



The Right to Food and Access to Justice:

Examples at the national, regional
and international levels



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Christophe Golay



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RIGHT TO FOOD STUDIES

Right to Food Studies are a series of articles and reports on right to food related issues of contemporary interest in the areas of policy, legislation, agriculture, rural development, biodiversity, environment and natural resource management.

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Right to Food Studies are available at www.fao.org/righttofood. For those without web access, mail or paper copies may be requested from the Right to Food Unit, FAO, Viale delle Terme di Caracalla 00153, Rome, Italy, righttofood@fao.org. Readers are encouraged to send any comments or reactions they may have regarding a Right to Food Study.

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List of Acronyms and Abbreviations

ACHR	American Convention on Human Rights
ACHPR	African Charter on Human and Peoples' Rights
ACHPRCom	African Commission on Human and Peoples' Rights
ACHPRCourt	African Court of Human and Peoples' Rights
ADRDM	American Declaration of the Rights and Duties of Man
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CERD	Committee for the Elimination of Racial Discrimination
ECHR	European Convention on Human Rights
ECHRCourt	European Court of Human Rights
GA	United Nations General Assembly
IACHRCom	Inter-American Commission on Human Rights
IACHRCourt	Inter-American Court of Human Rights
ICJ	International Court of Justice
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social, and Cultural Rights
FAO	United Nations Food and Agriculture Organization
FIAN	Foodfirst Information and Action Network
NGO	Non-Governmental Organization
OAS	Organization of American States
OHCHR	Office of the High Commissioner for Human Rights
SERAC	Social and Economic Rights Action Center
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNICEF	United Nations Children's Fund
WFS	World Food Summit



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Introduction

According to figures from the FAO, there are more than 1 billion undernourished people worldwide, primarily in developing countries.¹ Of that total, 6 million are children who die every year, directly or indirectly, from the consequences of malnutrition – that is, 1 child every 5 seconds.²

To fight against hunger, States undertook two quantifiable commitments. In the 1996 Rome Declaration on World Food Security and the Plan of Action of the World Food Summit (hereinafter WFS), States pledged to halve the *number* of undernourished people by 2015. Four years later, in the United Nations Millennium Declaration, they undertook to halve the proportion of undernourished people by 2015.³

Prior to the global food crisis, experts had already recognized that the goals above would be difficult to achieve.⁴ The number of undernourished people increased every year after 1996, while the corresponding proportion fell only 3% through 2007.⁵ The situation deteriorated further in 2008 and 2009.

Having recognized this failure, States and the FAO, spurred by civil society organizations, sought to reverse the trend registered since 2002. To this end, they have decided to effect a paradigm shift from an anti-hunger approach centered on food security to one based on the *right to food*.⁶

The decision to adopt a new approach was taken at the 2002 WFS. The 179 participating States reaffirmed the right to food and tasked a FAO intergovernmental working group with developing *voluntary guidelines to support the progressive realization of the right to adequate food in the context of national food security* (hereinafter the right to food guidelines) in order to provide practical guidance for achieving the goals established in 1996.⁷

1 FAO, *More people than ever are victims of hunger*, June 2009.

2 FAO, *The State of Food Insecurity in the World 2005*, p. 20.

3 The quantifiable difference between these two commitments is as follows: under the 1996 WFS, the number of undernourished persons in 2015 would stand at 408 million 2015, whereas under the Millennium Declaration in 2015 the total of undernourished individuals would number 591 million. KRACHT, U, “Whose Right to Food? Vulnerable Groups and the Hungry Poor” in EIDE, W. B, KRACHT, U (eds.), 2005, p. 120.

4 General Assembly (GA), *The right to food. Report of the Special Rapporteur on the right to food* (22 August 2007), Doc.U.N. A/62/289, paragraph 2; KRACHT, U, op.cit., p. 120.

5 FAO, *State of Food Insecurity in the World 2008*, p. 6.

6 BARTH EIDE, W, “From Food Security to the Right to Food” in BARTH EIDE, W, KRACHT, U (eds.), 2005, pp. 67-97.

7 FAO, *Declaration of the World Food Summit: five years later*, paragraph 10.

The guidelines were adopted by unanimous consent of the FAO Council in November 2004. As the first effort by governments to define a specific economic, social, and cultural right and recommend measures to ensure its realization,⁸ the universally approved guidelines represent a practical and immediately applicable instrument for combating undernourishment and malnutrition.

A central and controversial question in drafting the right to food guidelines and in the discussions within the United Nations Human Rights Council on the development of an Optional Protocol to the International Covenant on Economic, Social, and Cultural Rights (hereinafter ICESCR) – whose enactment will provide victims of violations of the right to food access to justice at the international level⁹ – was the question of access to justice for victims of violations of the right to food.¹⁰

After arduous negotiation, and notwithstanding the initial resistance of some States, the access to justice was recognized as an essential component of the right to food guidelines.¹¹ Further, in adopting the Optional Protocol unanimously on December 10, 2008¹² – a symbolic date marking the 60th anniversary of the Universal Declaration of Human Rights (UDHR), States also enshrined the principle by which all victims of violations of human rights – civil, political, economic, social, and cultural – are ensured the right of access to justice.

This publication outlines a range of concrete examples to demonstrate that access to justice is possible and useful to protect the victims of violations of the right to food. In the first section, we show that the traditional arguments against the justiciability of the right to food are today outdated. In the second part, we describe the conditions for ensuring that the victims of violations of the right to food have access to justice. We lay out the legal systems in which the access to justice is possible, and address the remaining gaps in other legal systems. Finally, we provide an analysis of current international, regional, and national jurisprudence and assess the impact of the access to justice on the full realization of the right to food.

8 DIOUF, J, “Preface” Right to Food Guidelines.

9 The Optional Protocol to the ICESCR was adopted by unanimous consent of the United Nations General Assembly on 10 December 2008. It will take effect following ratification by 10 States Parties to the ICESCR.

10 GOLAY, C, 2009, pp. 15-19; BORGHI, M, POSTIGLIONE BLOMMESTEIN, L, 2006; FAO, “Justiciability of the right to food,” in FAO, 2006, pp. 71-95; COURTIS, C, 2007.

11 In particular right to food guideline 7.

12 GA, *Optional Protocol to the International Covenant on Economic, Social, and Cultural Rights* (10 December 2008), Doc.U.N. A/RES/63/117.



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Part I. The right to food and its justiciability under international law

The right to food has been enshrined in a number of international instruments, including the ICESCR, and reaffirmed on several occasions by States, from the adoption in 1948 of the UDHR through the 2004 right to food guidelines. In this light, its status as a human right under international law is indisputable.

Despite unanimous adoption of the Optional Protocol to the ICESCR in December 2008, significant resistance persists in respect to ensuring access to justice in cases of violations of the right to food. Although a minority, certain States remain skeptical of the justiciability of economic, social, and cultural rights, including the right to food.¹³

This resistance extends back in time. Beginning in 1948, two arguments were invoked to challenge the justiciability of the right to food. First, it was argued that the right to food and the correlative obligations of States were not clearly formulated, nor precisely defined, precluding, as a consequence, any judicial or quasi-judicial body from determining, in concrete cases submitted for judgment, whether the right to food had in fact been violated.¹⁴ Second, a judicial or quasi-judicial body could not exercise effective oversight of the right to food given its specific *nature*. The right could only be realized progressively, a fact not conducive to judicial oversight, while its realization, even if progressive, would require significant budgetary outlays, which could only be approved by the political branches of government.¹⁵

In the first section, we will demonstrate that these two arguments, which may have had some merit before the right to food and the correlative obligations of States had been clearly defined and when jurisprudence on economic, social, and cultural rights had yet to be established, no longer apply. We will show that the right to food and the correlative

¹³ This is for example the case of the United Kingdom, the United States of America and Switzerland.

¹⁴ A number of States, among them Poland, argued this position during drafting of the Optional Protocol to the ICESCR. As a part of the relevant legal doctrine on this matter, we cite M. J. Dennis and D. P. Stewart who state: “A strong case can be made that further clarification and elucidation of the rights and obligations set forth in the ICESCR are vital to promoting greater respect and to achieving more effective implementation of that Covenant. That type of analysis – which has yet to be done – is nevertheless an essential first step before any of those rights can be said to be justiciable in any meaningful sense”. DENNIS, M.J, STEWART, D.P, 2004, p. 465-466.

¹⁵ This same argument was invoked by a number of States during the negotiations on the Optional Protocol to the ICESCR. DENNIS, M.J, STEWART, D.P, 2006, p. 467.

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obligations of States are clearly set forth in international law (1). We will also show that a judicial or quasi-judicial body is capable of identifying violations of the right to food and ordering all necessary corrective measures without infringing on the competencies of the political branches of national governments (2).



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1. Defining the right to food and the correlative obligations of States

In response to the call to elucidate the content of the 1996 WFS Plan of Action, the right to food and the correlative obligations of States were clearly defined. To give this definition, in 1999, the Committee on Economic, Social, and Cultural Rights adopted General Comment 12 on the right to food, which was broadly founded on the reports of A. Eide, experts meetings, and contributions from civil society.¹⁶ The interpretation provided in the general comment, according to various actors, became the reference frame for the issue.¹⁷ Following adoption, the general comment was supplemented by the work of the Special Rapporteur on the right to food and the adoption of the right to food guidelines, in which States reiterated the definition set out by the Committee on Economic, Social, and Cultural Rights. Below, a definition of the right to food is provided, followed by a discussion of the correlative obligations of States.

1.1. DEFINITION OF THE RIGHT TO FOOD

There are *two components* to the right to food under international law: the *right to adequate food* and the *fundamental right* to be free from hunger.¹⁸ These two elements are enshrined in the two paragraphs of article 11 of the ICESCR.

1.1.1. THE RIGHT TO ADEQUATE FOOD

The Committee on Economic, Social, and Cultural Rights and the first Special Rapporteur on the right to food, J. Ziegler, each set forth a definition of the right to food that encompasses the right to adequate food.

For the Committee:

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

16 Committee on Economic, Social, and Cultural Rights (hereinafter the Committee), *General Comment 12. The right to adequate food (article 11)* (12 May 1999), Doc.U.N. E/C.12/1999/5, paragraph 2.

17 FAO, first section report of the working group on right to food guidelines, Rome, 24-26 March 2003, Updated Synthesis Report of Submissions from Governments and Stakeholders (7 May 2003), Doc.FAO IGWG RTFG 1/2 Rev 1, paragraph 7. FAO, World Food Summit: five years later, Rome, 8-10 June 2002, *The Right to Food: Achievements and Challenges. Report by Mary Robinson, United Nations High Commissioner for Human Rights*, paragraph 13.

18 ALSTON, P, 1984, p. 32.

times to adequate food or means for its procurement. The core content of the right to adequate food implies (...) the availability of food in a quantity and quality sufficient to satisfy the dietary needs of individuals, free from adverse substances, and acceptable within a given culture (and) the accessibility of such food in ways that are sustainable and that do not interfere with the enjoyment of other human rights.¹⁹

For the Special Rapporteur:

The right to food is 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.²⁰

Both definitions are broadly founded on the work of A. Sen and the definition of food security adopted by the participating States in the 1996 WFS Plan of Action.²¹ The Special Rapporteur's definition, however, includes the notion of *human dignity*, a central aspect of any human rights based approach.

The normative framework on the right to adequate food encompasses, therefore, three essential elements: the adequacy and the availability of food, and the permanent access to food with dignity.

Adequate food requires that it be sufficient and adequate in quantity and quality. Overall diets should include a mix of nutrients necessary 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.²² It is also vital that diets contain the necessary micronutrients.²³ Food should also be healthy, free of toxins and contaminants. Lastly, food must be culturally acceptable.

Food should be adequate and available. Food should be made available either directly from the land or other natural resources or through distribution systems capable of moving food to where it is needed.²⁴

Finally, food must be accessible. Every person enjoys the right to have access to adequate and available food, that is, they have the right to « *access such foods in ways that are sustainable and that do not interfere with the enjoyment of other human rights* ».

19 Committee, *General Comment 12*, paragraphs 6-8.

20 Commission, *The right to food. Report by the Special Rapporteur on the right to food, Mr. Jean Ziegler*, (7 February 2001), Doc.U.N. E/CN.4/2001/53, paragraph 14.

21 According to this definition: « *food security means when all people at all times have physical and economic access to sufficient, safe and nutritious foods to meet their dietary needs and food preferences for an active healthy life* ».

22 Committee, *General Comment 12*, paragraph 9.

23 See Right to Food Guideline 10 on nutrition.

24 Committee, *General Comment 12*, paragraphs 8, 12.

The Committee on Economic, Social, and Cultural Rights has distinguished two components connected to the accessibility to food: economic and physical.²⁵

Economic accessibility implies that personal or household financial costs related to the acquisition of food required for an adequate diet should be at a level that do not threaten or compromise the exercise of other human rights (health, housing, education, among others). *Physical accessibility* implies that everyone, including physically vulnerable individuals, such as infants and young children, elderly people, disabled people, the terminally ill, and persons with persistent medical problems, including mentally ill, should be ensured access to adequate food.²⁶

There are multiple means for accessing food, the dynamics of which are complex. To be compatible with human dignity, the right to adequate food must be interpreted as *the right to feed oneself with dignity*.²⁷ Based on this principle, right to food guideline 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, with special emphasis given to the rights of the most vulnerable persons and groups, including women and indigenous populations.

In the 1996 WFS Plan of Action, States recognized that « [e]very country in the world has vulnerable and disadvantaged individuals, households and groups who cannot meet their own needs ». ²⁸ For all of these people, the right to adequate food implies the right to assistance with dignity. Assistance can entail food or financial resources; it is equally as important under non-emergency conditions, to protect the most vulnerable individuals in society, as under emergency situations.²⁹

1.1.2. THE FUNDAMENTAL RIGHT TO BE FREE FROM HUNGER

The right to be free from hunger is enshrined in article 11, paragraph 2, of the ICESCR. It is the only right recognized as fundamental under international law. For some authors, this recognition stems from the primacy conferred to the right to life.³⁰ The right to be free from hunger should therefore be interpreted as the core provision protecting individuals from hunger, defined as the *insufficient* or *inadequate* intake of food and low resistance to diseases leading to death.³¹

25 Committee, *General Comment 12*, paragraph par. 13.

26 Committee, *General Comment 12*, paragraph 8.

27 Council, *Report by the Special Rapporteur on the right to food, Jean Ziegler* (10 January 2008), Doc.U.N. A/HRC/7/5, paragraph 18. Guideline 1.1 of the right to food guidelines provides that States should create the conditions “in which individuals can feed themselves and their families in freedom and dignity.”

28 FAO, *Rome Declaration on World Food Security and the World Food Summit Plan of Action* (13-17 November 1996), paragraph 18 of the Plan of Action.

29 Right to food guidelines 13, 14, 15, and 16 address the support to vulnerable groups, the social safety net, international food aid, and the access to food in natural and human-made disasters. See also FAO, “Food aid and the right to food” in FAO, 2006, pp. 5-24; FAO, “Safety nets and the right to food” in FAO, 2006, pp. 141-154.

30 TOMASEVSKI, K, 1995, p. 229.

31 GOLAY, C, 2009, p. 80; UN Millennium Project, Task Force on Hunger, 2005, p. 2

The right to be free from hunger was established in paragraph 2 of article 11 of the ICESCR. It should be interpreted, in its context, as a sub-norm to paragraph 1 of the same article. For P. Alston, the right to be free from hunger should be understood, consequently, as the minimum content of the right to food.³² Other authors address the hard core or a minimum standard in respect to the right to food. As P. Texier states it is « *the minimum threshold below which one should never, in principle, fall under any circumstances* »³³.

In General Comment 12 on the right to food, the Committee on Economic, Social, and Cultural Rights provides that:

Every 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. (...) Violations of the Covenant occur when a State fails to ensure the satisfaction of, at the very least, the minimum essential level required to be free from hunger.³⁴

The right to be free from hunger, therefore, is 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.*

1.2. DEFINITION OF THE CORRELATIVE OBLIGATIONS OF STATES

The correlative obligations of States, such as the obligation to ensure the right to food, were not defined at the time of the ICESCR's approval. Yet, they have been since then, primarily through the work of A. Eide, the Committee on Economic, Social, and Cultural Rights and the Special Rapporteur on the right to food. In the right to food guidelines, States reiterated the definition applied by the Committee on Economic, Social, and Cultural Rights and offered numerous additional elements to define the pertinent obligations.

