

JUSTICIABILITY OF THE RIGHT TO FOOD

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I. INTRODUCTION

1. This paper concentrates primarily on the justiciability of the right to adequate food at the national level. Its purpose is to facilitate the deliberations of the Inter-Governmental Working Group (IGWG) on certain aspects of the Voluntary Guidelines on the Progressive Realization of the Right to Adequate Food in the Context of National Food Security, in particular with regard to the governing legal framework, access to justice and the rule of law. It also aims to assist in the national implementation of the right to food, in the context of applying the Voluntary Guidelines.

2. Human rights obligations would have little meaning if the duty bearers could not be held accountable to rights holders and to society at large. Such accountability is put into practice through several institutions and processes. In a democratic society, political accountability is established through free and fair elections and may, in addition, include parliamentary scrutiny of the executive branch of government. Administrative accountability includes that of public officials to their superiors and to those whom they are mandated to serve.

3. Judicial and quasi-judicial accountability are established through legislation, its implementation and, in the final instance, the ability of a free and independent judiciary or quasi-judicial body to uphold the law through the effective enforcement of judicial pronouncements, thus supporting both the separation and balance of power.¹

4. The question of the justiciability of economic, social and cultural rights has again re-surfaced within the context of the proposed Optional Protocol (OP) to the *International Covenant on Economic, Social and Cultural Rights* (ICESCR). Debates on this potential international instrument provide a wealth of information concerning the general nature of rights enshrined in the ICESCR, from which lessons and examples may be drawn to inform the present discussion.

¹ See Office of the High Commissioner for Human Rights, *Human Rights and Poverty Reduction: A Conceptual Framework*, United Nations, New York and Geneva, 2004.

It should be borne in mind, however, that within the context of the Voluntary Guidelines, arguments concerning the justiciability of the right to food are somewhat different. Firstly, the right to food is closely related to the right to life - a civil right, well-recognized in international and regional law and through a number of national constitutions.² Secondly, the IGWG is not debating whether an international quasi-judicial organ should be able to adjudicate potential state party violations of the ICESCR, but rather whether a competent national tribunal or quasi-judicial body would and should be able to make legal judgement as to whether the right to food had been adequately respected, protected and fulfilled.

5. While the right to food is justiciable in a number of states, others have voiced doubts as to whether the right to food should generally be considered to be justiciable and if so, whether it would be advisable for this right to be justiciable in all countries.³ In general, however, most nations have recognized the justiciability of the right to food, or some aspects of same, through legislative efforts ranging from social security guarantees, through food safety regulations, to land tenure legislation. This information paper will provide a framework definition with regard to the justiciability of the right to food, prior to engaging in a review of how the different aspects of this right are, and can be, justiciable, as illustrated from the practice of numerous and diverse judicial and quasi-judicial bodies. Furthermore, arguments against the justiciability of the right to food will be thoroughly examined. Finally, where violations of the right to food are found to exist, available remedies are canvassed in order to demonstrate the positive role that judicial and quasi-judicial bodies can play in relation to the protection and promotion of all human rights, including the right to food.

II. DEFINITIONS AND CONCEPTS

6. For the purposes of this information paper, the following working definition of justiciability is adopted, in relation to the right to food:

² See Art. 6 International Covenant on Civil and Political Rights which states: “Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.”; on the scope of Art. 6 see Human Rights Committee, General Comment 6: The right to life, 30 April 1982, para. 5, U.N. Document HRI/GEN/1/Rev. 6 of 12 May 2003, p. 128 where the Committee notes that “the right to life has been too often narrowly interpreted (...) The expression ‘inherent right to life’ cannot properly be understood in a restrictive manner, and the protection of this right requires that States adopt positive measures (...) [it] would be desirable [if States took] all possible measures to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics.”

³ See “Intergovernmental Working Group for the Elaboration of a Set of Voluntary Guidelines to support the progressive Realization of the Right to Adequate Food in the context of National Food Security”, *Recognition of the Right to Food at the national level*, FAO Document IGWG RTFG/INF2, Rome 2004 (hereafter “IGWG”).

the possibility of a human right, recognized in general and abstract terms, to be invoked before a judicial or quasi-judicial body that can: first, determine, in a particular concrete case presented before it, if the human right has, or has not, been violated; and second, decide on the appropriate measures to be taken in the case of violation.

7. What is at stake, therefore, is to determine whether the right to food as a general human right, recognized through national constitutions, regional instruments, international treaties or as general principles of law, is justiciable. On a conceptual level, the justiciability of the right to food within national, regional and international arenas receives support under international and regional law. Reference is made to Article 8 of the Universal Declaration of Human Rights (UDHR), which states:

Everyone has the right to an effective remedy by the competent national tribunal for acts violating the fundamental rights granted him by the constitution or by law.

8. Addressing this issue, the United Nations Committee on Economic, Social and Cultural Rights (CESCR) has advised that:

The Covenant [ICESCR] norms must be recognized in appropriate ways, within the domestic legal order; appropriate means of redress, or remedies must be available to any aggrieved individual or group and appropriate means of ensuring governmental accountability must be put in place.⁴

9. Further, through General Comment 12, the CESCR advised that any “person or group who is a victim of a violation of the right to adequate food should have access to effective judicial or other appropriate remedies”.⁵ “Other appropriate remedies” refers, in particular, to those provided by quasi-judicial mechanisms.⁶

⁴ Committee on Economic, Social and Cultural Rights, General Comment 9: The domestic application of the Covenant, U.N. Document E/C.12/1998/24 of 3 December 1998, para. 2 (hereafter “CESCR”).

⁵ CESCR, General Comment 12: The right to adequate food, U.N. Document E/C.12/1999/5 of 12 May 1999, paras. 32-35.

⁶ For the purposes of this paper, the concept “quasi-judicial mechanisms” denotes any non-judicial body that has the power to receive and consider complaints of individual or groups in a particular case. At the national level, a quasi-judicial mechanism is often found with a national human rights institution such as a human rights commission or a human rights ombudsman, whereas at the international level quasi-judicial bodies are, for example, the Human Rights Committee or the Committee for the Elimination of Racial Discrimination. Additionally see: Andreas Khol, *Zwischen Staat und Weltstaat: Die internationalen Sicherungsverfahren zum Schutze der Menschenrechte*, Wien 1969, p. 63. According to his study a quasi-judicial remedy implies that legal protection is provided by an independent organ, free from state influence, whose procedures are spelled out in general terms and which is empowered to take a legally non-binding decision in particular cases.

10. Regional instruments contain similar provisions on the right to a remedy. These include Art. 25 (1) of the American Convention on Human Rights and Art. 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). In particular, the European Court of Human Rights has found the absence of remedies on the national level to be a violation of the ECHR.⁷

11. For the purpose of this paper, remedy is defined as a legal or judicial means by which a right is enforced or the violation of a right is prevented, redressed, or compensated. While remedies are not inherent in the concept of justiciability *per se*, the two concepts are clearly linked. A remedy is not necessary unless there has been a violation; the violation of a right can only be determined if the right in question is seen as justiciable. If a right is found not to be justiciable, then no remedy can be provided. Furthermore, the recognition of a right as being justiciable does not automatically lead to any particular kind of remedy. In some cases, a declaration that there has been a violation would suffice, in other cases the appropriate remedy might include the prevention of repetition, a change in the law, compensation, restitution or other financial measures.

12. It may also be useful to distinguish between insufficient or inadequate access or use of food resulting in malnutrition or undernutrition and whether such situation is the result of a violation of the concerned individual's right to food. While a chronically malnourished individual could almost certainly claim that his or her right to food and nutrition was not realized, in order for a justiciable violation to exist, account must be taken of whether and to what extent the State had an obligation to take or not to take certain action, including, as appropriate, the possible inability of the said State to take action with regard to the realization of this right, or other such possible defences.⁸

13. The distinction between obligations of result (the actual enjoyment of the right to food as measured, for instance, through collection of anthropometric data) and obligations of conduct (the State takes steps that are reasonably calculated to achieve the enjoyment of the right to food) is also significant in the context of justiciability. The right to food entails obligations of conduct and of result,⁹ and both can be subject to determination by a competent organ as to whether a violation exists. The standards to be applied to assess whether a violation has occurred will vary, especially in view of the multifaceted nature of food insecurity and malnutrition. Thus, the mere existence of malnutrition in a given country is not conclusive in proving whether a violation of the right to food exists. However, if a country has relatively high income and relatively

⁷ *Hatton and others v. United Kingdom*, Application No. 36002/97 of 8 July 2003.

⁸ CESCR, General Comment 12, *op. cit.*, para 17.

⁹ CESCR, General Comment 3, The nature of State parties' obligations, para. 1, U.N. Document HRI/GEN/1/Rev.6 of 12 May 2003, p. 14.

high levels of malnutrition, this could be an indication of a failure to take necessary and appropriate steps to the maximum of available resources.

III. JUSTICIABLE DIMENSIONS OF THE RIGHT TO FOOD

14. With regard to the justiciability of the right to food and other economic and social rights, the South African Constitutional Court has affirmed that, “at the very minimum, socio-economic rights can be negatively protected from improper invasion”.¹⁰

This type of protection would be relatively easy to be justiciable in most jurisdictions. Negative protection of the right to food is similar to negative protection of other human rights, and merely requires that the State refrains from interfering with efforts made by individuals to feed themselves - that is, simply to respect this right. Consequently, negative obligations do not necessitate the utilisation of State resources, nor do they require a complex analysis of entitlements. Even a restrictive approach to economic, social and cultural rights leaves some space for justiciability:

*While governments intentionally violate civil and political rights with considerable frequency, the deliberate infliction of poverty, famine, or ill health is far less common. When it does occur – when deprivations are deliberately imposed on a population in whole or in part, especially from discriminatory motives – sanctions are, of course, appropriate.*¹¹

15. Positive obligations to ensure that individuals have access to food in all circumstances have been increasingly viewed as justiciable. In order to fully understand the implications of such obligations, however, it may be useful to distinguish between different State obligations, or dimensions, related to the right to food. In the following paragraphs, the explicit obligations accepted by States Parties under the ICESCR will be discussed, prior to an examination of the different levels of State obligations, to respect, protect and fulfil this right. As noted below, State Parties are not under an obligation to adopt the wording of the ICESCR in national laws. However, in light of the wide ratification of the ICESCR and its likely influence on national adjudicators, these different obligations will provide the structure for the discussion.

16. In the following, international, regional and national jurisprudence will be cited. It should be noted, however, that while the cases do not all concern

¹⁰ Ex parte Chairperson of the Constitutional Assembly: in Certification of the Constitution of the Republic of South Africa 1996 (First Certification judgment) 1996 (4) SA 744 (CC), paras. 77 - 78.

¹¹ Dennis, Michael J. and David P. Stewart, *Justiciability of Economic, Social and Cultural Rights: Should There Be an International Complaints Mechanism to Adjudicate the Rights of Food, Water, Housing and Health?*, American Journal of International Law, VOL 98, No 3, July 2004, at 498.

the right to food, they serve to illustrate the reasoning of Court judicial and quasi-judicial bodies regarding principles applicable to the right to food

A. Explicit ICESCR obligations

17. While it is important to bear in mind that national constitutions will not necessarily incorporate the precise wording of the ICESCR, it may be useful to recall the explicit obligations that the ICESCR imposes on State Parties.

1. To take steps

18. The first explicit obligation under Article 2 of the ICESCR is that each State Party:

undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

19. In relation to the right to food, this paragraph essentially requires States Parties to “do something” - engage in actions dedicated to the realization of the right to food. While it is recognized that the full realization of this right can only be achieved over time and is subject to the availability of resources, States Parties to the ICESCR signalled their commitment to be accountable at the international level with regard to the right to food. National level accountability will depend on the domestic laws of a country, including the status of international treaties, Constitutional provisions, the rule of law and political accountability. For the purpose of this paper it will be assumed that countries have in one way or another undertaken to take steps towards the realization of the right to adequate food, Elaborating on the principle of “taking steps”, the CESCR has advised that States Parties cannot defer action indeterminately, even if the rights are to be realized progressively over time and are constrained by available resources.¹² However, the extent of such steps could vary according to the level of economic resources available.

20. With regard to negative obligations, “taking steps” vis-à-vis the right to food may involve the repeal of legislation that prevents people from satisfying their personal food needs through their own efforts. More generally, “taking steps” also implies that it is not allowed to take steps in the opposite direction, i.e. that would deprive individuals of access to food. Taking steps to fulfil positive obligations related to this right could include appropriate regulatory action and law enforcement, the establishment of social security systems or free food distribution schemes for those severely affected in times of famine.

¹² CESCR, General Comment 3, op. cit., para. 2.

21. In a potential right to food case where the “taking steps” obligation was at issue, a Court would perhaps inquire as to whether “any” steps had been taken to implement the right. If there was widespread starvation in a country and the government failed to take any steps to address the situation, this would surely be inconsistent with the obligations under the ICESCR, unless the reason was clearly inability rather than unwillingness to do so. Consequently, a national Court or commission would also have little trouble in declaring such a situation to fall within its competence, and hence, to be justiciable.

22. In *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*¹³ (the “Ogoni Case”), the African Commission on Human and People’s Rights considered a communication that involved a violation of wide-ranging rights, including the right to food. The Commission had to consider whether or not the then military government of Nigeria had, through action and inaction, violated the rights of the Ogoni community. While the right to food is not explicitly enshrined in the *African Charter on People’s and Human Rights*, the African Commission read this right into the Charter and held that it was implicit in many other rights, such as the right to life, health, and to economic, social and cultural development. In its holding, the African Commission found that:

*Of course, the Commission here is not blaming the Nigerian Government for its endeavours to make use of its resources and thereby bring development to its people. Rather, the blame is qualified in that the Government has not taken such steps as would [be necessary] to protect the Ogoni population from harms done by the NNPC-Shell consortium.*¹⁴

23. The *Ogoni* Case demonstrates a concrete example of how the obligation “to take steps” can be judged. Thus it can be concluded that the obligation to take steps is justiciable.

2. Non-discrimination

24. The second explicit obligation relates to non-discrimination. According to ICESCR Article 2 (2) each State Party must

guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

¹³ Decision regarding Communication No. 155/96, Case No. ACHPR/COMM/A044/1 of 27 May 2002.

¹⁴ *Ibidem*, para. 56.

25. In the words of the CESCR, Article 2 mandates that

*any discrimination in the access to food, as well as to means and entitlements for its procurement, on the grounds of race, colour, sex, language, age, religion, political or other opinion, national or social origin, property, birth or other status with the purpose or effect of nullifying or impairing the equal enjoyment or exercise of economic, social and cultural rights, constitutes a violation.*¹⁵

26. The principle of non-discrimination is reflected in the United Nations Charter, the UDHR, and is additionally reaffirmed in a large number of binding international and regional human rights instruments. Within the national context, the principle of non-discrimination is deeply rooted in numerous constitutions, common legislation and national jurisprudence. If national economic, social or cultural rights legislation and/or state programmes/actions were found to discriminate against persons on the basis of such unlawful criteria, the question of justiciability in this regard would be easily resolved. The following four cases are illustrative of this point.

27. In *Khosa and others v Minister of Social Development*¹⁶ the South African Constitutional Court ruled on social security legislation, which was challenged on the basis that they excluded permanent residents who were non-citizens from having access to the social assistance scheme. The Court struck down the law as being unconstitutional and unreasonable as it excluded vulnerable persons lawfully residing in South Africa. By way of remedy, the Court judicially amended the legislation to remove its discriminatory effects, i.e. by “reading in” the words “or permanent resident” into the relevant provision.

