (and in some cases invited by the court) to present argument without being party to the case. See Gløppen, above n 73.

¹⁸⁸ G Mossisa, 'The Role of Experts in the Adjudication of Socio-Economic Rights' (working paper of the Annual Legal Research Network Conference, Groningen, 21-22 October 2010, 20).

¹⁸⁹ See A Sachs, 'The Judicial Enforcement of Socio-Economic Rights: The Grootboom Case' in P Jones and K Stokke (eds), *Democratising*

organizations must show that their interventions will differ from the parties' submissions and be useful for the court.¹⁹⁰ In India, in addition to allowing *amicus curiae* interventions, courts have sought the assistance of commissions and expert bodies to address highly technical questions, and deal with problems related to the establishment of facts or evidence gathering.¹⁹¹

2.3.3. OTHER AVENUES

2.3.3.1. NATIONAL HUMAN RIGHTS INSTITUTIONS (NHRIS)

At the national level, NHRIs are non- or quasi-judicial avenues through which to promote the right to food. NHRIs are state bodies with a constitutional or legislative mandate to protect and promote human rights. Although they are sometimes funded by the state, they operate independently from government.¹⁹² There is no standard model for NHRIs and they have different names, depending on national legal traditions.¹⁹³ They 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 100 NHRIs, 69 of which were accredited by the International Coordinating Committee of National Human Rights Institutions as being in compliance with the Paris Principles.¹⁹⁴ While their specific mandates may vary, the general role of NHRIs is to promote and protect civil, cultural, economic, political, and social rights. The Paris Principles require NHRIs to have as wide-ranging a role as possible, with two key responsibilities: promoting human rights (i.e., creating a national human rights culture through training and public education) and protecting human rights (i.e., helping to identify and investigate human rights violations, and providing a remedy and redress for victims).¹⁹⁵ NHRIs should have a legal mandate to carry out these functions and to issue views, recommendations or even pursue remedies before the courts.¹⁹⁶

The importance of these institutions is being increasingly recognized in the field of ESC rights. Guideline 18 of the FAO Right to Food Guidelines recommends establishing these institutions when they do not exist and including the

promotion and protection of the right to food in their mandates:

States that have as a matter of national law or policy adopted a rights-based approach, and national human rights institutions or ombudspersons, may wish to include the progressive realization of the right to adequate food in the context of national food security in their mandates. States that do not have national human rights institutions or ombudspersons are encouraged to establish them. Human rights institutions should be independent and autonomous from the government, in accordance with the Paris Principles. States should encourage civil society organizations and individuals to contribute to monitoring activities undertaken by national human rights institutions with respect to the progressive realization of the right to adequate food.¹⁹⁷

In some systems, NHRIs can receive complaints. Although their recommendations are usually not legally binding, they are often entrusted with the task of following up on their recommendations.¹⁹⁸

Development: The Politics of Socio-Economic Rights in South Africa (2005) 131.

¹⁹⁰ See S Liebenberg, 'Adjudicating Social Rights under a Transformative Constitution' in M Langford (ed), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (2008) 80, citing Rules of the Constitutional Court of South Africa, rule 10.

¹⁹¹ S Muralidhar, 'The Expectations and Challenges of Judicial Enforcement of Social Rights' in M Langford (ed), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (2008).

¹⁹² OHCHR, *National Human Rights Institutions: History, Principles, Roles and Responsibilities*, Professional Training Series No 4 (Rev.1) (2010). Also see OHCHR, *Fact Sheet No 19: National Institutions for the Promotion and Protection of Human Rights* (1993) <<http://www.ohchr.org/Documents/Publications/FactSheet19en.pdf>> at 25 June 2013.

¹⁹³ *Ibid* 13.

¹⁹⁴ The status and functioning of NHRIs are addressed by the Paris Principles, developed in 1991 during the first international workshop on National Institutions for the Promotion and Protection of Human Rights. 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).

¹⁹⁵ OHCHR, *National Human Rights Institutions*, above n 192, 21.

¹⁹⁶ *Ibid*.

¹⁹⁷ FAO, *The Right to Food Guidelines, Information Papers and Case Studies*, above n 56.

¹⁹⁸ OHCHR, *National Human Rights Institutions*, above n 192.

THE EXAMPLE OF THE SOUTH AFRICAN HUMAN RIGHTS COMMISSION

South Africa is a particularly instructive example of the importance NHRIs can have in realizing the right to food. 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 fulfillment of human rights.¹⁹⁹ 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.”²⁰⁰ 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.”²⁰¹

In Brazil, several institutions are mandated to monitor, promote and protect the right to food. In a 2010 FAO study, three key mechanisms were identified.²⁰² One is the Standing Commission on the Human Right to Adequate Food, which reviews public policies and programs from a right-to-food standpoint, provides recommendations to the government, and monitors compliance with the recommendations.²⁰³ Another body, established under the National Council for the Defense of the Rights of the Human Person is the Special Commission to Monitor Violations of the Human Right to Adequate Food.²⁰⁴ In addition, an independent National Rapporteur for the Right to Food and Rural Land has a similar mandate to that of the United Nations Special Rapporteur for the Right to Food.²⁰⁵ The Rapporteur carries out field missions in the states of Brazil and can receive individual or collective complaints for violations and recommend remedies.²⁰⁶ These investigations may provide a basis for litigation (see Part III). Following the investigations, the Rapporteur, in partnership with public prosecutors, may convene public hearings with the claimants, civil society and the relevant government officials.²⁰⁷

Some NHRIs can initiate litigation based on individual or collective complaints. NHRIs in many Latin American countries, often referred to as public defenders (*defensores del pueblo*) or ombudspersons, are becoming increasingly recognized for their key role in promoting human rights litigation. In Argentina and Colombia, for example, public defenders can file complaints before the courts on behalf of individuals and groups. Some of the cases analyzed in the following section will include claims initiated by such actors.

2.3.3.2. INFORMAL OR CUSTOMARY JUSTICE SYSTEMS

While this study focuses on the formal justice system and formal methods of seeking accountability for violations of the right to food, the existence of legal strategies directed at other informal, e.g. traditional or customary, justice mechanisms must also be mentioned.²⁰⁸ Customary or community justice mechanisms are the cornerstone of dispute resolution in many developing countries, and they are widely used to resolve issues strongly related to the right to food, such as questions relating to ownership of land. In countries where socio-economic and other barriers severely restrict access to formal courts for marginalized groups, the informal system may be the only viable option to obtain redress for certain claims.²⁰⁹ However, engagement with such systems may present a number of challenges, as well. The informal justice systems may reflect structural inequalities, power asymmetries and discriminatory social norms that are dominant in certain societies and may sit uneasily with human rights standards.²¹⁰ Considerable attention has been devoted to exploring activities that may improve the functioning and effectiveness of customary justice systems. These include the use of paralegals, legal literacy training, community mapping of local land rights and rights education campaigns.²¹¹ However, a thorough analysis of informal or customary justice systems exceeds the scope of the study.

2.3.4. REGIONAL AND INTERNATIONAL PROCEDURES

When domestic remedies are unavailable or ineffective, regional or international mechanisms become important

¹⁹⁹ Constitution of the Republic of South Africa, above n 95. 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.

²⁰⁰ *Ibid* s 1. Emphasis added.

²⁰¹ *Ibid* s 184(2)(b).

²⁰² Burity et al, above n 179.

²⁰³ *Ibid* 36-40. The FAO study describes this body’s mandate as follows: “its task is that of receiving and investigating violations of the human right to adequate food and recommending action to correct and remedy such violations. Its objective is to accelerate institutional responses to the extremely serious situations of food and nutrition insecurity in which millions of Brazilian families are living.”

²⁰⁴ *Ibid* 41.

²⁰⁵ See F Valente and N Beghin, *Realization of the Human Right to Adequate Food and the Brazilian Experience: Inputs for Replicability* (2006).

²⁰⁶ FAO, *Right to Food: Lessons Learned in Brazil* (2007) *The Right to Food* < <ftp://ftp.fao.org/docrep/fao/O10/a1331e/a1331e.pdf> > 17.

²⁰⁷ See De Schutter, Briefing Note 01, above n 92.

²⁰⁸ Gloppen, above n 73.

²⁰⁹ For a full discussion see United Nations Special Rapporteur on Extreme Poverty and Human Rights, *Access to Justice by People Living in Poverty* (2012) UN Doc A/67/278.

²¹⁰ 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.

²¹¹ Ubink and McInerney, above n 210.

avenues for seeking accountability. As such, prospective claimants, practitioners and advocates must be fully aware of options at the regional and international levels when seeking redress for violations of the right to food. In the words of one commentator, “strategy-conscious litigation must think about *both* levels from the very beginning”.²¹²

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. This means that complainants must have used all available legal processes in their domestic system and failed to obtain an effective remedy for the violation. The requirement to exhaust domestic remedies is rooted in the principle that a state must have the opportunity to redress an alleged violation within its own domestic legal system before its responsibility can be brought before regional or international bodies. This rule usually does not apply when domestic remedies are unreasonably prolonged or where domestic remedies are known to be ineffective.

2.3.4.1. EUROPEAN REGIONAL MECHANISMS

Within the European regional system, the primary mechanism for addressing violations of ESC rights is the quasi-judicial European Committee of Social Rights, responsible for assessing whether state parties act in conformity with provisions of the European Social Charter.²¹³ Under the collective complaints procedure provided by the charter, there is no direct access for individuals. Only national trade unions and employers’ organizations²¹⁴ and certain officially accredited international NGOs are permitted to lodge complaints with the Committee concerning violations of the Charter.²¹⁵ In addition, national NGOs may lodge complaints if the state concerned makes a declaration accepting the complaints procedure. As of March 2013, 15 out of 47 Council of Europe member states have accepted the collective complaints procedure.²¹⁶ Communications must be based on rights contained in the Charter and the right must have been

*expressly accepted by the state in question*²¹⁷ and comply with certain admissibility requirements.²¹⁸ While the right to food does not appear in the Charter’s text, potential claims may be pursued under closely connected and interdependent rights, such as the right to equitable remuneration, the right to social security, and the right to protection against poverty and social exclusion.²¹⁹

The European Court of Human Rights (European Court) is the regional judicial mechanism that monitors compliance with the European Convention.²²⁰ As the European Convention primarily concerns civil and political rights, the European Court has traditionally decided fewer cases dealing with violations of ESC rights.²²¹ However, the court has often engaged with ESC rights through a broad interpretation of the rights guaranteed by the European Convention. For example, 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 and the right to private and family life.²²² Individuals, NGOs, or a group of individuals can submit complaints (or ‘applications’) directly to the European Court.²²³ Before an application can be considered, however, it must satisfy admissibility requirements, including exhausting domestic remedies and submitting the application within six months from the date on which the final domestic decision was taken.²²⁴

2.3.4.2. THE INTER-AMERICAN SYSTEM

The Inter-American Commission on Human Rights (Inter-American Commission) is the quasi-judicial mechanism system mandated to promote, defend, and monitor human rights in member states of the Organization of American States (OAS) and can receive individual petitions. Under the American Convention, 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.²²⁵ Admissibility criteria include, as above, exhaustion of domestic remedies and the subject of

²¹² Scheinin, above n 127, 25.

²¹³ European Social Charter, above n 26; see also European Committee of Social Rights
<http://www.coe.int/t/dghl/monitoring/socialcharter/ecsr/ecsrdefault_EN.asp> at 25 June 2013.

²¹⁴ European Trade Union Confederation (ETUC), BUSINESSEUROPE (formerly UNICE) and International Organisation of Employers (IOE).

²¹⁵ Further information available at:
<www.coe.int/t/dghl/monitoring/socialcharter/OrganisationsEntitled/OrgEntitled_en.asp> at 29 April 2013.

²¹⁶ See
<www.coe.int/t/dghl/monitoring/socialcharter/Presentation/Overview_en.asp> at 25 June 2013.

²¹⁷ Additional Protocol to the European Social Charter Providing for a System of Collective Complaints, opened for signature 9 November 1995, CETS No 158, art 4 (entered into force 1 July 1998).

²¹⁸ For example, the complaint must be sufficiently substantiated. However, no exhaustion of domestic remedies is required and there is no time limit for submitting communications.

²¹⁹ Golay, The Right to Food and Access to Justice, above n 40, 38.

²²⁰ See the European Court of Human Rights
<<http://www.echr.coe.int/Pages/home.aspx?p=home>>.

²²¹ Examples of ESC rights protected under the European Convention include the protection of property and the right to education of Protocol No 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature 20 May 1952, 213 UNTS 262, arts 1 and 2 (entered into force 18 May 1954).

²²² For an overview of relevant case law see L Clements and A Simmons, ‘European Court of Human Rights’ in M Langford (ed), *Social Rights Jurisprudence* (2009) 409.

²²³ Convention for the Protection of Human Rights and Fundamental Freedoms, above n 22, art 34. See also Langford and Nolan, *Litigating Economic, Social and Cultural Rights*, above n 135, 177.

²²⁴ An application will also be declared inadmissible, for example, if it is anonymous; if it is substantially the same as a matter that has already been examined by the European Court or has already been submitted to another international procedure; if it is manifestly ill-founded; or if the applicant has not suffered a significant disadvantage. Convention for the Protection of Human Rights and Fundamental Freedoms, above n 22, art 34. For a comprehensive overview of admissibility criteria see European Court of Human Rights Research Division, *Practical Guide on Admissibility Criteria* (2012)

<http://www.echr.coe.int/Documents/Admissibility_guide_ENG.pdf> at 25 June 2013 .

²²⁵ American Convention on Human Rights, above n 23, art 44.

the petition cannot be pending in another international proceeding.²²⁶ Once a petition is deemed admissible, the Commission will “place itself at the disposal of the parties concerned with a view to reaching a friendly settlement.”²²⁷ If a settlement is not reached, the Commission may deliver its views and recommendations and set a time frame for the state to undertake the recommended remedial measures.²²⁸ It may also refer the case to the Inter-American Court of Human Rights (Inter-American Court), if the member state in question has accepted the court’s jurisdiction. The Inter-American Commission also has jurisdiction to receive petitions grounded in the Protocol of San Salvador. However, with the exception of the right to education and the right to organize and join unions, the ESC rights contained in the instrument (including the right to food) may not be the subject of individual petitions before the Inter-American Commission or the Inter-American Court.²²⁹

The Inter-American Court is the judicial mechanism that adjudicates on compliance with the American Convention.²³⁰ Only states parties and the Inter-American Commission have the right to submit a case to the court, meaning that there is no individual petition procedure.²³¹

2.3.4.3. THE AFRICAN REGIONAL SYSTEM

The African Commission is the quasi-judicial body responsible for promoting and protecting human rights in the African region, and was established under Article 30 of the African Charter.²³² Its mandate and functions include the promotion, protection and interpretation of the rights contained in the African Charter.²³³ 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.²³⁴ As with the other mechanisms examined, before a communication can be considered, it has to comply with a number of admissibility criteria, including

exhaustion of domestic remedies.²³⁵ The African Commission is also responsible for submitting cases to the African Court of Human and Peoples’ Rights (African Court). A number of ESC rights, including the rights to health, work, and education are explicitly enshrined in African Charter. In addition to these explicit rights, as noted in section 2.2.1, the African Commission has acknowledged that there are other ‘implicit’ ESC rights, such as the right to food.