In line with the Committee on Economic, Social, and Cultural Rights, below we lay out the *general legal* obligations of States, as prescribed in articles 2 and 3 of the ICESCR, and the *specific legal* obligations of States to respect, protect, and fulfil the corresponding rights.³⁵

1.2.1. THE GENERAL LEGAL OBLIGATIONS OF STATES

In ratifying the ICESCR, States assume the obligations prescribed in articles 2 and 3 of the Covenant, which include the obligation to ensure the right to food is realized without discrimination (article 2, paragraph 2) and exercised equally between men and women (article 3) as well as the obligation set forth in article 2, paragraph 1 of the ICESCR.

32 ALSTON, P, 1988, p. 167

33 TEXIER, P, 2000, p. 73.

34 Committee, *General Observation 12*, paragraphs 14, 17.

35 For example, Committee, *General Comment 15. The right to water (articles 11 and 12)* (20 January 2003), Doc.U.N. E/C.12/2002/11, paragraphs 17-29.

The non-discrimination clause was established in the Limburg Principles, according to which:

States will eliminate any *de jure* discrimination, abolishing without delay discriminatory laws, regulations and practices (including acts of commission as well as omission) affecting the enjoyment of economic, social, and cultural rights (...) *De facto* discrimination occurring as a result of the unequal enjoyment of economic, social, and cultural rights on account of a lack of resources, or otherwise, should be brought to an end as soon as possible.³⁶

The obligation to *de jure* non-discrimination is primarily fulfilled through legislative measures. As regards the right to food, the obligation requires that States review their legislation to assure the absence of discriminatory provisions in the access to food or the means and entitlements for its procurement.³⁷ Further, States should adopt specific laws to combat discrimination and refrain from any discriminatory practices.

The obligation to *de facto* non-discrimination implies that States should adopt positive measures to guarantee the equal realization of the right to food by historically or socially discriminated persons or groups of persons.

The obligation to assure the equal realization of the right to food by women and men follows the same reasoning. States should eliminate any *de jure* discrimination against women in the exercise of the right to food. For example, laws that discriminate against women in the access to productive resources, in particular land, or in the access to adequate remuneration should be amended. The same applies to any other laws that discriminate against women in the access to food. In the absence of legal protections against discrimination as relates to women, such protections should be formulated and adopted.

To ensure that women and girls have effective access to food on an equal basis with men and boys, States should implement positive measures to prevent that discrimination abolished by law is allowed to persist in practice.

The obligation provided for in article 2, paragraph 1, of the ICESCR can be divided into three sub-obligations: the obligation to take all appropriate steps, including in particular the enactment of legislative measures; the obligation to take steps with a view to achieving progressively the full realization of the right to food; and the obligation to take steps, both through the efforts of States themselves and international assistance and cooperation, to the maximum use of their available resources.³⁸

Article 2, paragraph 1, of the ICESCR imposes on States Parties the fundamental obligation to take action « *which in itself is not qualified or limited by other considerations* ».³⁹

³⁶ *Limburg Principles on the application of the International Covenant on Economic, Social, and Cultural Rights (Limburg Principles)*, paragraphs 37-38.

³⁷ Committee, *General Comment 12*, paragraph 18.

³⁸ SEPÚLVEDA, M, 2003.

³⁹ Committee, *General Comment 3. The Nature of States Parties Obligations (article 2, paragraph 1, of the Covenant)* (14 December 1990), Doc.U.N. E/1991/23, paragraph 2.

The obligation to action must be « *read in the light of the overall objective, indeed the raison d'être, of the Covenant which is to establish clear obligations for States parties in respect of the full realization of the rights in question* ». ⁴⁰ States, therefore, have the obligation to take deliberate and concrete steps, working as expeditiously and effectively as possible to assure the full realization of the right to food. ⁴¹

Irrespective of a State's available resources or development level, States Parties must take measures to ensure the fundamental right to be free from hunger. The Covenant is deemed to have been violated when a State fails to provide the minimum essential food necessary to ensure individuals are free from hunger. ⁴² Yet, States must also progressively realize the right to adequate food and ensure the continuous improvement of living conditions of their populations. ⁴³

The progressive realization of the right to adequate food implies that any retrogressive measures are hardly compatible with the ICESCR. As the Committee on Economic, Social, and Cultural Rights declared « *any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources* » ⁴⁴.

Finally, States Parties have the obligation to take action by using 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 resource constraints make it impossible to fulfill the right to food, the State must demonstrate that every effort has been made to use all the resources at its disposal to meet this obligation. The State must also demonstrate that it has made every effort to obtain international support to ensure the availability and accessibility of food. ⁴⁵

The corollary to this obligation is the *obligation to international cooperation and assistance* to which the States Parties to the ICESCR are subject. ⁴⁶ The obligation to international cooperation and assistance is specifically binding to the right to food, as it represents the right to which States have undertaken the most substantial commitment under international law to cooperate. Indeed, three different provisions of the ICESCR set out the commitment of States to cooperate: article 2, paragraph 1, and article 11, paragraphs 1 and 2.

40 Committee, *General Comment 3*, paragraph 9.

41 Committee, *General Comment 3*, paragraphs 2, 9; Committee, *General Comment 12*, paragraph 14.

42 Committee, *General Comment 12*, paragraphs 14, 17.

43 Article 11, paragraph 1, of the ICESCR.

44 Committee, *General Comment 12*, paragraph 9.

45 Committee, *General Comment 12*, paragraph 17.

46 Committee, *General Comment 12*, paragraphs 36-37.

1.2.2. THE SPECIFIC LEGAL OBLIGATIONS OF STATES

A majority of individuals who are forced to struggle to ensure their access to food must use their own resources, whether alone or in community with others. This realization gave rise to the obligations of States to respect and protect the existing access to food. To assist individuals without access to these resources and who, in spite of their best efforts, are unable to access food, States have an obligation to *facilitate* and provide the right to food, or, in other words, to fulfil the right to food. The obligations of States to respect, protect, and fulfil the right to food was developed by A. Eide⁴⁷ and was subsequently reaffirmed by the Committee on Economic, Social, and Cultural Rights and by States in the right to food guidelines.⁴⁸

The obligation to *respect* the right to food is essentially an obligation to refrain from action. It implies the obligation of States to refrain from taking measures that prevent individuals from accessing food.⁴⁹ J. Ziegler underscored the arbitrary nature of measures taken in noncompliance with this obligation. As he puts it:

The obligation to respect means that the Government should not arbitrarily take away people's right to food or make it difficult for them to gain access to food. The obligation to respect the right to food is effectively a negative obligation, as it entails limits on the exercise of State power that might threaten people's existing access to food. Violations of the obligation to respect would occur, for example, if the Government arbitrarily evicted or displaced people from their land, especially if the land was their primary means of feeding themselves, if the Government took away social security provisions without making sure that vulnerable people had alternative ways to feed themselves, or if the Government knowingly introduced toxic substances into the food chain, as the right to food entails access to food that is "free from adverse substances (...)."⁵⁰

The obligation to protect the right to food requires that States ensure enterprises and private individuals do not deprive individuals of their right to access adequate food.⁵¹ This obligation was defined generically in the Maastricht Guidelines:

The obligation to protect includes the State's responsibility to ensure that private entities or individuals, including transnational corporations over which they exercise jurisdiction, do not deprive individuals of their economic, social and cultural rights. States are responsible for violations of economic, social

47 Commission *The right to adequate food and to be free from hunger. Updated study on the right to food, submitted by A. Eide* (28 June 1999), E/CN.4/Sub.2/1999/12.

48 In the introduction to the right to food guidelines, States reiterated the exact same definition provided by the Committee on Economic, Social, and Cultural Rights

49 Committee, *General Comment 12*, paragraph 15; Introduction to the right to food guidelines.

50 Commission *The right to food. Report by the Special Rapporteur for the right to food, Jean Ziegler* (16 March 2006), Doc.U.N. E/CN.4/2006/44, paragraph 22.

51 Committee, *General Comment 12*, paragraphs 15, 27.

and cultural rights that result from their failure to exercise due diligence in controlling the behaviour of such non-state actors.⁵²

This obligation corresponds to the obligation to protect civil and political rights. It requires that States implement a legislative and institutional framework and a legal system which are appropriate for the protection of the right to food.

Finally, the obligation to *fulfil* is the requirement that most closely approximates the obligation provided for in article 2, paragraph 1, of the ICESCR to take steps up to the maximum of their available resources, with a view to progressively ensuring the full realization of the right to food for everyone through all appropriate means, including in particular the adoption of legislative measures.

For States⁵³ and for the Committee on Economic, Social, and Cultural Rights,⁵⁴ this obligation implies that States should first *facilitate* the realization of the right to food, creating an environment that enables individuals and groups of individuals to feed themselves by their own means, and second *provide* the right to food for those who are not capable of feeding themselves for reasons beyond their control, through the distribution of food and implementation of social protection programs.

The purpose of *facilitating* the right to food is to enable those individuals to have access to adequate food by themselves. As provided for in the right to food guideline 8, *facilitating* includes the obligation of States to take measures to ensure undernourished persons have access to productive resources or means, including land, water, seeds, microcredit, forest areas, fisheries, and livestock.

States also have the obligation to *provide* the right to food for those with no long-term prospects of access to adequate food by their own means. This obligation applies to detained persons and children. Further, it requires that States implement social safety nets to support the most vulnerable members of society, such as the elderly, the unemployed, and the disabled.⁵⁵ These social safety systems may be organized on the basis of monetary or food resources.⁵⁶

Finally, in emergency situations – in general, natural catastrophes or armed conflict – States should deliver food assistance without delay to persons who are vulnerable, alone, or have no means to access food, with the assistance of other States, United Nations agencies, and national and international NGOs.⁵⁷

52 *Maastricht Guidelines on Violations of Economic, Social, and Cultural Rights* (Maastricht Guidelines), paragraph 18.

53 Preface and introduction to the right to food guidelines, paragraph 17.

54 Committee, *General Comment 12*, paragraph 15.

55 Committee, *General Comment 12*, paragraph 13; right to food guideline 14.

56 FAO, “Safety nets and the right to food,” in FAO, 2006, pp. 141-151.

57 FAO, “Safety nets and the right to food,” in FAO, 2006, pp. 5-24.

The Right to Food and Access to Justice:
Examples at the national, regional and international levels

In the first section, we demonstrated that the right to food and the correlative obligations of States are clearly defined under international law. The first argument against the justiciability of the right to food, therefore, does not apply. What remains to be shown is that the second argument commonly used against the justiciability of the right to food is also outdated.



The Right to Food and Access to Justice: Examples at the national, regional and international levels

INTRODUCTION

PART I. THE RIGHT TO FOOD AND ITS JUSTICIABILITY UNDER INTERNATIONAL LAW

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CONCLUSION AND RECOMMENDATIONS

2. The justiciability of the right to food

The objective of the second section is to demonstrate that the right to food is fully justiciable, that is, a judicial or quasi-judicial body can identify violations of the right to food and provide for corrective measures without infringing on the competencies of the national political branches of government.⁵⁸

To this end, we review existing jurisprudence at the national, regional, and international levels. We begin with a definition of the violation of the right to food (1). Subsequently, we show that judicial or quasi-judicial bodies have succeeded in identifying the full range of violations of the right to food and the applicable corrective measures to be adopted, without infringing the principle of separation of powers.

2.1. DEFINITION OF THE VIOLATIONS OF THE RIGHT TO FOOD

Violations of economic, social, and cultural rights are defined in the Maastricht Guidelines:

As in the case of civil and political rights, the failure by a State Party to comply with a treaty obligation concerning economic, social and cultural rights is, under international law, a violation of that treaty.⁵⁹

The Maastricht Guidelines also provide for violations in respect to the types of obligations imposed on States to respect, protect, and fulfil economic, social, and cultural rights. In referencing the right to housing, work, and health, the Maastricht Guidelines underscore the following:

The obligation to *respect* requires States to refrain from interfering with the enjoyment of economic, social and cultural rights. Thus, the right to housing is violated if the State engages in arbitrary forced evictions. The obligation

58 The definition of justiciability we employ approximates that of M. J. Dennis and D. P. Stewart, according to which “a justiciable right (is) a right, subject to the possibility of formal third-party adjudication, with remedies for findings of non-compliance”. DENNIS, M. J., STEWART, D. P., 2004, p. 464. The Human Rights Committee is a quasi-judicial body at the international level. The Committee may hear complaints, apply the provisions of the ICCPR to concrete cases submitted for consideration, and issue opinions. This last criterion – the issuance of opinions instead of the rendering of enforceable decisions as judges do under internal law – is what distinguishes quasi-judicial bodies from, for instance, the European Court of Human Rights (ECHR Court), which is a regional judicial human rights body.

59 Maastricht Guidelines, paragraph 5.

to *protect* requires States to prevent violations of such rights by third parties. Thus, the failure to ensure that private employers comply with basic labour standards may amount to a violation of the right to work or the right to just and favourable conditions of work. The obligation to *fulfil* requires States to take appropriate legislative, administrative, budgetary, judicial and other measures towards the full realization of such rights. Thus, the failure of States to provide essential primary health care to those in need may amount to a violation.⁶⁰

The same reasoning applies to the definition of violations of the right to food. The right to food is violated when the correlative obligations of States are not respected. Violations of the right to food, as with violations of other human rights, may, therefore, be the result of an act of commission or omission by a State.⁶¹

To demonstrate the justiciability of the right to food, below we present the justiciability of the obligation to ensure the right to food is realized without discrimination (2), of the obligation to respect the right to food (3), of the obligation to protect the right to food, (4) and of the obligation to fulfil the right to food (5).

2.2. THE JUSTICIABILITY OF THE OBLIGATION TO GUARANTEE THE REALIZATION OF THE RIGHT TO FOOD WITHOUT DISCRIMINATION

The obligation to ensure the full enjoyment of the right to food without discrimination constitutes an immediately applicable and self-executing obligation. Its justiciability, therefore, is difficult to challenge⁶², as confirmed in national and international jurisprudence.

In *Khosa & Ors vs Minister of Social Development*, for example, the Constitutional Court of South Africa concluded that the legislation governing social assistance which only provided for social benefits to South African citizens violated the obligation to non-discrimination.⁶³ In various cases brought before the Swiss Federal Supreme Court by illegal immigrants and rejected asylum-seekers without access to social assistance, judges also ruled that the obligation to non-discrimination had been violated. The Federal Supreme Court found that any persons within the territorial boundaries of Switzerland, irrespective of their status, have the right to social assistance which ensures the minimum conditions for life, including basic human needs such as food.⁶⁴

Further, the Committee on Human Rights has ruled in various cases that article 26 of the ICESCR – which states that all people are equal under the law and have the right to equal protection under the law without discrimination – can be violated by discriminatory laws affecting the realization of economic, social, and cultural rights.⁶⁵

60 Maastricht Guidelines, paragraph 6.

61 Maastricht Guidelines, paragraph 13.

62 Committee, *General Comment 3*, paragraph 5.

63 South Africa, Constitutional Court, *Khosa and Others v. Minister of Social Development and Others*, 2004.

64 For example, Federal Supreme Court, *V. gegen Einwohnergemeinde X. und Regierungsrat des Kantons Bern*, 1995.

65 For example, Committee on Human Rights, *F.H. Zwaan-de Vries c. Pays-Bas*, 1987.

In the following three cases, the judicial or quasi-judicial bodies required specific measures to correct the violations, such as thorough reviews of existing legislation and guaranteed social benefits for claimants.⁶⁶

2.3. THE JUSTICIABILITY OF THE OBLIGATION TO RESPECT THE RIGHT TO FOOD

The obligation to *respect* the right to food is an obligation to refrain from taking action. It is immediately applicable and requires no specific budgetary outlays. As such, the justiciability of the obligation is not in question either, as confirmed by regional and national jurisprudence.

In *Ogoni*,⁶⁷ for example, the African Commission on Human and Peoples' Rights (ACHPRCom) found that the Nigerian government had violated the right to food of Ogoni communities by destroying their food sources:

The right to food requires that the Nigerian Government should not destroy or contaminate food sources. (...) The government has destroyed food sources through its security forces and State Oil Company (...) and through terror, has created significant obstacles to Ogoni communities trying to feed themselves. (...) [The] Nigerian Government (...) hence is in violation of the right to food of the Ogonis.⁶⁸

In this case, the ACHPRCom identified several measures that the Nigerian government should adopt to correct the violation of the right to food, including compensation and comprehensive cleanups of polluted or damaged lands and rivers.⁶⁹

In *Kenneth George*,⁷⁰ traditional South African fishing communities that lost their access to the sea following enactment of a law on marine resources appealed to the High Court of Cape of Good Hope Province. The fishing communities alleged that the government had violated its obligation to *respect* the right to food and to refrain from adopting *retrogressive measures* in fulfillment of this right.⁷¹ The Court, in its decision of 2 May 2007, ordered that the communities should have immediate access to the sea and that the government draft a new law, with the participation of traditional fishing communities, to ensure respect for the right to food.⁷²

66 For example, South Africa, Constitutional Court, *Kbosa and Others v. Minister of Social Development and Others*, 2004, paragraph 98; Committee on Human Rights, *F.H. Zwaan-de Vries c. Pays-Bas*, 1987, paragraph 16.