28. In *F. H. Zwaan-de Vries v. The Netherlands*¹⁷ the United Nations Human Rights Committee affirmed the principle of non-discrimination in relation to social rights when it ruled that Dutch legislation barring married women - but not married men - from obtaining unemployment benefits, was discriminatory and could not stand.

29. While the Constitution of the United States is silent on economic, social and cultural rights, it does contain provisions on equal protection under the law (14th Amendment), which the Supreme Court has used in the past to

¹⁵ CESCR, General Comment 12, op. cit., para. 18.

¹⁶ Case No. CCT 13/03, decision of 4 March 2004; the case was decided together with *Mablaule and others v. Minister of Social Development and others*, Case No. CCT 12/03 on account of the similarities of the two cases.

¹⁷ Communication No. 182/1984, U.N. Document CCPR/C/29/D/182/1984 of 9 April 1987.

ensure access to public assistance programmes. Thus, in *Plyler v. Doe*,¹⁸ the State of Texas was forbidden to deny public education to undocumented immigrant children.

30. In *Eldridge v. British Columbia (Attorney General)*,¹⁹ the Supreme Court of Canada declared that the failure of health care programmes to provide for interpretation services for the deaf constituted discrimination and thus violation of the equality provisions of the Canadian *Charter of Rights and Freedoms*. This failure denied deaf people the equal benefit of the law and discriminated against them, in comparison with hearing persons. The Court confirmed the principle that discrimination can accrue from a failure to take positive steps to ensure that disadvantaged groups benefit equally from services offered to the general public and acknowledged that the duty to take positive action to ensure that members of disadvantaged groups benefit equally from services offered to the general public is subject to the principle of reasonable accommodation.

31. It may be safely concluded that, as applied to the right to food, the principle of non-discrimination would be amenable to justiciability before national Courts

B. Levels of obligations

32. The following typology of State obligations is utilised to examine justiciability with regard to the right to adequate food: obligations to respect, protect and fulfil (the latter comprising obligations to facilitate and provide). This typology, which has been applied by the CESCR to clarify the obligations of State Parties to the ICESCR,²⁰ goes beyond the simple denotations of obligations as being either negative or positive. Judicial practice from a number of States conforms to this typology, notwithstanding the manner in which the recognition finds expression in a particular national constitution or legislation.

1. Respect

33. The obligation to respect the right to adequate food requires States not to take any measures that result in preventing individuals and/or groups from utilising their own efforts to satisfy this right.²¹ Conceptually, this formulates

¹⁸ 457 US 202 (1982).

¹⁹ Case No. [1997] 3 S.C.R. 624.

²⁰ First introduced in CESCR, General Comment 12, op. cit. and subsequently used in General Comments 13, 14 and 15.

²¹ CESCR, General Comment 12, op. cit., para. 15.

a key negative obligation, which would be violated if a State were to authorize, instruct or otherwise tolerate official policies, programmes and/or actions that destroyed people's food sources - such as crops or food stocks - without a valid reason or reasonable compensation. Other deprivations of income leading to inability to purchase adequate food could also fall hereunder. The obligation to respect may also include a prohibition against the suspension of legislation or State policies that enable people to have access to food, or the implementation of a food policy that excluded segments of the population vulnerable to hunger and food insecurity. The following four cases illustrate violations of the obligation to respect.

34. In the *Ogoni case*, cited above, the African Commission held that by destroying the people's food sources and arbitrarily evicting them from their homes, the authorities had breached their negative obligation not to interfere with people's access to food. In *Residents of Bon Vista Mansions v. Southern Metropolitan Local Council*,²² an action was brought before the High Court of South Africa, following a local council decision to disconnect the water supply to the flats, due to non-payment of water charges. The Court found that the applicants had existing access to water before the Council disconnected their supply; that the conditions and procedures for disconnection had not been "fair and equitable" in accordance with the applicable statute, and that the Council's disconnection of the water supply constituted a *prima facie* breach of its constitutional duty to respect the right of existing access to water. The water supply to the flats was subsequently reinstated.

35. In *Carlos Torres Benvenuto and others v Peru*,²³ the Inter-American Commission for Human Rights found that the Republic of Peru violated the rights of pensioners when it failed to pay monies calculated in the manner established by law, once petitioners began receiving payments under a specific system: accordingly, the subsequent modifications of pension schemes constituted a violation of the right to progressive development with respect to economic, social and cultural standards established under Articles 21, 25 and 26 of the American Convention.

36. Finally, in *Ain O Salish Kendro (ASK) & Ors v Government of Bangladesh & Ors*²⁴ the Bangladesh High Court held that the Government's demolition of 'Basties' (slum-dwellings) and the eviction of their inhabitants was contrary to the respect for human dignity.

²² 2000 (6) BCLR 625 (W), Case No.: 01/12312.

²³ Case No. 12.034.

²⁴ [1999] ICHRL 118 (3 August 1999).

37. These cases indicate the justiciability of the obligation to respect economic, social and cultural rights at the national level, not only as a negative obligation, but also in terms of respecting existing access, even when this access is provided through public funds.

2. Protect

38. The obligation to protect requires States to ensure that private parties, such as enterprises or individuals, do not deprive other individuals of access to adequate food.²⁵ Such measures would include the enforcement of existing legislation and rule of law guarantees that protect the most vulnerable segments of society against outside interference. A violation of the obligation to protect could, for instance, arise in the event of unsafe food being sold and consumed, if this could be attributed to a failure in establishing or enforcing food safety standards and controls. Another example could be failure to protect tenants from illegal eviction from their farmland by other individuals or corporations. The following cases are illustrative.

39. In the *Ogoni Case* referred to above, the African Commission found that the military Government of Nigeria had also violated its obligation to protect the right to food, as it did not prevent the oil companies from depositing oil and waste products that led to the contamination of water for farming and fishing, the destruction of crops and the death of farm animals: factors which resulted in malnutrition amongst the Ogoni.²⁶

40. In “*Social Insurance Law*”²⁷, the Constitutional Court of the Republic of Latvia noted that the Constitution and international treaties protected the right to social security:

The State social insurance is a sector of public rights and legal relations between the insurer and the insured person as well as with the employer in relation to public rights. The law obliges the employer to incur the payment of the compulsory premium for every employee. If the employer does not perform this task, then the organiser of the insurance, i.e. the State, shall ensure the implementation of it with the help of compulsory measures. Therefore, when developing the system of the State social insurance, the State is obligated to develop an efficient mechanism of implementation of the above legal norms, thus guaranteeing the right to social security, established by the [Constitution].

41. In its holding, the Court found that the Latvian system of collecting the dues from employers was not sufficient as it could lead to employees being

²⁵ CESCR, General Comment 12, op. cit., para. 15.

²⁶ Op. cit., footnote 12., para 66.

²⁷ Case No. 2000-08-0109, decision of 13 March 2001.

deprived of social insurance. As such, the legislation supporting this system was found to be null and void.

42. These examples indicate that failure to protect individuals' right to food against interference or non-respect by third parties can also be justiciable.

3. Fulfil (facilitate)

43. The obligation to fulfil (facilitate) means that the State must pro-actively engage in activities intended to strengthen people's access to and utilisation of resources and means to ensure their livelihood, including food security.²⁸ These activities do not necessarily entail the provision of substantial financial resources and could imply simply ensuring access to information regarding opportunities to satisfy the right to food. Examples of typical measures to facilitate access to food include education and training, agrarian reform, policies supportive of urban and rural development, market information etc.

44. For these obligations, the State would normally be granted a large margin of appreciation. The most appropriate question for judicial or quasi-judicial determination would be, firstly, whether the State had "taken steps" to facilitate access to food by the affected individual or the group and, secondly, whether such steps were reasonable or appropriate under the circumstances (the political and economic situation of the country). The central question faced by the court would be, therefore, whether steps had been taken and whether such steps were reasonable or appropriate. In such cases one would expect courts or quasi-judicial bodies to grant a wide margin of discretion to the legislative and executive arms of government in deciding on priorities.

45. An example of judicial involvement in facilitation measures rests in an order made in *People's Union for Civil Liberties versus Union of India and others*²⁹ (the "PUCCL case"). In this case, the Supreme Court of India ruled that beneficiaries of various official food security programmes must enjoy legal entitlements under same, as this would facilitate their access to food. Furthermore, the Court ruled that Indian States should carefully identify vulnerable groups under their jurisdiction and ensure that these groups are informed as to the way in which their right to food may be satisfied.³⁰ These orders were, however, auxiliary, and the Court was relying on existing programmes. Similarly, in the as-of-yet unsettled *Orissa Starvation Deaths Proceedings*,³¹ the National Human Rights Commission of India has considered

²⁸ CESCR, General Comment 12, op. cit., para. 15.

²⁹ *People's Union for Civil Liberties versus Union of India and others*, Writ Petition [Civil] No. 196 of 2001 (hereinafter *PUCCL case*).

³⁰ *PUCCL case*, op. cit., Court orders of 23 July 2001, 17 September 2001 and 28 November 2001.

³¹ Case No. 37/3/97-LD, decision of 17 January 2003.

a wide range of measures taken by the State of Orissa to facilitate access to food, including land reform, soil conservation, afforestation, primary health care and rural development programmes.

46. To conclude, the obligation to facilitate may be the most problematic issue area for judicial determination. Confronted with such cases, it would be important to consider the obligation to fulfil (facilitate) in light of budgetary implications, the role of government in setting priorities and action and other factors that would normally allow the government a relatively wide margin of discretion in such cases. Nevertheless, the judiciary is well-placed to assess whether State policies and programmes (the steps taken) are reasonable or appropriate, especially as to whether the plight of vulnerable persons has been considered and given appropriate priority.

4. Fulfil (provide)

47. According to the CESCR, whenever an individual or group is unable, for reasons beyond their control, to enjoy the right to adequate food by the means at their disposal, States have the obligation to fulfil (provide) that right directly, within the means at their disposal (maximum of available resources).³² This obligation also applies to persons who are victims of natural or other disasters. The obligation is, thus, not to provide for every individual but for those who cannot provide for themselves, due to age, infirmity or other such reasons.

48. While the standard of national safety-net schemes varies considerably amongst countries, most nations recognize the need to provide basic necessities for those unable to provide for themselves, temporarily or permanently, even if many rely on the resources of local communities, agencies such as the World Food Programme, or international NGOs.

49. There exists a wealth of jurisprudence from developing and developed nations on the obligation to provide. For example, as referenced above, while the final judgment in the *PUCL Case* has yet to be delivered, the Indian Supreme Court has issued a number of interim orders, which make the justiciability of this obligation before national Courts quite clear.³³ Indeed, the Court has issued orders according to which food grains are to be “provided to the aged, infirm, disabled, destitute women, destitute men who are in danger of starvation, pregnant and lactating women and destitute children, especially in cases where they or members of their family do not have sufficient funds to provide food for them”.³⁴

³² CESCR, General Comment No. 12, op. cit., para. 15.

³³ *PUCL case*, op. cit., Interim Order of 23 July 2001.

³⁴ *PUCL case*, op. cit., Interim Order of May 2, 2003.

50. A second example pertaining to the justiciable nature of the obligation to provide, emanates from the Swiss Federal Court which, in *Gebrüder V. v. Regierungsrat des Kanton Berns*,³⁵ recognized a previously unwritten constitutional right to basic minimum subsistence. This case was brought by three stateless Czech refugees who found themselves in Switzerland with no food and no money. They could not work because they could not get a permit and without official identity documents they could not leave the country. They asked the authorities for assistance but were refused. The Court decided that these individuals must have the right, at the very least, to basic minimum conditions within Switzerland so as to prevent them from being reduced to begging.

51. The third example of the obligation to provide as adjudicated through national Courts resides in *Grootboom and others v. Government of the Republic of South Africa and others*³⁶ (the “*Grootboom Case*”) where the Constitutional Court of South Africa considered the constitutional right to housing. Since the Court explored the implications of the obligation to provide, very thoroughly, the case will be presented in some detail. The applicant, Ms. Grootboom, a member of a large group of 510 children and 390 adults, lived in appalling circumstances in an informal settlement. After having illegally occupied nearby land earmarked for low-cost housing, the State evicted the community by force, with no provision for alternative accommodation. Thereafter the community settled on a sports field.

52. The Constitutional Court had to address the question of whether the measures taken by the State could be qualified as “reasonable” with respect to the realization of the right to have access to adequate housing under the Constitution. The Court stated that, in order for measures to qualify as reasonable, State authorities must take into account the degree and extent of the denial of the right, which it is obliged to realize. The Court evaluated the government’s housing programme with regard to its reasonableness and held as follows:

- > there must be a coordinated and comprehensive programme that is capable of facilitating the realization of the right;
- > such a programme must clearly allocate responsibilities and tasks to the different spheres of Government and ensure the availability of financial and human resources;
- > a reasonable programme must respond to the urgent needs of those in desperate situations;
- > the programme must be reasonable in formulation and implementation.

³⁵ See Entscheidungssammlung des Schweizerischen Bundesgerichts, Urteil der 2. öffentlichrechtlichen Abteilung vom 27. Oktober 1995 (ATF 121 I 367, 371, 373).

³⁶ *Grootboom and others v. Government of the Republic of South Africa and others*. Case No. CCT 11/00, decision of 4 October 2000 (hereinafter *Grootboom case*).

53. The Court then specifically considered the questions of progressive realization of the right to housing and the availability of resources. On the former question, the Court found that the housing programme had to progressively allow access to a larger and wider section of the society over time. As to the available resources, the Court considered that this was an important factor in determining both the rate of achieving, progressively, the right to housing and the reasonableness of the measures adopted.

54. The Constitutional Court concluded that the South African housing programme was not reasonable in that it did not provide for the immediate relief of “people in desperate need”, such as those “who have no access to land, no roof over their heads and who are living in intolerable conditions or crisis situations”.³⁷ The Court issued a declaratory order that the programme fell short and required the State to devise, fund, implement and supervise measures to provide relief to those in desperate need.

55. In this regard, it should be noted that the South African Constitution contains the explicit obligation “to take reasonable legislative and other measures” with regard to the right to food, housing and certain other rights which are to be progressively realized. The ICESCR does not have such an explicit reference to the reasonableness of the steps to be taken; yet the test of reasonableness may be seen as useful in determining whether the obligations of conduct listed in ICESCR Article 2.1 have been fulfilled. National bodies in other countries might similarly adopt this method in dealing with the right to food.

56. A fourth example, the case before the Constitutional Court of South Africa *Minister of Health and others v Treatment Action Campaign and others*³⁸ (the “TAC Case”), concerned the obligation to provide health care. The Treatment Action Campaign (TAC) challenged the decision by the South African Government to limit provision of the drug Nevrapine, used to limit mother-to-child-transmission of HIV/AIDS, to certain pilot health-care centres. The challenge was based on the right of access to health care services. Again, employing the reasonableness test developed in the Grootboom Case, the Constitutional Court ruled that the State had breached its obligations in relation to the right to health, by restricting access to the Nevrapine to only a few, while excluding others equally in need of it. The Court thus ordered the State to remove the restriction and roll out a national comprehensive programme.

³⁷ Grootboom case, op. cit., para. 99.