The African Court has been operational since 2006 and was established by the African Union to complement the mandate of the African Commission.²³⁶ The African Court’s jurisdiction extends to all cases submitted to it 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.”²³⁷ As with the Inter-American system, individuals generally do not have direct access to the court: only the African Commission, member states and African intergovernmental organizations can take a case to the court.²³⁸ However, states can make an optional declaration accepting the competence of the court to receive communications from individuals and NGOs with observer status before the African Commission.²³⁹

2.3.4.4. UN TREATY BODIES

The core UN international human rights treaties provide for the creation of oversight bodies to monitor the treaty implementation by the states that have ratified them. These bodies, referred to as ‘treaty bodies,’ oversee state compliance through the analysis of periodic reports submitted by states.²⁴⁰ In addition, some bodies can receive individual or collective complaints, known as ‘communications,’ in cases of violations of the rights contained in the treaties.²⁴¹

In May 2013, the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (OP-ICESCR) entered into force.²⁴² Under the protocol, individuals

²²⁶ For a full list see *ibid* art 46(1).

²²⁷ *Ibid* art 48(1)(f).

²²⁸ *Ibid* art 51.

²²⁹ Protocol of San Salvador, above n 24, art 19(6).

²³⁰ See American Convention on Human Rights, above n 23, ch VIII. See further: <<http://www.corteidh.or.cr/>> at 25 June 2013.

²³¹ *Ibid* art 61.

²³² African Charter on Human and Peoples’ Rights, opened for signature 27 June 1981, 1520 UNTS 217, art 30 (entered into force 21 October 1986).

²³³ *Ibid* art 45.

²³⁴ For additional information on the communications procedure see African Commission Secretariat, Information Sheet No 2: Guidelines for the Submission of Communications <www.achpr.org/files/pages/communications/guidelines/achpr_infosheet_communications_eng.pdf> at 25 June 2013.

²³⁵ For example, communications must not be anonymous, cannot be based exclusively on news from the media, and cannot deal with a matter already settled by another international human rights body. For other criteria see *ibid*.

²³⁶ 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,

OUA/LEG/MIN/AFCHPR/PROT.1 rev.2 (1997), art 2 (entered into force 25 January 2004).

²³⁷ *Ibid* art 3.

²³⁸ *Ibid* art 5(1).

²³⁹ *Ibid* art (6). As of 2012, five states have made such a declaration: Burkina Faso, Ghana, Mali, Malawi and Tanzania. See <<http://www.african-court.org/en/>> at 25 June 2013.

²⁴⁰ OHCHR, Fact Sheet No 30: The United Nations Human Rights Treaty System (2012)

<<http://www2.ohchr.org/english/bodies/docs/OHCHR-FactSheet30.pdf>> at 25 June 2013.

²⁴¹ As of 2013, six UN human rights treaty bodies can receive communications: the Human Rights Committee, the Committee on the Elimination of Discrimination against Women, the Committee on the Elimination of Racial Discrimination, the Committee against Torture, the Committee on the Rights of Persons with Disabilities, and, most recently, the Committee on Economic, Social and Cultural Rights.

²⁴² Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, opened for signature 24 September 2009, UNGA Res 63/117 GAOR 63rd Session Supp 49 vol 1, 329 annex (entered into force 5 May 2013). (OP-ICESCR). For an overview of the OP-ICESCR, see I Biglino and C Golay, The Optional

and groups can submit communications on violations of the rights contained in ICESCR, including Article 11 which explicitly enshrines the right to food. The body entrusted with deciding the complaint is the CESCR.²⁴³ The OP-ICESCR establishes that complaints may be submitted by or on behalf of individuals or groups of individuals under the jurisdiction of a state party to the Optional Protocol.²⁴⁴ Consent is required of individuals or groups of individuals for whom the complaint is submitted, unless the author can justify acting on their behalf without such consent.²⁴⁵ As with other treaty bodies and regional mechanisms, communications must meet admissibility criteria, such as the exhaustion of domestic remedies.²⁴⁶ Like other UN treaty bodies, once it has examined the communication, the CESCR will issue non-binding views and recommendations.²⁴⁷ In addition to the complaints procedure, the OP-ICESCR also establishes an inquiry procedure,²⁴⁸ an inter-state procedure,²⁴⁹ and provides that interim measures may be ordered to avoid irreparable harm to victims of the alleged violation.²⁵⁰

The adoption and entry into force of the OP-ICESCR conveys a powerful message: it reaffirms that at the international level ESC rights are justiciable human rights, and strengthens the principles of indivisibility, interdependence and interrelatedness of all human rights. There is significant potential in promoting the right to food through the individual communications mechanism established by the OP-ICESCR. The decisions of the CESCR will promote greater awareness of the right to food and ESC rights in general and provide persuasive guidance for decisions at the domestic level. It can also encourage actions to be brought, contribute to the development of more effective local remedies, and strengthen international accountability.²⁵¹

Three further avenues of particular relevance to the right to food are those established by the Optional Protocol to the International Covenant on Civil and Political Rights,²⁵² Article 14 of the Convention on the Elimination of All Forms of Racial Discrimination,²⁵³ and the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women.²⁵⁴ Through such complaints procedures,

dimensions of the right to food can be considered on the basis of provisions contained in the ICCPR, CEDAW and CERD.

2.3.4.5. UN SPECIAL PROCEDURES

The UN Special Procedures are a mechanism 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. Their mandates can be thematic, such as the right to food, the right to education, or human rights defenders, or cover all human rights in a specific country.²⁵⁵ 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 2013.²⁵⁶

Protocol to the International Covenant on Economic, Social and Cultural Rights (2013) Geneva Academy of International Humanitarian Law and Human Rights.

²⁴³ OP-ICESCR, above n 242, art 1.

²⁴⁴ *Ibid* art 2.

²⁴⁵ *Ibid*.

²⁴⁶ For an overview of the admissibility criteria, see Biglino and Golay, above n 242, 11-16.

²⁴⁷ OP-ICESCR, above n 242, art 9(1).

²⁴⁸ *Ibid* arts 11 and 12.

²⁴⁹ *Ibid* art 10.

²⁵⁰ *Ibid* art 5.

²⁵¹ M Langford, 'The Optional Protocol to the ICESCR: Perspectives on a New International Complaint and Inquiry Procedure' (2009) 27(1) *Special Issue Nordic Journal of Human Rights*.

²⁵² Optional Protocol to the International Covenant on Civil and Political Rights, opened for signature 19 December 1966, 999 UNTS 302 (entered into force 23 March 1976).

²⁵³ International Convention on the Elimination of All Forms of Racial Discrimination, opened for signature 7 March 1966, 660 UNTS 195 (entered into force 4 January 1969).

²⁵⁴ Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, opened for signature 6 October 1999, 2131 UNTS 83 (entered into force 20 December 2000).

²⁵⁵ 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.

²⁵⁶ 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 22nd Session (9 April 2013).

MANDATE OF THE UN SPECIAL RAPPORTEUR ON THE RIGHT TO FOOD

The mandate of the Special Rapporteur on the Right to Food includes the following:

- (a) To promote the full realization of the right to food and the adoption of measures at the national, regional and international levels for the realization of the right of everyone to adequate food and the fundamental right of everyone to be free from hunger so as to be able fully to develop and maintain their physical and mental capacities;
- (b) To examine ways and means of overcoming existing and emerging obstacles to the realization of the right to food;
- (c) To continue mainstreaming a gender perspective and taking into account an age dimension in the fulfillment of the mandate, considering that women and children are disproportionately affected by hunger, food insecurity and poverty;
- (d) To submit proposals that could help the realization of Millennium Development Goal No. 1 to halve by the year 2015 the proportion of people who suffer from hunger, as well as to realize the right to food, in particular, taking into account the role of international assistance and cooperation in reinforcing national actions to implement sustainable food security policies;
- (e) To present recommendations on possible steps with a view to achieving progressively the full realization of the right to food, including steps to promote the conditions for everyone to be free from hunger and as soon as possible enjoy fully the right to food, taking into account lessons learnt in the implementation of national plans to combat hunger;
- (f) To work in close cooperation with all states, intergovernmental and non-governmental organizations, the Committee on Economic, Social and Cultural Rights, as well as with other relevant actors representing the broadest possible range of interests and experiences, within their respective mandates, to take fully into account the need to promote the effective realization of the right to food for all, including in the ongoing negotiations in different fields;
- (g) To continue participating in and contributing to relevant international conferences and events with the aim of promoting the realization of the right to food.²⁵⁷

Special procedures mandate-holders may intervene with governments and other actors concerning information brought to their attention of alleged human rights violations through communications (in the form of “urgent appeals” or “letters of allegation”).²⁵⁸ While the communications procedure of the special procedures is neither judicial nor quasi-judicial, it can still be an important tool to hold states accountable at the international level, and to influence government action.²⁵⁹ Compared to filing a complaint with a treaty body or a national or regional court, the communications procedure allows for more immediate action.²⁶⁰ The procedure can be initiated irrespective of whether the alleged violations are being considered by a judicial or quasi-judicial body or domestic remedies have been exhausted.²⁶¹ While communications are confidential in their initial phase, all communications sent and replies received are subsequently published in joint communications reports presented regularly to the Human Rights Council.

Right to food advocates may also consider submitting complaints to other UN Special Procedures with related mandates. Depending on the case, 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, for example, may be addressed.²⁶²

²⁵⁷ OHCHR, Special Rapporteur on the Right to Food <<http://www.ohchr.org/EN/issues/food/Pages/FoodIndex.aspx>> at 25 June 2013.

²⁵⁸ 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/Communication.s.aspx>> at 25 June 2013.

²⁵⁹ Golay et al, The Impact of the UN Special Procedures, above n 255, 309.

²⁶⁰ Ibid.

²⁶¹ Ibid.

²⁶² 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>>, <<http://www.ohchr.org/EN/Issues/IPeoples/SRIIndigenousPeoples/Pages/SRIPeoplesIndex.aspx>> and <<http://www.ohchr.org/EN/Issues/Poverty/Pages/SRExtremePovertyIndex.aspx>> at 25 June 2013.

PART III: ADJUDICATION OF THE RIGHT TO FOOD IN PRACTICE

Having considered the legal basis and possible procedures for pursuing right to food claims, it is now important to examine relevant jurisprudence. What does the right to food mean in practice for those who wish to bring a claim before a court? How have courts dealt with different aspects of the right to food? The following section gives examples and outlines strategies for advancing the right to food through litigation in different domestic and regional legal systems, identifying entry points and challenges in litigating the right to food.

3.1. CASE LAW

In some cases, the right to food has been the direct subject of adjudication. However, these cases are less frequent than those in which the right to food has been considered by courts within the context of other rights or in terms of its components.

The approach to litigation examined in this section hinges on what might be called ‘food rights’. It rests on the premise that the right to food itself can be understood as a *bundle of rights* to be realized on different levels,²⁶³ composed of different aspects or components, and that most of them open up possibilities for litigation and adjudication.²⁶⁴ Such an approach is closely linked to the principle that human rights are universal, indivisible, interrelated, interdependent and mutually reinforcing.

Although several cases raise crosscutting issues and may fall into more than one category, the highlighted cases are organized into three categories:

- cases involving failure to ensure the right to be free from hunger;
- cases involving the means to produce or procure food; and
- cases involving the protection of vulnerable, marginalized or disadvantaged groups.

3.1.1. CASES INVOLVING FAILURE TO ENSURE THE RIGHT TO BE FREE FROM HUNGER

Many landmark decisions on ESC rights have resulted from situations of extreme suffering coupled with the state’s unwillingness to fulfill its obligations under existing legislation and policy.²⁶⁵ It has also been pointed out that inaction and inefficiency by the elected branches of government, coupled

with a lack of political will, constitute key obstacles to the realization of the right to food.²⁶⁶ Litigation that tackles long-standing systemic failures combined with state inaction may be more effective, especially if there is clear evidence of political incompetence.²⁶⁷ This can be the case in countries where the government is corrupt or has ceased to function properly, particularly with respect to its duties towards the most poor and marginalized members of society.²⁶⁸

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.²⁶⁹ As outlined in Part I, the realization of the fundamental right to be free from hunger, irrespective of available resources, is understood as the minimum content of the right.²⁷⁰ The examples below illustrate how courts in Argentina, Brazil, Colombia, India, and Nepal have tackled the failure to provide for such ‘minimum essential levels’ of protection with regard to the right to food.

3.1.1.1. ARGENTINA

Through an *amparo* procedure,²⁷¹ the national ombudsman (*defensor del pueblo de la nación*) requested the Supreme Court to order the federal government and the government of the Chaco Province to adopt urgent measures to improve the living conditions of the *Toba* indigenous communities and ensure their access to food and safe drinking water.²⁷² The complaint was founded both on domestic legislation²⁷³ and on regional and international provisions in the American Convention, the American Declaration,²⁷⁴ the Universal Declaration, the ICESCR (including Article 11), and CEDAW.²⁷⁵ Members of the *Toba* community were living in extreme poverty, suffering malnutrition and undernutrition, and their most basic needs, including food, were not being met.²⁷⁶ Eleven deaths were reported as a consequence of what the Argentinean Supreme Court termed a “food and health crisis.”²⁷⁷

The Supreme Court attributed this situation to the government’s inaction and failure to discharge its obligations under national and international law. On this basis, the court ordered that the communities’ right to food, among other

²⁶³ P Alston and K Tomasevski, *The Right to Food* (1984) 207.

²⁶⁴ Courtis, *The Right to Food as a Justiciable Right*, above n 15, 337.

²⁶⁵ Langford, *Domestic Adjudication*, above n 76, 94.

²⁶⁶ Golay, *The Right to Food and Access to Justice*, above n 40, 29.

²⁶⁷ Langford, *Domestic Adjudication*, above n 76, 94.

²⁶⁸ C Gonsalves, ‘Reflections on the Indian Experience’ in J Squires, M Langford and B Thiele (eds), *Road to a Remedy: Current Issues in the Litigation of Economic, Social and Cultural Rights* (2005) 177.

²⁶⁹ Golay, *The Right to Food and Access to Justice*, above n 40, 29.

²⁷⁰ *Defensor del Pueblo*, above n 89.

²⁷¹ See *ibid* s 2.3.3.

²⁷² *Ibid*.

²⁷³ Constitution of Argentina and Constitution of the Chaco Province.

²⁷⁴ American Declaration of the Rights and Duties of Man (10 December 1948) 43 AJIL Supp 133 (1949).

²⁷⁵ See *ibid* s 1.1.

²⁷⁶ *Defensor del Pueblo*, above n 89, para 1.

²⁷⁷ *Ibid*.

rights,²⁷⁸ had to be secured. The Supreme Court therefore ordered the national government and the government of Chaco Province to adopt emergency measures for immediate distribution of food and safe drinking water to the indigenous communities. It also ordered a series of detailed structural measures (discussed in greater detail in section 3.2).