67 ACHPRCom, *Social and Economic Rights Action Center (SERAC), Center for Economic and Social Rights v. Nigeria*, 2001.

68 ACHPRCom, *SERAC, Center for Economic and Social Rights v. Nigeria*, paragraphs 65-66.

69 ACHPRCom, *SERAC, Center for Economic and Social Rights v. Nigeria*, paragraph 49.

70 South Africa, High Court, *Kenneth George and Others v. Minister of Environmental Affairs & Tourism*, 2007.

71 South Africa, High Court, *Kenneth George and Others v. Minister of Environmental Affairs & Tourism*, 2007, Founding Affidavit by N. Jaffer, paragraphs 94-96.

72 South Africa, High Court, *Kenneth George and Others v. Minister of Environmental Affairs & Tourism*, 2007, paragraphs 1-7, 10.

2.4. THE JUSTICIABILITY OF THE OBLIGATION TO PROTECT THE RIGHT TO FOOD

The obligation to protect the right to food is a positive right. Its justiciability, therefore, is easier, *a priori*, to show. By nature, it is identical to the obligation to protect civil and political rights, which have been found justiciable on numerous occasions. In a number of cases, the ECHR Court, for instance, concluded that the obligation to protect this right was fully justiciable.⁷³

The justiciability of the obligation to protect the right to food has also been reaffirmed by national and regional jurisprudence. In two separate cases, the Supreme Court of India protected the sea, land, and water rights of traditional fishing communities against the activities of the shrimping industry⁷⁴ and the subsistence activities of tribal populations against State concessions granted to private enterprises.⁷⁵

Similarly, in the *Ogoni* case, the ACHPR Com found that the activities of a consortium constituted by the State Petroleum Company and Shell Oil violated the obligation to protect the right of food of the Ogoni people. As the ACHPR Com concluded:

[The Nigerian Government] should not allow private parties to destroy or contaminate food sources, and prevent peoples' efforts to feed themselves. (...) The government has allowed private oil companies to destroy food sources; and through terror, has created significant obstacles to Ogoni communities trying to feed themselves.⁷⁶

In all of these cases, the judicial or quasi-judicial bodies imposed specific measures to correct the violations, including payment of adequate compensation,⁷⁷ the suspension of illicit activities, and recovery of productive resources.⁷⁸

2.5. THE JUSTICIABILITY OF THE OBLIGATION TO FULFIL THE RIGHT TO FOOD

The obligation to fulfil the right to food requires budgetary resources and is often progressive. Its justiciability, as a consequence, generates the greatest skepticism and is the most difficult to demonstrate. However, there is substantial jurisprudence demonstrating that the obligation is in fact justiciable.

According to the existing jurisprudence, there are at least three ways to fulfil the realization of the right to food while respecting the competencies of the political branches of national governments.⁷⁹ First, a judicial or quasi-judicial body has legitimate authority to protect the core principle of the right to food, that is, the realization of the fundamental right to be free from hunger, irrespective of available resources and the behavior of the political branches of government. Second, if the political branches of government

73 See ECHR Court, *Akkoç c. Turquie*, 2000.

74 India, Supreme Court, *S. Jagannath Vs. Union of India and Ors*, 1996.

75 India, Supreme Court, *Samatha vs. State of Andhra Pradesh and Ors*, 1997.

76 ACHPR Com, *SERAC, Center for Economic and Social Rights v. Nigeria*, 2001, paragraphs 65-66.

77 ECHR Court, *Akkoç c. Turquie*, 2000, paragraphs 130-140.

78 ACHPR Com, *SERAC, Center for Economic and Social Rights v. Nigeria*, 2001, paragraph 49.

79 SQUIRES, J, LANGFORD, M, THIELE, B, 2005.

themselves adopt measures to fulfil the right to food, the respective bodies exercise legitimate authority to enforce its implementation. Third, judicial or quasi-judicial bodies have authority to oversee the appropriate/reasonable character of these measures, insofar as in adopting the ICESCR the political branches of government undertook a commitment to put in place measures to fulfil the right to food. Some examples follow.

2.5.1. OVERSIGHT OF THE REALIZATION OF THE FUNDAMENTAL RIGHT TO BE FREE FROM HUNGER

Protection of the hard core of human rights is one of the primary tasks of judicial and human rights protection bodies at the national, regional, and international levels. In a number of cases, the ECHR Court has protected the hard core of civil and political rights, even where such protection required positive measures and high budgetary costs for the political branches of government.⁸⁰

The Human Rights Committee did the same in cases in which it protected the right of detained persons to be treated with humanity and dignity (article 10, paragraph 1, of the ICESCR) and their right to not be subjected to cruel, inhumane, and degrading treatment (article 7 of the ICCPR).⁸¹ In several of these cases, the Court found that States must respect the set of minimum rules governing the treatment of detainees,⁸² which provide in particular for adequate food for each detainee, irrespective of the State's available resources.⁸³ As the Human Rights Committee observes:

It should be noted that these are minimum requirements which the Committee considers should always be observed, even if economic or budgetary considerations may make compliance with these obligations difficult.⁸⁴

In two cases – *Defensor del Pueblo de la Nación c. Estado Nacional y otra*⁸⁵ in Argentina and *Abel Antonio Jaramillo*⁸⁶ in Colombia – the Supreme Court of Argentina and the Constitutional Court of Colombia followed the same reasoning to protect the fundamental right to be free from hunger.

In *Defensor del Pueblo de la Nación c. Estado Nacional y otra*, the Argentine Supreme Court ordered the federal government and the government of Chaco Province to adopt urgent measures to ensure the access to food and potable water by indigenous

80 See, for example, ECHR Court, *Airey c. Irlande*, 1979.

81 See, for example, Human Rights Committee, *Lantsova c. Fédération de Russie*, 2002; Human Rights Committee, *Evans c. Trinité-et-Tobago*, 2003; Human Rights Committee, *Karimov et consorts c. Tadjikistan*, 2007.

82 *Standard Minimum Rules for the Treatment of Prisoners* was adopted by the United Nations Congress on the Prevention of Crime and the Treatment of Offenders in 1955 and subsequently approved by ECOSOC.

83 See, for example, Human Rights Committee, *Mukong v. Cameroon*, 1994, paragraph 9.3. See also Human Rights Committee, *General Comment 21. Article 10* (10 April 1992), paragraph 4.

84 Human Rights Committee, *Mukong v. Cameroon*, 1994, paragraph 9.3.

85 Argentina, Corte Suprema de Justicia de la Nación, *Defensor del Pueblo de la Nación c. Estado Nacional y otra*, 2007.

86 Colombia, Corte Constitucional, *Acción de tutela instaurada por Abel Antonio Jaramillo y otros contra la Red de Solidaridad Social y otros*, Sentencia T-025/2004.

communities in the province.⁸⁷ A total of eleven people had died due to deplorable living conditions, a circumstance that required urgent action. In very clear terms, the Court justified the order handed down to the political branches of government to adopt positive measures, invoking the gravity of the situation and its role as guardian of the Constitution and the fundamental rights therein enshrined. The Court stated:

The gravity and urgency of the alleged facts require this Court to exercise the oversight conferred to the judicial system in respect to the activities of the other branches of the State and, within this framework, adopt the necessary measures that, without diminishing the competencies of the other branches, contribute to ensuring observance of the National Constitution (...)
*This decision should not be construed as improper interference by the Judicial Branch when the only objective is to safeguard rights, and compensate for omissions to the extent such rights may have been violated.*⁸⁸

In *Abel Antonio Jaramillo*, Colombia's Constitutional Court concluded that the situation in which thousands of displaced families lived corresponded to an *unconstitutional* state of things. These families lived in difficult circumstances, without access to food assistance from the State, despite repeated pleas to the official bodies with primary responsibility for displaced persons, which responded that they could not provide the necessary assistance due to insufficient resource allocations from the State.⁸⁹

The Constitutional Court based its decision on the rights recognized in the Colombian Constitution, as interpreted in the light of the ICESCR and the general comments of the Committee on Economic, Social, and Cultural Rights, concluding that the conditions of extreme vulnerability of displaced populations, and the permanent omission of effective protection by the various responsible authorities, constituted, among others, a violation of the right to food.⁹⁰ In the Court's view, the State had the obligation to ensure, under all circumstances, the hard core of the right to food, defined as the right to minimum subsistence.⁹¹

The Court required the authorities to develop a plan within two months to ensure the necessary resources allocations within a period of one year to programs aimed at supporting displaced persons and guaranteeing, in turn, the hard core of the fundamental rights of *all displaced persons*, including the distribution of food assistance, until such time as displaced persons could provide for their own needs using their own means.⁹²

87 Argentina, Corte Suprema de Justicia de la Nación, *Defensor del Pueblo de la Nación c. Estado Nacional y otra*, 2007, paragraph 3.III.

88 Argentina, Corte Suprema de Justicia de la Nación, *Defensor del Pueblo de la Nación c. Estado Nacional y otra*, 2007, paragraph 3. par. We underline.

89 Colombia, Corte Constitucional, *Acción de tutela instaurada por Abel Antonio Jaramillo y otros contra la Red de Solidaridad Social y otros*, Sentencia T-025/2004, part. III.2.1.

90 Colombia, Corte Constitucional, *Acción de tutela instaurada por Abel Antonio Jaramillo y otros contra la Red de Solidaridad Social y otros*, Sentencia T-025/2004, part. III.5-6, 12.

91 Colombia, Corte Constitucional, *Acción de tutela instaurada por Abel Antonio Jaramillo y otros contra la Red de Solidaridad Social y otros*, Sentencia T-025/2004, part. III.5-6, 12.

92 Colombia, Corte Constitucional, *Acción de tutela instaurada por Abel Antonio Jaramillo y otros contra la Red de Solidaridad Social y otros*, Sentencia T-025/2004, part. III.9.

2.5.2. OVERSIGHT OF THE IMPLEMENTATION OF THE MEASURES ADOPTED BY THE POLITICAL BRANCHES OF GOVERNMENT

In cases in which political authorities adopt measure to fulfil the right to food and fail to meet the corresponding commitments, judicial or quasi-judicial bodies can more easily require fulfillment of the respective commitments. The intervention of judicial authorities is essential, insofar as it transforms government measures into justiciable rights for beneficiaries.⁹³

This perspective has been adopted by various national jurisdictions in respect to the realization of a range of economic, social, and cultural rights.⁹⁴ In *People's Union for Civil Liberties*,⁹⁵ the Indian Supreme Court employed this reasoning to protect the right to food of various communities affected by hunger in Rajasthan state. The communities were located only a few kilometers from available food supplies and the government had put in place programs to guarantee their access to these supplies, yet the unused inventories were being consumed by rats.

In response to the petition submitted by the NGO *People's Union for Civil Liberties*, the Supreme Court handed down numerous preliminary decisions beginning in 2001 requiring Indian states to implement food distribution programs developed by the national government.⁹⁶

In one of its first decision, the Supreme Court presented its reasoning as follows:

The anxiety of the Court is to see that the poor and the destitute and the weaker sections of the society do not suffer from hunger and starvation. The prevention of the same is one of the prime responsibilities of the Government – whether Central or the State. How this is to be ensured would be a matter of policy which is best left to the government. All that the Court has to be satisfied and which it may have to ensure is that the food-grains which are overflowing in the storage receptacles (...) should not be wasted by dumping into the sea or eaten by the rats. *Mere schemes without any implementation are of no use. What is important is that the food must reach the hungry.*⁹⁷

In subsequent decisions, the Supreme Court ordered state governments to identify the eligible beneficiaries of existing assistance programs and required the effective implementation of those programs, thus transforming the beneficiaries into stakeholders in the realization of justiciable rights.⁹⁸

93 ABRAMOVICH, V, "Fostering Dialogue: the Role of the Judiciary and Litigation", in SQUIRES, J, LANGFORD, M, THIELE, B, 2005, p. 169.

94 Argentina, Poder Judicial de la Nación, *Viceconte, Mariela Cecilia c/ Estado Nacional – M° de Salud y Acción Social- s/ amparo ley 16. 986*, 1998. For example, see BRAND, D, "Socio-Economic Rights and Courts in South Africa: Justiciability on a Sliding Scale" in COOMANS, F, 2004, pp. 209-211.

95 India, Supreme Court, *People's Union for Civil Liberties vs. Union of India & Ors*, 2001.

96 The Court's decisions are available at www.righttofoodindia.org.

97 India, Supreme Court, *People's Union for Civil Liberties v. Union of India & Ors*, 2001. We underline.

98 On 25 September, the Supreme Court of Nepal followed a similar line of reasoning, recognizing for the first time the justiciability of the right to food, http://www.fao.org/righttofood/news22_en.htm.

2.5.3. OVERSIGHT OF THE APPROPRIATE/REASONABLE CHARACTER OF THE MEASURES ADOPTED BY THE POLITICAL BRANCHES OF GOVERNMENT

The possibility of controlling the appropriate/reasonable character of the measures adopted by the political branches of government to fulfil economic, social, and cultural rights is a well-established principle in jurisprudence, particularly in South Africa.⁹⁹ The jurisprudence of the Inter-American Court of Human Rights (IACHRCourt) and the Indian Supreme Court demonstrates that this oversight is also possible to protect the right to food.

In *Sawboyamaxa vs. Paraguay*,¹⁰⁰ the IACHRCourt was charged with determining if the Paraguayan government had adopted all reasonable measures to improve the conditions of life of the Sawboyamaxa community. Members of the community lived in deplorable conditions, with limited access to food and irregular and inadequate food assistance deliveries from the State.¹⁰¹ A total of 31 members of the community had died from disease between 1991 and 2003. The conditions in which these people lived derived primarily from the failure to recognize the community's rights to its ancestral lands and the consequent loss of access to traditional means of subsistence.¹⁰²

All the parties recognized the conditions of life to which the members of the community were subject, yet the State denied any responsibility.¹⁰³ To determine that responsibility, the IACHRCourt concluded:

It is clear to the Court that a State cannot be responsible for all situations in which the right to life is at risk. Taking into account the difficulties involved in the planning and adoption of public policies and the operative choices that have to be made in view of the priorities and the resources available, the positive obligations of the State must be interpreted so that an impossible or disproportionate burden is not imposed upon the authorities. In order for this positive obligation to arise, it must be determined that at the moment of the occurrence of the events, the authorities knew or should have known about the existence of a situation posing an immediate and certain risk to the life of an individual or of a group of individuals, and that necessary measures were not adopted within the scope of their authority which could be reasonably expected to prevent or avoid such risk.¹⁰⁴

The IACHRCourt found that the Paraguayan government had not adopted all reasonable measures to ensure the right to life and the right to food of community members. To remedy the violation, the Court set forth a list of measures the government should adopt, including compensation for victims, recognition of the community's ancestral

99 LIEBENBERG, S, "Enforcing Positive Socio-Economic Rights Claims: The South African Model of Reasonableness Review" in SQUIRES, J, LANGFORD, M, THIELE, B, 2005, pp. 73-88.

100 IACHRCourt, *Sawboyamaxa Indigenous Community c. Paraguay*, 2006.

101 IACHRCourt, *Sawboyamaxa Indigenous Community c. Paraguay*, 2006, paragraphs 3, 145.

102 IACHRCourt, *Sawboyamaxa Indigenous Community c. Paraguay*, 2006, paragraph 145.

103 IACHRCourt, *Sawboyamaxa Indigenous Community c. Paraguay*, 2006, paragraph 149.

104 IACHRCourt, *Sawboyamaxa Indigenous Community c. Paraguay*, 2006, paragraph 155.

lands, creation of a development fund for the community, and distribution of adequate food until such time as community members had full access to their lands.¹⁰⁵

The Supreme Court of India adopted a similar line in *People's Union for Civil Liberties*, through which it ordered changes to at least two programs developed by the political branches of government which failed to reasonably meet “the needs” of the most vulnerable. The Court also ordered, in particular, that the school meal program provide a hot meal to all matriculated students in the public school system, instead of a cold meal.¹⁰⁶ Finally, the Court ordered that tribal populations, which are among India’s most vulnerable, be encompassed in a food assistance program, a requirement not provided for under the government’s plan.¹⁰⁷

The jurisprudence set forth in this first section demonstrates that the violation of the totality of correlative State obligations regarding the right to food must be considered justiciable. The discussion also shows that thousands of victims of violations of the right to food gained access to justice before the Supreme Court of India, the Supreme Court of Argentina, the Constitutional Court of Colombia, a South African Constitutional Court, the Swiss Federal Supreme Court, the ACHPRCom, and the Human Rights Committee. However, two questions remain: Why and how was the access to justice made possible? What impact has the jurisprudence had on the concrete enjoyment of the right to food? These are the two questions we examine in the second part of this document.