³⁸ *Minister of Health and others v Treatment Action Campaign and others*. Case No. CCT 8/02 (hereinafter *TAC case*)

57. *Gosselin v. Quebec*³⁹ before the Supreme Court of Canada concerned regulations providing for reduced welfare benefits for individuals under 30 not participating in training or work-experience employment programmes. The Supreme Court of Canada rejected that the regulations were discriminatory and further ruled that the circumstances of the case did not warrant a new application of section 7 of the Canadian Charter of Rights and Freedoms (which protects the right to life, liberty and security of the person) as the basis for a positive State obligation to guarantee adequate living standards. On this latter point, Justice Arbour (dissenting) considered that the right to a minimum level of social assistance was clearly connected to “security of person” in section 7 and that the interest claimed in this case fell within the range of entitlements that the State is under a positive obligation to provide under section 7. She further noted that the right was independent of any particular Statute and that the under-inclusiveness of the regulations in this case was clear as the State of Quebec had itself defined the minimum level of necessary income, which was higher than the welfare benefit payable to persons under 30.

58. As illustrated, the obligation to provide is capable of being justiciable at the national level. The extent to which a State would be expected to provide for those in need would, however, certainly vary between countries. The standard of living in the country, the definition of the poverty line as well as available resources and existing programmes, would all be factors to be taken into account by the Courts or quasi-judicial bodies.

IV. SOME SPECIFIC ISSUES CONCERNING JUSTICIABILITY

59. While it is clear that many aspects pertaining to the right to food are justiciable in many countries, this is not fully recognized in all countries, or in all circumstances. Of course, as experience is shared between countries and as lawyers are increasingly arguing for the right to food as a basis for decisions, it is likely that justiciability of the right to food will continue to expand over time. Yet, it must be acknowledged that there still remain arguments against justiciability, on a number of grounds. Governments may fear the cost implications of losing cases brought by people claiming a violation of the right to food. Some argue that economic, social and cultural rights, as stated in the ICESCR, are not justiciable, because they are imprecise, resource-demanding, and are subject to available resources and progressive realization.⁴⁰

³⁹ *Gosselin v. Quebec* (Attorney General Case No. 2002 SCC 84).

⁴⁰ Ida Elizabeth Koch/ Jens Vedsted-Hansen, Judicialised Protection of International Human Rights and the Issue of Power Balance, in: Martin Scheinin (ed.): *The Welfare State and Constitutionalism in Nordic Countries*, The Nordic Council of Ministers 2001, pp.198 ff.

60. Many also feel that the right to food is still insufficiently understood and that the right itself is too vague. Another voiced argument is that the judiciary would violate the principle of separation of powers if they adjudicated claims concerning the realization of the right to food, the determination of which rightly belongs to the people's elected officials. Yet others argue, especially at the international level, that the right is subject to progressive realization and cannot therefore be the subject of judicial or quasi-judicial scrutiny. Ultimately, objectors conclude that the nature of economic, social and cultural rights renders them unable to be adjudicated by the Courts. These objections will be addressed below.

A. Are socio-economic rights of a different nature?

61. Even today, it is sometimes mooted that economic and social rights are merely aspirational and not "real" rights, as they are fundamentally different from civil and political rights. For this reason, there were two separate international Covenants - one for economic, social and cultural rights and one for civil and political rights - with each Covenant employing different wording as to States' obligations. Many national Constitutions also separate economic and social rights in different chapters from civil and political rights, to the effect that the former are not intended to be directly justiciable.⁴¹

62. However, most countries do indeed recognize some aspects of at least some economic and social rights at the national level and through their ratification of various international treaties.⁴² In fact, since the 1993 World Conference of Human Rights there is general consensus that all human rights, civil, cultural, economic, political and social, are indivisible, interdependent and interrelated.⁴³ The distinction between the types of human rights is thus gradually dissolving.

63. Indian jurisprudence is the clearest example of judicial action to overcome distinctions between socio-economic and other human rights, by extending the scope of the right to life to encompass the right to a dignified life and thus to a number of elements which are indispensable for it. This is the case not only for the right to food,⁴⁴ which is easily interpreted in the right to life (as the right to biological survival), but also for the right to education, which the Indian Supreme Court has ruled to be protected under the same ambit.⁴⁵

⁴¹ For instance, the Constitutions of India and Sierra Leone maintain such separation.

⁴² See IGWG, Recognition of the Right to Food at the National Level, op. cit.

⁴³ World Conference on Human Rights: Vienna Declaration and Programme of Action, U.N. Document A/CONF.157/23, Part 1, para. 5.

⁴⁴ *People's Union for Civil Liberties v. Union of India and others*, op cit.

⁴⁵ *Unni Krishnan v. State of Andhra Pradesh*, AIR 1993 SC 2178, cited in: Kundu A. and S. Jain, IGWG RTFG/INF.4/APP.5, Right to food case study: India, p. 17.

64. Another example is the South African Constitution, a relatively new construction, which does not distinguish between categories of rights, but stipulates that all recognized human rights must be respected, protected and fulfilled. As appropriate, specific rights, including the right to food, are then subject to realization within available resources and by taking reasonable steps.⁴⁶

65. While the right to food is certainly complex, it follows from the above that - at least at the national level - there is no need to treat the right to food as if it were of a fundamentally different nature than civil and political rights. In some instances it may indeed be linked to rights that have been recognized in most if not all jurisdictions as being justiciable, such as the right to life and to security of the person.

B. Is the right to food too vague?

66. Another frequently-voiced objection to the justiciability of the right to food and other economic and social rights, is that these rights are too vague, and the obligations too ill-defined, for a judicial or quasi-judicial body to be able to determine whether or not there has been a violation. Such arguments on 'vagueness' are, however, receding through the work of legal scholars, General Comments and evolving practice at the national, regional and international level. These efforts have clarified the obligations involved and have developed methodologies to address socio-economic rights, as, for example, the South African Constitutional Court did in the *Grootboom* Case, and the African Commission in the *Ogoni* Case, both of which are cited above.

67. The recognition that economic and social rights, including the right to food, are justiciable, assists in clarifying the content of such rights through the practice of courts and quasi-judicial organs. In this regard it should be noted that jurisprudence has, and continues to play, a powerful role in clarifying the meaning of civil and political rights which, in the beginning, were no less imprecise than the right to food is perceived to be at present. Constitutional rights are in most cases proclaimed in an equally vague manner as they are in human rights treaties; jurisprudence and practice clarifies their meaning over time. The perceived vagueness of the right to food, therefore, should not prevent it from being recognized as justiciable.

⁴⁶ See section 27, Constitution of South Africa of 7 February 1997: "The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of each of these rights".

C. Is justiciability compatible with separation of powers?

68. It is sometimes argued that to allow justiciability with regard to the right to food would constitute undue interference with the separation of powers: Courts would be called upon to make decisions that rightly belong to the legislature and executive spheres of the State regarding allocation of financial resources and national priorities. However, it may also be argued that the justiciability of human rights is an important part of both the rule of law and the principle of the separation of powers. This is based on the notion that the realization of human rights cannot be left exclusively to politically-elected authorities. Political actors have a margin of discretion in determining and adopting measures aimed at the implementation of such rights, while Courts, in specific cases and disputes, would scrutinise these measures to determine whether they are in compliance with international and regional obligations, constitutional guarantees and legislative requirements. Courts may also be called upon to enforce decisions already made by the legislative or executive wings, as was the case in the Indian *PUCL* Case cited above, in which the Supreme Court issued interim orders for the implementation of programmes already established at the federal and state levels. In finding a violation, Courts may also refrain from deciding on remedies, but instruct relevant government organs to find ways to redress the situation. This way of proceeding was followed in the South African case of *Grootboom*, where the Constitutional Court instructed the Government to devise a plan that would address the housing needs of those in desperate need, without determining exactly how this should be done. The Court stated:

The precise contour and content of the measures to be adopted are primarily a matter of the legislature and the executive. They must, however, ensure that the measures they adopt are reasonable. In any challenge based on section 26 in which it is argued that the state failed to meet the positive obligations imposed upon it by section 26(2), the question will be whether the legislative and other measures taken by the state are reasonable. A court considering reasonableness will not enquire into whether other more desirable or favourable measures could have been adopted, or whether public money could be spent. The question would be whether the measures that have been adopted are reasonable.⁴⁷

69. In developing jurisprudence on the right to food, Courts would inevitably be involved in balancing human rights concerns against political and budgetary realities, just as they are called on to do in adjudicating on many civil and political rights. Clearly, Courts should always exercise caution, but they need not be more fearful of the right to food than of other

⁴⁷ *Grootboom case*, op. cit., para 41.

human rights they must protect. The argument therefore should not stand in the way of recognizing justiciability.

D. Do resource implications prevent justiciability?

70. Perhaps the most often-voiced objection to the justiciability of economic and social rights concerns the resource implications involved. It is often argued that poorer countries simply cannot afford to recognize the right to food as a justiciable right. Wealthy countries would be more capable of affording such protection, but poor countries simply cannot do so. A number of responses have also been made in relation to this contention. First and foremost is the argument that respecting the right to food, as a negative obligation, does not entail any resource implications. Many steps that could be taken to protect and facilitate access to food would carry no, or minimal, costs and while, admittedly, other measures would require a dedication of financial resources, such measures would be subject to State discretion, progressive realization and the availability of such resources. Justiciability here would simply help bringing social spending within the ambit of the rule of law.

71. Additionally, it must be borne in mind that the realization of all human rights requires a dedication of State resources. For instance, organising elections or ensuring fair trials require a substantial allocation of resources. Furthermore, within the realm of civil and political rights, Courts have not shied away from issuing decisions that entail considerable cost implications. For instance, the European Commission on Human Rights' decision of *Jón Kristinsson v. Iceland*⁴⁸ led to the country having to establish a number of new Courts to ensure the separation of the judiciary from the executive powers. The financial implications of this decision were considerable.

72. One way in which to explicitly address the question of resources, is the one followed in the South African Constitution, which states the obligation to take measures "within available resources". Even without such an explicit provision, the lack of resources would continue to operate as a valid defence against a legal claim that the right to food had been violated. In such a case, Courts would examine what steps had been taken, the extent of available resources and how they are allocated, in seeking to protect the interests of the most vulnerable. The ICESCR also takes the "cost" argument into account as it obliges States Parties to take steps towards the realization of economic, social and cultural rights "to the maximum of available resources". The CESCR thus makes a distinction between a country's unwillingness to implement these rights and its inability to do so.

⁴⁸ Case No. 13/1989/173/229.

73. Another safeguard built into the ICESCR is the notion of “progressive realization”, which explicitly recognizes that countries may not be able to fulfil all economic, social and cultural rights for all people, immediately. In this regard, it is important to distinguish between dimensions of the right to food that can be implemented immediately and those that can only be fully realized over time.⁴⁹ Immediate measures would include stopping any State or non-State interference with the right to food, whereas progressive measures would include establishing and maintaining adequate safety nets for those unable to provide for themselves.

74. A Court or a quasi-judicial organ called upon to determine, in a particular case, whether the right to food has been violated, would be expected to take account of resource limitations when determining whether a violation has taken place and when determining appropriate remedies. Thus, if the State’s defence was that economic circumstances necessitated austerity measures, the Court might assess whether such measures had unreasonably affected the most vulnerable in society.

75. The “test of reasonableness” developed by the South African Constitutional Court in the *Grootboom* Case could be a valuable legal tool for other countries in such an assessment. In determining whether the State had complied with its obligations of progressive implementation or whether a defence of austerity was valid, a Court could evaluate whether measures were adopted to address problem areas and whether such measures were reasonable, both in their conception and implementation. In assessing the reasonableness of South African housing programmes in the *Grootboom* Case, State measures were considered in light of the social, economic and historical context and the capacity of institutions responsible for implementing housing programmes. The Court found that South African housing programmes failed to address the needs of the most desperate and thus failed against the standard of reasonableness.

76. The above-cited *PUCL* Case in India involved a revelation that over 50 million tons of food grains were lying idle in the premises of the Food Corporation of India (FCI) while there was widespread hunger in the country, especially in drought-affected areas. In this case, resources were clearly available and the Court felt no compunction in ordering the distribution of idle food stocks.

77. It should also be noted in this context that hunger and malnutrition carry costs both for the individuals and for societies as a whole. In certain

⁴⁹ See Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights of 1986, U.N. Document E/CN.4/1987/17, Annex, para. 8.

circumstances, therefore, it may be more expensive in the long run to take no steps to address malnutrition.

78. It may be concluded that limited resources do not, *per se*, affect the justiciability of the right to food. However, they may well affect the judgment as to whether or not, in a particular case, there has been a violation.

V. POSSIBLE OUTCOMES OF JUDICIAL AND QUASI-JUDICIAL DECISIONS

79. According to CESCR General Comment 12, all victims of violations of the right to food should be entitled to adequate reparation at the national level, which “may take the form of restitution, compensation, satisfaction or guarantees of non-repetition”.⁵⁰ This section gives an overview of the types of redress generally available to Courts and quasi-judicial mechanisms, as well as remedies actually prescribed in the case law.

80. In the preceding chapter, the question of justiciability (for example, whether legal institutions can determine violations of the right to food in a meaningful way) has been answered in the affirmative. Appropriate remedies for violations of the right to food would, of course, depend on the nature of the violation. For example, if a law, State policy or official action violated the negative duty to respect the right to food, a Court might declare the law invalid, or order the cessation of the unlawful conduct. In addition, it might order the relevant authority to correct the defect in the law or issue an interdict preventing the threatened violation from occurring. In respect of the positive obligation to protect and fulfil, a Court may direct the State to enforce legislation or devise and implement a reasonable programme giving effect to the right to food. The highlighted jurisprudence demonstrates that a wide variety of remedies may be advanced which take into account available resources, margin of appreciation, progressive realization and the separation of powers. The following cases reveal the wide range of potential remedies that may be utilised by Courts in protecting and promoting the right to food.

81. Declaratory pronouncements are widely used in human rights cases at the international level. Thus, the United Nations Human Rights Committee routinely calls upon the State parties to “take effective and enforceable remedial action”, the details of which should be communicated to the Committee.

82. The Supreme Court of Switzerland in *Gebürder V. v. Regierungsrat des Kanton Berns*, cited above, deemed that it lacked the legal competence to

⁵⁰ CESCR, General Comment 12, *op. cit.*, para. 32.

set priorities for the allocation of resources necessary to realize the right to minimum conditions of existence, including food. However, it determined that it could set aside legislation if the outcome of this legislative framework failed to meet the minimum claim required by constitutional rights. In this case, the exclusion of three non-nationals from social welfare legislation was found to be a violation of their right to food, despite the fact that they were illegal immigrants. The Swiss Federal Court decision determined that the right to food in this sense could be the foundation of a justiciable claim for official assistance.

83. In *Grootboom*, cited above, the South African Constitutional Court declared that there had been a violation of the right to housing and that the State housing programme had to include measures “to provide relief for people who have no access to land, no roof over their heads and who are living in intolerable conditions or crisis situations”.⁵¹ The details of such a revised housing programme were however to be decided by the legislative and executive powers as monitored by the South African Human Rights Commission.

84. In a case before the Administrative Disputes Tribunal of the City of Buenos Aires, Argentina,⁵² which concerned the exclusion of a family from a new food programme, “Vale Ciudad”, the Tribunal ordered the Secretary for Social Development (Buenos Aires) to incorporate the claimant and her family in the new food assistance programme on a provisional basis. Alternatively, the City Government could provide the family with the necessary food rations. The case demonstrates, on the one hand, that the threshold for an interim measure may be quite low in a case such as this, in which delay could have irreparable damage. On the other hand, the case demonstrates a flexible approach by a tribunal, providing the authorities with alternatives.

85. The Indian Supreme Court, in its interim orders in the *PUCL* Case, has given very detailed instructions to the State and Federal Governments for the implementation of eight different centrally-sponsored schemes for food security and the introduction of cooked mid-day meals in all government and government-assisted schools. However, with the exception of the mid-day meals, the orders relate to the implementation of programmes already established by the Government. The Court held that it is not possible to compel the State through the judicial process to make provision by statutory

⁵¹ *Government of the Republic of South Africa and others v. Grootboom and others*, op. cit., para. 99.