In the judgment, the Supreme Court also addressed the proper role of courts in tackling such issues and issuing specific remedial actions. The court stated that the role of judges as “guardians of constitutional rights” entails ensuring the effectiveness of rights and avoiding their violation, especially in cases of such urgency and gravity, where life and physical integrity are at stake.²⁷⁹ Therefore, the court’s intervention was not improper interference on the part of the judiciary *vis à vis* other branches of the state.²⁸⁰

Such judicial responses to state inaction in Argentina are not unique to this case, and other judgments may provide useful examples. For instance, though dealing with water and health rather than specifically with food, in the case of *Menores Comunidad Paynemil*, an *amparo* action was filed by the Public Defender of Minors of Neuquén (Children’s Public Defender) to protect the health of indigenous children and youths exposed to drinking water contaminated with lead and mercury.²⁸¹ The Neuquén Provincial Court of Appeals ordered that 250 liters of drinking water per person were to be delivered each day to the community until the government resolved the contamination problem. The decision hinged on the acknowledgement that the government, although fully aware of the problem, had not taken reasonable measures to address it.²⁸² The court stated that: “even though the government has performed some activities as to the pollution situation, in fact there has been a failure in adopting timely measures according with the gravity of the problem.”²⁸³

3.1.1.2 BRAZIL

A 2007 case filed against the Municipality of Maceió provides an example of how Brazilian courts have responded to state failure to realize the right to food and react to extreme

poverty.²⁸⁴ According to the UN Special Rapporteur on the Right to Food, this case established an important precedent that can provide inspiration for other actions based on the ESC rights of vulnerable communities.²⁸⁵

The case was sparked by the deplorable living conditions affecting a community of approximately 1,500 families. The National Rapporteur on the Right to Food, Water and Land investigating the community’s situation found that inhabitants of the Orla Lagunar *favelas* in the city of Maceió lived in extreme poverty, used mud and plastic sheeting for housing, lacked basic infrastructure and adequate sanitation, and children suffered from severe malnutrition.²⁸⁶ The main sources of sustenance were reported to be a garbage dump and small-scale fishing.²⁸⁷ The existing social benefits programs had limited coverage in the area, as many of its inhabitants did not possess the necessary documents for eligibility, such as a birth certificate or identity card.²⁸⁸ According to a FAO case study, public programs specifically targeting the community were scarce and existing programs were underfunded.²⁸⁹ The study explained that the community did not qualify as a “high policy priority” area, as it was an urban community within the state capital.²⁹⁰

In response, a number of public prosecutors from the State Public Ministry (Ministério Público Estadual),²⁹¹ filed a public civil action against the municipality requesting the realization of the right to food, education, life and health of children and adolescents living in the area.²⁹² In September 2007, a judgment was issued which the UN Special Rapporteur on the Right to Food called “one of the sharpest defenses of economic, social and cultural rights in Brazilian jurisprudence to date.”²⁹³ The Municipality of Maceió was held responsible for violating the rights to food, health, and education of the children and adolescents of the Orla Lagunar communities. A number of specific remedial actions (discussed below in section 3.2.1) were issued. The judgment’s reasoning was grounded both on domestic provisions protecting the right to food²⁹⁴ and on international human rights treaties.²⁹⁵

²⁷⁸ Other rights that the government authorities were required by the Supreme Court to fulfill were the right to a dignified existence, the right to life, the right to health, the right to potable water, the right to social and medical assistance, education, social inclusion, work and “general wellbeing.” *ibid* para 1.

²⁷⁹ *Ibid* para 3.

²⁸⁰ *Ibid*.

²⁸¹ *Menores Comunidad Paynemil s/acción de amparo (1997) Expte. 311-CA-1997. Sala II.*

²⁸² M Langford, ‘Judging Resource Availability’ 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)* 100.

²⁸³ *Ibid*.

²⁸⁴ Action No 4.830/07, 2ª Vara da Infância e Juventude de Maceió (2007) s II (1-10). Translation by FAO, *Right to Food: Making it Happen Progress and Lessons Learned through Implementation (2011)*.

²⁸⁵ As commented by De Schutter, Briefing Note 01, above n 92, 11.

²⁸⁶ See FAO, *Right to Food Case Study Brazil (2004)* UN Doc. IGWG RTFG /INF 4/APP.1; also see De Schutter, Briefing Note 01, above n .

²⁸⁷ De Schutter, Briefing Note 01, above n 92, 11.

²⁸⁸ FAO, Brazil, above n 286, 56.

²⁸⁹ *Ibid*.

²⁹⁰ *Ibid*.

²⁹¹ Including the Public Ministry for Children and Adolescents (Promotorias de Justiça da Infância e da Juventude da Capital) and the Public Ministry for Labor (Ministério Público do Trabalho em Alagoas).

²⁹² The claim was filed with the District Court for Children and Adolescents (28ª Vara Cível Da Capital - Infância e Juventude, Estado de Alagoas).

²⁹³ De Schutter, Briefing Note 01, above n 92.

²⁹⁴ Amongst other provisions, the right to food of children and adolescents contained in Article 277 of the Brazilian Federal Constitution (as amended by Constitutional Amendment No 65, 2010).

²⁹⁵ Amongst other provisions, the rights of the child protected in Article 19 of the American Convention on Human Rights. The judgment also refers to the Universal Declaration of Human Rights. (See Part III- Conclusions).

3.1.1.3. COLOMBIA

The Colombian Constitutional Court's 2004 decision on internal displacement due to armed conflict is an illustrative case in connection with the right to food.²⁹⁶ The case combined over 100 *tutela* actions²⁹⁷ by 1150 internally displaced families against municipal and departmental administrations. Many of the families were made up of women head of households, elderly persons and minors, as well as indigenous persons.²⁹⁸ As with the cases described above, these families lived in situations of extreme vulnerability in relation to access to food, healthcare, education, and housing. In its judgment, the court cited a study on the nutritional situation of the displaced population which revealed that 23% of the displaced children under six years were below minimum nutritional standards and suffered from health problems associated with inadequate nutrition.²⁹⁹ This situation had lasted several years and the families had unsuccessfully sought aid (including food assistance) from state agencies responsible for assisting displaced persons. Moreover, most claimants stated they had not received adequate guidance and instructions to access existing programs and benefits.³⁰⁰ When confronted, local government entities responded that they could not provide the necessary assistance due to scarce resources.³⁰¹

In its judgment, the court highlighted that the situation was not attributable to a single government entity.³⁰² Rather, it occurred from a series of structural, systemic failures: while the state had a public policy on displacement in place, implementation was insufficient and the responsible authorities had not taken the necessary steps to address the situation,³⁰³ there was no consistent information on the number of displaced persons and their situations, and the budget set aside for the issue was inadequate.³⁰⁴ This situation was deemed an *unconstitutional state of affairs*.³⁰⁵ This refers to circumstances in which "there are systematic violations of several constitutional rights that affect a number of people [and] the violation of these rights cannot be attributed to one state authority, but are due to structural deficiencies."³⁰⁶

The conditions of vulnerability, coupled with the systemic failures described above, led to the finding of several human rights violations, including the right to life, the right to an essential existential minimum, and the right to special protection for elderly persons, women, and children.³⁰⁷ Significantly, the court based its decision on constitutional provisions, interpreted against the backdrop of obligations set out in the ICESCR.³⁰⁸ To assist with the interpretation of ICESCR obligations, the court expressly drew on several CESCR General Comments.³⁰⁹ The court required the authorities to develop a plan within two months to ensure the necessary resource allocation to programs targeted at displaced persons. The specific remedies will be discussed in greater detail below.

3.1.1.4. 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*.³¹⁰ The case came before the Indian Supreme Court and concerned recurrent famines and starvation deaths in drought-affected regions of the country, including the state of Rajasthan.³¹¹

In 2001, following the third consecutive year of drought 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. The petitioners argued that the right to life under Article 21 of the Constitution includes the right to food, as recognized in the court's jurisprudence,³¹² which in turn entails a state obligation to provide food to people in drought-affected areas who cannot purchase or produce it themselves.³¹³ In practical terms, the People's Union for Civil Liberties sought enforcement of existing food distribution schemes and policies and of legislation that provided for the release of grain stocks in times of famine.³¹⁴ The petition noted that the government's failure to address hunger and starvation was particularly serious in light of surplus grain supplies which remained unused and

²⁹⁶ Acción de tutela instaurada por Abel Antonio Jaramillo y otros contra la Red de Solidaridad Social y otros, Sentencia T-025/2004 (2004).

²⁹⁷ See *ibid* section 2.3.2.

²⁹⁸ See R Arango Rivadeneira, 'Judicial Protection of Internally Displaced Persons: The Colombian Experience' (2009) The Brookings Institution-University of Bern Project on Internal Displacement, 150.

²⁹⁹ Acción de tutela, above n 296, para 6.

³⁰⁰ *Ibid* para 2.1. Also see Golay, *The Right to Food and Access to Justice*, above n 40, 25.

³⁰¹ Acción de tutela, above n 296, para 2.1.

³⁰² Rivadeneira, above n 298, 207.

³⁰³ *Ibid* 309.

³⁰⁴ See C Rodríguez-Garavito, 'Beyond the Courtroom: The Impact of Judicial Activism on Socioeconomic Rights in Latin America' (2011) 89(7) *Texas Law Review* <<http://www.cesarrodriguez.net/docs/articulos/SER-Impact-TexasLawReview-FinalEdit.pdf>> at 11 October 2013, 2.

³⁰⁵ See Part III, para 7.

³⁰⁶ Sepulveda, Colombia, above n 123.

³⁰⁷ See Golay, *The Right to Food and Access to Justice*, above n 40, 55.

³⁰⁸ *Ibid* 56.

³⁰⁹ Part III, para 8.2. The General Comments cited include General Comment No 3 on the nature of states parties' obligations (above n 49) and United Nations Committee on Economic, Social and Cultural Rights, General Comment No 14: The Right to the Highest Attainable Standards of Health, 11 May 2000, ESCOR [2001] Supp 2, 128. (General Comment No 14).

³¹⁰ *People's Union for Civil Liberties v Union of India* (2003) Writ Petition (Civil) No 196 of 2001 and Interim Order of 2 May 2003.

³¹¹ L Birchfield and J Corsi, 'Between Starvation and Globalization: Realizing the Right to Food in India' (2010) 31 (4) *Michigan Journal of International Law* 691, 697-698. Birchfield and Corsi describe how in 1999 over 70% of villages in Rajasthan state were affected by droughts; how national health surveys reported malnutrition rates of nearly 50% of all children and estimated that almost half of the rural population lived below the poverty line; how by the third year of drought (2000-2001) acute hunger and starvation deaths were being reported in the entire state.

³¹² See Francis Coralie Mullin, discussed above n 117, section 2.2.1.4.

³¹³ *People's Union for Civil Liberties v Union of India*, above n 310, para 50.

³¹⁴ See *ibid* paras 49 and 50.

deteriorated in warehouses due to inadequate storage conditions.³¹⁵

The Supreme Court famously acknowledged that “[p]lenty of food is available, but distribution of the same amongst the very poor and the destitute is scarce and non-existent.”³¹⁶ 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.³¹⁷ It added that “[m]ere schemes without any implementation are of no use” and stressed that “[w]hat is important is that the food must reach the hungry.”³¹⁸ To tackle this situation, pending a final judgment, the Supreme 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. Through interim orders, the court 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.”³¹⁹

3.1.1.5. NEPAL

The Supreme Court of Nepal has also adjudicated the issue of hunger and starvation. While the original constitution does not contain an explicit right to food, the 2007 Interim Constitution of Nepal guarantees the ‘right to food sovereignty.’ The Supreme Court of Nepal has interpreted this right in terms of the right to food and the right to be free from hunger under the ICESCR.³²⁰ Before the Interim Constitution came into force, in *Kumar Basnet v Prime Minister & Ors*, the petitioners filed a writ before the Supreme Court asking for the provision of food to communities facing starvation in several districts.³²¹ The court did not ultimately issue the order sought by the petitioners, although it clearly stated that the protection of life was the responsibility of the government.³²²

In a 2008 case before the Supreme Court, *Prakash Mani Sharma and others on behalf of Forum for Protection of Public Interest (Pro Public) v Government of Nepal*, the petitioners claimed that scarcity of food, inefficiencies in food distribution, and the distribution of rotten food had led to widespread starvation and disease in certain areas of the country.³²³ The petitioners filed a claim to obtain access to food and requested the development of an adequate legal framework, the establishment of infrastructures, storage facilities, and the development of a functioning food distribution system.³²⁴

Pending a final judgment, the Supreme Court issued an interim order, which recognized the fundamental right to a dignified existence, and requested the authorities to immediately supply food in affected areas.³²⁵ In the final judgment delivered in 2010, the court reaffirmed that the right to food, health, housing, education and social security are all basic human rights and the state has the obligation to ensure their realization.³²⁶

3.1.2. CASES INVOLVING THE MEANS TO PRODUCE OR PROCURE FOOD

According to CESCR General Comment No 12, the right to food requires that each individual, alone or in community with others, has physical and economic access at all times to adequate food or the means of its procurement.³²⁷ Two main components of the normative content of the right to food, described in Part I above, namely *availability* and *accessibility* relate to the ways in which individuals and groups can obtain food. Availability means that food should be available either by production using natural resources (for example through animals or land) or by using those natural resources directly (for example fishing or hunting). Accessibility covers both physical access to food or the necessary means to obtain it, and economic access: individuals and groups must be able to afford food necessary for an adequate diet without compromising other basic needs.³²⁸ The link between human dignity and the right to adequate food was highlighted in the definition of the UN Special Rapporteur on the Right to Food noted in Part I above. According to this definition the right to food must, therefore, be interpreted as not merely the right to feed oneself, but the right to feed oneself *in dignity*.

FAO’s Voluntary Guideline No 8 provides that states should facilitate access to productive resources, in particular land, water, and seeds, as well as services and labor, to ensure that every person has access to food. As explained by the UN Special Rapporteur on the Right to Food, the obligation to respect means that states must not violate the right to food by evicting people from their land, by destroying crops or other food sources, or by preventing them from accessing and controlling the resources essential to their livelihood.³²⁹ The obligation to protect entails that states should not allow third parties to engage in such activities.

The following cases illustrate that when a given resource, such as land or water, is the main source of food availability and

³¹⁵ See *ibid* para 11 and Birchfield and Corsi, *Between Starvation and Globalization*, above n 311, 699.

³¹⁶ *People’s Union for Civil Liberties v Union of India and Others* (2001) Interim Order of 23 July 2001.

³¹⁷ V Gauri and D Brinks, *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World* (2008) 348.

³¹⁸ *People’s Union for Civil Liberties v Union of India and Others* (2003) Interim Order of 2 May 2003.

³¹⁹ 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 26.

³²⁰ See M Langford and A Bhattarai, ‘Constitutional Rights and Social Exclusion in Nepal’ (2011) 18 *International Journal on Minority and Group Rights* 387, 402.

³²¹ *Kumar Basnet v Prime Minister & Ors* (1998) Writ No 3341.

³²² Langford and Bhattarai, above n 320, 402.

³²³ *Prakash Mani Sharma and others on behalf of Forum for Protection of Public Interest (Pro Public) v Government of Nepal*, cited in *ibid* 402-403.

³²⁴ De Schutter, Briefing Note 01, above n 92, 11.

³²⁵ Langford and Bhattarai, above n 320, 403.

³²⁶ See case commentary by B Adhikari, ‘Nepalese Supreme Court Decision on the Right to Food’ in *Right to Food and Nutrition Watch, Claiming Human Rights: The Accountability Challenge* (2011) 94-95.