105 IACHRCourt, *Sawboyamaxxa Indigenous Community c. Paraguay*, 2006, paragraphs 204-248.

106 India, Supreme Court, *People's Union for Civil Liberties Vs. Union of India & Ors*, 2001.

107 India, Supreme Court, *People's Union for Civil Liberties Vs. Union of India & Ors*, Order of 2 May 2003.



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Part II. The right to food and access to justice: the empirical reality

Access to justice makes the right to food more effective and tangible. By calling the responsible parties to account and enabling victims to claim their rights, access to justice shines a light on is commonly identified as the primary obstacle to the realization of the right to food and the struggle against hunger: the lack of political will.¹⁰⁸ To paraphrase Eleanor Roosevelt, access to justice provides meaning to human rights « *in small places, close to home* ». ¹⁰⁹ In India, for example, it was the complaint filed in 2001 by the human rights organization *The People's Union for Civil Liberties* which gave rise to a series of decisions by the Indian Supreme Court requiring state governments to realize, in concrete terms, the right to food for millions of the neediest persons through an aimed at identifying and distributing food to those population segments.¹¹⁰

This premise underlay various measures provided for in the right to food guidelines which States can adopt to ensure access to justice in the event of violations of the right to food.

States are called on to enshrine the right to food under domestic law, including their Constitutions, and to provide for adequate, effective, and expeditious remedies in cases of violations, in particular for vulnerable groups.¹¹¹ States should also assist individuals and groups to secure legal assistance to enforce their rights, protect the human rights advocates, including the right to food, and inform the general of the full range of rights and available remedies at its disposal.¹¹² Finally, the guidelines establish that national human rights institutions exercise a central role in promoting access to justice.¹¹³

In all legal systems in which access to justice is ensured in cases of violations of the right to food – India, South Africa, Argentina, Colombia, Switzerland, the African and American continents, and at the international level – the right to food is enshrined, legal

108 FAO, World Food Security Committee, *Promouvoir la volonté politique de lutter contre la faim*, 2001, Doc.FAO CFS:2001/Inf.6.

109 Eleanor Roosevelt served as President of the United Nations Human Rights Commission from 1946 to 1952, that is, during drafting of the UDHR. According to Roosevelt, the objective in protecting human rights is to give them meaning « *in small places, close to home* ». See ROBINSON, M, 2003, p.1.

110 India, Supreme Court, *People's Union for Civil Liberties Vs. Union of India & Ors*, Writ Petition (Civil) No. 196/2001.

111 Right to food guidelines 7.1 and 7.2.

112 Right to food guidelines 1.5 and 7.3.

113 Right to food guideline 18.

remedies are available, and judicial and quasi-judicial bodies recognize the justiciability of the right to food. In the second part, we describe the realization of these three conditions in different international, regional, and national legal systems. The analysis will enable us to identify the gaps that need to be filled in other legal systems and to formulate practical recommendations to enhance access to justice worldwide and for all victims.



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3. The right to food and access to justice at the international level

Sixty years after the adoption of the UDHR and after five years of arduous negotiation, the United Nations General Assembly finally adopted the Option Protocol to the ICESCR. The adoption of the Optional Protocol represents a key advance in recognizing the justiciability of economic, social, and cultural rights. As L. Arbour puts it, this puts an end to the notion that access to justice is not pertinent to economic, social, and cultural rights.¹¹⁴

In this section, we lay out the potential that adoption of the Optional Protocol holds out for victims of violations of the right to food, and describe the existing avenues of access to justice at the international level. We begin by presenting the legal basis of the right to food in international human rights instruments (1). We then outline the available legal remedies to invoke the right to food before judicial or quasi-judicial bodies at the international level (2). Finally, we examine the jurisprudence of bodies that have recognized the justiciability of the right to food (3).

3.1. LEGAL BASIS OF THE RIGHT TO FOOD AT THE INTERNATIONAL LEVEL

As shown in the first part, the right to food is clearly enshrined under international law, article 25 of the UDHR and article 11 of the ICESCR. In addition to these two instruments, a number of other international instruments reaffirm the protection of the right to food.

The ICCPR enshrines various rights which offer additional protections for the right to food, such as the right to life (article 6), the right to not be tortured or subjected to inhumane or degrading treatment (article 7), the right of detained persons to be treated with humanity and dignity (article 10, paragraph 1), the right of minorities to their own culture (article 27), and the right to non-discrimination (article 26). Similarly, the International Convention on the Elimination of All forms of Racial Discrimination provides for a series of supplemental rights, including the right to equitable and satisfactory remuneration (article 5, e, i), the right to social security and social services (article 5, e, iv), and the right to property for all people, either alone or in association with others (article 5, d, v), all of which are understood to impose on States the

obligation to combat discrimination – *de jure* and *de facto* – in the access to food and in the access to productive resources, in particular land, by vulnerable persons and groups, especially indigenous populations.¹¹⁵

Two articles in the Convention on the Elimination of All Forms of Discrimination Relative to Women (CEDAW) are particularly important in protecting the right to food: article 12, which protects the right of mothers and the right of infants to food, and article 14, which protects the right of women living in rural zones against discrimination in the access to productive resources, in particular land, and in the access to social security programs.

Finally, the Convention on the Rights of the Child gives special emphasis to the protection of the right to food, in view of the fact that malnutrition is the leading cause of infant mortality in the world. The right to food of children is explicitly protected in two articles of the Convention: article 24, which enshrines the right to health, and article 27, which recognizes the right to an adequate standard of living.

3.2. AVAILABLE LEGAL REMEDIES AT THE INTERNATIONAL LEVEL

There are two primary legal remedies available to invoke the right to food at the international level: individual and collective complaints entered before treaty bodies (1) and inter-state complaints filed with the ICJ (2).

3.2.1. INDIVIDUAL AND COLLECTIVE COMPLAINTS BEFORE THE TREATY BODIES

Every human rights treaty provides the creation of an oversight body composed of independent experts. The bodies oversee the measures adopted by States to fulfil the protected rights through analysis of the periodic reports submitted by States. In addition, some bodies entertained individual or collective complaints, in cases of violations of established rights, assuming, in this instance, a quasi-judicial competence.¹¹⁶

Among the treaties presented, three discharge quasi-judicial functions: the ICCPR, by means of the Optional Protocol to the ICCPR, the Convention on the Elimination of All Forms of Racial Discrimination, through article 14 of the Convention, and the CEDAW, through the Optional Protocol to the Convention. The three procedural avenues establish certain conditions for admissibility, most significantly that the petitioner exhaust all internal legal remedies, that is, all efforts to secure access to justice at the national level. If the conditions are met, an adversarial process is established, upon conclusion of which the oversight body may rule on the violation of the right to food and present its observations to the State Party.

In the near future, petitioners will have the opportunity to file complaints – individual, collective, or on behalf of victims – before the Committee on Economic, Social,

¹¹⁵ CERD, *General Recommendation 23, Indigenous Peoples* (18 August 1997), reproduced in GA, *Report of the Committee on the Elimination of Racial Discrimination*, Doc.U.N. A/52/18, Annex V.

¹¹⁶ Ler VANDENHOLE, W, 2004.

and Cultural Rights in cases of violations of the right to food, based on the provisions of the Optional Protocol to the ICESCR.¹¹⁷ There is no optional protocol establishing a petition mechanism under the Convention on the rights of the Child. Consequently, access to justice before the Committee on the Rights of the Child is not possible.

3.2.2. INTER-STATE COMPLAINTS BEFORE THE INTERNATIONAL COURT OF JUSTICE

The International Court of Justice (ICJ) is the primary judicial body of the United Nations. All UN member States are automatically parties to the Court's Statute, although the ICJ does not exercise mandatory jurisdiction, that is, it has no authority to judge a State that does not recognize its jurisdiction.¹¹⁸ The ICJ has two principal functions: disputes and consultations. In respect to disputes, only States may petition the ICJ. Therefore, individuals may only access justice before the ICJ through their respective States.

Article 38 of the ICJ Statute provides the sources of international law to which the ICJ is subject. These include the treaties ratified by States. Potentially, *every treaty that enshrines the right to food and to which two States in dispute are party, provided the respective States recognize the jurisdictional competency of the ICJ, may be called before the ICJ in the event of violations of the right to food.*

In its consultative function, the ICJ may be petitioned by the UN General Assembly or Security Council, which may request a advisory opinion on any legal matter, and by the specialized agencies of the United Nations, which may request an opinion on any legal matter arising within the scope of their activities.¹¹⁹

3.3. EXISTING JURISPRUDENCE AT THE INTERNATIONAL LEVEL: CASE STUDY

Jurisprudence on the right to food at the international level is extremely limited. There are two reasons for this. First, the victims of violations of the right to food have never availed themselves of the legal remedies provided for under the Committee for the Elimination of Discrimination relative to Women and the Committee for the Elimination of Racial Discrimination. Although these remedies are available, a lack of interest among human rights organizations and the absence of information for victims have prevented these bodies from intervening to protect the right to food.¹²⁰ Second, the treaty bodies that have most clearly set forth the justiciability of the right to food – the Committee on Economic, Social, and Cultural Rights and the Committee on the Rights of the Child¹²¹ – do not have judicial or quasi-judicial competency;

117 As discussed above, the Optional Protocol was adopted by the General Assembly on 10 December 2008, but will only enter into force following ratification by 10 States Parties to the ICESCR.

118 Articles 36 and 37 of the ICJ Statute.

119 Article 96 of the United Nations Charter and articles 65-68 of the ICJ Statute.

120 For a critical analysis of this situation, see VAN BOVEN, 2001.

121 Committee, *General Comment 12, paragraph 32; Committee on the Rights of the Child, General measures of the implementation of the Convention on the Rights of the Child (article 4, 42 and 44, paragraph 6) (27 November 2003)*, Doc.U.N. CRC/GC/2003/5, paragraph 6.

access to justice, therefore, is not possible before either body in the event of violations of the right to food.

In the near future, victims of violations of the right to food would have access to justice before the Committee on Economic, Social, and Cultural Rights. If the Committee recognizes the justiciability of the right to food in terms similar to those developed in the first part, specifically the justiciability of the totality of violations of the right to food, its contribution to protecting the right to food could be extraordinary.¹²² In enabling individual and collective complaints and petitions on behalf of victims the procedure will offer organizations seeking to provide support to victims in their claims a valuable tool.¹²³

To determine the extent to which victims of violations of the right to food had access to justice at the international level, below we provide an outline of jurisprudence within the Human Rights Committee and the ICJ.

3.3.1. THE PROTECTION OF THE RIGHT TO FOOD FOR DETAINED PERSONS AND INDIGENOUS PEOPLE BY THE HUMAN RIGHTS COMMITTEE

The Human Rights Committee has issued opinions in more than 450 cases.¹²⁴ In some of these cases, individuals or groups have invoked the violation of civil and political rights to protect the right to food.

In several cases, detained persons or their relatives have invoked the right to be treated with humanity and dignity and the right to not be subjected to cruel, inhumane, and degrading treatment to protect the right to food. In *Mukong vs. Cameroon*,¹²⁵ the Human Rights Committee found that the conditions of detention of Mr. Mukong, who had been denied food for several days, constituted cruel, inhumane, and degrading treatment. In *Lantsova vs. Fédération de Russie*, the Human Rights Committee ruled that the conditions of detention of Mr. Lantsov, who died in an overcrowded detention center without access to adequate food or health services, had violated his right to be treated with humanity and dignity.¹²⁶ In both cases, the Committee concluded that the State should pay compensation and ensure similar violations are not repeated, notwithstanding the potential related costs of such measures.¹²⁷

The jurisprudence of the Human Rights Committee includes, additionally, a number of cases in which indigenous communities have invoked the right of minorities to their

122 This should be the case given that during the negotiations on the Optional Protocol to the ICESCR it became clear that the interpretation of the rights set forth in the ICESCR would have to be guided by the jurisprudence on human rights bodies at the national and regional level, as set out in the first part. Commission, Doc.U.N. E/CN.4/2004/44, paragraph 36.

123 For more on the practical aspects of the Protocol, see GOLAY, C, 2008.

124 VANDENHOLE, W, 2004, p. 195.

125 Human Rights Committee, *Mukong c. Cameroon*, 1994.

126 Human Rights Committee, *Lantsova c. Fédération de Russie*, 2002, paragraph 9.1.

127 Human Rights Committee, *Mukong v. Cameroon*, 1994, paragraph 11; Human rights Committee, *Lantsova c. Fédération de Russie*, 2002, paragraph 11.

own culture before the Committee in order to protect their right to food. In *Länsman et al. vs. Finland*, the Human Rights Committee ruled that the mining activities in question had been undertaken without consulting the indigenous populations and that the destruction of their way of life and means of subsistence constituted a violation of the right enshrined in article 27 of the ICPR.¹²⁸

Despite the progressive interpretation of the right to life, such as the obligation of States to combat infant mortality and, in particular, eliminate malnutrition,¹²⁹ the Human Rights Committee has never heard a petition alleging a violation in this area. The fact that the Human Rights Committee has concluded that the right to non-discrimination and equal protection under the law applies to laws aimed at realizing economic, social, and cultural rights offers a considerable, albeit as of yet unexploited, opportunity to protect the right to food.

3.3.2. THE PROTECTION OF THE RIGHT TO FOOD OF THE PALESTINIAN PEOPLE BY THE INTERNATIONAL COURT OF JUSTICE

The ICJ was called on to rule on petitions alleging violation of the right to food in at least two contentious cases. In *République démocratique du Congo vs. Rwanda*, the Democratic Republic of Congo invoked the ICESCR, the CEDAW, and the Convention on the Rights of the Child, arguing that the instruments had been violated as a result of actions undertaken by the Rwandan army within Congolese territory, involving in particular the looting of civilian property.¹³⁰ In its decision of 3 February 2006, the ICJ ruled that the Court was not competent to render a ruling on the matter.¹³¹ In a recent case, *Ecuador vs. Colombia*, Ecuador invoked the ICESCR to denounce the violation of human rights stemming from aerial herbicide spraying by Colombia in Ecuadorian territory, including in particular damage caused to the population's means of subsistence.¹³² It is quite possible that the ICESCR will occupy a prominent position in the ICJ's deliberations.

In 2004, the ICJ issued an advisory opinion on the legal consequences of the construction of a wall in the occupied Palestinian territory in response to an inquiry from the United Nations General Assembly. The Court's opinion concluded that the wall violated the right to food.¹³³ The ICJ began by noting that the ICESCR and the Convention on the Rights of the Child included a number of pertinent provisions to the case in question, particularly in regard to « *the right to an adequate standard of living, including adequate food, clothing and housing and the right «to be free from hunger» (art. 11)* ». ¹³⁴ The opinion goes on to describe the impact of building the wall on the enjoyment of these rights, giving significant emphasis to violation of the right to food.

128 Human Rights Committee, *Länsman et al. v. Finland*, 1994, paragraph 9.5.

129 Human rights Committee, *General Comment 6, The right to life (Article 6)* (30 April 1982), Doc.U.N. HRI/GEN/1/Rev.4, pp. 97-98, paragraph 5.

130 ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo/Rwanda)*, 2002.

131 ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo/Rwanda)*, 2006.

132 ICJ, *Aerial Herbicide Spraying (Ecuador vs. Colombia)*, 2008, paragraph 38.

133 ICJ, *Legal Consequence of the Construction of a Wall in the Occupied Palestinian Territory*, 2004.

134 ICJ, *Legal Consequence of the Construction of a Wall in the Occupied Palestinian Territory*, 2004, paragraph 130.

The Court concluded that construction of the wall and the regime to which it was associated violated the exercise of various economic, social, and cultural rights, among them the right to an adequate standard of living.¹³⁵ For the first time, the Court ruled on the violation of the right to food and, by extension, its justiciability. The ICJ determined that for Israel to reverse the violation of its obligations it would need to bring construction of the wall to an immediate halt and dismantle the completed sections of the wall in occupied Palestinian territory.¹³⁶ It would also have to *make reparation for the damage caused to all natural or legal persons concerned, in particular by returning the land, the orchards, the olive groves or compensating the victims in the event such material compensation proves to be impossible.*¹³⁷ Finally, the Court, considering the importance of the violated rights, determined that all States have certain obligations, particularly the obligation to not recognize illegal situations or to render assistance aimed at maintaining those situations.¹³⁸

The advisory opinion produced limited effects. Yet, the fact that ICJ recognized the right to food of Palestinian victims and their right to compensation represents, notwithstanding, an important step forward in international law.¹³⁹

135 ICJ, *Legal Consequence of the Construction of a Wall in the Occupied Palestinian Territory*, 2004, paragraph 134.

136 ICJ, *Legal Consequence of the Construction of a Wall in the Occupied Palestinian Territory*, 2004, paragraphs 150-151.