⁵² Expediente No EXP-6985/0: Maria Delia Cerrudo y otros c/ Gobierno de la Ciudad de Buenos Aires, cited in Background paper prepared by the Secretariat: Selection of case law on economic, social and cultural rights, UN document E/CN.4/2004/WG.22/CRP.1, November 2003, page 6

enactment to ensure implementation of those rights, but “where such legislation is already enacted by the State providing these basic requirements (...) the State can certainly be obligated to ensure observance of such legislation”.⁵³

86. Unlike in the *Grootboom* Case, in the *TAC* Case, the South African Constitutional Court ordered immediate redress and direct action by the Government. In this, the Court ordered the State to remove the restriction and roll out a national comprehensive anti-HIV/AIDS programme. This case demonstrates a more direct order to the Government for specific action as the remedy, for example, the direct provision of the drug to all expectant mothers, but it refrained from instructing the Government as to how the national plan should be rolled out.

87. In the *Orissa Starvation Deaths Proceedings* cited above, the National Human Rights Commission of India held a series of hearings resulting in the State of Orissa agreeing that certain measures had to be taken, including the cessation of the practice of considering the existence of starvation solely on the basis of death, and the revision of the State Famine Code to bring it into line with the Constitutional provisions of the right to food (Article 21 on the right to life read together with State Directive Principles on livelihoods and nutrition in Articles 39 (a) and 47). It should also be noted that quasi-judicial bodies may have more scope than judicial organs in finding suitable solutions, or a friendly settlement, in particular cases, as was the case in the *Orissa Starvation Death Proceedings*.

88. The above shows that Courts and quasi-judicial bodies may call for specific measures or leave it to the executive or legislative branches to devise such measures. Courts will tread carefully before devising new programmes or ways of implementing rights, especially as the legitimacy of these bodies to make such decisions will be in focus; the more practical and well-reasoned their decisions, the greater legitimacy Court holdings will possess. Indeed, the examples show a number of remedies other than financial compensation, although the latter may remain appropriate in some cases.

VI. CONCLUSION

89. From the above analysis, it may be persuasively concluded that there is nothing inherent in the right to food that dictates its non-justiciability at the national level. Indeed, there are powerful arguments in support of the justiciability of the right to food. First is the uncontested fact that the right

⁵³ See *PUCL case*, op. cit., Court orders of 28 November 2001.

is already justiciable in a number of countries, as the review of relevant case law has shown. Second, there is a fundamental principle in international human rights law whereby everyone has the right to an appropriate “effective remedy” when his/her right or rights have been violated.

90. All levels of obligations regarding the right to food can be and have been found to be justiciable. However, obligations to respect and to protect, as well as the obligation to extend the right to food on a non-discriminatory basis, are the least problematic. Obligations to facilitate and to fulfil may be evaluated on the basis of the reasonableness test, developed and applied by the South African Constitutional Court.

91. Ensuring that victims of violations of the right to food have effective access to justice at the national level, however, requires more than State and judicial recognition of justiciability. Awareness of the right to food and the obligations pertaining thereto need to be heightened amongst rights holders. Lawyers need to be educated so that they can argue effectively for the upholding of this right and judges need to acquire the knowledge to accept such arguments, when appropriate. In some countries, legislative action may also be advisable to ensure that the written law of the land adequately reflects the right to food and the obligations of all branches of the State to uphold it.

IMPLICATIONS OF THE VOLUNTARY GUIDELINES FOR PARTIES AND NON-PARTIES TO THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

5

I. INTRODUCTION

1. The World Food Summit: *five years later* decided on the elaboration of voluntary guidelines to support the efforts of Member States towards the progressive realization of the right to adequate food in the context of national food security (hereinafter referred to as Voluntary Guidelines). The main provision of international law concerning the right to food is contained in Article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).¹ This information paper sets out some considerations for determining the legal basis and legal implications of the voluntary guidelines for States that have ratified the ICESCR, to which there are currently 148 State Parties, and for those that have not ratified this treaty.

¹ Dec. 16, 1966, 993 UNTS 3 (entry into force July 18, 1978).

ICESCR, ARTICLE 11

1. The States Parties to the present Covenant recognise the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognising to this effect the essential importance of international co-operation based on free consent.

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

(a) To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilisation of natural resources;

(b) Taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world supplies in relation to need.

II. TREATIES, DECLARATIONS AND CUSTOMARY INTERNATIONAL LAW

2. The Vienna Convention on the Law of Treaties² defines a treaty as “an international agreement concluded between States in written form and governed by international law...” (Art. 2(1)(a)). In contrast, declarations, resolutions and other non-binding instruments may encompass strong political commitments or moral obligations, even though they are not legally binding. Non-binding instruments may serve the parties to a treaty to authoritatively interpret its terms, resolving any ambiguities that may exist. A non-binding instrument may also be adopted as a precursor to a treaty.

3. The Voluntary Guidelines are not meant to be legally binding. However, they may have a strong recommendatory force for States that are already bound by provisions of international law, insofar as the Voluntary Guidelines provide interpretation of such legal norms and guidance for their implementation.

² May 23, 1969, 1155 U.N.T.S. 331.

A. International Covenant on Economic, Social and Cultural Rights

4. As noted above, 148 FAO and UN Member States have ratified the ICESCR. By ratifying the ICESCR, a State Party assumes the obligation to take steps “to the maximum of its available resources” in order to achieve “progressively the full realization” of the rights recognized in the ICESCR (Art. 2). The ICESCR requires States Parties to submit “reports on the measures which they have adopted and the progress made in achieving the observance of the rights recognized herein.” (art. 16(1)). The ICESCR itself did not establish a special committee to review the reports; it merely stipulated that these reports are to be submitted to the UN Economic and Social Council (ECOSOC). ECOSOC adopted a series of resolutions in this regard that culminated in the establishment of the Committee on Economic, Social and Cultural Rights (CESCR) in 1985.³

ICESCR, ARTICLE 2

1. Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.
2. The States parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

General Comments

5. The CESCR has used its General Comments and analyses of State reports to clarify the meaning of ambiguous provisions of the ICESCR, thus providing the international community with analytical interpretations of the normative content of economic, social and cultural rights.

6. General Comments are addressed to the State Parties in general and are designed to provide guidance to them in discharging their reporting obligations under the ICESCR. The General Comment has evolved into an instrument in which the CESCR spells out its interpretation of different provisions of the ICESCR. General Comments are relied upon by the CESCR in evaluating States’ compliance with their obligations under the ICESCR.

³ ECOSOC Resolution 1985/17 of May 22, 1985.

General Comments are now, as a rule, analytical and frequently address difficult issues of interpretation and policy. Over time, General Comments have become authoritative guideposts for the interpretation and application of the ICESCR.

7. The CESCR General Comment 3 (1990),⁴ points out that “while the Covenant provides for progressive realization and acknowledges the constraints due to limits of available resources, it also imposes various obligations, which are of immediate effect.” Among these, the CESCR singles out two in particular: the undertaking of the States Parties to guarantee that the rights set out in the ICESCR will be exercised without discrimination; and the undertaking in Article 2(1) “to take steps.” Regarding the undertaking to take steps, the CESCR notes that although “the full realization of the relevant rights may be achieved progressively, steps towards that goal must be taken within a reasonably short time after the Covenant’s entry into force for the States concerned.”

8. General Comment 12 was adopted by the CESCR in 1999, in part as a response to objective 7.4 of the World Food Summit Plan of Action. It includes in its definition of the right to adequate food the requirement for physical and economic access at all times to adequate food or means for its procurement. Furthermore, the CESCR considers that the core content of the right to adequate food implies: (a) 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 (b) the *accessibility* of such food in ways that are sustainable and that do not interfere with the enjoyment of other human rights. While acknowledging that the right to adequate food should be realized progressively, General Comment points out that States have a core obligation to take action to ensure that, at the very least, people under their jurisdiction have access to the minimum essential food that is needed to ensure their freedom from hunger

9. It is worth noting that the UN Commission on Human Rights and the UN General Assembly have welcomed⁵ the work of the CESCR, including its General Comment 12. Similarly, the FAO Committee on World Food Security (CFS) welcomed General Comment 12 as an important step in implementing Objective 7.4 of the World Food Summit Plan of Action⁶.

⁴ Report of the Committee on Economic, Social and Cultural Rights, Fifth Session, U.N. Doc. E/1991/23. E/C.12/1990/8, at 83 (1991).

⁵ CHR Res. 2000/10, paragraph 8, GARES 57/226, paragraph 17, in which these bodies “welcome the work already done by the Committee on Economic, Social and Cultural Rights in promoting the right to adequate food, in particular its General Comment No. 12 (1999) on the right to adequate food”.

⁶ Report of the 25th Session of the Committee on World Food Security, Rome, 31 May - 3 June 1999. FAO Document No. CL 116/10.

10. A review of the practice of States in reporting to the CESCR shows that general comments are normally taken into account. Furthermore, during the second session of the IGWG in October 2003, a number of countries referred to General Comment 12 as constituting the most complete and appropriate interpretation of the right to food.⁷

Role of FAO in the ICESCR

11. The Voluntary Guidelines to be adopted within the framework of FAO may be linked to the ICESCR pursuant to several articles of the Covenant, in which a strong role for specialized agencies in promoting implementation of the ICESCR is foreseen. Article 18 provides that ECOSOC may arrange to receive reports by such agencies on, *inter alia*, “the particulars of decisions and recommendations regarding progress made in achieving the observance of the provisions of the Covenant falling within the scope of their activities.” Article 22 additionally provides that specialized agencies may decide, “each within its field of competence, on the advisability of international measures likely to contribute to the effective progressive implementation” of the ICESCR, based upon information brought to their attention by ECOSOC.

12. Finally, in Article 23, States Parties to the ICESCR agree that international action to achieve the rights recognized therein includes, *inter alia* the conclusion of additional conventions and the adoption of recommendations. Thus, the States Parties to the ICESCR have consented to the adoption of further international instruments including by specialized agencies within the field of their competence. Good faith compliance with the ICESCR would suggest that the States Parties owe due regard to any Voluntary Guidelines that are adopted in this context.

B. UN Charter and Universal Declaration of Human Rights

13. All members of the United Nations have ratified the UN Charter and thus pledged to act individually and in cooperation with the Organization to promote, *inter alia*, higher standards of living and universal respect for and observance of human rights and fundamental freedoms (Art. 55). The Charter authorizes the ECOSOC to “make recommendations for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms for all.” (Art. 62(2)) According to Article 1 (3) of the Charter, one of the purposes of the United Nations is to “achieve international cooperation in solving international problems of an economic, social, cultural or humanitarian character, and in promoting and encouraging respect for human rights and fundamental freedoms for all without distinction as to race, sex, language

⁷ For instance, Statement on behalf of GRULAC (Latin America and the Caribbean) during the debates at the second session of the Inter-Governmental Working Group, Rome 27-29 October 2003.

or religion”. The Universal Declaration of Human Rights (UDHR), which refers to the right to food in Art. 25,⁸ is frequently invoked as enunciating the human rights obligations of UN Member States. It may be argued that the UN’s consistent reliance on the UDHR when applying the human rights provisions of the UN Charter compels one to conclude that the Declaration has come to be accepted as an authoritative interpretation of these provisions. The Member States of the UN would have agreed that they have an obligation under the Charter to promote “universal respect for, and observance of” the rights which the UDHR proclaims, thus including the right to food.⁹

14. Among non-binding instruments, declarations generally carry particular weight. They often restate norms and principles that already exist in customary law.¹⁰ The continuous and consistent reference to the UDHR provisions on the right to food by the UN General Assembly and the Commission on Human Rights, also add to the status of the right to food in international law. Recent resolutions reaffirm the right of everyone to have access to safe and nutritious food, consistent with the right to adequate food and the fundamental right of everyone to be free from hunger so as to be able to fully develop and maintain

⁸ “Everyone has the right to a standard of living adequate for the health and well being of himself and his family, including food,...” Adopted by General Assembly resolution 217 A (III) of 10 December 1948

⁹ Courts have given effect to the UDHR in interpreting domestic laws. See e.g., *Boehm v. Superior Court*, 223 Cal Reprtr 716 (Ct. App. 1986) in which a state court used the standards of UDHR art. 25 to interpret the California Welfare and Institutions Code section 17 000 providing minimum assistance to the poor. A study several years ago found that more than 90 national constitutions since 1948 contain statements of fundamental rights inspired by the UDHR. More than two dozen constitutions explicitly refer to the UDHR. Annex 2 of the study lists national cases citing the UDHR and includes more than 200 opinions from 27 countries. In sum, the UDHR has served as a model for domestic constitutions, laws, regulations and policies; has been a source of judicial interpretation, a basis for action by inter-governmental organizations and diplomatic action; and has provided an inspiration to non-governmental organizations and individuals pressing for human rights in domestic law and international forums. See Hannum, H., “The Status of the Universal Declaration of Human Rights in National and International Law”, 25 Georgia. Journal of International and Comparative Law 287(1996).

¹⁰ According to a 1962 statement of the United Nations legal advisor, “[i]n United Nations practice, a ‘declaration’ is a formal and solemn instrument, suitable for rare occasions when principles of great and lasting importance are being enunciated, such as the Universal Declaration of Human Rights....in view of the greater solemnity and significance of a ‘declaration’ it may be considered to impart, on behalf of the organ adopting it, a strong expectation that members of the international community will abide by it. Consequently, in so far as the expectation is gradually justified by state practice, a declaration may become recognized as laying down rules binding upon states.” E/3616/Rev.1, E/CN.4/832/Rev.1, Commission on Human Rights, Report of the Eighteenth Session, ECOSOC Supp. No. 8 (1962), paras.103-105.

their physical and mental capacities.¹¹ Different aspects of the right to food have also been recognized in declarations and plans of action resulting from international conferences.¹²

C. Right to Food as customary international law

15. The right to food as customary international law depends upon finding sufficient state practice and *opinio juris* to establish the rule as one that is binding on all states. Custom as a general practice accepted as law requires both elements: the practice of states over time and the manifestation of conviction that the practice is obligatory. Treaties and other normative instruments can be utilized to show the existence of customary international law.¹³ In this respect, it has been noted that “the right to food has been endorsed more often and with greater unanimity and urgency than most other human rights, while at the same time being violated more comprehensively and systematically than probably any other right.”¹⁴ There are many historical examples of societies recognizing either the duty of governments to provide food or the entitlement of people to food and nutrition.¹⁵ The right to food is widely recognized in constitutional law¹⁶

¹¹ See General Assembly Resolutions A/RES/57/226 adopted on 18 December 2002, and A/RES/56/155 adopted on 19 December 2001, operative paragraph 2. See also Commission on Human Rights resolutions 1999/24 (26 April 1999), 2000/10 (17 April 2000, adopted by a vote of 49-1, with 2 abstentions), 2001/25 (20 April 2001), 2002/25 (22 April 2002, adopted without a vote) and 2003/25 (22 April 2003 adopted by a vote of 51-1 with one abstention).

¹² See, for instance, the Universal Declaration on the Eradication of Hunger and Malnutrition, Report of the World Food Conference, Rome, 5-16 November 1974; and Rome Declaration on World Food Security and the World Food Summit Plan of Action, FAO of the UN, Report of the World Food Summit, 13-17 November 1996

¹³ State practice and *opinio juris* can be derived from national laws, declarations of intergovernmental bodies, and treaties. *North Sea Continental Shelf Cases*, 1969 ICJ 27 (Feb.20). See also Restatement of Foreign Relations Law of the United States, which declares that “virtually universal participation of states in the preparation and adoption of international agreements recognizing human rights principles generally, or particular rights” can be evidence of customary international law. Restatement of the Law (Third) Foreign Relations Law of the United States § 701(1986).