³²⁷ General Comment No 12, above n 32, para 6.

³²⁸ De Schutter, Briefing Note 05, above n 102, 5.

³²⁹ *Ibid*.

accessibility, where there are few other livelihood opportunities, and where the ability of markets to ensure access to food is limited,³³⁰ courts have intervened to enforce obligations concerning the right to food or aspects thereof.

3.1.2.1 LAND AS A SOURCE OF LIVELIHOOD

Land is instrumental to the right to food: it is protected as a means through which people can produce food for their own consumption, or as a source of income for purchasing food.³³¹ There are 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. In certain cases, the right to food is closely connected to and may complement the protection of the right to property or the relationship of indigenous people with their lands and natural resources.³³²

It has been suggested that in certain contexts there is an emerging 'right to land' that should be protected as a component of the right to food, although such a right is not yet codified in international human rights law.³³³ This emerging right is increasingly being seen as instrumental to the realization of several key human rights, such as the right to food, but also the right to water, housing and health, and the right to an adequate standard of living.³³⁴ However, while the role of land is important for the realization of the right to food, it does not imply the right to be given land. Having said this, the right to food may become highly relevant as a way of expressing land rights and *vice versa*.

In the Malaysian case of *Kerajaan Negeri Johor v Adong bin Kuwau*, members of the Orang Asli indigenous community alleged a violation of their right to life following the Malaysian government's decision to build a dam on their ancestral land.³³⁵ They grounded their claim on provisions of the constitution³³⁶, national legislation (namely the Aboriginal Peoples Act), and common law.³³⁷ In deciding for the claimants, the Malaysian Court of Appeal noted the community's livelihood depended on hunting animals and collecting forest products on their land. The court stated that it

was "settled beyond argument in our jurisdiction that deprivation of livelihood may amount to deprivation of life itself and that state action which produces such a consequence may be impugned on well-established grounds."³³⁸

Judicial protection of land as a source of livelihood can be seen in judgments by the Constitutional Court of Colombia. A significant case involves the community of *Las Pavas*, whose members occupied unused land in 1997 and started farming activities as a means to feed themselves.³³⁹ Over the years, the community had been repeatedly subjected to various forms of intimidation and harassment, including attacks by paramilitary groups and the destruction of crops and food.³⁴⁰ A formal eviction order was issued in 2009 at the request of two private companies, who claimed ownership of the land.³⁴¹ The eviction was enforced notwithstanding a national law prohibiting evictions from lands undergoing the process of ownership formalization, which the *Las Pavas* community had initiated prior to the issuing of the eviction order.³⁴²

Without alternative means of subsistence, the community, through its Peasants' Association,³⁴³ filed a *tutela* action requesting a reversal of the eviction order. The claimants asserted that the eviction entailed, amongst others, violations of their right to live in dignity and their right to work, as well as the right to property.³⁴⁴ In 2011, the Colombian Constitutional Court delivered judgment *T-267*, granting the petition and finding that the actions leading to the eviction of the families of *Las Pavas* were unlawful and violated the right to a dignified existence, amongst others.³⁴⁵ The court further ordered reassessment of the question of legal title to the land, particularly with regard to the recognition of ownership requested by the community.³⁴⁶ As noted by an organization which presented *amicus curiae* briefs in the case, if this reassessment is carried out in a transparent way, the peasant community may eventually be able to secure the means to feed themselves.³⁴⁷

On a connected note, protection of the rights of peasants and other rural workers is increasingly prominent on the international human rights agenda.³⁴⁸ In certain jurisdictions,

³³⁰ L Cotula et al, above n 146, 23.

³³¹ United Nations General Assembly, Access to Land and The Right to Food: Report of the Special Rapporteur on the Right to Food, Olivier De Schutter (2010) UN Doc A/65/281.

³³² C Golay and I Cismas, 'Legal Opinion: The Right to Property from a Human Rights' Perspective' (2010) Rights & Democracy.

³³³ United Nations General Assembly, above n 3331.

³³⁴ S Narula, 'The Global Land Rush: Markets, Rights, and the Politics of Food' (paper presented at the International Conference on Global Land Grabbing II, Cornell University, Ithaca, New York, 17-19 October 2012).

³³⁵ *Kerajaan Negeri Johor & Another versus Adong bin Kuwau & Others* (2002).

³³⁶ In particular art 5 protecting the right to life.

³³⁷ *Kerajaan Negeri Johor*, above n 335.

³³⁸ *Ibid* para 7.

³³⁹ Constitutional Court of Colombia, Sentencia T-267/11, 8 April 2011.

³⁴⁰ *Ibid* s I, para 1.2.

³⁴¹ For a concise summary of facts see FIAN, Action Case Colombia - Peasant Community Success Before Constitutional Court, reported

in original judgment para 1.2

<<http://fian.satzweiss.com/cases/cases2/action-case-colombia-peasant-community-success-before-constitutional-court>> at 25 June 2013. Also see FIAN casework at: <<http://www.fian.org/what-we-do/case-work/columbia-las-pavas/>> at 25 June 2013.

³⁴² Sentencia T-267/11, above n 339, s I, para 1.

³⁴³ Asociación de Campesinos de Buenos Aires (ASOCAB).

³⁴⁴ Sentencia T-267/11, above n 339, s I, para 2.

³⁴⁵ *Ibid* s II, para 4.5.

³⁴⁶ *Ibid* s III.

³⁴⁷ *Ibid*.

³⁴⁸ In September 2012, the Human Rights Council adopted a resolution on the promotion and protection of the human rights of peasants and other people working in rural areas. An intergovernmental Working Group was set up to negotiate, finalize and present a draft declaration to the Human Rights Council. The first session of the Working Group took place on 15-19 July 2013. For more information see <<http://www.ohchr.org/EN/HRBodies/HRC/RuralAreas/Pages/W>

including Colombia, the special relationship farmers and other rural workers enjoy with the land they use for their daily activities, such as the production of food or other agricultural products, has been recognized in Constitutional Court judgments and could provide a potential entry point for litigation.³⁴⁹ Colombian courts have also repeatedly recognized the right of indigenous peoples to their ancestral properties and collective property rights can be invoked directly when an alleged violation is linked “by connection” to another fundamental right, such as the right to life or life in dignity.³⁵⁰

The focus of the cases above have been on land as a source of livelihood either through growing food, hunting or collecting non-timber forest products. Connections have also been drawn between the right to food and the right to housing. The Kenyan High Court considered this issue in *Ibrahim Sangor Osman v Minister of State for Provincial Administration & Internal Security*.³⁵¹ The claim was brought by more than 1,000 people who had been violently evicted from their homes on public land that they had occupied since the 1940s.³⁵² Their homes were subsequently demolished and building materials and household goods were destroyed in the process.³⁵³ The court noted that following the eviction, the claimants were forced to live and sleep in the open without shelter, food, water, sanitation and health care.³⁵⁴ In the court’s words, the claimants were moved to an environment “where there was no single basic necessity of life” and rendered unable to provide for themselves.³⁵⁵

The High Court found violations of the right to life and the right to be free from hunger, as well as right to adequate housing, the right to water and sanitation, the right to physical and mental health, and the right to information, among others.³⁵⁶ The court based its ruling on the Kenyan Constitution, the ICESCR and the African Charter, stressing that any international treaty ratified by Kenya is part of Kenyan law.³⁵⁷ On a similar note, in a case heard by the Supreme Court of Bangladesh, the residents of an informal settlement in Dhaka City successfully challenged its demolition by government authorities and their eviction on the ground that the eviction deprived residents of means of livelihood in violation of the right to life.³⁵⁸

Examples of how the right to food can be interconnected with land issues can also be found in regional systems. In *Centre for*

Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya, the Endorois, a primarily pastoralist indigenous community, were removed from their lands by the Kenyan government to establish a wildlife reserve.³⁵⁹ The African Commission found Kenya to have violated Articles 8, 14, 17, 21 and 22 of the African Charter.³⁶⁰ The commission stressed that, as a consequence of their removal, the community had been “relegated to semi-arid land,” which was not suitable for pastoralism.³⁶¹ Grazing animals, a key means of subsistence for the community, had therefore been made impossible as a result of loss of their land and this threatened the community’s survival.³⁶²

The African Commission case of *SERAC v Nigeria* is a good illustration of a number of connected points discussed above. In this case, the African Commission held that Nigeria’s treatment of the Ogoni indigenous community violated the right to food implicit in the African Charter.³⁶³

In their communication to the African Commission, the NGOs bringing the claim argued that:

[t]he Nigerian government...destroyed and threatened Ogoni food sources through a variety of means. The government...participated in irresponsible oil development that...poisoned much of the soil and water upon which Ogoni farming and fishing depended. In their raids on villages, Nigerian security forces have destroyed crops and killed farm animals. The security forces have created a state of terror and insecurity that...made it impossible for many Ogoni villagers to return to their fields and animals. The destruction of farm lands, rivers, crops and animals...created malnutrition and starvation among certain Ogoni communities.³⁶⁴

It was also claimed that the government directly participated in the contamination of air, water and soil and, by not monitoring and regulating the operations of oil companies on the Ogoni land, it failed to protect the population from the harmful consequences of these operations. The African Commission determined that the Nigerian government 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.³⁶⁵ In addition, the government was found to

GRuralAreasIndex.aspx> at 25 June 2013. Also see J Ziegler et al, *The Fight for the Right to Food: Lessons Learned* (2011) 34–41.

³⁴⁹ See, for example, Colombian Constitutional Court Judgment T-763/12 (2012).

³⁵⁰ See further Colombia Constitutional Court Judgments: T-567/92; T-188/93; T-652/98; T-652/98; SU 510/93; and SU 0039/97.

³⁵¹ *Ibrahim Sangor Osman*, above n 136.

³⁵² *Ibid* 12 and 13.

³⁵³ *Ibid* 8.

³⁵⁴ *Ibid* 13.

³⁵⁵ *Ibid* 19.

³⁵⁶ *Ibid* 20.

³⁵⁷ *Ibid* 11.

³⁵⁸ *Ain o Salish Kendra v Government and Bangladesh & Ors* (1999) 19 BLD 488.

³⁵⁹ *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* (2010) 276/O3.

³⁶⁰ Respectively, freedom of conscience and religion, the right to property, the right to education, the right of peoples to freely dispose of their wealth and natural resources, and the right to economic, social and cultural development. *Ibid* paras 144–298.

³⁶¹ *Ibid* para 286.

³⁶² *Ibid*.

³⁶³ *SERAC and the Center for Economic and Social Rights v Nigeria*, above n 13, para 9.

³⁶⁴ *Ibid*.

³⁶⁵ *Ibid* paras 43–63. The African Commission found Nigeria in violation of arts 2, 4, 14, 16, 18(1), 21 and 24 of the African Charter

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).³⁶⁶ 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.³⁶⁷ 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."³⁶⁸

Several cases within the Inter-American system have affirmed the existence of a state obligation to recognize, demarcate, and protect the right to collective ownership of land, in particular to guarantee indigenous populations access to their own means of subsistence.³⁶⁹ The Inter-American Court has recognized that the relationship of indigenous peoples with their land is "essential for maintaining their cultural structures, and for their ethnic and *material* survival" in a number of cases.³⁷⁰ The Inter-American Court has also made it clear that access to traditional lands is an important means to practice subsistence agriculture and carry out commercial production to ensure economic independence.³⁷¹ For example, in *Mayagna (Sumo) Awas Tingni Community v Nicaragua*, the Inter-American Court held that the right to freely use and enjoy one's property, contained in Article 21 of the American Convention, includes the right of indigenous peoples to the protection of their traditional land and the resources present on the land.³⁷²

In *Sawhoyamaya v Paraguay*, members of an indigenous community lived in deplorable circumstances after losing their access to traditional subsistence activities, primarily as a result of the government's refusal to recognize their ancestral lands.³⁷³ In this case, the Inter-American Court found that Paraguay violated the right to life of the *Sawhoyamaya* indigenous community,³⁷⁴ since the lack of recognition and protection of their lands "forced them to live on a roadside

and deprived them from access to their traditional means of subsistence."³⁷⁵

In *Comunidad Indígena Yakye Axa v Paraguay* the displacement of the members of an indigenous community from its traditional lands had caused "special and grave difficulties to obtain food, primarily because the area where their temporary settlement is located does not have appropriate conditions for cultivation or to practice their traditional subsistence activities, such as hunting, fishing, and gathering."³⁷⁶ The court further noted that the community members suffered from malnutrition and associated conditions such as anemia.³⁷⁷ The Inter-American Court found that Paraguay had violated the right to life and the right to property of the community members.³⁷⁸

3.1.2.2. FISHING AS A SOURCE OF LIVELIHOOD

Fishing continues to be a source of food and income for many communities worldwide. However, many fishing communities in the developing world face serious social and economic vulnerability, particularly small-scale fishers.³⁷⁹ A 2012 report by the UN Special Rapporteur on the Right to Food states that to fully discharge their obligations to realize the right to food, governments should refrain from adopting policies that negatively affect the territories and activities of small-scale, artisanal and indigenous fishers unless their free, prior and informed consent is obtained.³⁸⁰ The Special Rapporteur argues that courts should be empowered to adjudicate claims from small-scale fishers whose livelihoods are threatened.³⁸¹

National courts in different systems have demonstrated a willingness to intervene to protect such sources of livelihood. A number of cases are worth noting. *Kenneth George and Others v Minister of Environmental Affairs & Tourism* (South Africa) concerned a marine resources law which introduced a quota system for fishing.³⁸² As a result, a number of communities lost access to the sea and their means of livelihood. Their nutritional status deteriorated significantly as they faced increasing food insecurity and poverty.³⁸³ With the support of various NGOs, a class action was filed against the Minister of Environmental Affairs and Tourism before the High Court (Cape of Good Hope Provincial Division). Following a lengthy negotiation, the fishing communities and the government reached an out-of-court settlement, which was

³⁶⁶ Ibid paras 64-66.

³⁶⁷ Ibid para 66.

³⁶⁸ Ibid.

³⁶⁹ See further below section 3.1.3.2.

³⁷⁰ *Juan Humberto Sánchez v Honduras* (2003) IACtHR Ser C No 99. Emphasis added.

³⁷¹ See Courtis, *The Right to Food as a Justiciable Right*, above n 15, 317. Also see *Mayagna (Sumo) Awas Tingni Community v Nicaragua* (2001) IACtHR Ser C No 79, para 12.

³⁷² *Mayagna (Sumo) Awas*, above n 371, para 153.

³⁷³ *Sawhoyamaya v Paraguay* (2006) IACtHR Ser C No 146.

³⁷⁴ American Convention on Human Rights, above n 23, art 4.

³⁷⁵ *Sawhoyamaya v Paraguay*, above n 375, para 145(a).

³⁷⁶ *Comunidad Indígena Yakye Axa v Paraguay* (Judgment) (2005) IACtHR Series C No 125, para 164. In the words of a witness quoted in the judgment: "[w]here the Community is located today is a strip of land that the authorities say is a public road and there it is not

possible to cultivate, or to have animals to hunt. The Community has been forbidden to hunt, gather firewood and get water from its lands" (para 164).

³⁷⁷ Ibid paras 50, 97 and 165.

³⁷⁸ Ibid paras 242(1) and (3).