137 ICJ, *Legal Consequence of the Construction of a Wall in the Occupied Palestinian Territory*, 2004, paragraphs 152-153.

138 ICJ, *Legal Consequence of the Construction of a Wall in the Occupied Palestinian Territory*, 2004, paragraph 159.

139 As M. Scheinin notes: “The World Court – which is not known for any activist role in referring to ESC rights or even human rights in general – found the ICESCR applicable in relation to Israel’s conduct in the Palestinian territories, referred specifically to a number of substantive ESC provisions in the ICESCR, and did not hesitate to pronounce that Israel was in breach of those provisions, notably the right to work, the right to health, the right to education and the right to an adequate standard of living. Hence, it was acknowledged by the most authoritative judicial body in international law that the ICESCR, and in particular the rights just mentioned, as enshrined in that Covenant, are justiciable on the level of international law”. SCHEININ, M, “Justiciability and the Interdependence of Human Rights” in SQUIRES, J, LANGFORD, M, THIELE, B, 2005, p. 25.



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4. The right to food and access to justice at the regional level

There are three regional human rights protection systems – the African, American, and European systems. In all three systems, the victims of violations of the right to food can only have indirect access to justice in respect to the right to food, based on the protection of the right to life, property, or health. Nonetheless, this has not prevented the development on the African and American continents of a substantial body of jurisprudence ensuring access to justice for thousands of victims of violations of the right to food.

We will present the *legal basis of the right to food at the regional level* (1), the *available legal remedies* at the regional level (2) and the *jurisprudence* of the regional bodies that recognize the justiciability of the right to food (3).

4.1. LEGAL BASIS OF THE RIGHT TO FOOD AT THE REGIONAL LEVEL

Incorporation of the right to food within the framework of the African, American, and European legal systems took distinct forms, as demonstrated below. On the African continent, the right is recognized, directly or indirectly, in three instruments: the African Charter on Human and People's Rights, the African Charter on Human and People's Rights (ACHPR), the African Charter on the Rights and Welfare of the Child, and the Protocol to the African Charter on Human and People's Rights on the Rights of Women.

While the ACHPR does not explicitly recognize the right to food, the right is contained within various interdependent rights such as the right of all people to health and the right of all peoples to a satisfactory and global environment that promotes development. The instrument enshrines the right of all peoples to the free use of their wealth and natural resources. The ACHPR also provides that the ACHPRCom, which exercises oversight of compliance with the ACHPR, is to be guided by the UDHR and all human rights treaties ratified by the African States, including all the international treaties that enshrine the right to food, in particular the ICESCR.

The African Charter on the Rights and Welfare of the Child explicitly requires States to « *ensure the provision of adequate nutrition and safe drinking water* » and « *combat disease and malnutrition within the framework of primary health care* » (article 14). The Protocol to the African Charter on Human and People's Rights on the Rights of Women protects the right to food of women and their access to the productive resources and means required

to realize this right. The Protocol also enshrines the right to health, which includes the right of women to nutritional services during pregnancy and breastfeeding, economic rights, the right to social protection, and the special right of women to protection in cases of physical danger.

On the American continent, there are three principal human rights protection instruments apply as well: the ADRDM, the American Convention on Human Rights (ACHR), and the San Salvador Protocol. The right to food is set forth in article XI of the Declaration, which protects the right of all people to health and welfare. The ACHR enshrines interdependent rights to the right to food, such as the right to life, the right to the recognition of dignity, and the right to private property, the enjoyment of which may be subordinated under law to the social interest. Further, the ACHR, recognizes the right of every child to protective measures by families, society, and the State. Finally, the 1988 San Salvador Protocol is the only regional treaty that explicitly provides for the right of all people to food. Article 12 states:

1. Everyone has the right to adequate nutrition which guarantees the possibility to enjoy the highest level of physical, emotional and intellectual development.

The protection of the right to food is complemented by the protection of the right to food for children and elderly persons prescribed in articles 15 and 17 of the Protocol.

The right to food as such is not enshrined in Europe, yet the European Social Charter establishes a number of interdependent rights, such as the right to equitable remuneration, the right to social security, and the right to social and medical assistance. The European Social Charter also provides for the right to protection against poverty and social exclusion. Finally, it includes special protections for families, children and teenagers, and elderly persons.

4.2. AVAILABLE LEGAL REMEDIES AT THE REGIONAL LEVEL

There are a number of available legal remedies for the victims of violations of the right to food at the regional level. After all internal legal remedies have been exhausted, a number of potential quasi-judicial remedies are available, including the ACHPRCom, the African Committee of Experts on the Rights and Welfare of the Child, the Inter-American Commission on Human Rights (IAHRCCom), and the European Committee on Social Rights, as well as two channels of judicial remedy, the ACHPRCourt and the IAHRCourt. Below, we describe the available legal remedies on the African, American, and European continents.

4.2.1. AVAILABLE LEGAL REMEDIES ON THE AFRICAN CONTINENT

The ACHPRCom is charged with promoting and protecting human rights and the rights of African peoples. In the exercise of its mandate, the Commission oversees compliance with the ACHPR and the Protocol to the ACHPR on the Rights of Women in Africa through review of the reports submitted by States Parties every two years. In addition, the Commission analyzes communications submitted by States and « *other communications* », which include those presented by individuals and NGOs. In case of violations of

established rights, the Commission may forward its recommendations to the State in question. An additional quasi-judicial body was created through the African Charter on the Rights and Welfare of the Child, namely the African Committee of Experts on the Rights and Welfare of the Child. Since 2002, the Committee has had primary responsibility for reviewing the communications submitted by individuals, groups, or NGOs recognized by the OAU, a particular State, or the UN.¹⁴⁰

The ACHRCourt, the only judicial body for human and peoples' rights in Africa was established in 1998 through adoption of the Protocol to the African Charter on Human and People's Rights, which provided for the creation of an African Court for Human and People's Rights. The Protocol entered into effect in 2004. The Court was established subsequently, although it has yet to hear any complaints.

However, the potential of the ACHRCourt is enormous. The ACHRCourt may be called on to hear a matter by the ACHPRCom, States, and Intergovernmental African Organizations. Where the accused State has declared its acceptance as to the Court's competence to hear petitions, individuals and NGOs with observer status before the ACHPRCom may refer a matter to the ACHRCourt.¹⁴¹ The Court has authority to consider cases of violations of rights enshrined in African instruments or in any other international treaty.¹⁴² *Potentially, all violations of the right to food may be invoked before the ACHRCourt, which may issue a binding decision and determine the appropriate compensation.*

4.2.2. AVAILABLE LEGAL REMEDIES ON THE AMERICAN CONTINENT

The IACHRCom was established in 1959 for the sole purpose of overseeing, in its capacity as a *treaty body*, compliance with the rights enshrined in the ACHR by States Parties and promoting, in its capacity as the *OAS* body, the human rights in every member State of the OAS, based on the ACHR and the ADRDM.¹⁴³ In its role as a treaty body, the IACHRCom may hear petitions on violations of the ACHR submitted by « *[a]ny person or group of persons, or any nongovernmental entity legally recognized in one or more member states of the Organization* ». ¹⁴⁴ In addition to individuals and groups of individuals, NGOs may petition the IACHRCom, *on their own behalf or on behalf of third parties*, to denounce any violation of established rights. The San Salvador Protocol, further, provides for the assertion of the right to organize and join unions and the right to education before the IACHRCom, but not the right to food. The victims of violations of the right to food must, therefore, base their petitions on the interdependent rights set out in the ACHR.

If the IACHRCom declares a petition admissible, the first objective is to forge an amicable settlement between the State and the petitioning party. If no amicable solution is found, and if the recommendations of the IACHRCom are not observed, the case may then be referred to the IACHRCourt. The IACHRCom may, at any time, impose conservatory

140 Article 44 of the African Charter on the Rights and Welfare of the Child.

141 Article 5.3 of the Protocol to the ACHPR.

142 Article 8 of the Protocol to the ACHPR.

143 See SEPÚLVEDA, M, 2003, p. 50.

144 Article 44 of the ACHR.

measures to prevent irreparable harm to an individual and may conduct on-site visits to verify violations of established rights.¹⁴⁵

The role of the OAS body is also significant to the extent that the IACHRCom may hear petitions alleging violations of *human rights recognized in the ADRDM committed by member States of the OAS which have not ratified the ACHR*.¹⁴⁶ This represents an important potential avenue for protecting the right to food, insofar as this right is provided for in numerous articles of the ADRDM. A key difference remains, however, in relation to the former procedure to the extent that cases based on the ADRDM cannot be referred to the IACHRCourt in the event the IACHRCom is unable to settle matter.¹⁴⁷

As with the ACHPRCourt, the IACHRCourt is a judicial body for the protection of human rights. Its decisions, therefore, are final and unappealable. However, in contrast to the ACHPRCourt, *only the IACHRCom or a State may take a matter to the IACHRCourt*.¹⁴⁸ Petitioners do not enjoy this prerogative. In extremely serious cases, and to prevent irreparable harm, the IACHRCourt may order conservatory measures. If the IACHRCourt determines that a violation of a right enshrined in the ACHR has taken place, the body may order *reparations* for the violation and payment of just compensation to the victim.

4.2.3. AVAILABLE LEGAL REMEDIES ON THE EUROPEAN CONTINENT

The European Committee on Social Rights oversees compliance with the European Social Charter. With the entry into force in 1998 of the additional protocol establishing a collective complaints system, national and international labor organizations and certified NGOs are authorized to enter complaints in cases of violations of established rights. The conditions governing admissibility are more flexible than those applied by other regional oversight mechanisms, to the extent petitioners are not required to exhaust all internal legal remedies. However, the European Committee on Social Rights exercises more limited oversight authority, and must submit its reports to the Committee of Ministers of the Council of Europe, which then renders a decision on whether to present the recommendations to the State in question.

4.3. EXISTING JURISPRUDENCE AT THE REGIONAL LEVEL: CASE STUDY

A number of legal remedies available at the regional level for cases of violations of the right to food have never been invoked by victims. This applies particularly to the ACHPRCourt, the African Committee of Experts on the Rights and Welfare of the Child, and the European Committee on Social Rights. If in the case of the ACHPRCourt the failure to invoke the available legal remedies are attributable to the slowness of the respective judicial procedures, in the case of the African Committee of Experts and the European Committee this failure can only be explained by insufficient information

145 Article 25, paragraph 1, and article 40 of the Regulations of the IACHRCom.

146 Article 20 of the Statute of the IACHRCom and article 49 of the Regulations of the IACHRCom.

147 Article 50 of the IACHRCom Regulation.

148 Article 61 of the ACHR.

or interest.¹⁴⁹ The other available remedies at the regional level – the ACHPRCom, the IACHRCom, and the IACHRCourt – have generated substantial jurisprudence on the right to food, as we described in this section. On the American continent, existing jurisprudence has had a positive impact on the realization of the right to food, in particular for indigenous populations.

4.3.1. THE PROTECTION OF THE RIGHT TO FOOD OF DETAINED PERSONS AND THE OGO NI PEOPLE BY THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS

The ACHPRCom has rendered numerous findings of the violation of economic, social, and cultural rights. In at least one case – *Civil Liberties Organization vs. Nigeria*¹⁵⁰ – the Court ruled that the right to food of detained persons had been violated. As the ACHPRCom concluded: « *The deprivation of light, the insufficient food and lack of access to medicine or medical care also constitute a violation of Article 5* ».¹⁵¹

In regard to the protection of the right to food, the most important case in ACHPRCom jurisprudence involves the *Ogoni*. The case grew out of the submission of a communication by two NGOs in 1996 – a Nigerian NGO, *The Social and Economic Rights Action Center (SERAC)*, and an American NGO, *The Center for Economic and Social Rights* – to protect, among others, the right to food of the Ogoni people against the activities of a consortium constituted by the National Oil Company and Royal Dutch Shell.¹⁵² The Nigerian government was accused of destroying and threatening the food sources of the Ogoni people. Through the participation in the irresponsible exploitation of oil, the government was charged with poisoning the soil and water on which Ogoni communities depended for agriculture and fishing. Further, Nigerian security forces were accused of sowing terror and destroying harvests through their attacks on villages. This, in turn, created an atmosphere of insecurity that made it impossible for villagers to return to their fields and livestock, leading to malnutrition and hunger within Ogoni communities.

In its decision, the ACHPRCom opened by recognizing that the ACHPR protects protected the right to food. The ACHPRCom found that:

The Communication argues that the right to food is implicit in the African Charter, in such provisions as the right to life (Art. 4), the right to health (Art. 16) and the right to economic, social and cultural development (Art. 22). By its violation of these rights, the Nigerian Government trampled upon not only the explicitly protected rights but also upon the right to food implicitly guaranteed.¹⁵³

149 The European Committee on Social Rights has issued reports in response to approximately twenty collective complaints. Many of these refer to the right to housing or health, yet none center on the right to food.

150 ACHPRCom, *Civil Liberties Organisation vs. Nigeria*, 1999.

151 ACHPRCom, *Civil Liberties Organisation vs. Nigeria*, 1999, paragraph 27. Article 5 of the ACHPR states: « *Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited* ».

152 The original communication is available at <http://cestr.org/filestore2/download/578/nigeriapetition.pdf>

153 ACHPRCom, *SERAC, Center for Economic and Social Rights v. Nigeria*, 2001, paragraph 64.

The ACHPRCom noted that the obligations to respect, protect, and fulfil were universally applicable to all rights.¹⁵⁴ The Commission concluded that in the case in question the Nigerian government had violated its obligation to *respect* and *protect* the right to food of the Ogoni people, including against the activities of national and transnational petroleum enterprises.¹⁵⁵ To make reparation for the violation of the right to food of the Ogoni people, the ACHPRCom urged the Nigerian government to adopt measures, including the payment of compensation and the cleanup of polluted or damaged lands and rivers.¹⁵⁶ The commission also called for adequate assessments of the social and ecological impact of petroleum operations for purposes future oil projects and determined that the government should provide information on health and environmental risks and ensure the communities subject to potential impacts from petroleum operations have effective access to the pertinent regulatory and decision-making bodies.¹⁵⁷

The line of reasoning employed by the ACHPRCom was exemplary in the cases above. Yet, more than ten years following the decision, the conditions of life of the Ogoni communities have not effectively improved in any significant manner.¹⁵⁸

4.3.2. THE PROTECTION OF THE RIGHT TO FOOD OF INDIGENOUS COMMUNITIES BY THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

The IAHRCom renders over one hundred decision every year. The majority of decisions in this vast body of jurisprudence relate to civil and political rights and a large number are settled amicably between the State in question and victims. Yet, a small portion refers to petitions alleging violation of the right to food enshrined in article XI of the ADRDM or the right to food as recognized in rights provided for under the ACHR, in particular the right to life and the right to property. Most cases connected to the protection of the right to food involve indigenous populations.

There are two particularly interesting cases: *Yanomani v. Brazil*,¹⁵⁹ in which the IACHRCom found that the right to food recognized in article XI had been violated, and *Enxet-Lamenxay and Kayleyphapopyet (Riachito)*,¹⁶⁰ in which the Commission authorized, for the first time, the conclusion of an amicable settlement to protect the right to property and the right to food of indigenous communities.

In *Yanomani v. Brazil* (1985), the IACHRCom declared its competence to hear petitions based on the ADRDM. The case represented one of the first instances in which sanctions were assessed for the violation of collective rights. Brazil was not yet a party to the

154 ACHPRCom, *SERAC, Center for Economic and Social Rights v. Nigeria*, 2001, paragraph 44.

155 ACHPRCom, *SERAC, Center for Economic and Social Rights v. Nigeria*, 2001, paragraphs 65-66.

156 ACHPRCom, *SERAC, Center for Economic and Social Rights v. Nigeria*, paragraph 49.

157 ACHPRCom, *SERAC, Center for Economic and Social Rights v. Nigeria*, 2001, concluding part, paragraph 1.

158 Commission, *Report of the African Commission on Human and Peoples' Rights Working Group of Experts on Indigenous Peoples/Communities* (21 April 2005), Doc.U.N. E/CN.4/Sub.2/AC.5/2005/WP.3, pp. 19-20.