¹⁴ See Philip Alston, *International Law and the Human Rights to Food*, in *The Right to Food* (Philip Alston and Katarina Tomasevski eds., 1984) at 9.

¹⁵ See P. Spitz, *Right to Food for Peoples and the People: A Historical Perspective*, in *The Right to Food*, 170-75 (Philip Alston and Katarina Tomasevski eds.), 1984; Robert Robertson, *Human Rights in the Twenty-First Century: A Global Challenge*, 451 (Pathleen Mahoney and Paul Mahoney, eds. 1993)

¹⁶ FAO Document IGWG RTFG 2/INF 1, *Recognition of the right to food at the national level*, September 2003.

and in numerous international texts, some pre-dating the United Nations. The League of Nations adopted a Declaration on the Rights of the Child in 1924 which stated that mankind owes the child the best that it has to give and that “the child that is hungry should be fed.” (para 2).¹⁷

16. Among texts of the United Nations, the UDHR goes beyond a right to be free from hunger, to establish a right to food adequate for health and well-being (Art. 25). The ICESCR contains both “the right to an adequate standard of living, including food” (Art. 11(1)) and “the fundamental right of everyone to be free from hunger” (Art. 11(2)). General Comment 12 of CESCR calls the second an “absolute, a minimum standard,” and in this respect it can be argued that it reflects customary international law, while the first is to be progressively realized according to resources. Notably, the right to freedom from hunger is the only right that is qualified as “fundamental”, both in the ICESCR and in the International Covenant on Civil and Political Rights. The latter implies a right to food as part of the inherent right to life in Art. 6.¹⁸ The nutritional aspects of the right to food also have a place in the Convention on the Rights of the Child (Arts. 24 and 27) and in the Convention on the Elimination of All Forms of Discrimination against Women (Arts. 12 and 14).

17. The 1993 Vienna Declaration and Programme of Action affirmed that “food should not be used as a tool for political pressure”¹⁹, and this has been repeated time and again in several resolutions by the UN General Assembly and the Commission on Human Rights cited above. In the Universal Declaration, Participating States unequivocally summed up their views on the Eradication of Hunger and Malnutrition of the World Food Conference: “Every man, woman and child has the inalienable right to be free from hunger and malnutrition in order to develop fully and maintain their physical and mental facilities.”²⁰ Similarly, the UN General Assembly has reaffirmed “that the right to food is a universal right which should be guaranteed to all people...”²¹

¹⁷ League of Nations O.J. Spec. Supp. 23 (1924). Freedom from want was also one of the four freedoms proclaimed by President Franklin Roosevelt on Jan. 6, 1941. Franklin D. Roosevelt, The Annual Message to Congress, January 6, 1941, in 9 Public Papers and Address of Franklin D. Roosevelt, at 672 (S. Rosenman ed., 1941). U.S. President Clinton on World Food Day 1998 referred to the right to food as the most basic human right.

¹⁸ Notably, the Human Rights Committee, in General Comment 6 of April 30, 1982, held that the right to life “has been too often narrowly interpreted. The expression “inherent right to life” cannot be understood properly in a restrictive manner, and the protection of this right requires that States adopt positive measures. In this connection, the Committee considers that it would be desirable for States parties to take all possible measures to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics.”

¹⁹ Vienna Declaration and Programme of Action, A/CONF.157/23) Part I, para. 31.

²⁰ 16th Plenary Meeting 16 Nov. 1974, para 1.

²¹ GA RES. 166, UN GAOR, 39th Sess. (1984).

18. In the context of armed conflict, consistent State practice and *opinion juris* exist to prohibit the use of food deprivation as a weapon of warfare,²² and there is also a duty to refrain from interfering with food destined for those threatened with hunger. The starvation of civilians as a method of warfare is prohibited in both international²³ and non-international armed conflict.²⁴ That prohibition is violated not only when denial of access to food causes death, but also when the population suffers hunger because of deprivation of food sources or supplies. The prohibition of starvation is elaborated upon in provisions prohibiting attacks against, or destruction of, items necessary for the survival of the civilian population, including foodstuffs and drinking water. The United Nations Security Council has reiterated that individuals impeding food deliveries during armed conflicts may be held individually responsible in Somalia and the former Yugoslavia.²⁵ Further evidence is seen in the fact that under the 1998 Rome Statute of the International Criminal Court, intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival is considered a war crime in international armed conflict.²⁶ More generally, the basic norms of international humanitarian law applicable in armed conflicts have been considered by the International Court of Justice as “intransgressible” in character.²⁷ Based on this statement by the Court, the International Law

²² Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, arts. 20, 26; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 23; Protocol Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, arts. 54, 70. 1125 U.N.T.S. s, Protocol II Additional. At all times, the Genocide Convention prohibits the deliberate infliction of “conditions of life calculated to bring about its physical destruction in whole or in part” Art. II (c).

²³ The Geneva Convention Relative to the Protection of Civilian Persons in Time of War has been ratified by almost all States. The Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) have been ratified by the vast majority of States. Provisions guaranteeing access to humanitarian aid are considered part of customary international law and therefore binding on all States regardless of ratification.

²⁴ The Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), stipulates, in article 14: “Starvation of civilians as a method of combat is prohibited. It is therefore prohibited to attack, destroy, remove or render useless, for that purpose, objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works.”

²⁵ Somalia: U.N. SCOR, 3145th mtg., U.N. Doc. S/RES 794 (1992); Yugoslavia, 3106th mtg., UN Doc S/RES 700 (1992); and UN SCOR 3137th mtg., U.N. Doc. S/RES/787 (1992).

²⁶ For international armed conflict, see art. 8, para. 2 (a) (vii) and (b) (viii) of the Rome Statute; for non-international armed conflict, see art. 8, para. 2 (e) (viii).

²⁷ Legality of the Threat or Use of Nuclear Weapons, ICJ, Reports 1966, p. 226 at p. 257, para. 79.

Commission has considered that these norms may give rise to obligations of peremptory character that are not subject to derogation.²⁸

19. The extent to which these texts give rise to legal commitments must be considered in the light of the UN Charter, to which all states are party, and general international law. In practice declarations are viewed as persuasive evidence of the existence and interpretation of rules of international law and contribute to the formation of new rules, influence the practice of States and organizations and legitimate claims and justifications in international relations.²⁹ Marshalling all the evidence, although there are dissenting opinions, the majority of commentators assert that “under international law there is currently found, minimally a treaty right³⁰ conjoined with a customary right to be free from hunger.”³¹

20. There is some contention as to whether the right to food is customary international law, and what the content of that norm would be. However, given that the Voluntary Guidelines are addressed to all FAO and UN Member States to promote implementation of the right to food as contained in numerous international treaties and as part of the obligations of United Nations Member States, pursuant to the Universal Declaration of Human Rights, the customary nature of the right to food could be left aside.

III. LEGAL BASIS FOR VOLUNTARY GUIDELINES

A. World Food Summit

21. The World Food Summit in 1996 adopted the Rome Declaration on World Food Security and the World Food Summit Plan of Action. The Rome Declaration reaffirmed the right of everyone to have access to safe and nutritious food, “consistent with the right to adequate food and the fundamental right of everyone to be free from hunger”. In the Plan of Action, Objective 7.4 is “to clarify the content of the right to adequate food and the fundamental right of everyone to be free from hunger as stated in the International Covenant on Economic, Social and Cultural Rights and other relevant international and regional instruments.” In addition, Objective 7.4 urged States that have not

²⁸ Draft Articles on State Responsibility for Internationally Wrongful Acts contained in Report of the International Law Commission on its 53rd session, GA Official Documents 56th session Doc. A/56/10, comments on Article 40.

²⁹ North Sea Continental Shelf case at 4.

³⁰ See Katarina Tomasevski, ed., *The Right to Food: Guide Through Applicable International Law* (1987).

³¹ Donald E. Buckingham, *A Recipe for Change: Towards an Integrated Approach to Food under International Law*, 6 *Pace Int'l L. Rev.* 285 (1994).

yet done so to ratify the ICESCR, and all Governments to make every effort to implement it.³² The links between the concept of the right to food in the World Food Summit documents and the International Covenant on Economic, Social and Cultural Rights (ICESCR) were thus clearly established.

22. Within the United Nations human rights system, both UN Charter-based bodies and Treaty bodies³³ responded to this call by the World Food Summit. The Committee on Economic, Social and Cultural Rights³⁴ (CESCR), which monitors implementation of ICESCR, adopted General Comment 12 on the Right to Adequate Food. Among the Charter-based bodies, both the Commission on Human Rights and the Sub-Commission on the Promotion and Protection of Human Rights³⁵ have undertaken studies on the Right to Food, with the Commission on Human Rights having appointed a Special Rapporteur on the topic who reports both to the Commission and to the General Assembly.³⁶ The links between the World Food Summit and the various human rights instruments have thus been further strengthened.

B. Mandate of the IGWG

23. The Declaration adopted by the World Food Summit: *five years later* invited the FAO Council to “establish ... an Intergovernmental Working Group, with the participation of stakeholders, in the context of the WFS

³² FAO, Report of the World Food Summit, Appendix, Rome 1997.

³³ Charter-based bodies are those not established by separate human rights treaty, but derive their authority directly from the UN Charter and subsequent resolutions. These include, in particular, UN General Assembly, ECOSOC, the Commission on Human Rights and the Sub-Commission on Promotion and Protection of Human Rights. Treaty bodies, by contrast, are those human rights bodies established under the various human rights treaties, such as the Human Rights Committee and the Committee Against Torture.

³⁴ ECOSOC created the CESCR to monitor implementation of the Covenant. Unlike the Human Rights Committee, the CESCR is not mandated to undertake its supervisory activities independently but is to assist ECOSOC in fulfilling its role under the Covenant.

³⁵ In 1999, the Special Rapporteur of the Sub-Commission on the Promotion and Protection of Human Rights, Mr. Asbjørn Eide, updated his study on the right to food and to be free from hunger. The Special Rapporteur recognized the role played by the World Food Summit Plan of Action in changing attitudes and acknowledged the important contribution of General Comment No. 12 in clarifying the content of the right and of corresponding State obligations. He noted that international institutions were increasingly endorsing a human rights approach to food and nutrition issues and called on States, international organizations, NGOs and civil society to act in a concerted way to eliminate the scourge of hunger from humanity.

³⁶ In 2000, the Commission on Human Rights appointed Mr. Jean Ziegler (Switzerland) as its first Special Rapporteur on the right to food. He has since submitted a number of reports and mission reports to the Commission on Human Rights and to the General Assembly. See, for instance, UN documents E/CN.4/2001/53, 7 February 2001; E/CN.4/2002/58/Add.1, 23 January 2002; A/56/357, 27 August 2002.

follow-up, to elaborate, in a period of two years, a set of voluntary guidelines to support Member States' efforts to achieve the progressive realization of the right to adequate food in the context of national food security".³⁷ The reference to Member States in the Declaration implies that the Voluntary Guidelines shall apply to all FAO Member States. Resolutions adopted by the General Assembly³⁸ and the United Nations Commission³⁹ on Human Rights and its Sub-Commission also include a reference to "Member States" that strongly suggest that the Voluntary Guidelines are to be addressed to all FAO (and UN) Member States. The Working Group is open to the participation of all FAO and UN members.⁴⁰ This clearly suggests that the Voluntary Guidelines are intended for all States and not only for States Parties to the ICESCR.

24. The wording of the World Food Summit documents refers to the ICESCR with regard to the content of the right to adequate food and the fundamental right to be free from hunger. The implication of this could be that, while the Voluntary Guidelines are by themselves not legally binding, they should be based on existing international law, including the ICESCR. On the other hand, the wording of the mandate might also imply that the Voluntary Guidelines should focus only on that aspect of the right to food falling within the ambit of "progressive realization" as opposed to obligations of an immediate nature or those specifically related to the fundamental right to be free from hunger.

C. Nature of the Voluntary Guidelines

25. The Vienna Convention on the Law of Treaties is clear in indicating that international agreements do not create obligations for States without their consent.⁴¹ The Voluntary Guidelines, as their name indicates, are not intended to be legally binding. Both the form and content would suggest that they are recommendatory and are not meant to create any new legal obligations for any State. It also seems clear that while the ICESCR is highly relevant, the Voluntary Guidelines are not intended solely for those States that have ratified it. On the other hand, the Voluntary Guidelines cannot detract from obligations

³⁷ Declaration of the World Food Summit: five years later, Operative Paragraph 10.

³⁸ General Assembly Res. A/C.3/58/L.70, 18 November 2003, welcoming the work of the Intergovernmental Working Group to elaborate a set of voluntary guidelines to support the efforts of Member States to achieve the progressive realization of the right to adequate food in the context of national food security. See also General Assembly resolution A/RES/57/226, paragraph 14.

³⁹ Commission on Human Rights Res. 2003/25, welcoming the Voluntary Guidelines as a means to "support Member States efforts to achieve the progressive realization of the right to adequate food in the context of national food security and encourages them to continue their cooperation in this regard." (emphasis added).

⁴⁰ See Annex D, Report of the 123rd Session of the FAO Council, 28 October to 2 November 2002.

⁴¹ Vienna Convention on the Law of Treaties, art. 34.

that States already have, whether under treaty or customary law, and should avoid giving the impression that their implementation would not suffice for implementing obligations under human rights law, such as the ICESCR.

26. It should also be borne in mind that the Voluntary Guidelines are for application in all countries, whatever their level of development, climate or wealth. The CESCR has noted in this regard : “The most appropriate ways and means of implementing the right to adequate food will inevitably vary significantly from one State Party to another. Every State will have a margin of discretion in choosing its own approaches, but the Covenant clearly requires that each State party take whatever steps are necessary to ensure that everyone is free from hunger and as soon as possible can enjoy the right to adequate food.”⁴²

27. For practical purposes, it is hard to see how the Voluntary Guidelines could be applied if they do not provide the necessary definitions and principles to be applied when taking measures in the various fields addressed by these.

IV. CONCLUSION

28. In developing the Voluntary Guidelines, the IGWG may, in light of the above discussion, consider whether it should restate existing customary or treaty law, interpret existing customary or treaty law, progressively develop the right to food as it is contained in the ICESCR, or reaffirm the interpretations suggested by the CESCR in General Comment 12.

29. If the Voluntary Guidelines are based on the interpretations of the ICESCR, they would primarily facilitate the fullfilment of State Parties’ obligations under the ICESCR. However, FAO and UN Member States non-party to the ICESCR could also implement the Voluntary Guidelines to the extent possible and compatible with their existing legal obligations.

30. Alternatively, the Voluntary Guidelines could be drafted taking as a basis the right to food as contained in the Universal Declaration on Human Rights, other international legal instruments⁴³ or general international law.

31. If at least the right to be free from hunger is customary international law, then it will be automatically incorporated into the domestic law of many States pursuant to their national legal systems and constitutional processes;

⁴² General Comment 12, para. 21.

⁴³ Including ICESCR, CEDAW, Convention on the Rights of the Child, Geneva Conventions and Protocols.

the Voluntary Guidelines can assist in giving further content to this right. In States that do not automatically incorporate customary international law, but whose constitutions or laws contain a right to food or duty of government to assist the needy, the Voluntary Guidelines may provide authoritative interpretation of the constitutional provision.