³⁷⁹ D Bojic, 'Fisheries and the Right to Food: Implementing the Right to Food in National Fisheries Legislation' (2009) *FAO Right to Food Studies*.

³⁸⁰ United Nations General Assembly, *Fisheries and The Right to Food: Report of the Special Rapporteur on the Right to Food*, Olivier De Schutter (2012) UN Doc A/67/268, para 39.

³⁸¹ Ibid.

³⁸² Reported in Golay, *The Right to Food and Access to Justice*, above n 40, 54-55.

³⁸³ Ibid.

subsequently formalized, authorizing traditional fishermen to fish and sell their products.³⁸⁴ The High Court also issued an order requiring the assignment of permits to the fishermen and the development of a new legislative and policy framework that would “accommodate traditional fishers more effectively.”³⁸⁵ The court specified that such a framework “should take into account international and national legal obligations and policy directives to accommodate the socio-economic rights of these fishers and to ensure equitable access to marine resources for those fishers.”³⁸⁶

In *West Coast Rock Lobster Association v Minister of Environmental Affairs & Tourism*, a commercial fishermen’s association challenged an agreement between the South African government and small-scale fishermen exempting the latter from legislation prohibiting a number of fishing practices and fishing of certain species, such as lobsters.³⁸⁷ The Western Cape High Court upheld the agreement, accepting the argument that the small-scale fishermen depended on the resources provided by the sea and traditional fishing methods as the only means to feed themselves and their families.³⁸⁸

The Supreme Court of Canada has also issued decisions on the rights of fishing communities relating to the right to food. In *R. v Côte*, the court struck down part of a criminal prosecution against a member of an indigenous community who was charged with fishing without a license in a nature reserve.³⁸⁹ The court held, *inter alia*, that the requirement of a license infringes the “aboriginal right to fish for food” within the lakes and rivers of the territory in question.³⁹⁰

In *Jagannath v Union of India*, the Indian Supreme Court prohibited intensive shrimp raising because of its negative effects on the means of subsistence of traditional fishermen and local farmers.³⁹¹ The Colombian Constitutional Court has also defended artisanal fishermen in connection with their means of subsistence and the right to food in its 2012 judgment *T-348/12*.³⁹²

3.1.2.3. THE ECONOMIC MEANS TO OBTAIN FOOD AND THE ROLE OF THE STATE

Having sufficient means to obtain and afford food is another important aspect in realizing the right to food. As suggested by Courtis, litigation strategies targeted at claiming the “recognition and payment of a basic income (be it a salary, a pension, other kinds of social security or social assistance allowances, alimony, etc.), and the adequacy of this income in terms of its sufficiency to cover food requirements,” can be valid entry points for furthering the right to food through litigation.³⁹³ This strategy again highlights how the right to food is interrelated with other ESC rights, such as the right to work and the right to social security.

An illustration can be seen in the 2012 German Federal Constitutional Court judgment *1 BvL 10/10*.³⁹⁴ In this case, the court ruled on whether cash benefits for asylum seekers provided by the *Asylbewerberleistungsgesetz* (Asylum Seekers Benefit Act) were compatible with the constitution. The court relied on earlier decisions to reiterate that the state is under an obligation to ensure a “dignified minimum existence,” defined as a “comprehensive fundamental rights guarantee” which includes access to food, clothing, household items, housing, heating, hygiene health, and social assistance to persons in need.³⁹⁵ The benefits awarded to the asylum seekers under the law in question were deemed insufficient to guarantee a dignified minimum existence.³⁹⁶ The court also reaffirmed that benefits must be calculated on the basis of “real and actual needs” and thus be measured realistically.³⁹⁷ The court noted that the benefits prescribed under the Asylum Seekers Benefit Act had not increased since 1993, even though the cost of living in Germany had risen by 30% in that time.³⁹⁸ As a result, a number of provisions of the act were declared unconstitutional.³⁹⁹ The court ordered the enactment of new legislation that would ensure a dignified minimum standard of living and introduced a transitional scheme that would provide higher cash benefits in the interim.⁴⁰⁰

Some cases before national courts in developing countries have challenged evictions of vendors from markets because of the harmful impact on their income and subsequent ability to buy food. In Kenya, in the *Toi Market* case, vendors of an

³⁸⁴ Kenneth George and Others v Minister of Environmental Affairs and Tourism (2007) Case No EC 1/2005.

³⁸⁵ *Ibid* para 8.

³⁸⁶ *Ibid*.

³⁸⁷ *West Coast Rock Lobster Association v Minister of Evtl. Affairs & Tourism* 532/09 [2010] ZASCA 114. See commentary in McDermott, above n 116.

³⁸⁸ McDermott, above n 116.

³⁸⁹ *R v Cote* (1996) 3 SCR 139.

³⁹⁰ *Ibid* para 72.

³⁹¹ See C Golay and M Özden, *The Right to Food: A Fundamental Human Right Affirmed by the United Nations and Recognized in Regional Treaties and Numerous National Constitutions* (2009) Europe-Third World Centre (CETIM) <<http://www.cetim.ch/en/documents/Br-alim-A4-ang.pdf>> at 25 June 2013. See also *S Jagannath v Union Of India & Ors* (1996) AIR 1997 SC 811.

³⁹² Colombia Constitutional Court Judgment T-348/12.

³⁹³ Courtis, *The Right to Food as a Justiciable Right*, above n 15, 331.

³⁹⁴ Bundesverfassungsgericht, Urteil vom 18 Juli 2012 - 1 BvL 10/10 , BVerfG, 1 BvL 10/10 vom 18.7.2012, Absatz-Nr. (1 - 140), Germany: Bundesverfassungsgericht, 18 July 2012.

³⁹⁵ *Ibid* s I, para 1(b). The Court also reiterated, in the same paragraph, that a ‘dignified minimum existence’ further “guarantees the possibility to maintain interpersonal relationships and a minimal degree of participation in social, cultural and political life.” Also see Courtis, *The Right to Food as a Justiciable Right*, above n 15.

³⁹⁶ 1 BvL 10/10, above n 380, s I.

³⁹⁷ *Ibid* para 1(f). Based on translation on the German Federal Constitutional Court website: <https://www.bundesverfassungsgericht.de/en/decisions/l20120718_1bvl001010en.html> at 25 June 2013.

³⁹⁸ *Ibid* s III, para 3.

³⁹⁹ Specifically, the court ruled that the provisions were incompatible with the fundamental right to a minimum standard of living, guaranteed by art 1(1) (right to human dignity) in conjunction with art 20(1) (principle of the social welfare state) of the Basic Law.

⁴⁰⁰ 1 BvL 10/10, above n 380, s D(II).

unofficially established market sought an injunction against a threatened eviction from the market.⁴⁰¹ Although the claimants lost the case in court, the litigation mobilized the group so successfully that it deterred the government from carrying out the eviction.⁴⁰²

Similarly, in *Khathang Tema Baitokoli and Another v Maseru City Council and Others*, a group of traders whose income depended on selling food along the city's main road challenged their removal and relocation before the Lesotho Court of Appeal.⁴⁰³ They claimed that the removal had put their 'right to a livelihood' at risk.⁴⁰⁴ The court noted this, quoting a claimant's testimony in the judgment: "I hardly make anything per day because of being out of convenient reach of the public who would buy my goods. As a result of my removal from my long-term place of business I have been unable to meet my basic needs ... I am not able to purchase food and clothing for my dependants [*sic*], and we are slowly starving to death."⁴⁰⁵ The court, however, dismissed the traders' claim on the ground that the right to livelihood did not constitute a judicially enforceable right but was, rather, a directive principle of state policy.⁴⁰⁶

3.1.3. 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.⁴⁰⁷ Social inequality may exclude segments of the population from the political process, which in turn limits their exercise of a wide range of human rights.⁴⁰⁸ In such circumstances, courts may be a valuable mechanism for securing protection of such groups.⁴⁰⁹ In the South African context, a key reason underlying the decision to grant the power of judicial review to courts was to protect the rights of minorities, marginalized communities and others who are unable to claim their rights through the democratic process.⁴¹⁰

Courts may be more likely to intervene to enforce ESC rights when beneficiaries of the enforcement are minorities or vulnerable, marginalized groups, even in cases that involve

positive obligations. In Colombia, the Constitutional Court explicitly stated that:

the negligent abstention by the State, its passivity regarding the marginalized and discriminated groups of society, does not meet its duty to put in place an equitable social order ...[i]t also fails to comply with the constitutional provision proscribing marginalization and discrimination. In these circumstances, the role of the judiciary is not to replace public authorities, which are liable for this abstention. It is rather to order the State to fulfill its duties, where it is clear that failure to act violates a fundamental constitutional right.⁴¹¹

Many of the cases discussed above concern individuals, groups and communities that face particular vulnerabilities and whose ESC rights are at greatest risk. The cases discussed in this section provide examples of how courts address the right to food, or elements thereof, of vulnerable sections of the population.

3.1.3.1. PRISONERS OR DETAINED PERSONS

Prisoners and detainees clearly represent a particularly vulnerable section of the population. For the very reason that they are detained, the state has an unequivocal obligation to ensure that their right to food is fulfilled without regard to the limits of government resources. This obligation is explicitly recognized in some constitutions, such as the Constitution of South Africa, where the state is obliged to ensure the right to adequate food for every detained person.⁴¹² Courts at the national and regional level, as well as quasi-judicial mechanisms at the international level, have reaffirmed this in a number of cases.

In *Francis Coralie Mullin v Union Territory of Delhi*, the Indian Supreme Court ruled that Article 21 of the Constitution (right to life) requires that a detainee be provided the basic necessities of life, including adequate nutrition, clothing, and shelter.⁴¹³ In Colombia, a large number of *tutela* actions were initiated against prison administrators based on inhumane conditions in prisons, including lack of adequate food.⁴¹⁴ As many of these actions were successful, the court realized that

⁴⁰¹ O Opiata, *Toi Market: How Market Traders Transformed Judicial Fiasco into a Song of Victory* (undated) ESCR-Net <http://www.escr-net.org/sites/default/files/Opiata_-_Case_Studies_from_Kenya_O.pdf> at 25 June 2013.

⁴⁰² As reported in ESCR-Net, DeJusticia and Norwegian Centre for Human Rights, 'Analytical Report of the Enforcement of ESC Rights Judgments' (paper presented at the International Symposium, Bogota, 6-7 May 2010) <http://www.escr-net.org/sites/default/files/Analytical_Report_-_Enforcement_of_Judgments_workshop_May_6-7,_2010_O.pdf> at 25 June 2013.

⁴⁰³ *Khathang Tema Baitokoli and Another v Maseru City Council and Others* (2004) AHRLR 195 (LeCA 2004). The claimants were referred to as "people whom economic need has drawn from rural areas to the capital, seeking to eke out an existence through informal trading." (para 7).

⁴⁰⁴ *Ibid* para 9. It was argued that the right to livelihood was implicit in the right to life, contained in art 5 of the Constitution of Lesotho.

⁴⁰⁵ *Ibid* para 5.

⁴⁰⁶ *Ibid* para 28.

⁴⁰⁷ Langford, *Domestic Adjudication*, above n 76, 97.

⁴⁰⁸ V Abramovich, 'From Massive Violations To Structural Patterns: New Approaches and Classic Tensions in the Inter-American Human Rights System' (2009) 6(11) SUR - International Journal on Human Rights 7.

⁴⁰⁹ Langford, *Domestic Adjudication*, above n 76, 97.

⁴¹⁰ *S v Makwanyane and Another* (CCT3) [1995] ZACC3, para 88.

⁴¹¹ Constitutional Court of Colombia, SU-225/98, 20 May 1998, para 29 cited by Curtis, *Courts and the Legal Enforcement of Economic, Social and Cultural Rights*, above n 71.

⁴¹² Constitution of the Republic of South Africa, above n 95, s 35(2)(e).

⁴¹³ *Francis Coralie Mullin v Administrator*, above n 117.

⁴¹⁴ R Uprimny, 'Should Courts Enforce Social Rights? The Experience of the Colombian Constitutional Court' in F Coomans (ed), *Justiciability of Economic and Social Rights: Experiences from Domestic Systems* (2006) 370.

it constituted a widespread phenomenon that affected all the country's prisons and declared an unconstitutional state of affairs.⁴¹⁵ In Zimbabwe, litigation has challenged overall prison conditions, including lack of access to food and water, leading to physical and mental suffering and harm.⁴¹⁶ The court ordered, among other things, that persons in holding cells should be provided nutritious food at appropriate times and should, on request, be permitted to buy food with their own money.⁴¹⁷

At the regional level, the African Commission has decided similarly in *Civil Liberties Organization v Nigeria*, where deprivation of light, insufficient food and lack of access to medical care constituted violations of Article 5 of the African Charter (prohibition of torture, cruel, inhuman or degrading punishment).⁴¹⁸ At the international level, in *Mukong v Cameroon*, the Human Rights Committee found that the conditions of detention of the applicant, who had been deprived of food for several days, constituted cruel, inhuman, and degrading treatment.⁴¹⁹ In this case the Committee reiterated that there are *minimum requirements* regarding the conditions of detention which should always be observed, regardless of resource constraints.⁴²⁰ Such requirements include the "provision of food of nutritional value adequate for health and strength."⁴²¹

Another aspect of the right to food of detained persons is using food deprivation as a punishment. The High Court of Fiji struck down a punishment imposed by prison authorities of reducing an inmate's food rations.⁴²² The High Court considered the reduction of food rations and the use of food as a means of punishment to be inconsistent with Article 11(1) of the ICESCR.⁴²³ The punishment was held to be incompatible with human dignity, and degrading and inhuman treatment. At the regional level, the European Court of Human Rights made an analogous finding in *Ilaşcu and Others v Moldova and Russia*.⁴²⁴

Additional factors, such as HIV status, can increase the vulnerability of certain detainees to human rights violations. In Zambia, two HIV-positive detainees undergoing anti-retroviral treatment filed a claim against prison authorities before the Lusaka High Court.⁴²⁵ They contended that the lack of

adequate food, poor prison conditions, and the barriers to HIV treatment they experienced while in prison violated their rights under the Constitution of Zambia⁴²⁶ as well as their rights under international law, including the right to food under the ICESCR.⁴²⁷ This strand of litigation relating to the right to food may be a direction for others looking to further the rights of persons living with HIV. As stated by the FAO, the right to adequate food may entail higher nutrition standards for people living with HIV.⁴²⁸

Aside from cases involving detainees, many jurisdictions have demonstrated willingness to enforce the social and economic rights of persons living with HIV.⁴²⁹ This form of protection could potentially be applied by analogy to patients in hospitals. Although not necessarily in 'detention,' patients in hospitals are often in situations where they cannot access food themselves and depend on hospital authorities to provide adequate nutrition. In Argentina, the Buenos Aires Administrative Court ordered that a hospital authority must include a food plan and provide adequate food to a patient receiving cancer treatment in 2005.⁴³⁰

3.1.3.2. INDIGENOUS PEOPLES

Courts in domestic and regional systems have considered the right to food of indigenous peoples in a wide range of cases. Some cases discussed above in section 3.1.1, concerned indigenous peoples, including the case of *Defensor del Pueblo Estado Nacional y otra* on the right to food of indigenous communities in the Argentine Chaco Province.⁴³¹

The role of judges in ensuring certain procedural conditions are met before state authorities or third parties decide to carry out activities entailing the exploitation of natural resources on indigenous lands may be an important tool against interference with the right to food.⁴³² In this regard, a potential entry point for right to food litigation involves the principle of free, prior and informed consent (FPIC) of indigenous peoples to externally imposed policies and activities that directly affect their livelihoods or wellbeing.⁴³³ The principle is recognized in several international instruments, such as the ILO Convention No. 169 and the UN Declaration on Rights of Indigenous Peoples. Article 32 of the declaration provides that "[s]tates

⁴¹⁵ Ibid.