159 IAHRCom, *Brazil*, Case 7615, Resolution 12/85, 5 March 1985.

160 IAHRCom, *Enxet-Lamenxay and Kayleyphapopyet (Riachito)*. Paraguay, 1999.

ACHR in 1985, such that the petition submitted on behalf of the Yanomani could not be based on the ADRDM.¹⁶¹ The petition was aimed at protecting the rights of members of the Yanomani community, with a population of more than 10,000 people living in the Amazon region, whose rights were being infringed by highway construction projects and mining activities on community land. A government agricultural development project intended to ensure access to food for displaced persons had proved ineffective. The government had also undertaken a commitment to demarcate and protect the community's lands, yet these measures had not been implemented in practice.¹⁶²

The IACHRCom concluded that Brazil was in breach of a number of rights enshrined in the ADRDM, among them the right to food, because the country had failed to take the necessary measures to protect the Yanomani community.¹⁶³ The Commission recommended that the government carry out the demarcation of the community's territory and implement social and medical programs.¹⁶⁴ In 1992, the Yanomani territory was demarcated and in 1995 the IACHRCom conducted an on-site inspection to verify the respect and protection of the demarcated territory.¹⁶⁵

In *Enxet-Lamenxay and Kayleyphapopyet (Riachito)*, the IACHRCom authorized conclusion of the first amicable settlement aimed at enabling indigenous communities to reclaim their ancestral lands and receive food assistance until such time as they could return to their lands.¹⁶⁶ The Lamenxay and Riachito communities are both part of the Enxet people, a population of 16,000 members located in the Chaco region of Paraguay. Nearly 6,000 of these people depended on fishing, hunting, gathering, agriculture, and livestock raising for their sustenance at the time the State began selling off their ancestral lands to foreign interests beginning in 1885. By 1950, all Lamenxay and Riachito lands had been acquired. The members of the two communities sought to recover their territories, an effort that proved unsuccessful despite the adoption of a new Constitution in 1992 that recognized the rights of indigenous communities to their lands.¹⁶⁷

Paraguay became a party to the ACHR in 1989. The petition was deposited in December 1996. It alleged the breach of various rights established under the ACHR, among them the right to property. The parties arrived at an amicable settlement in March 1998. According to the agreement, the government undertook a commitment to repurchase the land and redistribute it free of charge to the indigenous communities. The government also pledged to guarantee access to food and medicine during such time as the communities returned to their lands.¹⁶⁸ By July 1999, when an IAHRCom delegation arrived in Paraguay to conduct an on-site visit, the State had repurchased

161 Brazil adhered to the ACHR on 9 July 1992.

162 IAHRCom, *Brazil*, Case 7615, Resolution 12/85, 5 March 1985, paragraphs 2 and 3.

163 IAHRCom, *Brazil*, Case 7615, Resolution 12/85, 5 March 1985, conclusive part, paragraph 1.

164 IAHRCom, *Brazil*, Case 7615, Resolution 12/85, 5 March 1985, conclusive part, paragraph 2.

165 IAHRCom, *Report on the Situation of Human Rights in Brazil*, 29 September 1997, paragraphs 63-73.

166 For a similar case, in which the Chilean State undertook a commitment to provide for the rights of indigenous populations in the Constitution and to refrain from implementing large-scale projects on indigenous lands, see IAHRCom, *Mercedes Julia Huenteao Beroiza y otros*, 2004.

167 IAHRCom, *Enxet-Lamenxay and Kayleyphapopyet (Riachito)*. Paraguay, 1999, paragraphs 3 and 5.

168 IAHRCom, *Enxet-Lamenxay and Kayleyphapopyet (Riachito)*. Paraguay, 1999, paragraphs 13-15.

the land but had not yet granted the respective land titles to the communities, the lone remaining step which was finally taken by the President of Paraguay on the occasion of the IAHRCom visit.¹⁶⁹

4.3.3. THE PROTECTION OF THE RIGHT TO FOOD OF CHILDREN AND INDIGENOUS COMMUNITIES BY THE INTER-AMERICAN COURT ON HUMAN RIGHTS

The IAHRCourt renders a limited number of decisions every year. However, the body exercises the singular attribute of being able to monitor the implementation of its decisions through their full realization by the State Party. Although the IAHRCourt's mandate is connected to the protection of civil and political rights, it has been especially active in protecting the economic and social rights of the most vulnerable groups in society, including migrant workers, detained persons, children, and indigenous populations.¹⁷⁰ Its jurisprudence is particularly substantive in regard to the protection of the right to food of children and indigenous populations.

One of the first decisions in which the IAHRCourt provided a broad interpretation of the right to life, defined as the right to a dignified life, was its decision in a case concerning the death of three homeless children in 1999. The IAHRCourt concluded that Guatemala had breached the right to life of these children not only because of their mistreatment and murder at the hands of police officers, but also because the State had not taken the necessary measures to guarantee the children a dignified life and prevent, in this way, the inhumane living conditions to which they had been subjected.¹⁷¹ This specific interpretation of the children's right to life was subsequently reaffirmed on several occasions by the IAHRCourt. In a more recent case, the Court invoked the Convention on the Rights of the Child to interpret the ACHR, concluding that Paraguay had violated the rights of the child enshrined in the ACHR, primarily as a result of its failure to ensure detained children access to food.¹⁷²

The jurisprudence of the IAHRCourt includes several cases in which the body ruled that the right to property of indigenous populations included the obligation of the State to recognize, demarcate, and protect the right to collective ownership of land, and in particular to guarantee indigenous populations access to their own means of subsistence. Below, two especially important cases are presented: *Mayagna (Sumo) Awas Tingni Community v. Nicaragua* and *Sawhoyamaxa v. Paraguay*.¹⁷³

In *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, the IAHRCourt protected the access of more than one hundred families of the *Awas Tingni* communities to their ancestral lands, which were threatened by a government concession to a Korean enterprise. The Court ruled that the State had violated its obligation to refrain from taking

169 IAHRCom, *Enxet-Lamenxay and Kayleyphapopyet (Riachito)*. Paraguay, 1999, paragraph 21.

170 BURGORGUE-LARSEN, I, ÚBEDA DE TORRES, A, 2008, pp. 443-564.

171 IAHRCourt, *Villagrán-Morales y otros vs. Guatemala*, 1999, paragraphs 144, 191.

172 IAHRCourt, *"Instituto de Reeducción del Menor" vs. Paraguay*, 2004, paragraphs 134, 161, 176.

173 See also IAHRCourt, *Comunidad Indígena Yakye Axa vs. Paraguay*, 2005.

any action, whether direct (through its agents) or indirect (by accepting or tolerating activities by third parties), that could affect the existence, value, use, or enjoyment of lands on which members of the community lived and carried out their activities.¹⁷⁴ To remedy the situation, the Court ruled that the State should invest, as reparation for non-material damages, the amount of US\$ 50,000 in works or services of collective interest for the benefit of the community, in accordance with and under the supervision of the IAHRCom.¹⁷⁵ The Court also ordered the State to implement measures to delimit, demarcate, and recognize the land titles of the communities, with their full participation and in accordance with their values and customary law.¹⁷⁶

In *Sawboyamaxa v. Paraguay*, the IAHRCourt protected the right of ownership and the right to life of the *Sawboyamaxa* indigenous community, and, through this protection, the right to food.¹⁷⁷ As noted in the first part, the members of the *Sawboyamaxa* indigenous community lived in difficult circumstances, having lost their access to traditional means of subsistence, primarily as a result of the government's refusal to recognize their ancestral lands. Community members had extremely limited access to food and received inadequate food assistance from the State. A full 31 members of the community, including several children, had died between 1991 and 2003 from diseases caused by substandard living conditions.¹⁷⁸

In its decision of 29 March 2006, the IAHRCourt recalled its progressive interpretation of the right to life in earlier jurisprudence.¹⁷⁹ It then determined that upon receiving a report from the community's leader detailing the deteriorating health of members and their lack of access to adequate food, the government had the obligation to adopt reasonable measures to remedy the situation.¹⁸⁰ Citing General Comment 12 of the Committee on Economic, Social, and Cultural Rights, the IAHRCourt concluded that the principal measure the government should implement to protect the right to life was to recognize the rights of community members to their ancestral lands.¹⁸¹

The IAHRCourt ruled that the government had not taken all reasonable measures and that it was, as a consequence, in breach of its international obligations.¹⁸² The Court noted that the principle of international customary law by which any violation of an international obligation which causes harm results in the obligation to remedy such harm.¹⁸³ The Court also ordered significant reparations for the community and its members, in accordance with the body's progressive jurisprudence in this area.¹⁸⁴

174 IAHRCourt, *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, 2001, paragraphs 153, 164, 173.4.

175 IAHRCourt, *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, 2001, paragraphs 167, 173.6.

176 IAHRCourt, *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, 2001, paragraphs 138, 164, 173.3.

177 IAHRCourt, *Sawboyamaxa Indigenous Community v. Paraguay*, 2006.

178 IAHRCourt, *Sawboyamaxa Indigenous Community v. Paraguay*, 2006, paragraphs 3, 145.

179 IAHRCourt, *Sawboyamaxa Indigenous Community v. Paraguay*, 2006, paragraphs 150-154.

180 IAHRCourt, *Sawboyamaxa Indigenous Community v. Paraguay*, 2006, paragraph 159.

181 IAHRCourt, *Sawboyamaxa Indigenous Community v. Paraguay*, 2006, paragraph 164.

182 IAHRCourt, *Sawboyamaxa Indigenous Community v. Paraguay*, 2006, paragraph 164.

183 And the IAHRECourt, *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, 2001, paragraph 163.

184 BURGORGUE-LARSEN, L, *ÚBEDA DE TORRES*, A, 2008, pp. 242-260.

While recognizing that every individual member of the indigenous community was a victim, the IAHRCourt ordered that compensation be made available to community leaders in their capacity as representatives. To remedy the violations, the Court required the State to adopt legislative, administrative, and other measures to ensure formal and physical usufruct by community members of their ancestral lands within a period of three years. The Court also instructed the State to create a development fund for the community in the amount of US\$ 1 million to implement agricultural, health, potable water, education, and housing projects. Lastly, the Court mandated that the State ensure access to adequate food for community members, until such time as they regained full access to their ancestral lands.¹⁸⁵



The Right to Food and Access to Justice: *Examples at the national, regional and international levels*

INTRODUCTION

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CONCLUSION AND RECOMMENDATIONS

5. The right to food and access to justice at the national level

The primary objective of international and regional human rights systems is to ensure the respective rights are ensured at the national level. In terms of the judicial and quasi-judicial roles described here, international and regional treaty bodies occupy a subsidiary position, intervening only where an effective protection is not ensured at the national level. In practice, protection of the right to food is highly unequal at the national level. In a large number of States, there is considerable potential in this area as the right to food has been enshrined in internal law and legal remedies are available. Yet, in a majority of cases judges do not recognize the justiciability of the right to food. By way of examples, we present the cases of Switzerland and the Netherlands, where judges have not recognized the justiciability of the ICESCR. There are currently only a few States in which the victims of violations of the right to food can currently access justice. Of these, we offer the examples of South Africa, Argentina, Colombia, India, and Switzerland, where judges have recognized the justiciability of the constitutional right to the minimum conditions for life.¹⁸⁶

In this final chapter, we describe the various avenue chosen by States to enshrine the right to food (1) and ensure its applicability under internal law (2). We also present rich body of existing jurisprudence in South Africa, Argentina, Colombia, India, and Switzerland that has ensured millions of people access to justice in cases of violations of the right to food (3).

5.1. LEGAL BASIS OF THE RIGHT TO FOOD AT THE NATIONAL LEVEL

States have selected at least five approaches to incorporating the right to food in internal law. First, the right to food has been enshrined in a number of States through recognition of the *formal validity of international or regional treaties* under internal law. A study performed by FAO on the recognition of the right to food at the national level based on the work of the Committee on Economic, Social, and Cultural Rights demonstrated that the ICESCR is formally recognized in 77 States which have opted for adoption or incorporation of the instrument.¹⁸⁷ In Argentina, for example, article 75,

186 Other national jurisdictions, for example Germany and the United States, have recognized the justiciability of the right to food. For more on the related jurisprudence, see COURTIS, 2007.

187 FAO, "Recognition of the right to food at the national level," pp. 135-136.

paragraph 22, of the Constitution sets forth the specific international and regional instruments with constitutional validity.

Second, a small number of States has established the right to food as a *fundamental* right under the national Constitution. This is particularly the case of South Africa, Brazil, Congo-Brazzaville, Haiti, Nicaragua, and Ukraine. In 2008 and 2009, Bolivia and Ecuador each adopted constitutions in which the right to food is enshrined as a justiciable fundamental right.¹⁸⁸ Some States, such as Brazil, Colombia, Cuba, Ecuador, Guatemala, and Paraguay have established the right to food for particularly vulnerable groups within their populations, including children, teenagers, elderly persons, indigenous populations, and detainees.

Third, a large number of States have enshrined the access to food – not the right to food – as *a principle, a social or political constitutional end or objective*. Cases include Bangladesh, Ethiopia, Guatemala, India, Malawi, Nigeria, Pakistan, Uganda, the Dominican Republic, the Islamic Republic of Iran, and Sri Lanka. As we will show in the Indian example, the access to justice in cases of violations of the right to food is virtually impossible where the right enjoys only tepid recognition under the Constitution. Yet, partial consecration of the right to food can lead to its incorporation in internal law by other means.

Fourth, the right to food is protected in a vast number of States through the establishment of *fundamental interdependent rights in the Constitution*, such as the right to life or the right to human dignity. The FAO study regarding the recognition of the right to food reveals that 114 States have enshrined the right to social security in their Constitutions, 46 States provide for an even broader right, such as an adequate standard of living or the right to live in dignity, 13 States set forth a right to health which can encompass the right to food, and 37 States mandate the right to an adequate minimum wage to satisfy the basic needs of working persons and their families.¹⁸⁹ To provide the greatest protection possible and enable access to justice in cases of violations of the right to food, it is imperative that interdependent rights be incorporated as justiciable constitutional rights. The most important among these are the right to human dignity, which has been enshrined under the Swiss Constitution,¹⁹⁰ and the right to life, set forth in the Indian Constitution.¹⁹¹

Finally, some States have enshrined the right to food through passage of a *national law* governing, for example, food security or the right to food. The Committee on Economic, Social, and Cultural Rights,¹⁹² the special Rapporteur on the right to food,¹⁹³ and States, through the right to food guidelines, have recommended the adoption of legislation to enshrine the right to food at the national level. In 2009, FAO published the *guide on legislating on the right to food*, which lists several positive examples and provides

188 Article 16 of the Constitution of Bolivia, adopted by the people on 25 January 2009; articles 11 and 13 of the Constitution of the Republic of Ecuador, adopted by the people on 28 September 2008.

189 FAO, “Recognition of the right to food at the national level,” pp. 118-119.

190 Article 12 of the Federal Constitution of the Swiss Confederation, adopted in 1999.

191 Article 21 of the Constitution of India, adopted in 1950.

192 Committee, *General Comment 12*, paragraph 29.

193 Commission, *The right to food, Report by the Special Rapporteur on the right to food*. (7 February 2001), Doc.U.N. E/CN.4/2001/53, paragraphs 29-30.

comprehensive information on the best approaches to developing national legislation.¹⁹⁴ It is worth mentioning that Guatemala¹⁹⁵ and Brazil¹⁹⁶ were among the first States to adopt a law on food and nutritional security that recognizes the right to food and the correlative obligations of States and provides for oversight mechanisms.

5.2. AVAILABLE LEGAL REMEDIES AT THE NATIONAL LEVEL

In a majority of national legal systems, legal remedies are available to protect fundamental rights. The related procedures are generally available for purposes of claiming the violation of civil and political rights, but to the extent the right to food is enshrined at the national level the procedures should become applicable in this area as well.

There is a range of legal remedies available at the national level. In this section, we lay out individual remedies, citing the example of Switzerland, collective and public interest remedies, based on the examples of South Africa and India, and *amparo* actions and tutelary procedures, as applied in the Argentine and Colombian cases. Further, we describe the competencies of constitutional judges in these States and the role of national human rights institutions.

5.2.1. INDIVIDUAL REMEDIES: THE SWISS CASE

In Switzerland, individual petitions to the Federal Supreme Court in cases of violations of fundamental rights dates to 1874, when the new Constitution established the *direct public remedy*, enabling individuals to submit complaints to the Federal Supreme Court in cases of violations of their fundamental rights. This possibility was maintained, with modifications, on adoption of the 1999 Constitution and passage of a new Supreme Court law in 2007. The singular feature of the Swiss procedure is that it only provides for *individual remedies*, which are limited to direct victims of violations acting in their personal interest.¹⁹⁷ There is no possibility, consequently, for collective actions or public interest remedies under the Swiss system. The other unique aspect of the Swiss model is that it limits the competencies of the Federal Supreme Court in respect to the measures it may determine in cases of violations of a fundamental right. The Court may, for example, decide against applying a law in the case in question where the law breaches a fundamental right, but it may not void a federal law, even if such action were consistent with the protection of fundamental rights.