32. For States Parties to the ICESCR whose domestic legal systems elevate human rights treaties to constitutional status, the interpretative statements contained in General Comments and Voluntary Guidelines would have interpretive weight, although they would not be legally binding. The Voluntary Guidelines would provide further detail to the definition of the rights and obligations contained in General Comment 12.

33. States Parties to the ICESCR must report on measures taken and difficulties encountered in implementing the rights it contains, but few States provide sufficient and precise information on the right to food.⁴⁴ The Voluntary Guidelines could provide benchmarks and a framework for State reporting. They would assist the CESCR and could be endorsed or adopted by it as a framework for future State reporting and the CESCR's own evaluation of State reports.

34. The juridical value of the Voluntary Guidelines would be strengthened if the text makes specific reference to a customary international law right to food or is linked to the obligations of States Parties to the ICESCR or the United Nations Charter. The Voluntary Guidelines may set forth standards of conduct that give rise to strong political expectations if they refer to existing law to give them an authoritative basis and legitimacy. A certain weakness of command is explicit in the title "Voluntary Guidelines", but the degree of specificity may give them stronger force than vague or ambiguous standards in a binding text. Thus, soft or indeterminate formulation of the right to food in treaty texts may be strengthened by the Voluntary Guidelines.

⁴⁴ FAO Document IGWG RTFG 2/INF 1, Recognition of the right to food at the national level, September 2003.

RECOGNITION OF THE RIGHT TO FOOD AT THE NATIONAL LEVEL

6

I. INTRODUCTION

1. The Right to Food has been recognized and affirmed at the international level on many occasions. But to what extent is international recognition reflected at the national level?
2. This paper provides an overview of the various ways in which the right to food is recognized in different countries. It gives an indication of the number of countries which recognize the right to food, the extent to which they do so, their understanding of this right, and the respective levels of protection provided. The paper is based primarily on reviews of State reports to the Committee on Economic, Social and Cultural Rights (CESCR) and on analysis of constitutional provisions.

ICESCR, ARTICLE 11

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

ICESCR, ARTICLE 2

1. Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.
2. The States parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

II. HUMAN RIGHTS TREATIES**A. Ratification**

3. The first step in the inquiry is to gauge the commitment of individual States to the Right to Food by measuring the status of ratification of food related human rights treaties. If on the one hand the adoption in international forums of resolutions and declarations is an important indicator of the level of awareness and will to proceed in protecting human rights, on the other hand the real legal commitment is only created through the national process leading to ratification of legally binding instruments.
4. States that have ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR) have recognized the right to adequate food as part of the right to an adequate standard of living, and the fundamental right to be free from hunger (Article 11 ICESCR). States Parties have committed themselves to progressively realizing this right, to the maximum of available resources through all appropriate means, including in particular legislative measures (Article 2 ICESCR). As of December 2003, 149 States were Parties (while 6 remained Signatories) to the ICESCR.
5. States Parties to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) have agreed to take special measures to eliminate discrimination against women, including insurance of equal access by rural women to food security measures (Article 14 CEDAW) and appropriate nutrition during pregnancy and lactation (Article 12:2 CEDAW). As of December 2003, 175 States were Parties to the CEDAW.
6. States Parties to the Convention on the Rights of the Child (CRC), have undertaken to respect and ensure the right to a standard of living adequate for

the child's physical, mental, spiritual, moral and social development (Article 27:1 CRC). States Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall, in case of need, provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing (Article 27:3 CRC).

7. The right of the child to the highest attainable standard of health (Article 24:1 CRC) must be implemented, *inter alia*, through the provision of adequate nutritious food and clean drinking water (Article 24:2:c CRC). In addition, States Parties shall ensure that parents and children are informed, have access to education and are supported in the use of basic knowledge of child health and nutrition, the advantages of breastfeeding, hygiene and environmental sanitation and the prevention of accidents (Article 24:2:e CRC).

8. These rights are to be ensured for each child within a State Party's jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status. (Article 2:1 CRC). As of December 2003 there are 193 State Parties to the CRC, which is close to universal ratification.

9. Annex I shows the status of ratification of the ICESCR, CEDAW and CRC.

B. International Covenant on Economic, Social and Cultural Rights

10. The International Covenant on Economic, Social and Cultural Rights (ICESCR) is monitored by the Committee on Economic, Social and Cultural Rights (CESCR), established in 1987 by the Economic and Social Council (ECOSOC). The State Parties, according to Article 16 of the ICESCR, have the duty to report on the measures which they have adopted and the progress made in achieving the observance of the rights recognised therein. These reports are submitted to the CESCR every five years after the initial report which must be submitted within two years of ratification. If a report is not submitted, the CESCR may elect to review a State's compliance with the Covenant without a report. The CESCR submits annual reports to ECOSOC.

11. The CESCR has issued "General Guidelines regarding the form and contents of reports to be submitted by State Parties under articles 16 and 17 of the CESCR".¹

¹ UN document E/C.12/1991/1 (Basic Reference Document), 17 June 1991.

According to these Guidelines, State Reports should contain the following information:

- > Current standard of living of its entire population, with particular attention to the changes occurred in the short period (e.g., in the last 5 – 10 years), also through statistical instruments;
- > The extent to which the right to adequate food has been realized in the country, through nutritional surveys and detailed information on malnutrition, dividing the population in groups depending on sex, age, race, origin, geographical collocation, and other similar criteria;
- > Recent legal and political developments and measures considered necessary by the Government to guarantee access to adequate food for each of the vulnerable or disadvantaged groups and for the worse-off areas;
- > Measures taken to improve methods of production, conservation and distribution of food, by making full use of technology and scientific knowledge;
- > Evidence of any groups lacking knowledge of principles of nutrition;
- > Agrarian reforms made in order to improve efficiency of the agrarian system;
- > Measures taken to ensure equitable distribution of world food supplies in relation to need, taking into account the problems of both food-importing and food-exporting countries.

12. These Guidelines reflect paragraphs 1 and 2 of Article 11 of the ICESCR, as well as paragraph 2 of Article 2 ICESCR, which forbids discrimination in relation to any of the rights recognized in the ICESCR. It should be noted that these guidelines precede General Comment 12 of 5 May 1999,² and are in the process of being revised to take account of normative developments in the understanding of the right to food.

C. States' Reports to CESCR

13. In order to provide an overview of State Parties' understanding of State obligations relating to the right to adequate food and freedom from hunger, a survey of the 69 State Reports, submitted during the decade 1993-2003, was undertaken by the FAO Legal Office in July 2003. The main findings are reported below.

14. Thirty-two reports - almost half of those submitted - contain various statistics, such as on poverty levels, cost of living, food consumption, per capita consumption of goods and services, average income and average expenditure, economic production, agriculture. In general, a State report may

² UN document E/C.12/1999/5, General Comment 12, The right to adequate food (Article 11 of the Covenant).

cover a variety of issues, such as agriculture, economic production, health, social security, nutritional habits or poverty in general. This is an indication of a broad understanding of the enabling environment necessary for the enjoyment of the right to food by all.

15. Many State Parties report on institutional measures taken to implement the right to adequate food. In particular, food safety and control institutions and food security coordination mechanisms, such as specific bureaus, agencies or committees are mentioned. Such coordination mechanisms may also have a mandate to identify legislative gaps.

16. A vast majority of the Reports are selective in the issues they report on, choosing one or two they deem most important, and many provide only major statistics. Less than a dozen of the 69 Reports give a coordinated and complete representation of all aspects of the implementation of article 11 in the national legal systems.³

17. Legislative measures are mentioned in the vast majority of State Parties' Reports. Such measures normally fall into one of three broad categories:

- > Specific legal measures adopted in specific fields, in order to guarantee the direct implementation of the right to adequate food in those contexts⁴;
- > Analysis on general legislation forming the legal basis for the implementation of large-scale programmes and reforms⁵;
- > Description of legal instruments creating coordination mechanisms to implement the right to adequate food⁶.

18. Common law countries may report on relevant jurisprudence, in particular on instances where a court has created *ex novo* rules and constitutionally

³ Bolivia, 1999 (UN doc.E/1990/5/Add.44); Japan, 1998 (UN doc.E/1990/6/Add.21); Panama, 2000 (UN doc. E/1990/6/Add.24); Paraguay, 1999 (UN doc. E/1989/5/Add.13); Philippines, 1997 (UN doc. E/1989/5/Add.11); Sri Lanka, 1997 (UN doc. E/1990/5/Add.32); Switzerland, 1996 (UN doc. E/1990/5/Add.33); Syrian Arab Republic, 1999 (UN doc.E/94/104/Add.23); Trinidad and Tobago, 2000 (UN doc. E/90/6/Add.30); Tunisia, 1996 (UN doc. E/1990/6/Add.14).

⁴ See for instance Estonia, *Food Act, Consumer Protection Act, Public Health Act, Water Act, Packaging Act*, 2001 (UN doc.E/1990/5/Add.51); Finland, *Living Allowance Act*, 1999 (UN doc. E/C.12/4/Add.1); Japan, *Soil Productivity Improvement Law*, 1998 (UN doc.E/1990/6/Add.21).

⁵ See for instance Brazil, *The Food and Nutritional Vigilance System (SISVAN)*, 2001 (UN doc. E/1990/5/Add.53); Bulgaria, *National Food and Nutrition Policy*, 1996 (UN doc. E/1994/104/Add.16); Canada, *National Plan of Action and Nutrition*, 1998 (UN doc. E/1994/104/Add.17); Ireland, *National Anti-Poverty Strategy (NAPS)*, 2000 (UN doc. E/1990/6/Add.29).

⁶ See for instance Slovakia, *Subsistence Minimum Act*, 2001 (UN doc. E/1990/5/Add.49); Tunisia, *Seventh Economic and Social Development Plan*, 1996 (UN doc. E/1990/6/Add.14).

protected rights. In common law jurisprudence the right to a decent standard of living, free from need and starvation, has been recognized.⁷

19. Various programmes and plans may be presented in a Report of a State Party with regard to:

- > Agrarian reform⁸;
- > Economic growth plans⁹;
- > Social security measures¹⁰;
- > Distribution of land and resources¹¹;
- > Public health measures¹²;
- > Special programmes to address the needs of a minority group or a particularly disadvantaged group¹³.

D. Applicability of the ICESCR at the national level

20. One of the measures consistently advocated by the CESCR is the incorporation of the provisions of the ICESCR in the constitutions or national legislation of the State Parties, to ensure that the provisions can be directly applied by national courts and other agencies. It should also be noted that some State Parties to the ICESCR follow the so-called monistic system, which means that once ratified, a treaty becomes part of the law of the land and thus

⁷ See Israel, Judgment by the Israel's Supreme Court in the case of Gazmo v. Ishayahu (REC 4905/98) 0F 19 March 2001, 2001 (E/1996/6/Add.32).

⁸ See for instance Brazil, *National Agrarian Reform Programme*, 2001 (UN doc.E/1990/5/Add.53.); Colombia, *Agrarian Reform Bill*, 2000 (UN doc. E/C.12/4/Add.6); Philippines, *Comprehensive Agrarian Reform Programme*, 1997 (UN doc. E/1989/5/Add.11).

⁹ See for instance Bolivia, *General Social and Economic Development Plan*, 1999 (UN doc. E/1990/5/Add.44); Tunisia, *Seventh Economic and Social Development Plan*, 1996 (UN doc. E/1990/6/Add.14).

¹⁰ See for instance Argentina, *Social Nutritional Programme (PROSONU)*, 1997 (UN doc. E/1990/6/Add.16); Panama, *Social Assistance Programme*, 2000 (UN doc. E/1990/6/Add.24).

¹¹ See for instance Armenia, *Programme of Land Reforms*, 1998 (UN doc. E/1990/5/Add.36); Philippines, *Comprehensive Agrarian Reform Programme*, 1997 (UN doc. E/1989/5/Add.11).

¹² See for instance Bulgaria, *Health Nutrition Information and Training Programme*, 1996 (UN doc. E/1994/104/Add.16); Mexico, *Nutrition and Health Programme*, 1997 (UN doc. E/1994/104/Add.18).

¹³ See for instance Argentina, *Nutritional Programme for Mothers and Children (PROMIN)*, 1997 (UN doc.E/1990/6/Add.16); See also Australia, protection of health of indigenous, 1998 (UN doc. E/1994/104/Add.22); Panama, laws protecting indigenous ownership of land, 2000 (E/1990/6/Add.24); Paraguay, The Food and Nutritional Education Program – set up to improve living conditions in rural areas through health, nutrition and education programmes for vulnerable groups, 1999 (UN doc.E/1989/5/Add.13); Philippines, Government policies and social welfare focused on socially disadvantaged women, physically and mentally disabled persons and the more disadvantaged members of labour force, 1997 (UN doc. E/1989/5/Add.11).

applicable by courts. States which follow the dualist approach normally need to adopt specific legislation to this effect before the provisions of a treaty becomes applicable.

21. Based on a review of Constitutions and of State Parties Reports to the ICESCR, the FAO survey found that in 77 State Parties to the ICESCR the provision of international treaties such as the ICESCR are part of the domestic legal order and directly applicable, while in others the incorporation of such provision in the domestic system is subject to the adoption of specific national laws. In this regard, some countries have taken important steps to incorporate the entire Covenant,¹⁴ while others took action to enforce single rights alone.¹⁵ A full list of the State Parties where the ICESCR is part of the domestic legal order is provided in Annex II.

III. NATIONAL CONSTITUTIONS

A. Dimensions of the Right to Food

22. The right to food is a multidimensional right, the realization of which depends on many factors. In a normal situation, for the majority of persons, the right to food is realized primarily through their own efforts, by producing or procuring the food they need. This depends on access to land and other productive resources and on access to paid employment. Some people are unable to provide for themselves, for reasons beyond their control - such as unemployment, age, sickness, disability, natural catastrophes, and war. Their food entitlements depend on transfer of food or cash from their families, communities, countries or international aid organizations. The right to adequate food also implies that the food obtained must be of adequate quality. This entails that food purchased on the free market or given as food aid must fulfil minimum safety standards. The right to food is linked to various other human rights, from property rights and access to justice, labour rights and the right to information and education.

23. Exploring the constitutional protection of the right to food therefore is a more complex endeavour than simply searching for keywords such as “food” or “nutrition”.¹⁶ On the other hand, if the survey is to remain meaningful,

¹⁴ See for instance Norway – the Human Rights Act of 21 May 1999 No.30 gave ICESCR, ICCPR and ECHR the force of Norwegian Law; Argentina – the 1994 Constitutional amendment included ICESCR into the National Constitution.

¹⁵ See discusses in the following section on protection of single rights though constitutional provisions.

¹⁶ This was the methodology followed in “The Right to Food in Theory and Practice”, FAO, Rome, 1998.

some limits must be set to its scope. The FAO Legal Office undertook a survey of all national constitutions in June and July 2003, using the following criteria for inclusion:

- > Explicit recognition of the right to food of everyone;
- > Explicit recognition of the right to food of specific groups (such as children, the elderly, pensioners, prisoners);
- > Implicit recognition of the right to food through explicit recognition of a wider right, such as the right to an adequate standard of living, a decent life or a livelihood;
- > Recognition of a right to social security for non-workers, which constitutes an implicit recognition of the right to food;
- > Recognition of the rights of the child, which can normally be taken to include their nutrition rights;
- > Recognition of a right to minimum wage for workers, enough to provide for the basic needs of the worker and his or her family, including food needs;
- > Recognition of the importance of agriculture, food safety or consumer rights through explicit provisions on rights or on a duty of the State;
- > Recognition of the right to health, in such a way as to include food rights.