⁴¹⁶ Nancy Kachingwe, Wellington Chibehbhe & Others v Minister of Home Affairs (2005) AHRLR 228 (ZwSC 2005).

⁴¹⁷ Ibid para 1.

⁴¹⁸ *Civil Liberties Organization v Nigeria* (1995) Comm. 101/93, 8thh ACHPR AAR Annex VI (1994-1995), para 27.

⁴¹⁹ *Womah Mukong v Cameroon* (1994) Communication No. 458/1991, UN Doc. CCPR/C/51/D/458/1991.

⁴²⁰ Ibid para 9.3.

⁴²¹ Ibid.

⁴²² *Taito Rarasea v State*, Criminal Appeal No HAA0027 of 2000.

⁴²³ Ibid.

⁴²⁴ *Ilaşcu and Others v Moldova and Russia* (2004) 48787/99.

⁴²⁵ 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.

⁴²⁶ The right to life and the right to be free from inhuman and degrading treatment.

⁴²⁷ Summary of *Mwanza and Another v Attorney General*, above n 425. At the time of the publication of this study, the case was still pending before the Lusaka High Court.

⁴²⁸ FAO, *The Right to Food and HIV/AIDS* (2007).

⁴²⁹ *Sepulveda*, Colombia, above n 123.

⁴³⁰ *González Rayco, Artidoro v GCBA s/amparo* (2005), cited in Courtis, *Socio-Economic Rights before the Courts in Argentina*, above n 129, 337.

⁴³¹ See above section 2.3.2.

⁴³² See Courtis, *The Right to Food as a Justiciable Right*, above n 15.

⁴³³ P Anderson, 'Free, Prior, and Informed Consent in REDD+: Principles and Approaches for Policy and Project Development' RECOFTC – The Center for People and Forests and Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) Bangkok (2011).

shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.⁴³⁴

Cases concerning these issues have been adjudicated in national contexts. For example, 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.⁴³⁵ 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 manner⁴³⁶ and a meeting to discuss the impact of exploration activities had not been convened prior to the granting of the license.⁴³⁷ This case formed a solid precedent for subsequent judgments on the topic.⁴³⁸

At the regional level, many cases before the Inter-American Commission have addressed free, prior and informed consent.⁴³⁹ For example, in *Maya indigenous community of the Toledo District v Belize*, the Inter-American Commission found that Belize had violated the property rights of Maya people by granting logging and mining concessions without their consent and without a proper consultation process.⁴⁴⁰ In the 2012 case of *Pueblo Indígena Kichwa de Sarayaku v Ecuador*, a complaint was brought against Ecuador for allowing an Argentinean company to begin exploration activities within the Sarayaku people's territory without having sought their consent.⁴⁴¹ In referring the case to the Inter-American Court, the Inter-American Commission noted, *inter alia*, that the oil exploitation would have seriously harmed the food security of the members of the community, as the exploitation was planned to take place in areas they used for hunting, fishing and food gathering.⁴⁴² The Inter-American Court concluded

that many rights of the indigenous community members had been violated, including their rights to communal property, consultation and the right to life.⁴⁴³

In the African regional system, in *SERAC v Nigeria* the African Commission noted that "in all their dealing with the Oil Consortiums, the government did not involve the Ogoni communities in the decisions that affected the development of Ogoniland" and held that Nigeria had violated the right of the Ogoni people to freely dispose of its natural wealth and resources by issuing oil concessions on Ogoni lands.⁴⁴⁴

3.1.3.3. CHILDREN

The right to food of children must be given special care, as children often cannot procure or access food without adult assistance. As noted above, some constitutions explicitly recognize the right to food of children. For example, the South African Constitution provides that children have the rights "to basic nutrition, shelter, basic health care services and social services," and their rights are not limited by the availability of resources.⁴⁴⁵ The cases of *People's Union for Civil Liberties v Union of India* and the *Maceió* case in Brazil discussed above addressed aspects of the right to food in relation to children. The Brazilian case specifically hinged on the violation of the rights of children and adolescents living on the Orla Lagunar favelas.⁴⁴⁶

Litigation is being used to combat child malnutrition in Guatemala, which has one of the highest recorded levels of child malnutrition in Latin America.⁴⁴⁷ In 2012, a coalition of 14 civil society organizations linked to the campaign "Guatemala without hunger" (*Guatemala sin Hambre*) engaged in strategic litigation to claim the right to food of children suffering from chronic malnutrition and living in conditions of extreme

⁴³⁴ UN General Assembly, United Nations Declaration on the Rights of Indigenous Peoples: Resolution / Adopted by the General Assembly, 2 October 2007, A/RES/61/295.

⁴³⁵ 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.

⁴³⁶ For example, community leaders were not present at the meetings.

⁴³⁷ Courtis, Notes on the Implementation by Latin American Courts, above n 435, 65-66.

⁴³⁸ Ibid 66. The judgments listed in the article include: T-652/98, 10 November 1998; T-606/01, 7 June 2001; C-418/02, 28 May 2002a; C-891/02, 22 October 2002b; and T-955/03, 17 October 2003.

⁴³⁹ See, for example, *Mayagna (Sumo) Awas Tingni Community v Nicaragua*, above n 371; *Masacre Plan de Sánchez v Guatemala (Reparaciones)* (2004) IACtHR Ser C No 116; *Moiwana Village v Suriname (Judgment)* (2005) IACtHR Series C No 124; *Comunidad Indígena Yakye Axa v Paraguay*, above n 375; and *Saramaka People v Suriname (Judgment)* (2007) IACtHR Series C No 172. Also see F McKay, 'From Sacred Commitment to Justiciable Norms: Indigenous Peoples Rights in the Inter-American System' in M E Salomon et al (eds), *Casting the Net Wider: Human Rights, Development and New Duty Bearers* (2010) 371.

⁴⁴⁰ *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.

⁴⁴¹ *Case of Kichwa Indigenous People of Sarayaku v Ecuador (Judgment)* (2012) IACtHR Series C No 245.

⁴⁴² Ibid para 174.

⁴⁴³ Also see I Biglino, C Golay and I Truscan, 'Economic, Social and Cultural Rights - Droits économiques, sociaux et culturels' (2013) 1(2) *Journal européen des droits de l'homme/ European Journal of Human Rights* 269.

⁴⁴⁴ *SERAC and the Center for Economic and Social Rights v Nigeria*, above n 27, para 58.

⁴⁴⁵ See *ibid* section 2.2.1.

⁴⁴⁶ *Action No 4.830/07*, above n 284, s II(1-10).

⁴⁴⁷ *Center for Economic and Social Rights and Instituto Centroamericano de Estudios Fiscales, Derechos o privilegios? El compromiso fiscal con la salud, educación y la alimentación en Guatemala* (2009). FIAN reports that in 2009, close to 60 percent of indigenous children were malnourished and in certain regions nearly 65 percent of all children were chronically malnourished. FIAN, *The Right to Food of Indigenous Peoples in Latin America* (2012) 9.

poverty.⁴⁴⁸ Five proceedings were initiated under *La Ley de Protección Integral de la Niñez y la Adolescencia* (the Law for the Integral Protection of Children and Adolescents) requesting urgent measures to address acute malnutrition in the Camotán municipality. The claimants argued that the state had not taken any decisive action to combat the problem and that existing policies to tackle malnutrition were insufficient and ineffective.⁴⁴⁹ Detailed evidence of the conditions of malnutrition and the consequences affecting the children in question was presented to the court.

The judgments were delivered in April 2013 by the Child and Adolescence Court of the Zacapa Department which, on the facts, found violations of the right to food, the right to life, the right to housing and the right to an adequate standard of living.⁴⁵⁰ The judges relied on different legal bases contained in the constitution, ordinary legislation,⁴⁵¹ and international treaties ratified by Guatemala.⁴⁵² Specifically with regard to the right to food, the court grounded its reasoning on Article 51 of the constitution, which protects the right to food for children, as well as on Article 11 of the ICESCR and Article 25 of the Universal Declaration.⁴⁵³ To define the right to food and the obligations that stem from it, the court cited CESCR's General Comment 12.⁴⁵⁴ The court ordered a range of measures to provide relief to the claimants, including requesting the Ministry of Agriculture 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.⁴⁵⁵ The content of the order will be discussed further in the section on remedies.

At the regional level, in the *Yakiye Axa* case described above in section 3.1.2.1, the Inter-American Court highlighted the special gravity of the situation of the children who had been displaced.⁴⁵⁶ The court, recalling its existing jurisprudence on the right to life of children, reaffirmed that the state “must play the role of guarantor ... and it must take special measures based on the principle of the best interests of the child.”⁴⁵⁷ The Inter-American Court held that the state had the obligation to provide the children of the community with “the basic conditions to ensure that the situation of vulnerability of their

Community due to lack of territory will not limit their development or destroy their life aspirations.”⁴⁵⁸

3.1.3.4. OTHER VULNERABLE, MARGINALIZED OR DISADVANTAGED GROUPS

The protection of other vulnerable groups such as *refugees, asylum-seekers, stateless persons and undocumented migrants* has also warranted the attention of courts, particularly in developed countries. Courts in Germany and Switzerland, for example, have addressed the problem of undocumented migrants and asylum-seekers whose right to food has been threatened.⁴⁵⁹ In a frequently-cited case, the Swiss Federal Tribunal held that there is an implicit constitutional right to a “minimum level of subsistence” that also applies to foreigners, regardless of their legal status, and that this right can be claimed in court.⁴⁶⁰ In this regard, the state was required to guarantee basic human needs such as food, clothing, and housing, and protect individuals from an undignified existence. Subsequent cases decided by the Federal Tribunal reaffirmed the protection of these minimum conditions. Significantly, the right to these minimum conditions, articulated as the ‘right to assistance when in need,’ was later incorporated in the 1999 Swiss Federal Constitution.⁴⁶¹ Article 12 of the constitution states that “[p]ersons in need and unable to provide for themselves have the right to assistance and care, and to the financial means required for a decent standard of living.”⁴⁶²

3.1.4. OTHER POSSIBLE ENTRY POINTS FOR LITIGATION

3.1.4.1. ADEQUACY, QUALITY AND SAFETY

As outlined in Part I, General Comment No 12 makes clear that food quality and safety are important components of the right to food. The CESCR considered that the core content of the right to adequate food encompasses the availability of food in a quantity and quality sufficient to satisfy the dietary needs of individuals, and free from adverse substances.⁴⁶³ The phrase “free from adverse substances” entails the introduction of food safety requirements and protective measures by both public and private means.⁴⁶⁴ The Office of the High

⁴⁴⁸ OHCHR Guatemala, *Cinco casos de desnutrición crónica en Jocotán, Chiquimula Guatemala* (2012), document on file with author.

⁴⁴⁹ *Ibid.*

⁴⁵⁰ Guatemala, *Juzgado de la niñez y la adolescencia e de Adolescentes en Conflicto con la Ley Penal del Departamento de Zacapa, Carrpeta Judicial No 19003-00638-Of.1ª*, 3 April 2013.

⁴⁵¹ Including the Law for the Integral Protection of Children and Adolescents and the National Law on Food and Nutritional Security (*Ley del Sistema Nacional de Seguridad Alimentaria y Nutricional*).

⁴⁵² Including the Convention on the Rights of the Child, the American Convention, the ICCPR and the Universal Declaration.

⁴⁵³ *Carrpeta Judicial No 19003-00638-Of.1ª*, above n 450.

⁴⁵⁴ *Ibid.*

⁴⁵⁵ *Ibid.*

⁴⁵⁶ *Comunidad Indígena Yakiye Axa v Paraguay*, above n 376, para 172. An expert witness quoted in the judgment described the children's situation as follows: “the Community suffers from parasitism and anemia, and this...can be seen by the naked eye. When one arrives at the Community one sees the children's discolored hair and their

enlarged stomachs.” (para 174). According to another witness: “Many children lose the school year ... because they have no food, no water, especially during drought periods, and because they are ill.” (para 174).

⁴⁵⁷ *Ibid.*

⁴⁵⁸ *Ibid.*

⁴⁵⁹ S Oenema, *Europe Should Have the Leading Role in the Fight Against Hunger* (2011) Right to Food and Nutrition Watch, Claiming Human Rights: The Accountability Challenge <<http://www.icco.nl/nl/linkservid/3A46F75E-B7BE-E8E3-2D5F060C82C9975E/showMeta/O/>> 71.

⁴⁶⁰ *V gegen Einwohnergemeinde X und Regierungsrat des Kantons Bern* (1995) BGE/ATF 121 I 367.

⁴⁶¹ See Golay, *The Right to Food and Access to Justice*, above n 40, 58.

⁴⁶² Federal Constitution of the Swiss Confederation, 18 April 1999, art 10. Translation available at <<http://www.admin.ch/ch/e/rs/1/101.en.pdf>> at 25 June 2013.

⁴⁶³ General Comment No 12, above n 32, para 8.

⁴⁶⁴ *Ibid* para 10.

Commissioner for Human Rights (OHCHR) and FAO note that the obligation to *protect* the right to food includes ensuring that food put on the market is safe and nutritious: states must therefore establish and enforce food quality and safety standards.⁴⁶⁵

Food safety and quality 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. CESCR General Comment No 14 on the right to health defines the right as “an inclusive right extending not only to timely and appropriate health care but also to the underlying determinants of health, such as access to safe and potable water and ... an adequate supply of safe food.”⁴⁶⁶ The committee drew attention to the obligation to protect all individuals under the states parties’ jurisdiction from health hazards deriving from the activities of third parties (especially private actors such as corporations), including the duty to protect consumers from dangerous practices by food manufacturers.

Food-related claims in this remit can, therefore, be litigated via constitutionally protected rights, such as the right to life or, as previously mentioned, the right to health. An example of litigation addressing these issues is *Dr Mohiuddin Farooque v Bangladesh* which came before the Bangladesh Supreme Court.⁴⁶⁷ In this case, Dr Farooque challenged the authorities’ failure to take effective measures to deal with a large consignment of imported milk powder that contained radioactive material. The court found that the contaminated milk powder was a threat to health violating the right to life under the Constitution of Bangladesh. As Article 18 of the constitution requires the state to improve the quality of health and nutrition, the court interpreted the right to life to include the “protection of health and normal longevity of an ordinary human being.”⁴⁶⁸

Quality and safety dimensions of the right to food do not necessarily need the vehicle of constitutional rights to be litigated. They can 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.