5.2.2. COLLECTIVE AND PUBLIC INTEREST REMEDIES: THE SOUTH AFRICAN AND INDIAN CASES

In South Africa and India, all victims of violations of a fundamental right may invoke their right before the regional constitutional jurisdictions – the *High Courts* in South Africa's

194 FAO, *Guide on Legislating for the Right to Food*, FAO, Rome, 2009.

195 Law on the establishment of a national food and nutritional food security system enacted through Decree 32/2005.

196 Law 11346 adopted on 15 September 2006 by the Brazilian Congress.

197 Law of 17 June 2005 on the Federal Supreme Court, articles 89, 115.

Provinces and in India's States – with the additional option of appeal to the national level before the South African Constitutional Court and the Indian Supreme Court.¹⁹⁸ In addition to this competency in individual cases, the constitutional jurisdictions in South Africa and India have authority to hear collective and public interest petitions as well. The former enable the member of a group to submit a complaint on behalf of the group, while the latter allow any person to petition the courts in cases of violations of fundamental rights. While these remedies are explicitly set for in the South African Constitutions,¹⁹⁹ public interest remedies were only accepted by the Indian Supreme Court beginning in the 1980s, with the specific objective of ensuring disadvantaged persons, who constitute the majority of India's population, access to justice.²⁰⁰ In India, a single complaint submitted by any person can prompt a constitutional judge to launch an inquiry of alleged violations of fundamental rights affecting one person or one million persons.²⁰¹

In addition to hearing petitions on a diversity of matters, the constitutional jurisdictions of South Africa and India have the power to order the State to take measures to remedy violations of fundamental rights.²⁰² In a large number of cases, the jurisdictions have imposed concrete measures to ensure the realization of fundamental rights, including the right to food, and they have not hesitated to follow up, over many years, on the execution of their decisions. The Courts also exercise broad discretion to verify the constitutionality of any law that is in breach of fundamental rights.²⁰³

5.2.3. AMPARO AND TUTELARY PROCEDURES: THE ARGENTINE AND COLOMBIAN CASES

Amparo actions first emerged in Mexico and are today a common feature of most Latin American Constitutions, including Argentina's.²⁰⁴ In Colombia, where the remedy is called *tutelage*, the procedure was established with the adoption of the new Constitution and creation of the Constitutional Court in 1991. Its objective is to enable the victims of violations of fundamental rights immediate access to justice, to which end judges are required to reach a decision on petitions submitted before them within a period of ten days.²⁰⁵

Generous in scope, *amparo* actions in Argentina and tutelary procedures in Colombia allow for *individual remedies* in cases of the violation of the right to food, as well as

198 Article 167, paragraph 6 of the Constitution of South Africa; Article 32, paragraph 1, and article 226, paragraph 1, of the Constitution of India.

199 Article 38 of the Constitution of South Africa.

200 MURALIDHAR, S, "Judicial Enforcement of Economic and Social Rights: the Indian Scenario" in COOMANS, 2006, pp. 240-243.

201 COHRE, 2003 pp. 31-33.

202 Article 172 of the Constitution of South Africa; Articles 139 and 142 of the Constitution of India.

203 Articles 32, paragraph 2, and 226 of the Constitution of India; Article 172 of the Constitution of South Africa.

204 Article 43 of the Constitution of Argentina.

205 Articles 86 and 241 of the Constitution of the Republic of Colombia. See UPRIMNY YEPES, R, "The Experience of the Colombian Constitutional Court" in COOMANS, F, 2006, pp. 358-360.

collective resources and, in certain cases *public interest remedies*. In Argentina and Colombia, the Ombudsman may file complaints where the collective right to food has been breached. For its part, the Supreme Court has heard collective petitions on a number of occasions.²⁰⁶ In Colombia, the Constitutional Court has also recognized that the tutelary procedures can be applied to collective actions, by indigenous communities, for examples, in cases of the violation of the right to food.²⁰⁷ In both States, judges exercise considerable authority to determine what measures the State should adopt to remedy a given violation.

5.2.4. THE ROLE OF NATIONAL HUMAN RIGHTS INSTITUTIONS

There are various types of national human rights institutions, including national human rights commissions, mediating offices, and Ombudsman units. Their functioning and mandate is generally guided by the *Paris Principles* adopted by the respective national institutions in October 1991 and ratified by the United Nations in 1991 and 1993. In General Comment 10 on the role of human rights institutions, the Committee on Economic, Social, and Cultural Rights recommended that States should ensure the mandate of these institutions include economic, social, and cultural rights and the authority to hear complaints where these rights have been violated.²⁰⁸ Right to food guideline 18 recommends the establishment of these institutions in the event they do not exist and the inclusion of the promotion and protection of the right to food in their mandates.²⁰⁹

In practice, various national institutions exercise competence to hear complaints in cases of violations of the right to food involving the authority to investigate and mediate with the political branches of government. Several of these institutions, including in Argentina and Colombia, have the power to file complaints on behalf of victims, including in cases of violations of the right to food.

5.3. EXISTING JURISPRUDENCE AT THE NATIONAL LEVEL: CASE STUDY

The justiciability of the right to food has not been recognized in every State in which the right to food is enshrined and irrevocable. Far from it. Yet, many national jurisdictions have recognized the right, enabling millions of victims access to justice. We open with an examination of the jurisprudence in States in which national jurisdictions have failed to recognize the direct applicability of article 11 of the ICESCR, citing the specific examples Switzerland and the Netherlands. We then provide examples of positive jurisprudence in Argentina, South Africa, Colombia, India, and Switzerland.

206 COURTIS, C, “Socio-Economic Rights before the Courts in Argentina” in COOMANS, F, 2006, p. 313, 350-351.

207 Colombia, Corte Constitucional, *Defensor del Pueblo, doctor Jaime Córdoba Triviño (en representación de varias personas integrantes del Grupo Etnico Indígena U'WA) c/ Ministerio del Medio Ambiente y Occidental de Colombia, Inc. s. Acción de tutela*, Sentencia SU-039/1997.

208 Committee, General Comment 10. *The role of national human rights institutions in the protection of economic, social and cultural rights* (14 December 1998), Doc.U.N. E/C.12/1999/25, paragraphs 3-4.

209 Right to food guideline 18.

5.3.1. THE ABSENCE OF PROTECTION OF THE RIGHT TO FOOD DUE TO NON-RECOGNITION OF THE DIRECT APPLICABILITY OF THE ICESCR: THE SWISS AND DUTCH CASES

As we have seen, the international or regional instruments that enshrine the right to food, such as the ICESCR, have formal validity in at least 77 States. For the Committee on Economic, Social, and Cultural Rights, legal validity should be accompanied by recognition of the direct applicability of the ICESCR provisions under internal law.²¹⁰ Unfortunately, the reality is quite different. In a majority of States, the instruments are not recognized as directly applicable.

Switzerland and the Netherlands are two illustrations of this phenomenon. In both States, the highest political and judicial bodies have ruled for decades that the rights enshrined in the ICESCR are not directly applicable.²¹¹ This position is based on the supposed non-justiciability of these rights. As the Swiss Federal Supreme Court sees it:

According to jurisprudence, a norm is directly applicable if it is sufficiently determined and clear from its content to constitute the basis for a concrete decision. In contrast to the guarantees arising from the International Covenant on Civil and Political Rights, the applicability of which is generally recognized, the provisions of the Covenant invoked by the appellant are limited to prescribing for States, in the form of ideas and guidelines, objectives to be achieved in the various fields considered. They provide greater latitude in respect to the means used to realize those objectives. It must be recognized (...) that they do not manifest, with the a few exceptions, the characteristics of directly applicable norms.²¹²

The Federal Supreme Court arrived at the same conclusion with regard to article 11, paragraph 1, of the ICESCR, denying the right to food the status of directly applicable right.²¹³ This decision was offset by the fact that the Court recognized the justiciability and existence in 1995 of a constitutional right to the minimum conditions for life (see below). Yet, this position triggered an extreme decision in the Netherlands regarding the absence of protections for the right to food.

In a case brought directly to the District Court in The Hague, article 11 of the ICESCR was invoked to protect the rights of rejected asylum seekers who had been denied food, clothing, and housing assistance.²¹⁴ In its decision of 6 September 2000, the District

210 Committee, *General Comment 9. The domestic application of the Covenant* (3 December 1998), Doc.U.N. E/C.12/1998/24, paragraphs 2, 7.

211 This position was expressed by the Federal Council upon Switzerland's ratification of the ICESCR and by the highest political authorities of the Netherlands at the time of that country's ratification of the instrument. See in particular VLEMMIX, F, "The Netherlands and the ICESCR: Why didst thou Promise such a Beauteous Day?" in COOMANS, F (ed.), 2006, pp. 43-65.

212 Federal Supreme Court, *T. v. Neuchâtel County Compensation Bank and Administrative Court, Neuchâtel*, ATF 121 V 246, Judgment, 20 July 1995, p. 249.

213 Federal Supreme Court, *E.M. gegen Kantonale Steuerverwaltung St.Gallen und Verwaltungsgericht St.Gallen*, ATF 122 I 101, Judgment, 24 May 1996, p. 103.

214 District Court of The Hague, Decision of 6 September 2000, in VLEMMIX, F, "The Netherlands and the ICESCR: Why didst thou Promise such a Beauteous Day?" in COOMANS, F (ed.), 2006, pp. 50-51.

Court began by recognizing that the right to adequate food enshrined in the ICESCR could not be invoked in the same manner as the civil and political rights prescribed in the ICCPR. All victims of a violation of any of these rights could petition the Court. However, the Court ruled that the expression « *adequate food* » was too vague to be directly applicable. Despite the fact that the rejected asylum seekers had no access to *any* food, the Court concluded that it could not determine whether the food was adequate.²¹⁵ The case reveals that in the case of the Netherlands even the right to the minimum essential needs is understood to fall under the exclusive scope of the pertinent political authorities, with disastrous consequences for the most disadvantaged.

5.3.2. THE PROTECTION OF THE RIGHT TO FOOD FOR INDIGENOUS PEOPLE THROUGH RECOGNITION OF THE DIRECT APPLICABILITY OF INTERNATIONAL AND REGIONAL INSTRUMENTS UNDER DOMESTIC LAW: THE ARGENTINE CASE

In Argentina, the formal validity of international and regional instruments that enshrine the right to food has been accompanied by recognition of their direct applicability by national jurisdictions, generating substantial jurisprudence in this area.²¹⁶ Within this body of law, *Defensor del Pueblo c. Estado Nacional y otra*, cited in the first part of this publication, occupies a particularly important position. Recall that the case was initially brought before the Supreme Court by Argentina's Ombudsman through an *amparo* action filed against Chaco Province and the national government which was aimed at forcing the two spheres to provide medical and food assistance to indigenous communities.²¹⁷ A total of eleven persons had died as a consequence of substandard living conditions. In his complaint, the mediator invoked the rights, including the right to life and the right to food, enshrined in the Constitution, ACHR, ADRDM, UDHR, ICESCR, and CEDAW.

In its decision of 18 September 2007, the Supreme Court recognized the direct applicability of the international and regional instrument that enshrine the right to food. To prevent imminent and irreparable harm, the Court ordered the national government and the government of Chaco Province to adopt *emergency measures* through the distribution of food and potable water to indigenous communities.²¹⁸ In addition to the emergency measures, the Supreme Court affirmed the need to implement *structural measures* to fulfil the right to food of indigenous communities in Chaco Province. The national government and the government of Chaco Province were instructed to identify the indigenous communities living in the area and to submit a report to the Court on the implementation of food, health, sanitary assistance, potable water, education,

215 VLEMMIX, F, "The Netherlands and the ICESCR: Why didst thou Promise such a Beauteous Day?" in COOMANS, F (ed.), 2006, p. 51.

216 COURTIS, C, "Socio-Economic Rights before the Courts in Argentina" in COOMANS, F (ed.), 2006, pp. 309-353.

217 Argentina, Corte Suprema de Justicia de la Nación, *Defensor del Pueblo de la Nación c. Estado Nacional y otra*, 2007, paragraph 1. All case documents are available at: www.defensor.gov.ar.

218 Argentina, Corte Suprema de Justicia de la Nación, *Defensor del Pueblo de la Nación c. Estado Nacional y otra*, 2007, par. 3.III.

and housing programs developed to assist the communities in question and the corresponding budget allocations.²¹⁹ The case remains under consideration by the Court; it could have a decisive impact on the realization of the right to food for indigenous communities in Chaco Province.

5.3.3. THE PROTECTION OF THE CONSTITUTIONAL RIGHT TO FOOD OF FISHING COMMUNITIES: THE SOUTH AFRICAN CASE

Incorporation of economic, social, and cultural rights as fundamental rights under the South African Constitution, reflecting the intent to put an end to the institutional discrimination of the Apartheid era, has given rise to a substantial body of jurisprudence in this area.²²⁰ In May 2007, following a series of decisions on the right to housing and to health, in *Kenneth George* the South African judicial system enshrined, for the first time, protection of the right to food.²²¹

The petition was aimed at protecting the rights of access of traditional fishing communities. A law on marine resources (*Marine Living Resources Act*) was introduced in 1998 in the Cape of Good Hope Province establishing a system of quotas through which the totality of fishable resources in a given year was divided into commercial licenses. The specific needs of traditional fishing communities were not taken into account by the law, while the quota licensing procedures were complex and burdensome, thereby excluding, *de facto*, traditional fishermen. With implementation of the law, entire fishing communities lost their access to the sea, and their nutritional status deteriorated significantly as a result.

In December 2004, with the support of a development organization, a number of traditional fishermen filed a complaint with the High Court of Cape of Good Hope Province, invoking the violation of their right to food. An *affidavit* was also submitted to the Court by the Special Rapporteur of the United Nations on the right to food, J. Ziegler. After months of negotiations, the fishing communities and the Ministries of the Environment and Tourism reached an amicable agreement. According to the agreement, nearly 1,000 traditional fishermen, who had demonstrated their historic reliance on fishing as their primary means of subsistence, obtained a fishing authorization and the right to fish and sell their products.²²² The Court ratified the agreement, authorizing the fishermen to petition the body in the event the agreement was breached.²²³ The Court also struck down the law and ordered the government to draft a new legislative

219 Argentina, Corte Suprema de Justicia de la Nación, *Defensor del Pueblo de la Nación c. Estado Nacional y otra*, 2007, par. 3.I.

220 LIEBENBERG, S, "Enforcing Positive Socio-Economic Rights Claims: The South African Model of Reasonableness Review" in SQUIRES, J, LANGFORD, M, THIELE, B, 2005, pp. 73-88

221 South Africa, High Court, *Kenneth George and Others v. Minister of Environmental Affairs & Tourism*, 2007.

222 South Africa, High Court, *Kenneth George and Others v. Minister of Environmental Affairs & Tourism*, 2007. par. 1-7.

223 South Africa, *High Court, Kenneth George and Others v. Minister of Environmental Affairs & Tourism*, 2007. par. 12.

and policy framework, with the full participation of the traditional fishing communities, in order to ensure the realization of their rights.

5.3.4. THE PROTECTION OF THE RIGHT TO FOOD OF DISPLACED PERSONS: THE COLOMBIAN CASE

The 1991 Colombian Constitution does not expressly recognize the justiciability of economic, social, and cultural rights,²²⁴ although it does provide for the adoption of positive measures by the State on behalf of marginalized and vulnerable groups and enshrines the formal validity of international treaties under internal law, which may then be used to interpret fundamental rights.²²⁵ While the tutelary procedure is limited to violations of the fundamental rights set forth in the Constitution,²²⁶ the Constitutional Court has produced considerable jurisprudence on economic, social, and cultural rights based on the interdependence of these rights with civil and political rights and on the obligation of the State to protect the rights of vulnerable persons or groups.²²⁷ The right existing jurisprudence has most clearly set out to protect is the right to food of displaced persons, in particular in cases of extremely vulnerable persons or groups, such as the elderly, children, and women heads of households. *Abel Antonio Jaramillo y otros* illustrates this point.²²⁸

In this case, the Constitutional Court ruled on the situation of 1,150 families, representing over 4,000 persons, who had brought a total of 108 *tutelary* procedures.²²⁹ All of the families had lived in situations of extreme vulnerability for many years and had unsuccessfully sought assistance from the State agencies with primary responsibility for displaced persons, particularly with respect to food. Based on the rights recognized in the Constitution, interpreted in the light of the ICESCR, the general recommendations of the Committee on Economic, Social, and Cultural Rights, and the guiding principles on displaced persons developed by F. Deng,²³⁰ the Court concluded that the situation constituted a violation, among others, of the right to life, the right to essential minimum needs, and the right to special protection for elderly persons, women heads of households, and children. The Court stipulated that the rights enshrined in the Constitution, as defined in the light of the principles on displaced persons developed by

224 Title III of the Constitution of the Republic of Colombia provides for the applicable rights, guarantees, and duties; chapter I enshrines the fundamental rights of individuals, in essence civil and political (articles 11-41); chapter II establishes the economic, social, and cultural rights of individuals (articles 42-77); and chapter III sets forth the collective and environmental rights of Colombians (articles 78-82). Only the first set of rights is recognized as justiciable.