24. There is considerable overlap between those different dimensions of protection and recognition of the right to food; some Constitutions contain provisions falling into most of these categories. On the other hand, some Constitutions contain no such provisions at all. Map No 1 aims at capturing the scope of recognition of the right to food in the world based on some of these dimensions.¹⁷

25. The most common constitutional provisions are formulated along the lines of the Universal Declaration of Human Rights, recognizing the right of everyone to an adequate standard of living, including food, clothes and shelter. Others refer to a decent living standard or life in dignity. Yet other constitutions list component rights only, such as food or nutrition. There are some Constitutions where the right to food as such is not mentioned, and reference is made only to the obligation of the State to ensure an adequate standard of living or level of nutrition of the population, which for the purpose of this paper is deemed equivalent to implicit recognition of the right to food.¹⁸

26. Constitutions that recognize the rights of the child almost always state that the parents have the obligation to feed their children; often they also contain

¹⁷ The maps referred to in this paragraph and paragraph 32 are not included in this publication. They can be obtained from Righttofood@fao.org.

¹⁸ For instance, Article 47 of the Constitution of India.

reference to obligations to provide state support to parents or to ensure the care of orphans. Specific groups other than children, whose food rights are specifically protected in some constitutions, include pensioners, the elderly, war widows, veterans and prisoners. Such provisions often coexist with more general provisions concerning the right to food.

CONSTITUTIONAL PROVISIONS FOR THE RIGHT TO FOOD	
1) CONSTITUTIONAL PROVISIONS MAKING DIRECT MENTION OF THE RIGHT TO FOOD, APPLICABLE TO THE WHOLE OF THE POPULATION ¹⁹	22
2) EXPLICIT PROTECTION OF THE RIGHT TO FOOD OF A SPECIFIC GROUP	17
3) CONSTITUTIONS PROTECTING A BROADER RIGHT, INCLUDING THE RIGHT TO FOOD, SUCH AS ADEQUATE STANDARD OF LIVING, OR DIGNIFIED LIFE ²⁰	46
4) RIGHTS OF THE CHILD CONSTITUTIONALLY PROTECTED	66
5) CONSTITUTIONS RECOGNIZING A RIGHT TO SOCIAL SECURITY	114
6) CONSTITUTIONAL PROVISIONS ON MINIMUM WAGES	37
7) CONSTITUTION PROVIDES FOR STATE RESPONSIBILITY FOR FOOD SAFETY, CONSUMERS, PROMOTION OF AGRICULTURE ETC.	23
8) BROAD CONSTITUTIONAL PROVISIONS ON THE RIGHT TO HEALTH, WHICH COULD INCLUDE THE RIGHT TO FOOD	13
TOTAL NUMBER OF CONSTITUTIONS REVIEWED	203

27. Some constitutions contain reference to the resources available to the State in connection with the realization of the right to food, which echoes the International Covenant on Economic, Social and Cultural Rights (ICESCR) and should therefore be interpreted in accordance with the obligations of a State Party to that Covenant.

28. A statistical review of the results reveals that a majority of countries recognize some dimension of the right to food. The Table below gives a breakdown of the statistics. It should be noted that no account is taken of overlaps between the categories, of which there are some instances. It must also be acknowledged that these categories are by their nature loose, and the placement of a particular provision in one category rather than another may be disputable.

29. Annex II contains the full list of constitutional provisions.

¹⁹ See Annex III: High level of constitutional protection of the right to food.

²⁰ See for instance Norway, which has a provision referring to all human rights recognized by Norway.

B. Level of constitutional protection

30. Given the considerable overlap between the various constitutional provisions, which is not reflected above, a subjective judgment was made as to how strong the constitutional protection of the right to food is deemed to be. For instance, while the Constitution of Bolivia does not have a provision classified by the survey as explicit recognition of the right to food of the entire population, there are provisions about the right to food of various groups and the rights of the child and recognition of the right to an adequate standard of living, as well as protection of the right to social security and to a minimum wage.²¹ Taken together, the constitutional protection of the right to food in Bolivia is, in fact, very strong.

31. Some countries do not have written constitutions. Nevertheless, the judiciary in those countries may recognize constitutional rights, and there are examples of the right to food having been so recognized in case law.²² These countries have been taken into account in this survey.

32. Map 2 depicts the assessment of degree of constitutional protection in different countries on the basis of the cumulative constitutional provisions and direct applicability of the ICESCR noted in Annex II and partly reflected in Map 1. Annex III provides the complete list of countries and the assessment of the level of protection. It should be noted that this part of the survey did not distinguish between justiciable and non-justiciable provisions.

33. The conclusion of this – rather subjective – assessment is that a total of 57 countries²³ provide rather strong constitutional protection, and another 55 countries have medium level protection, while 28 countries provide some, but more limited, protection of the right to food. The majority of countries therefore recognizes and protects the right to food to some extent.

IV. JURISPRUDENCE ON THE RIGHT TO FOOD

A. Justiciability

34. The review of the constitutional protection of the different dimensions of the right to food referred to above does not distinguish between provisions

²¹ See Articles 8, 157, 158, 164 and 199 of the Constitution of Bolivia.

²² For instance, Israel, see *Gazmo vs Ishayahu* (REC 4905/98) delivered by the Supreme Court of Israel on 19 March 2001, quoted in Israel's report to the CESCR in 2001, UN doc. E/1990/6/Add.32, paragraph 284

²³ See Annex III, countries listed as having high and medium high protection.

that are justiciable, and those that are not. Nor does it give an indication as such whether the right to food is well protected in law or in practice. It should furthermore be noted that perceived justiciability may change over time, notwithstanding the original intention or interpretation. At the present time there is little jurisprudence available specifically on the right to food although a growing body of case law exists for various other economic, social and cultural rights.²⁴ The following sections will briefly review relevant jurisprudence from three countries in different continents.

B. Switzerland

CONSTITUTION FÉDÉRALE DE LA CONFÉDÉRATION SUISSE ART. 12 Droit d'obtenir de l'aide dans des situations de détresse

Quiconque est dans une situation de détresse et n'est pas en mesure de subvenir à son entretien a le droit d'être aidé et assisté et de recevoir les moyens indispensables pour mener une existence conforme à la dignité humaine.

35. An important case on the right to food and minimum subsistence comes from Switzerland. In 1996 the Swiss Federal Court, which is the highest court in Switzerland, recognized the right to minimum basic conditions, including “the guarantee of all basic human needs, such as food, clothing and housing” to prevent a situation where people “are reduced to beggars, a condition unworthy of being called human”. The case was brought by three brothers, state-less Czech refugees, who found themselves in Switzerland with no food and no money. They could not work, because they could not get a permit, and without papers they could not leave the country. Their request for assistance to the cantonal authorities in Bern was refused.²⁵

36. The Court in this case deemed that it lacked the legal competence to set priorities for the allocation of resources necessary to realize the right to minimum conditions of existence, including food. However, it determined that it could set aside legislation if the outcome of this legislative framework

²⁴ Databases of such caselaw are available from various organizations, including the International Network on Economic, Social and Cultural Rights (ESCR-Net) www.escr-net.org, Interights www.interights.org and the Nordic Human Rights Network www.nordichumanrights.net/tema/tema3/caselaw/ and the Centre for Housing Rights and Evictions (COHRE) www.cohre.org/litigation.

²⁵ The right to food, Report by the Special Rapporteur on the right to food, Mr. Jean Ziegler, submitted in accordance with Commission on Human Rights resolution 2001/25 and General Assembly resolution of ***, UN document E/CN.4/2002/58, 20 December 2001, paragraph 58.

failed to meet the minimum claim required by constitutional rights. In this case, the exclusion of three non-nationals from social welfare legislation was found to be a violation of their right to food, despite the fact that they were illegal immigrants. The Swiss Federal Court decision determined that the right to food in this sense could be the foundation of a justiciable claim for official assistance.²⁶

37. Transforming the hitherto unwritten constitutional right, the 1999 Swiss Constitution contains an explicit Constitutional provision on the right to assistance in situations of distress, as set out in the box above.

C. India

38. The Indian Constitution recognizes the right to life, and contains a specific provisions related to food, as shown in the box below.

THE CONSTITUTION OF INDIA

Part III – Fundamental Rights

Article 21: Protection of life and personal liberty

No person shall be deprived of his life or personal liberty except according to procedure established by law.

Part IV – Directive Principles of State Policy

Article 47: Duty of the State to raise the level of nutrition and the standard of living and to improve public health.

The State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and, in particular, the state shall endeavour to bring about prohibition of the consumption except for medicinal purpose of intoxicating drinks and of drugs which are injurious to health.

39. According to the “Right to Food Campaign”, the year 2001 witnessed a time of widespread drought across the country. In many states, it was the second or third successive year of drought. In this time of crisis, state governments often failed to meet their responsibilities towards drought-affected citizens, as spelt out in their respective “famine codes” or “scarcity manuals”. This failure was all the more shocking in view of the country’s gigantic food stocks (approximately 50 million tonnes at that time).

²⁶ Langford, Malcolm, Right to Food in International Law: Obligations of States and the FAO, LLM Thesis presented to the European University Institute, Florence, dated 1 October 2001.

40. In response to this situation, the People's Union for Civil Liberties (Rajasthan) filed a writ petition in the Supreme Court in April 2001, demanding the immediate utilization of the country's food stocks for drought relief and prevention of hunger. The scope of the petition was not restricted to drought situations alone. It also focused on the general need to uphold the "right to food". The respondents to the lawsuit were the Union of India, all the state/UT governments, and the Food Corporation of India.²⁷

41. The Supreme Court held its first hearing on 9 May 2001 and has held regular hearings in the case since then. The case is still ongoing, but a number of interim orders have been issued. In its Interim Order of 2 May 2003 the Court stated:

*"Article 21 of the Constitution of India protects for every citizen a right to live with human dignity. Would the very existence of life of those families which are below poverty line not come under danger for want of appropriate schemes and implementation thereof, to provide requisite aid to such families? Reference can also be made to Article 47 which inter alia provides that the State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties."*²⁸

42. The Supreme Court has thus formally recognized the right to food, and has ordered the central and State governments to take a number of measures to improve the situation. The justiciability of this right is therefore confirmed, and the Court has issued a number of orders to government, entailing expenditure of resources. Among the decisions of the court case to date are:

- > Benefits of eight nutrition-related schemes (PDS, Antyodaya, mid-day meals, ICDS, Annapurna, old-age pensions, NMBS and NFBS) have become legal entitlements;
- > All state governments have been directed to begin cooked mid-day meals for all children in government and government-assisted schools;
- > State and central governments have been ordered to adopt specific measures to ensure public awareness and transparency of assistance programmes;
- > Government of India must develop a system to ensure that all poor families are identified as Below Poverty Line;
- > Licences of ration shop dealers to be cancelled if they (i) do not open on time, (ii) overcharge, (iii) retain ration cards, (iv) make false entries in BPL cards, or (v) engage in black marketing;

²⁷ Right to Food Campaign (India) website, Legislative action. <http://www.righttofood.com>, consulted on 9 September 2003.

²⁸ PUCL vs. Union of India and others, Writ Petition (Civil) No.196 of 2001, available at www.righttofood.com

- > Especially vulnerable groups have been identified amongst the poor, including widows, the elderly, infirm, disabled, pregnant and lactating women without assured means of subsistence, as well as “primitive tribes”;
- > All State Governments have been ordered to implement food for work schemes in scarcity areas.

43. In its Interim Orders of 2 and 8 May 2002, the Supreme Court appointed two Commissioners of the Court “for the purpose of monitoring the implementation of all orders relating to the right to food”. The Commissioners are empowered to enquire about any violations of these orders and to demand redress, with the full authority of the Supreme Court. They may enlist the assistance of NGOs and individuals. Resident Commissioners have also been appointed in each state, to assist the Commissioners of the Court. At the time of writing the Commissioners have submitted four reports to the Supreme Court, making a number of observations and recommendations.²⁹

D. South Africa

44. The South African Constitution adopted in 1994 after the abolition of apartheid, is in many ways very progressive.

CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA - CHAPTER 2 Bill of Rights

Section 27: Health care, food, water and social security

1. Everyone has the right to have access to –
 - ...(b) sufficient food and water, and
 - (c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.
2. The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of each of these rights.

Section 28: Children

1. Every child has the right -
 - ...(c) to basic nutrition, shelter, basic health care services and social services;

Section 35: Arrested, detained and accused persons

2. Everyone who is detained, including every sentenced prisoner, has the right-
 - ...(e) to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment;

²⁹ www.righttofood.com, Commissioners’ work, consulted on 9 September 2003.

45. The way in which the social, economic and cultural rights are drafted leaves no doubt as to the justiciability of those rights. In section 7 (2) of the Constitution the State is required to respect, protect, promote and fulfil the rights in the Bill of Rights. Section 38 of the Constitution states that a class, group or individual can “approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights”.

46. The justiciability of social, economic and cultural rights in South Africa has been confirmed in a Supreme Court judgment, in the *Grootboom* case,³⁰ which concerned the right to adequate housing. The judgment developed a test of “reasonableness” against which to measure the performance of the government in dealing with the right to adequate housing, and established that priority must be given to those in desperate need.

47. The right to food is protected in three different articles of the Constitution, shown in the box above. While the general right to food is subject to available resources, no such limitation is listed on the nutrition rights of the child and of prisoners. In addition to the right to food being justiciable in South Africa, the Constitution also established a Human Rights Commission, with the mandate to monitor all human rights. The Commission has developed a set of questionnaires sent to relevant government departments at central and state levels, soliciting information about actions taken to implement the right to food.³¹

V. CONCLUSIONS

48. Food-related rights are recognized to some extent in a majority of countries, often on the same basis as the right to food is recognized in the ICESCR. However, the actual respect, protection and fulfilment of this right remains elusive and in most countries there is lack of clear definition and understanding of the content of these rights at the national level, let alone clear justiciable provisions on the right to food as such.

49. The right to food is underdeveloped as of yet; the understanding of the right, its content, limitations and application by oversight mechanisms, remain largely unexplored. The progress in the realization of the right to food is also very uneven in the world; while hunger and malnutrition have been largely

³⁰ See *Government of the Republic of South Africa v. Grootboom* 2001 (1) SA 46 (CC).

³¹ See presentation entitled “The Right to Food – The South African Experience” by Commissioner Charlotte McClain at the “Forum national sur le droit à une alimentation adéquate”, Bamako, Mali, 19 – 21 March 2003.

eradicated in some countries, yet in others the situation remains critical, and many people have no effective entitlements and no effective ways of holding their governments accountable if they suffer from hunger and malnutrition. The ICESCR specifies the adoption of legislative measures for the realization of the rights recognized in the ICESCR, yet very few countries have taken legislative steps regarding the right to food beyond simple constitutional provisions, which, while important first steps, probably do not suffice for effective action.

50. Specific legislation, such as framework law, is urgently needed in order to ensure the process side of the progressive realization of the right to adequate food in all its implications, especially in countries where incidence of under nutrition is high. As noted earlier, the right to food is a multidimensional issue and demands cross-sectoral approaches. This may inadvertently lead to less accountability on the part of the State. It is therefore of crucial importance to assign responsibilities for coordination of efforts and for the various areas and levels of government that may help or hinder the enjoyment of the right to adequate food.

51. To date there have been very few instances in which national courts have adjudicated on the basis of provisions related to food rights. However, there are some signs of progress in the strengthening of judicial and other mechanisms, and as jurisprudence and administrative review cases gradually build up, the ways and means by which effective remedies for violations of the right to food can be provided will become increasingly clear.

ANNEX I

STATUS OF RATIFICATION OF RELEVANT TREATIES

The Table shows the status of ratification of three relevant human rights treaties, the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the Convention on the Rights of the Child (CRC). The year refers to the entry into force of the instrument of ratification or accession. The symbol (s) denotes that the country in question has signed, but not ratified the instrument.