Litigation may also be used as a strategy to combat overweight, obesity and non-communicable diseases associated with unhealthy diets. In the United States, lawsuits filed against fast food companies based on consumer protection grounds emerged in the early 2000s.⁴⁶⁹ Many cases relied on consumer protection legislation to challenge unfair and misleading marketing and sales practices.⁴⁷⁰ Similar approaches have also been used in some systems to challenge marketing of unhealthy foods targeted specifically at children. The UN Special Rapporteur on the Right to Food has also raised concerns about advertisements promoting unhealthy foods-high in sugars and fats, and low in nutrients-to children.⁴⁷¹ In this area, even if cases are unsuccessful, litigation may still have an impact, as private companies in the food industry might be swayed to change their conduct to avoid further litigation and a consequent decrease in consumption of their products.⁴⁷² Litigation may also raise public awareness on the issues and disclose important information to the public.⁴⁷³

3.2. WHAT KINDS OF REMEDIES ARE AVAILABLE FOR VIOLATIONS OF THE RIGHT TO FOOD?

The principle that rights are not meaningful unless accompanied by remedies also applies to the adjudication of ESC rights. General Comment No 12 on the Right to Adequate Food states that victims of violations of the right are entitled to adequate reparation, “which may take the form of restitution, compensation, satisfaction, or guarantees of non-repetition.”⁴⁷⁴

At the national level, however, one of the main objections to the justiciability of ESC rights rests on the argument that judges will encounter formidable 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.⁴⁷⁵ Conversely, ESC rights cases may require simple remedies which do not involve significant government expenditure. Yet, it must be acknowledged that determining remedies for violations of ESC rights is not necessarily an easy task. Judges will often need to respond to systemic problems affecting large numbers of people beyond the individual or group who brought the claim.⁴⁷⁶ Practical examples from different national systems will illustrate how judges have been able to formulate such remedies, sometimes in creative and innovative ways.

⁴⁶⁵ OHCHR and FAO, Fact Sheet No 34: The Right to Adequate Food (2010) <www.fao.org/docrep/O16/b358e/b358e.pdf> at 25 June 2013.

⁴⁶⁶ General Comment No 14, above n 309, para 11.

⁴⁶⁷ *Dr Mohiuddin Farooque v Bangladesh*, 48 BLD (HDC) (1996) 438.

⁴⁶⁸ *Ibid.*

⁴⁶⁹ For a discussion of cases see National Research Council, *Legal Strategies in Childhood Obesity Prevention: Workshop Summary* (2011) 52-53.

⁴⁷⁰ *Ibid.*

⁴⁷¹ UNHRC, Report submitted by the Special Rapporteur on the Right to Food, Olivier De Schutter (2011) UN Doc A/HRC/19/59.

⁴⁷² National Research Council, above n 469, 55.

⁴⁷³ *Ibid.*

⁴⁷⁴ General Comment No 12, above n 32, para 32.

⁴⁷⁵ 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.

⁴⁷⁶ *Ibid.*

3.2.1. DOMESTIC EXAMPLES

At the national level, available remedies depend on the facts of the case, as well as the legal, political and social context in which judges operate.⁴⁷⁷ A number of constitutions contain provisions on remedies. For example, the South African Constitution leaves ample discretion to judges, providing that, “[w]hen deciding a constitutional matter within its power, a court ... may make any order that is just and equitable.”⁴⁷⁸ Moreover, when deciding a constitutional matter within its power, courts must declare that any law or conduct that is inconsistent with the constitution is invalid to the extent of its inconsistency.⁴⁷⁹ In Canada, the Charter of Rights and Freedoms provides that “courts of competent jurisdiction can grant whatever remedy is appropriate and just in the circumstances.”⁴⁸⁰ Possible remedies include damages, costs, declarations and injunctions, but judges are also given considerable discretion in determining other forms of appropriate remedies.⁴⁸¹ The Constitution of India provides that the “Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, *quo warranto* and *certiorari*, which may be appropriate for the enforcement of any of the rights conferred by this Part.”⁴⁸² Such systems allow for ample flexibility.

The importance of flexibility and creativity in finding remedies for violations of ESC rights has been underscored on several occasions by the South African Constitutional Court. In *Fose v Minister of Safety and Security*, for example, the court stated that “[p]articularly in a country where so few have the means to enforce their rights through the courts, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated. The courts have a particular responsibility in this regard and are obliged to ‘forge new tools’ and *shape innovative remedies*, if need be, to achieve this goal”.⁴⁸³

REMEDIES FOR VIOLATIONS OF THE RIGHT TO FOOD

The FAO Guide on Legislating for the Right to Food identifies the following remedies among those that can be sought for violations of the right to food:

- > Restitution of the right, e.g. implementing an entitlement, restoring access to means of subsistence, removing unsafe food from the market;
- > Cessation of the violation or guarantees of non-repetition, e.g. stopping logging activity, barring mining in a certain area to prevent further interference with the right to food;
- > Rehabilitation, e.g. carrying out a thorough and effective investigation for establishing liability of state officials or bodies as well as of private actors for acts or omissions that have led to a grave violation of the right to food such as starvation deaths or a death caused by unsafe food; rehabilitation is generally combined with compensation for the damage suffered from the violation of the right;
- > Compensation, in kind or in cash, for the (material and moral) damage caused by the violation of the right to food; e.g. offering alternative land suitable for agriculture in case of an eviction necessary for using the relevant land for another compelling public interest or compensating a loss of harvest due to an unregulated industrial activity; and
- > Ordering of systemic remedies that have as their orientation the mitigation or amelioration of patterns of entrenched rights, violations or the need to reorganize government programs, etc.; e.g. reforming legislation detrimental to right to food such as laws pertaining to oil deregulation or mining, and setting programs for gender equality in order to prospectively redress and prevent future violations.⁴⁸⁴

The following examples provide an overview of remedies issued in the cases discussed in section 2.3 above and other relevant cases. In some cases, courts have used more traditional remedies such as compensation, restitution and declarations, while in others detailed orders have been issued. Overall, courts have combined these different elements in crafting their remedies.

One remedy involves issuing a declaration. Judges ‘declare’ what the law is and may find violations of rights, but a declaration can be loosely worded, thus allowing governments to select the precise means to redress a given situation.⁴⁸⁵ In some systems, ‘delayed declarations of invalidity’ will be issued if legislation is found unconstitutional, giving legislatures the opportunity to amend laws.⁴⁸⁶ In doing so, it is often said that courts engage in a ‘dialogue’ with political or legislative authorities.

An example can be drawn from a case on the right to education in India. In *Unnikrishnan J.P. v State of Andhra*

⁴⁷⁷ Gloppen, above n 73, 16.

⁴⁷⁸ Constitution of the Republic of South Africa, above n 95, s 172(1)(b).

⁴⁷⁹ *Ibid* s 172(1)(a).

⁴⁸⁰ Canadian Charter of Rights and Freedoms, Part I of the Constitution Act 1982, being Schedule B to the Canada Act of 1982 (UK) c 11, art 24(1).

⁴⁸¹ Roach, *The Challenges of Crafting Remedies*, above n 475, 58.

⁴⁸² Constitution of the Republic of India, above n 114, art 32.

⁴⁸³ *Fose v Minister of Safety and Security* (1997) (3) SA 786, para 69. Emphasis added.

⁴⁸⁴ FAO, *Methodological Toolbox*, above n 35.

⁴⁸⁵ See Gloppen, above n 73, 20. Also see K Roach, ‘Crafting Remedies for Violations of Economic, Social and Cultural 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) 113.

⁴⁸⁶ See Roach, *Crafting Remedies for Violations*, above n 485, 112.

Pradesh, the Supreme Court declared that the right to education was implicit in the right to life guaranteed under Article 21 of the constitution and that this means a child has the right to free education up to age 14.⁴⁸⁷ The state responded to this declaration - many years following the date of judgment - by amending the constitution to include the right to education for children between the ages of 6 and 14.⁴⁸⁸ In this regard there have been concerns about the effectiveness of declarations and allowing long delays before governments comply with judgments.⁴⁸⁹ In cases of serious, ongoing systemic problems and when government actors have not been proactive in responding to the judgments, this type of remedy will clearly not be adequate.⁴⁹⁰

Turning to examples, a declaration may state that legislation is incompatible with constitutional provisions. Where the legal system allows it, the court may specifically require the repeal or amendment of the legislation in question. As seen above, in the German Constitutional Court case *1 BvL 10/10*, the provisions of legislation granting benefits to asylum-seekers were deemed insufficient to guarantee a dignified existence and on this ground were declared unconstitutional.⁴⁹¹ The court ordered the legislature to enact new provisions that would ensure a dignified minimum standard of living and developed a transitional arrangement to increase the benefits. The arrangements were applied retroactively and, although the court did not specify a deadline for the enactment of the new law, the legislature was required to act “without undue delay.”⁴⁹²

Another approach used in ESC rights cases is the so-called *reading in* technique in order to modify legislation without striking it down or formally amending it. This remedy has been used, for example, by South African courts to specify the right of permanent residents to access social security benefits.⁴⁹³

The vast majority of cases examined above in Part III involve mandatory orders or mandatory injunctive relief. This form of relief is a prominent feature in the ESC rights arena. Mandatory orders are a stronger remedy that may be sought in cases where governments are inactive or incompetent.⁴⁹⁴ Some courts, such as the Indian Supreme Court and the South African Constitutional Court, have issued highly detailed mandatory orders, sometimes including plans of action and schedules for compliance. Mandatory orders can also be complemented by continued judicial involvement and supervision of the orders’ implementation⁴⁹⁵ and may be issued in conjunction with other remedies.

Examples of this can be found in cases already discussed. For instance, 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.⁴⁹⁶ 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).⁴⁹⁷

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 the affected communities. First, the court set a 60-day deadline for the municipality to extend social services to the residents of the affected communities.⁴⁹⁸ The court also required the municipality to submit proposals for the implementation of a wide range of public policies and actions, including:⁴⁹⁹

- › establishing a multidisciplinary commission to analyze the socio-economic profile of children and adolescents living in the *favelas* within 30 days;
- › ensuring sufficient shelter for children of less than 18 years within 30 days;
- › offering day nurseries for infants of less than 6 years within 30 days;
- › ensuring the enrollment of all children and adolescents at primary school age within 30 days;
- › proposing short, medium and long-term solutions to the community within 90 days;
- › ensure that sufficient resources are allocated to these solutions in the municipality’s budget and prepare a contingency plan if enough resources cannot be found; and
- › expediting the registration of children and adults.

⁴⁸⁷ Unnikrishnan JP v State of Andhra Pradesh (1993) AIR 2178.

⁴⁸⁸ Muralidhar, *Judicial Enforcement*, above n 181, 244.

⁴⁸⁹ Roach, *Crafting Remedies for Violations*, above n 485, 115-116.

⁴⁹⁰ *Little Sisters Book and Art Emporium v Canada* (2000) 2 SCR 1120, paras 258-261 cited in Roach, *The Challenges of Crafting Remedies for Violations*, above n 475.

⁴⁹¹ *1 BvL 10/10*, above n 379.

⁴⁹² *Ibid* para 1 and Part III. Based on translation on the German Federal Constitutional Court website: <https://www.bundesverfassungsgericht.de/en/decisions/lS20120718_1bvl001010en.html> at 25 June 2013.

⁴⁹³ See Nolan et al, above n 86, 17-18.

⁴⁹⁴ Roach, *Crafting Remedies for Violations*, above n 485, 115-116.

⁴⁹⁵ *Ibid* 113. Also see below section 3.2.3.

⁴⁹⁶ *Ibrahim Sangor Osman*, above n 136, 70.

⁴⁹⁷ *Ibid* 20-21.

⁴⁹⁸ Action No 4.830/07, above n 284, 70.

⁴⁹⁹ *Ibid*.

GUATEMALAN COURT TACKLES CHILD MALNUTRITION

In a Guatemalan case concerning child malnutrition, a similarly detailed set of orders was issued by the court in its April 2013 judgment.⁵⁰⁰ Several authorities were requested to carry out a number of specific actions. For example, the Ministry of Agriculture⁵⁰¹ 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;
- > assist the children's families in their agricultural activities by providing the necessary technology and training, to ensure the production of food for the families; and
- > provide the families with a rainwater collection and purification technology to ensure access to safe drinking water.⁵⁰²

The Ministry of Health was also required to take a number of actions relating to the children's physical and mental health, which included "strict monitoring" of the children's nutritional status.⁵⁰³ The Ministry of Social Development was asked to guarantee access by the children's families to social benefits programs and to grants for food purchases⁵⁰⁴ covering not just basic foodstuffs but also food supplements.⁵⁰⁵ 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.⁵⁰⁶ Finally, the court ordered the Guatemalan Secretariat for Food and Nutritional Security⁵⁰⁷ to develop a "Protocol for the enjoyment of the right to food,"⁵⁰⁸ aimed at giving effect to the right to food and avoiding future violations.⁵⁰⁹ The court specified in considerable detail the issues to be tackled in the document and its "minimum content."⁵¹⁰

Some of the above examples can also be referred to as *structural remedies*, whereby courts issue a series of orders to tackle the root causes of structural problems, particularly where there is inaction or resistance by the state.⁵¹¹ Structural remedies can take different forms, some being open-ended and leaving discretion to the state on the precise way to

address the issue in question, other times providing detailed solutions. In the Colombian *tutelas* filed against prison authorities,⁵¹² the court ordered the government to increase public expenditure on prisons in quite some detail.⁵¹³ In a similar vein, the court ordered reallocation of resources to programs for internally displaced persons.⁵¹⁴ The court also requested that authorities develop a plan of action⁵¹⁵ to address the state of emergency for internally displaced persons within two months and proceed with the necessary budgetary allocations within one year.⁵¹⁶ Pending the structural measures, the court ordered the state to provide claimants with immediate food assistance and ensure "the minimum levels of protection of their rights."⁵¹⁷

Forms of interim relief, or interim orders, are significant, as even if a judgment is pending, or if the judgment has been appealed, the public authority in question is required to implement such orders *immediately* or within very strict time frames. The rationale underlying these orders is that the urgent nature of many cases requires immediate action. For example, in the *Chaco Province* case, the Supreme Court of Argentina issued a number of interim orders. The state had to provide detailed information to the court on the measures taken with regard to the protection of the indigenous community residing in the region. The information included data on the indigenous population,⁵¹⁸ the budget set aside for indigenous matters, the status of the implementation of health, nutrition, education, housing and sanitation programs.⁵¹⁹ The government was also required to appear at a public hearing to explain the measures taken to resolve the situation of the indigenous communities.⁵²⁰ The court further ordered measures to ensure urgent relief to the claimants. In this case, safe drinking water and food had to be provided without delay to the indigenous community in the affected region.⁵²¹

The Indian *People's Union for Civil Liberties* case provides one of the most cited examples concerning interim relief. As mentioned above, the court noted that food was available, but its distribution was scarce and malfunctioning, ultimately leading to malnutrition and starvation.⁵²² The court therefore found it necessary to ensure relief for those most in need. This

⁵⁰⁰ Carrpeta Judicial No 19003-00638-Of.1^a, above n 450.

⁵⁰¹ Ministry of Agriculture, Livestock and Food (Ministerio de Agricultura, Ganadería y Alimentación).

⁵⁰² Carrpeta Judicial No 19003-00638-Of.1^a, above n 450, s II paras A-D.

⁵⁰³ Ibid s II paras E-I.

⁵⁰⁴ Original: bolsas de alimentos.

⁵⁰⁵ Carrpeta Judicial No 19003-00638-Of.1^a, above n 450, s II paras A-D and N.