225 Articles 13-93 of the Constitution of the Republic of Colombia.

226 Article 86 of the Constitution of the Republic of Colombia.

227 Ler UPRIMNY YEPES, R, "The Experience of the Colombian Constitutional Court" in COOMANS, F, 2006, p. 365.

228 Colombia, Corte Constitucional, *Acción de tutela instaurada por Abel Antonio Jaramillo y otros contra la Red de Solidaridad Social y otros*, Sentencia T-025/2004.

229 Colombia, Corte Constitucional, *Acción de tutela instaurada por Abel Antonio Jaramillo y otros contra la Red de Solidaridad Social y otros*, Sentencia T-025/2004, part. I.1.

230 Commission, *Human Rights, Mass Exodus and Displaced Persons, Report of the Representative of the Secretary-General, M. Francis M. Deng. Addendum. Guiding Principles on Internal Displacement* (16 October 1998), Doc.U.N. E/CN.4/1998/55.Add.2.

F. Deng, ensured the right to food. In the Court's view, because the massive, ongoing, and repeated violation of fundamental rights was not attributable to a single authority but represented a structural problem – the absence of resources to fund policies aimed at assisting displaced persons and the lack of institutional capacity to implement such policies – the situation correspond to an *unconstitutional state of things*.²³¹

As discussed above, to remedy the unconstitutional state of affairs, the Court ordered the State to reallocate resources to programs for displaced persons. It also instructed the authorities to develop a plan within two months and allocate the necessary resources within a period of one year, while ensuring the hard core of fundamental rights for each displaced person, including the distribution of food assistance, until such time as they could provide for their needs through their own means on the basis of the mandated socioeconomic development programs that were to be implemented.²³²

The case did not produce significant structural changes with respect to State support to the development of the 1,150 displaced families, but it was followed by a considerable increase in government food aid to displaced persons.

5.3.5. THE PROTECTION OF THE RIGHT TO FOOD OF THE BENEFICIARIES OF FOOD ASSISTANCE PROGRAMS BASED ON THE RIGHT TO LIFE: THE INDIAN CASE

Among all the States that have enshrined the right to life in their Constitutions, India provides, without question, the best example of direct involvement by judges to protect the right to life of the most disadvantaged, defined as the protection of the right to live in dignity.²³³ To protect the right to life, the Supreme Court has ruled to protect, for example, the right of traditional fishermen to access the sea and the right of local farmers to safeguard their lands and water against the activities of the shrimping industry.²³⁴ The Court has also protected the means of subsistence of tribal populations against State mining concessions to private enterprises.²³⁵ However, the most important case on the protection of the right to food in India was *People's Union for Civil Liberties*, in which the Court handed down a series of resolutions beginning in 2001 requiring state governments in India to implement food distribution programs to the most disadvantaged.²³⁶

There are more than 200 million undernourished people in India, primarily women, children, Dalits, and members of tribal communities who live in rural zones.²³⁷

231 Colombia, Corte Constitucional, *Acción de tutela instaurada por Abel Antonio Jaramillo y otros contra la Red de Solidaridad Social y otros*, Sentencia T-025/2004, section III.

232 Colombia, Corte Constitucional, *Acción de tutela instaurada por Abel Antonio Jaramillo y otros contra la Red de Solidaridad Social y otros*, Sentencia T-025/2004, section III.9.

233 MURALIDHAR, S, "Judicial Enforcement of Economic and Social Rights: the Indian Scenario" in COOMANS, F (ed.), 2006, pp. 237-267.

234 India, Supreme Court, *S. Jagannath Vs. Union of India and Ors*, 1996.

235 India, Supreme Court, *Samatha Vs. State of Andhra Pradesh and Ors*, 1997.

236 India, Supreme Court, *People's Union for Civil Liberties Vs. Union of India & Ors*, 2001.

237 FAO, *The State of Food Insecurity in the World*, p. 12.

Nearly 2 million children die every year as a result of malnutrition and diseases linked to malnutrition.²³⁸ It was in this context that the Supreme Court decided to hear a public interest petition in 2001 submitted by the *People's Union for Civil Liberties*, with the objective of protecting the right to food of various communities suffering from hunger in the state of Rajasthan. A large number of people in those communities were dying of hunger, yet they did not receive any government assistance, despite the availability of food supplies only a few kilometers away.²³⁹ In response to the petition, the Supreme Court recognized that the right to food was enshrined in the Constitution under the right to life provision set forth in article 47, which requires that the State undertake measures to improve the nutritional state of the population. The Court followed this interpretation with the issuance of a number of directives to the state governments of India.²⁴⁰

The Supreme Court ordered the state governments to identify the eligible beneficiaries under the different existing programs, while mandating the effective implementation of those programs. In the event the programs developed by the political branches of government were inadequate, the Supreme Court instructed that the necessary improvements be undertaken. To ensure fulfillment of its decisions, the Supreme Court appointed two Delegates to draft reports on the implementation of the programs undertaken across India's various states. Further, the body instructed that its resolutions be published in every food distribution center throughout India with the corresponding list of beneficiaries and that the information be widely disseminate through the media.

Despite difficulties in the early stages of implementation, the Court's resolutions had a significant impact on the tangible realization of the right to food in India. Food assistance programs which had begun to be abandoned were revived thanks to dramatic improvements in their implementation, enabling access to food for millions of individuals.²⁴¹ More important, the resolutions of the Supreme Court carried symbolic importance: they transformed the beneficiaries of assistance programs into stakeholders of justiciable rights, reminded state governments of their constitutional obligations, and fostered a shift in the perception of judges regarding their role as guardians of the right to food.²⁴²

238 Commission, *The right to food. Report of the Special Rapporteur on the right to food, Jean Ziegler*. Addendum. Mission to India (20 March 2006), Doc.U.N. E/CN.4/2006/44/Add.2, paragraph 7.

239 GONSALVES, C, "The Spectre of Starving India" in BORGHI, M, POSTIGLIONE BLOMMESTEIN, L (eds), 2006, pp. 179-197.

240 India, Supreme Court, *People's Union for Civil Liberties Vs. Union of India & Ors*, 2001. All case documents are available at: www.righttofoodindia.org.

241 GONSALVES, C, "Reflections on the Indian Experience" in SQUIRES, J, LANGFORD, M, THIELE, B, 2005, pp. 177-182.

242 Human Rights Law Network, *Food Security & Judicial Activism in India*, New Delhi, Human Rights Law Network, 2007.

5.3.6. THE PROTECTION OF THE RIGHT TO FOOD OF PERSONS WITHOUT LEGAL STATUS BASED ON THE RIGHT TO HUMAN DIGNITY: THE SWISS CASE

Although Switzerland is among the States in which the direct applicability of the ICESCR is not recognized, the Federal Supreme Court has developed a considerable body of jurisprudence on the protection of the right to food based on the right to human dignity. The right was initially recognized by the Court in 1995 to protect the rights of three siblings, all illegal stateless immigrants of Czech origin, who were in Switzerland without food or money.²⁴³ The three siblings could not work, due to their inability to secure the necessary authorizations, and could not leave the country because of their undocumented status. They turned to the authorities in Berna County for assistance, but were denied. To obtain assistance, they petitioned the Federal Supreme Court, which ruled that the siblings had the right to the minimum conditions for life in order to prevent them from spiraling into indigence. A year later, the jurisprudence was reaffirmed to protect the access to social assistance for rejected asylum seekers. More recently, the Federal Court protected the access to emergency assistance provided to rejected asylum seekers,²⁴⁴ even where such individuals failed to cooperate in their deportation procedures.²⁴⁵ All individuals residing in Swiss territory may, therefore, invoke this right, irrespective of their status. Similarly, the scope and corresponding core of the right may not be restricted given that it protects the right to the minimum conditions for life.²⁴⁶

The practical implications of the Supreme Court's decision are limited, insofar as they only apply to individual cases. Since 1995, restrictive federal asylum laws have been enacted, many of which violate the right to dignity but which the Federal Supreme Court is powerless to void. However, the jurisprudence is of significant interest given that the right to the minimum conditions for life was not enshrined in the Constitution at the time the justices invoked the right in 1995. Therefore, the Federal Court recognized the existence of an « *unwritten federal constitutional right* » to minimum conditions for life, including the guarantee of all basic human needs such as food, clothing, or housing, to protect individuals from a human condition without dignity.²⁴⁷ The right was later enshrined in article 12 of the 1999 Swiss Constitution. For M. Borghi, recognition of the right to the minimum conditions for life by the Federal Supreme Court and the Swiss Constitution derives from the imperative of every Democratic State of Law that seeks legitimacy to provide judicial protection for the essential fundamental rights which guarantee the inviolability and dignity of the human person.²⁴⁸ If we follow this line of reasoning, a similar conclusion could be drawn from a majority of national legal systems, enabling, therefore, more substantial protection of the right to food.

243 Federal Supreme Court, *V. gegen Einwohnergemeinde X. und Regierungsrat des Kantons Bern*, 1995.

244 Federal Supreme Court, *B. gegen Regierung des Kantons St.Gallen*, 1996.

245 Federal Supreme Court, *X. gegen Departement des Innern sowie Verwaltungsgericht des Kantons Solothurn*, 2005.

246 Federal Supreme Court, *X. gegen Sozialhilfekommission der Stadt Schaffhausen und Departement des Innern sowie Obergericht des Kantons Schaffhausen*, 2004.

247 Federal Supreme Court, *V. gegen Einwohnergemeinde X. und Regierungsrat des Kantons Bern*, 1995.

248 BORGHI, M, "The Juridical Interaction between the Right to Food and the Code of Conduct, a Symbiosis?" in BORGHI, M, POSTIGLIONE BLOMMESTEIN, L (eds.), 2002, pp. 230-239.



The Right to Food and Access to Justice: *Examples at the national, regional and international levels*

INTRODUCTION

PART I. THE RIGHT TO FOOD AND ITS JUSTICIABILITY UNDER INTERNATIONAL LAW

1. DEFINING THE RIGHT TO FOOD AND THE CORRELATIVE OBLIGATIONS OF STATES
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CONCLUSION AND RECOMMENDATIONS

Conclusion and recommendations

In the first section of our discussion, we demonstrated that the two primary arguments traditionally invoked against the justiciability of the right to food are no longer applicable. First, the right to food and the correlative obligations of States are clearly defined under international law. Second, there is nothing inherent to the right to food that precludes its justiciability. We presented substantial jurisprudence demonstrating that judicial or quasi-judicial bodies are capable of identifying violations of the totality of State obligations – the obligation to ensure the right to food is exercised without discrimination, the obligation to respect, protect, and fulfil this right – and the measures which must be implemented to remedy these violations, without infringing on the principle of separation of powers.

The discussion of this jurisprudence, moreover, enabled us to show that the millions of victims of violations of the right to food have been granted access to justice throughout the world, principally in South Africa, Argentina, Colombia, India, and Switzerland, as well as before the ACHPRCom, IAHRCom, IAHRCourt, Human Rights Committee, and International Court of Justice. Therefore, it is no longer acceptable to affirm that access to justice is not possible in cases of violations of the right to food.

In the second part, we sought to understand why victims of violations of the right to food are able to secure access to justice under some legal systems and not others. We showed that a number of conditions were required to ensure the access to justice. First, the right to food must be enshrined in the legal system in question, it must have a legal basis. Second, legal remedies must be available and applied to protect the victims from violations of the right to food. Third, the petitioned oversight bodies must recognize the right to food and their role as guarantor of the respect, protection, and fulfilment of the right to food.

In laying out the implementation of these three conditions at the national, regional, and international levels, we found that the right to food is founded on a variety of legal bases – international or regional treaties in Argentina, the Constitution of South Africa, or Guatemalan national law – although the ideal scenario resides in enshrining the right to food as a justiciable fundamental right under the Constitution, as in the Ecuadorian and Bolivian cases.

In examining the available legal remedies, we concluded that these are readily accessible to victims and that they provide for collective remedies, such as in South Africa, Argentina, Colombia, or public interest remedies, as in the Indian example. It is also

important that national human rights institutions provide support to the claims of victims, as occurs in South Africa, Argentina, and Colombia. Further, we concluded that the petitioned oversight bodies, whether judicial or quasi-judicial, should have broad investigative powers, the authority to render detailed decisions on the required measures, assistance and structural alike, and possess the capacity to verify the execution of those decisions, as reflected in the Indian Supreme Court and the Inter-American Court on Human Rights.

Finally, we concluded that the consecration and irrevocability of the right to food before a judicial or quasi-judicial oversight body does not guarantee recognition of its justiciability by the petitioned body. We presented the Dutch case, in which judges ruled that ensuring the right to the minimum conditions for life is the exclusive purview of the legislative and executive authorities. In contrast, South African, Argentine, Colombian, Indian, and Swiss judges interpreted their role as guardians of the respect, protection, and realization of the right to food very differently, recognizing the full justiciability of the right to food.

The national jurisprudence described in these pages revealed that the efforts of judges are facilitated when a progressive Constitution confers on judges the legitimate authority to intervene, as in South Africa, Argentina, and Colombia. Further, the discretion of judges to intervene is more effectively legitimated where the realization of the hard core of the right to food and the right to life itself that is in play. In every case examined in this text, the victims were members of the most vulnerable segments of society: indigenous populations in Argentina, traditional fishing communities in South Africa, displaced persons in Colombia, children, the elderly, the poorest households, and tribal populations in India, illegal immigrants and rejected asylum-seekers in Switzerland.

The conditions we identified to enable access to justice in cases of violations of the right to food have been fulfilled in Argentina, South Africa, Colombia, and India, and, to a more limited extent, in Switzerland, and are equally present on the African and American continents. There is significant potential in this area in a number of States, including Bolivia and Ecuador, and at the international level, following adoption of the Optional Protocol to the ICESCR on 10 December 2008. Upon the Protocol's entry into force, the Committee on Economic, Social, and Cultural Rights will have the capacity to exercise a central role in protecting the right to food at the international level, recognizing the justiciability of the totality of the right to food and enabling access to justice for scores of victims who would not otherwise have access to justice at the national level.

In a number of cases we have presented, in particular Argentina, South Africa, Colombia, India, and the American continent, access to justice has led to major improvements in the access to food for hundreds of thousands of people. Access to justice, therefore, should be considered an essential component to fight against hunger based on the right to food. Below, we offer recommendations, based on the right to food guidelines, to enable access to justice in an increasing number of legal systems:

1. States should enshrine the right to food under internal law, and, if possible, in their Constitutions. Of equal importance is the adoption of a framework law on food security or the right to food that provides for responsibility of governments,

coordination of its ministries, the participation of civil society and most vulnerable groups, the objectives to be achieved, the available remedies in cases of violations of the right to food, and the role of national human rights institutions.

2. States should provide mechanisms that offer adequate, effective, and timely remedies in cases of violations of the right to food, in particular to vulnerable groups. Ideally, these procedures should enable collective or public interest remedies. It is equally necessary to provide legal assistance to individuals and groups for purposes of enforcing their right to food. States should ensure protection for human rights defenders, including the right to food, and provide information to the public at large on all of their rights and available remedies.
3. National human rights institutions have a central role in protecting and ensuring access to justice in cases of violations of the right to food. It is imperative that these national institutions have the mandate to receive complaints in cases of violations of the right to food and that they have competence to represent the victims before the courts. The experience of national institutions that protect the right to food, such as in Argentina, South Africa, or Colombia, can serve as an important source of inspiration for other national institutions.
4. States should strive to ensure recognition of the justiciability of the right to food by judicial and quasi-judicial bodies at the national, regional, and international levels. As underscored in the 1995 Bangalore Declaration and Plan of Action, adopted by more than one hundred jurists, judges, attorneys must be educated and legal doctrine adapted.²⁴⁹ Training on the history of economic, social, and cultural rights, including the right to food, and on the role of oversight bodies as guarantors of the respect, protection, and realization of the right to food should be organized. University education centered on economic, social, and cultural rights should be created and have equal footing with academic disciplines in the area of civil and political rights. Finally, States should certify that human rights in general, and the right to food in particular, are taught in schools and that training programs are offered to citizens and officials with primary responsibility for the realization of the right to food in urban and rural areas alike.

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