⁵⁰⁶ Ibid s II para K.

⁵⁰⁷ Ibid s II para T.

⁵⁰⁸ Original: Protocolo Para el Ejercicio del Derecho Humano a la Alimentación.

⁵⁰⁹ Ibid s II para T.

⁵¹⁰ Ibid s II para T(a)-(g). Including, but not limited to, mechanisms to ensure the 'exigibility' of the right to food for children and adolescents; inter-institutional mechanisms; administrative measures; disciplinary measures for non-compliance.

⁵¹¹ N Gillespie, 'Charter Remedies: The Structural Injunction' (1989-1990) 11 *Advocates Quarterly* 190.

⁵¹² See above section 3.1.3.1: Prisoners or detained persons.

⁵¹³ Ibid.

⁵¹⁴ Constitutional Court of Colombia, Judgment T-025/04, paras VI and IV(b).

⁵¹⁵ Ibid para IV.

⁵¹⁶ Ibid para IV(b).

⁵¹⁷ Ibid para IV.

⁵¹⁸ Defensor del Pueblo, above n 89, s I(1).

⁵¹⁹ Ibid s I(3-6).

⁵²⁰ Ibid s II. Also see M Martin and J Vivero (eds), *New Challenges to the Right to Food* (2011).

⁵²¹ Defensor del Pueblo, above n 89, s III.

⁵²² PUCL order 2003, *People's Union for Civil Liberties v Union of India* (2001) Writ Petition (Civil) No 196/2001.

relief took the shape of more than one hundred court orders with a very wide reach and a considerable amount of detail. As mentioned above, one order redefined nutrition-related government schemes as constitutionally protected legal entitlements and set out how those schemes had to be implemented.⁵²³ 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.⁵²⁴ Based on the information submitted as evidence, the court also calculated the minimum quantities of food that had to be distributed to each child.⁵²⁵ Various interim orders were made in following years. For example, in 2003, the court ordered, among other measures, that:

- › grain allocation for the *Food for Work* schemes be doubled and financial support for schemes be increased;
- › ration shop licensees must stay open and provide grain to families below the poverty line at the set price;
- › the government should publicize the rights of families below the poverty line to grain to ensure that all eligible families are covered; and
- › all individuals without means of support (older persons, widows, disabled adults) are to be granted a ration card for free grain.⁵²⁶

Beyond their immediate practical significance, these interim orders were essential for defining and giving effect to the right to food in India.⁵²⁷ The Supreme Court of Nepal has developed a similar practice of awarding interim relief and the cited cases from Nepal also involved a series of interim orders pending final judgment.⁵²⁸

3.2.2. REMEDIES AWARDED BY REGIONAL BODIES

The three regional human rights courts are empowered to issue binding remedies. 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.

The Inter-American Court provides an interesting example of remedial options 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.⁵²⁹ In cases involving the land rights of indigenous communities, the court has ordered the development of mechanisms for the delimitation, demarcation, and titling of such communities' traditional territories. For example, in *Mayagna (Sumo) Awas Tingni Community v Nicaragua*, the Inter-American Court ordered Nicaragua to demarcate and title the indigenous community's lands, to abstain from any future conduct that might interfere with the community's interests in the land, and to establish mechanisms under domestic law to secure the land rights of all indigenous communities in Nicaragua.⁵³⁰

The Inter-American Court also uses combined remedies that merge urgent relief and more long-term measures. In *Sawhoyamaya v Paraguay*, the court awarded compensation for material and non-material damages.⁵³¹ The court also required the state to enact legislative, administrative, and other measures to establish a mechanism to claim the restitution of indigenous communities' ancestral lands.⁵³² The court further requested that the state create a community development fund to implement educational, housing, agricultural and health projects.⁵³³ Among the more immediate measures ordered, the court required that the state deliver the basic supplies and services necessary for the community's survival (including food in sufficient quantities and quality and safe drinking water) until the community acquired access to its land.⁵³⁴ In *Comunidad Indígena Yakye Axa v Paraguay* the Inter-American Court ordered a very similar set of remedies.⁵³⁵ In addition, the state of Paraguay was required to conduct a "public act of acknowledgment of its responsibility" within one year of the date of the judgment.⁵³⁶

Another combination of different remedies awarded by the Inter-American Court can be seen in the *Pueblo Indígena Kichwa de Sarayaku* case.⁵³⁷ The court first ordered Ecuador to deactivate or remove the explosives connected to the oil exploration activities, present on Sarayaku land.⁵³⁸ Also, there must be prior, adequate, effective and full consultation with the Sarayaku people on any resource extraction projects envisaged in the future.⁵³⁹ The state was also ordered to conduct training programs on the human rights of indigenous peoples for public officers (including military, police and judicial officials) working with such communities.⁵⁴⁰ Finally, the court ruled that the state should pay compensation for both

⁵²³ See Human Rights Law Network, above n 305.

⁵²⁴ People's Union for Civil Liberties v Union of India and Others (2001) Interim Order of 28 November 2001.

⁵²⁵ *Ibid.* Also see Muralidhar, *Judicial Enforcement*, above n 181, 246.

⁵²⁶ As summarized in S Verma, 'Justiciability of Economic Social and Cultural Rights Relevant Case Law' (paper presented at the International Council on Human Rights Policy Review Meeting, Geneva, 15 March 2005, 34).

⁵²⁷ Birchfield and Corsi, *Between Starvation and Globalization*, above n 311, 691.

⁵²⁸ See above section 3.1.1.5.

⁵²⁹ 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.

⁵³⁰ *Mayagna (Sumo) Awas Tingni Community v Nicaragua*, above n 371, para 173(1)-(9).

⁵³¹ *Sawhoyamaya Indigenous Community of the Enxet People v Paraguay* (2006) IACtHR Series C No 146, para 248(8).

⁵³² *Ibid* para 248(12).

⁵³³ *Ibid* paras 224, 225 and 248(7).

⁵³⁴ *Ibid* paras 230 and 248(9).

⁵³⁵ *Comunidad Indígena Yakye Axa v Paraguay*, above n 376, para 242.

⁵³⁶ *Ibid* para 242(11).

⁵³⁷ *Kichwa Indigenous People of Sarayaku v Ecuador*, above n 441.

⁵³⁸ *Ibid* para 341.

⁵³⁹ *Ibid* para 341(1).

⁵⁴⁰ *Ibid* para 341(5).

material and non-material damages “so that the money may be invested as the Community sees fit, in accordance with its own decision-making mechanisms and institutions, among other things, for the implementation of educational, cultural, food security, health ... development projects or other communal works or projects of collective interest that the Community considers a priority.”⁵⁴¹

In the African system, recommendations provided by the African Commission in *SERAC v Nigeria* show how a regional quasi-judicial body can issue directions on what steps must be taken to remedy human rights violations. To redress the violation of the right to food and other rights of the Ogoni people, the commission called on the Nigerian government to adopt a series of measures, including paying compensation and cleaning up polluted or damaged soil and rivers.⁵⁴² The commission also called for social and environmental impact assessments before future oil projects are considered.⁵⁴³ In addition, the African Commission 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.⁵⁴⁴ For the violations found in the *Endorois* case, the African Commission recommended a combination of remedies involving compensation, restitution, and specific measures. Namely, the government was requested to legally recognize the Endorois community’s legal ownership rights, reconstitute their ancestral lands, provide compensation for their losses, and ensure the Endorois benefit from the royalties and employment opportunities within the game reserve.⁵⁴⁵

3.2.3. ENFORCEMENT AND IMPLEMENTATION OF JUDGMENTS

The final question is what happens after a judgment is delivered or an order is issued. Is the judgment enforced, are orders complied with, and is the decision implemented?⁵⁴⁶ One commentator notes that “[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.”⁵⁴⁷ A comprehensive discussion on the impact of litigation cannot be addressed in this study. However, this final section will provide general insights on implementation and enforcement, seen by some

commentators as one of the fundamental weaknesses of litigation-based strategies.⁵⁴⁸

In a 2003 survey by the Centre for Housing Rights and Evictions (COHRE), 46 lawyers, civil society leaders, judges and community leaders covering 17 countries and 9 international mechanisms were interviewed on ESC-rights litigation.⁵⁴⁹ Virtually all interviewees identified failures to ensure implementation as a pitfall of legal strategies. It has been argued that lack of implementation in part depends on the complexity of the remedies, and that simpler remedies, such as compensation and individual orders, may have a greater chance of being speedily complied with.⁵⁵⁰ Wide-ranging structural and more complex orders may lead to slower implementation.⁵⁵¹ Implementation of remedies also hinges on the political and economic context, the government’s capacity to implement rulings, as well as political will.⁵⁵² Whatever the causes, the majority of interviewees in the COHRE study identified the crucial importance of monitoring by claimants, practitioners and advocates of court orders and judgments. It was also noted that successful monitoring efforts were almost always accompanied by a public or political campaign, or the active involvement of the affected communities.⁵⁵³

In some cases, judges at the national level issue follow-up orders themselves and retain supervisory jurisdiction to ensure remedies are implemented. At the regional level, the Inter-American Court has made increasing use of supervisory jurisdiction, including in the cases discussed above.⁵⁵⁴

National courts such as the South African Constitutional Court, the Indian Supreme Court and the Canadian Supreme Court grant judges supervisory jurisdiction, under which they may require governments to report to the court on the progress of implementation. If necessary, the courts may issue additional remedies to ensure compliance with the judgment or orders.⁵⁵⁵ These methods are usually used when authorities are unwilling or unable to comply with and implement the orders. In a well-known right to health case, the South African Constitutional Court held that “[w]here a breach of any right has taken place, including a socio-economic right, a court is under a duty to ensure effective relief is granted.... Where necessary this may include both issuing a writ of *mandamus* and the exercise of supervisory jurisdiction.”⁵⁵⁶ A similar position is taken by the Indian Supreme Court.

⁵⁴¹ Ibid paras 323 and 341(8).

⁵⁴² *SERAC and the Center for Economic and Social Rights v Nigeria*, above n 27, paras 70-72.

⁵⁴³ Ibid para 71.

⁵⁴⁴ Ibid.

⁵⁴⁵ Ibid recommendation 1, paras (a)-(g).

⁵⁴⁶ See Gloppen, above n 73, 6.

⁵⁴⁷ Ibid.

⁵⁴⁸ V Gauri, *Human Rights-Based Approaches to Development: Concepts, Evidence* (2012).

⁵⁴⁹ Centre on Housing Rights and Evictions, *Litigating Economic, Social and Cultural Rights: Achievements, Challenges and Strategies* (2003).

⁵⁵⁰ Langford, *The Justiciability of Social Rights*, above n 82, 41.

⁵⁵¹ Ibid.

⁵⁵² Gloppen, above n 73, 24.

⁵⁵³ Centre on Housing Rights and Evictions, above n 549, 18.

⁵⁵⁴ See for example *Comunidad Indígena Yakye Axa v Paraguay*, above n 376, para 242(14); *Kichwa Indigenous People of Sarayaku v Ecuador*, above n 441, para 341(11); also see Melish, above n 529, 370.

⁵⁵⁵ Roach, *Crafting Remedies for Violations*, above n 485, 120.

⁵⁵⁶ *Minister of Health and Others v Treatment Action Campaign and Others* (2002) 5 SA 721 (CC).

A further noteworthy development in the Indian courts has been the creation of court-appointed commissions to assist with monitoring compliance with, and implementation of, judgments. In *People's Union for Civil Liberties v Union of India*, the Supreme Court created a commission in one of its interim orders for monitoring the implementation of orders related to the right to food and reporting back to the court.⁵⁵⁷ The judiciary in Nepal has also directly tackled the issue of enforcement of judgments. In 2007, the Supreme Court created a monitoring division to oversee the implementation of its decisions and in 2009 established an Implementation Directorate.⁵⁵⁸

In Colombia, Constitutional Court decision *No T-025 of 2004* involving internally displaced persons was characterized by a series of follow-up measures, which included public hearings and additional orders. More than 80 follow-up decisions were issued between 2004 and 2010 to evaluate government compliance with the judgment.⁵⁵⁹ Implementation also involved cooperation between the court and civil society. The court established a Civil Society Follow-up Commission tasked to monitor public policies on internal displacement; the commission was composed of representatives of IDP organizations, NGOs, and indigenous peoples.⁵⁶⁰ This participatory process has been defined as “the most explicit and systematic case in Latin America of a judicial and civil society strategy to assure the implementation of a structural decision.”⁵⁶¹

Human rights advocates widely acknowledge that litigation is more effective and can have greater impact when it occurs in conjunction with a *broader advocacy strategy*, in particular for

cases involving marginalized groups.⁵⁶² Social mobilization, community organization, awareness and media campaigns, and political lobbying have been identified as crucial ingredients for successful litigation.⁵⁶³ 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.⁵⁶⁴

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.⁵⁶⁵ 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.⁵⁶⁶ 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.⁵⁶⁷ In Kenya, a coalition of advocates, including those acting as *amici curiae* in the case, have come together to monitor the implementation and enforcement of the judgment in the *Ibrahim Sangor Osman* case cited above.⁵⁶⁸

⁵⁵⁷ *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*, above n 311, 726–732.

⁵⁵⁸ Langford and Bhattarai, above n 319, 407.

⁵⁵⁹ For an overview of the follow-up process see C E Reales, 'Design and Implementation of the Orders Issued in Decision T-025 of 2004: An Assessment of the Process' in R Rivadeneira (ed), *Judicial Protection of Internally Displaced Persons: The Colombian Experience* (2009) 49–88.

⁵⁶⁰ See C Rodriguez and D Rodriguez, 'The Colombian Constitutional Court's Response to the Accountability Challenge: The Case of the Displaced Persons' in *Right To Food And Nutrition Watch, Claiming Human Rights: The Accountability Challenge* (2011) 35–36.

⁵⁶¹ *Ibid* 36.

⁵⁶² Langford, *Domestic Adjudication*, above n 76, 108.

⁵⁶³ *Ibid*.

⁵⁶⁴ 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.

⁵⁶⁵ For details see Right to Food Campaign website <<http://www.righttofoodindia.org/index.html>> at 25 June 2013.

⁵⁶⁶ See Birchfield and Corsi, *Between Starvation and Globalization*, above n 311, 727.

⁵⁶⁷ FAO, *Right to Food: Making it Happen*, above n 144.

⁵⁶⁸ See case commentary on the ESCR-Net Case Law Database <<http://www.ESCR-net.org>> at 25 June 2013.

PART IV: 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 which 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 in this regard. However, the lack of explicit constitutional inclusion does not mean that there is no legal basis for such a claim. Other domestic legislative bases should 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 then be able to assert the right to food in the legal system, or have the right asserted on their behalf. The highlighted examples demonstrate how some countries provide procedures that allow individuals who bring a claim before domestic courts to pursue remedies for violations of their rights. 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.⁵⁶⁹

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 strategic entry points for pursuing such a strategy were 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.

Finally, 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. The literature has highlighted that a shortcoming in many legal strategies is insufficient preparation to enforce a decision.⁵⁷⁰ 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 tasks⁵⁷¹ and by building partnerships with other stakeholders in order to garner widespread support for their case.

⁵⁶⁹ Langford, Domestic Adjudication, above n 76, 109.

⁵⁷⁰ Ibid 110.

⁵⁷¹ Ibid.

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