COUNTRIES	ICESCR	CEDAW	CRC
AFGHANISTAN	1983	2003	1994
ALBANIA	1992	1994	1992
ALGERIA	1989	1996	1993
ANDORRA	-	1997	1996
ANGOLA	1992	1986	1991
ANTIGUA AND BARBUDA	-	1989	1993
ARGENTINA	1986	1985	1991
ARMENIA	1993	1993	1993
AUSTRALIA	1976	1983	1991
AUSTRIA	1978	1982	1992
AZERBAIJAN	1992	1995	1992
BAHAMAS	-	1993	1991
BAHRAIN	-	2002	1992
BANGLADESH	1999	1984	1990
BARBADOS	1976	1981	1990
BELARUS	1976	1981	1990
BELGIUM	1983	1985	1992

COUNTRIES	ICESCR	CEDAW	CRC
BELIZE	2000 ⁵	1990	1990
BENIN	1992	1992	1990
BHUTAN	-	1981	1990
BOLIVIA	1982	1990	1990
BOSNIA AND HERZEGOVINA	1992	1993	1992
BOTSWANA	-	1996	1995
BRAZIL	1992	1984	1990
BRUNEI DARUSSALAM	-	-	1996
BULGARIA	1976	1982	1991
BURKINA FASO	1999	1987	1990
BURUNDI	1990	1992	1990
CAMBODIA	1992	1992	1992
CAMEROON	1984	1994	1993
CANADA	1976	1982	1992
CAPE VERDE	1993	1981	1992
CENTRAL AFRICAN REPUBLIC	1981	1991	1992
CHAD	1995	1995	1990
CHILE	1976	1990	1990
CHINA	2001	1981	1992
COLOMBIA	1976	1982	1991
COMOROS	-	1994	1993
CONGO	1984	1982	1993
COOK ISLANDS	-	-	1997
COSTA RICA	1976	1986	1990
CÔTE D'IVOIRE	1992	1996	1991
CROATIA	1991	1992	1991
CUBA	-	1981	1991
CYPRUS	1976	1985	1991
CZECH REPUBLIC	1993	1993	1993
DEMOCRATIC PEOPLE'S REPUBLIC OF KOREA	1981	2001	1990
DEMOCRATIC REPUBLIC OF THE CONGO	1977	1986	1990
DENMARK	1976	1983	1991

COUNTRIES	ICESCR	CEDAW	CRC
DJIBOUTI	2003	1999	1991
DOMINICA	1993	1981	1991
DOMINICAN REPUBLIC	1978	1982	1991
ECUADOR	1976	1981	1990
EGYPT	1982	1981	1990
EL SALVADOR	1980	1981	1990
EQUATORIAL GUINEA	1987	1984	1992
ERITREA	2001	1995	1994
ESTONIA	1992	1991	1991
ETHIOPIA	1993	1981	1991
FIJI	-	1995	1993
FINLAND	1976	1986	1991
FRANCE	1981	1984	1990
GABON	1983	1983	1994
GAMBIA	1979	1993	1990
GEORGIA	1994	1994	1994
GERMANY	1976	1985	1992
GHANA	2000	1986	1990
GREECE	1985	1983	1993
GRENADA	1991	1990	1990
GUATEMALA	1988	1982	1990
GUINEA	1978	1982	1990
GUINEA-BISSAU	1992	1985	1990
GUYANA	1977	1981	1991
HAITI	-	1981	1995
HOLY SEE	-	-	1990
HONDURAS	1981	1983	1990
HUNGARY	1976	1981	1991
ICELAND	1979	1985	1992
INDIA	1979	1993	1993
INDONESIA	-	1984	1990
IRAN (ISLAMIC REPUBLIC OF)	1976	-	1994

COUNTRIES	ICESCR	CEDAW	CRC
IRAQ	1976	1986	1994
IRELAND	1990	1986	1992
ISRAEL	1992	1991	1991
ITALY	1978	1985	1991
JAMAICA	1976	1984	1991
JAPAN	1979	1985	1994
JORDAN	1976	1992	1991
KAZAKHSTAN	-	1998	1994
KENYA	1976	1984	1990
KIRIBATI	-	-	1996
KUWAIT	1996	1994	1991
KYRGYZSTAN	1994	1997	1994
LAO PEOPLE'S DEMOCRATIC REPUBLIC	2000 (s)	1981	1991
LATVIA	1992	1992	1992
LEBANON	1976	1997	1991
LESOTHO	1992	1995	1992
LIBERIA	1967 (s)	1984	1993
LIBYAN ARAB JAMAHIRIYA	1976	1989	1993
LIECHTENSTEIN	1999	1996	1996
LITHUANIA	1992	1994	1992
LUXEMBOURG	1983	1989	1994
MADAGASCAR	1976	1989	1991
MALAWI	1994	1987	1991
MALAYSIA	-	1995	1995
MALDIVES	-	1993	1991
MALI	1976	1985	1990
MALTA	1990	1991	1990
MARSHALL ISLANDS	-	-	1993
MAURITANIA	-	2001	1991
MAURITIUS	1976	1984	1990
MEXICO	1981	1981	1990
MICRONESIA (FEDERAL STATES OF)	-	-	1993

COUNTRIES	ICESCR	CEDAW	CRC
MONACO	1997	-	1993
MONGOLIA	1976	1981	1990
MOROCCO	1979	1993	1993
MOZAMBIQUE	-	1997	1994
MYANMAR	-	1997	1991
NAMIBIA	1995	1992	1990
NAURU	-	-	1994
NEPAL	1991	1991	1990
NETHERLANDS	1979	1991	1995
NEW ZEALAND	1979	1985	1993
NICARAGUA	1980	1981	1990
NIGER	1986	1999	1990
NIGERIA	1993	1985	1991
NIUE	-	-	1996
NORWAY	1976	1981	1991
OMAN	-	-	1997
PAKISTAN	-	1996	1990
PALAU	-	-	1995
PANAMA	1977	1981	1991
PAPUA NEW GUINEA	-	1995	1993
PARAGUAY	1992	1987	1990
PERU	1978	1982	1990
PHILIPPINES	1976	1981	1990
POLAND	1977	1981	1991
PORTUGAL	1978	1981	1990
QATAR	-	-	1995
REPUBLIC OF KOREA	1990	1985	1991
REPUBLIC OF REPUBLIC OF MOLDOVA	1993	1994	1993
ROMANIA	1976	1982	1990
RUSSIAN FEDERATION	1976	1981	1990
RWANDA	1976	1981	1991
SAINT KITTS AND NEVIS	-	1985	1990

COUNTRIES	ICESCR	CEDAW	CRC
SAINT LUCIA	-	1982	1993
SAINT VINCENT AND THE GRENADINES	1982	1981	1993
SAMOA	-	1992	1994
SAN MARINO	1986	-	1991
SAO TOME AND PRINCIPE	1995 (s)	2003	1991
SAUDI ARABIA	-	2000	1996
SENEGAL	1978	1985	1990
SERBIA AND MONTENEGRO	1992	1982	1991
SEYCHELLES	1992	1992	1990
SIERRA LEONE	1996	1988	1990
SINGAPORE	-	1995	1995
SLOVAKIA	1993	1993	1993
SLOVENIA	1992	1992	1991
SOLOMON ISLANDS	1982	2002	1995
SOMALIA	1990	-	2002 (s)
SOUTH AFRICA	1994 (s)	1996	1995
SPAIN	1977	1984	1991
SRI LANKA	1980	1981	1991
SUDAN	1986	-	1990
SURINAME	1977	1993	1993
SWAZILAND	-	-	1995
SWEDEN	1976	1981	1990
SWITZERLAND	1992	1997	1997
SYRIAN ARAB REPUBLIC	1976	2003	1993
TAJKISTAN	1999	1993	1993
THAILAND	1999	1985	1992
THE FORMER YUGOSLAV REPUBLIC OF MACEDONIA	1994	1994	1991
TIMOR-LESTE	2003	2003	2003
TOGO	1984	1983	1990
TONGA	-	-	1995
TRINIDAD AND TOBAGO	1979	1990	1992

COUNTRIES	ICESCR	CEDAW	CRC
TUNISIA	1976	1985	1992
TURKEY	2003	1986	1995
TURKMENISTAN	1997	1997	1993
TUVALU	-	1999	1995
UGANDA	1987	1985	1990
UKRAINE	1976	1981	1991
UNITED ARAB EMIRATES	-	-	1997
UNITED KINGDOM	1976	1986	1992
UNITED REPUBLIC OF TANZANIA	1976	1985	1991
UNITED STATES OF AMERICA	1977 (s)	1980 (s)	1995 (s)
URUGUAY	1976	1981	1990
UZBEKISTAN	1995	1995	1994
VANUATU	-	1995	1993
VENEZUELA	1978	1983	1990
VIET NAM	1982	1982	1990
YEMEN	1987	1984	1991
ZAMBIA	1984	1985	1992
ZIMBABWE	1991	1991	1990
TOTAL REMAINING SIGNATURES	6	1	2
TOTAL RATIFICATIONS	149	175	193

ANNEX II

CONSTITUTIONAL PROTECTION OF THE RIGHT TO FOOD

The list below lists countries containing constitutional provisions under each category, with reference to the Article or Section of the Constitution in brackets.

Constitutional provisions making direct mention of the right to food, applicable to the whole of the population

Bangladesh (15); Brazil (6); Democratic People's Republic of Korea (25); Ecuador (23); Ethiopia (90); Guatemala (99); Guyana (40); Haiti (22); Iran (Islamic Republic of) (3, 43); Malawi (13, 30); Namibia (95); Nicaragua (63); Nigeria (16); Pakistan (38); Panama (106); Puerto Rico (2); Republic of Moldova (47); South Africa (27); Sri Lanka (25); Suriname (24); Uganda (14, 22); Ukraine (48).

Explicit protection of the right to food of a specific group

Bolivia (8); Brazil (208, 227); Colombia (44,46); Costa Rica (82); Cuba (9, 38); Dominican Republic (8); Ecuador (49,50); Guatemala (51); Honduras (121, 123); Panama (52); Paraguay (54, 57); Philippines (15); Peru (6); South Africa (28, 35); Sri Lanka (22); The former Yugoslav Republic of Macedonia (40); Uruguay (56).

Constitutions protecting a broader right, including the right to food, such as adequate standard of living, or dignified life

Bangladesh (18); Belgium (23.1); Bolivia (158); Brazil (170); Canada (7); Colombia (46); Dem. Rep. of Congo (48); Cyprus (9); Dominican Republic (8); El Salvador (101); Eritrea (Preamble,10); Ethiopia (89); Finland (19); Germany (1); Ghana (36); Guatemala (119); Honduras (150); India (21, 47); Indonesia (28); Ireland (45); Liberia (8); Mozambique (41); Netherlands (20); Nigeria (16, 17); Norway (110 c); Pakistan (38); Paraguay (53); Peru (2);

Puerto Rico (2); Republic of Korea (34); Romania (43); Russian Federation (7); Sierra Leone (8); Slovakia (39); Spain (Preamble); Sudan (11); Sweden (2); Switzerland (12); Syrian Arab Republic (44); Tajikistan (1); The former Yugoslav Republic of Macedonia (40); Trinidad and Tobago (Preliminary, Sec. I); Turks and Caicos Islands (2); United Republic of Tanzania (8, 11); Vanuatu (5); Venezuela (3, 299).

Right of the child constitutionally protected

Bahrain (5); Bolivia (199); Brazil (203); Bulgaria (47); Cambodia (48, 73); Capo Verde (71, 86); Colombia (44, 45, 50); Comoros (Preamble); Congo (33,34); Costa Rica (55); Côte d'Ivoire (6); Croatia (62); Cuba (9, 38); Ecuador (50); Egypt (10); El Salvador (35); Ethiopia (36); Guatemala (51); Haiti (260); Honduras (121, 123); Hungary (16); Iceland (76); India (39); Indonesia (28b); Ireland (45); Italy (31); Kuwait (10); Latvia (110); Lesotho (27); Lithuania (39); Namibia (15); Nepal (26); Nicaragua (105); Nigeria (17); Pakistan (35); Panama (52); Paraguay (53, 54); Peru (4); Philippines (15); Poland (72); Portugal (69); Puerto Rico (2); Qatar (22); Republic of Moldova (50); Romania (45); Russian Federation (7); Sao Tome and Principe (51); Seychelles (31); Slovenia (56); South Africa (28); Spain (39); Sri Lanka (22); Sudan (14); Suriname (37); Switzerland (11); Syrian Arab Republic (44); Tajikistan (340); Thailand (53); The former Yugoslav Republic of Macedonia (40, 42); Timor-Leste (18); Turkey (41, 61); Uganda (34); United Arab Emirates 916); Uruguay (41); Venezuela (78); Viet Nam (59, 65).

Constitutions recognizing a right to social security

Albania (59); Algeria (59); Andorra (30); Angola (47); Armenia (33); Azerbaijan (38); Bahrain (3); Bangladesh (15); Belgium (23); Belarus (47); Bolivia (164); Brazil (203, 230); Bulgaria (51); Burkina Faso (18); Cambodia (36, 72, 75); Cape Verde (7, 67, 72); Chile (19); China (45); Hong Kong Province of China (36, 145); Colombia (44, 46, 47, 48, 49); Côte d'Ivoire (6); Croatia (57, 58, 64); Cuba (9, 48); Cyprus (9); Democratic People's Republic of Korea (72); Democratic Republic of the Congo (47, 50); Dominican Republic (8); Ecuador (55, 56, 57); Egypt (17); El Salvador (66, 70); Eritrea (21); Estonia (28); Ethiopia (41, 89); Finland (19); France (Preamble); Gabon (1); Georgia (32); Germany (20); Ghana (37); Greece (21, 22); Guatemala (94); Haiti (22, 260); Honduras (142); Hungary (70e); Iceland (76); India (41); Indonesia (34); Iran, Islamic Republic of (29); Ireland (45); Italy (38); Kazakhstan (24, 28, 29); Kuwait (11); Kyrgyzstan (27); Latvia (109); Liberia (8); Liechtenstein (26); Lithuania (48); Luxembourg (11, 23); Madagascar (30); Malawi (13); Maldives (28); Mali (17); Malta (Sec.17); Marshall Island (Sec. 15); Mexico (123); Mongolia (16); Namibia (95); Nepal (26); Netherlands (20); Nicaragua (82, 105); Nigeria (16, 17); Oman (12); Pakistan (38); Panama (109); Paraguay (58, 70, 95); Peru (4, 10, 11); Philippines (15); Poland (67, 69); Portugal (63, 72); Puerto Rico (2);

Qatar (23); Republic of Korea (34); Republic of Moldova (47, 51); Romania (33, 43, 45, 46); Russian Federation (7, 39); Sao Tome and Principe (27, 43); Saudi Arabia (27); Seychelles (37); Sierra Leone (8, 22); Slovakia (39); Slovenia (50); South Africa (27); Spain (41, 49, 50); Sri Lanka (22, 25); Sudan (11); Suriname (50); Sweden (2); Switzerland (12, 41); Syrian Arab Republic (46); Tajikistan (39); Thailand (52, 54, 55); The former Yugoslav Republic of Macedonia (34, 35, 36); Timor-Leste (20, 21, 56); Togo (33); Turkey (60, 61); Turkmenistan (34); Uganda (35); Ukraine (46); United Arab Emirates (16); United Republic of Tanzania (8, 11); Uruguay (44, 46, 67); Uzbekistan (39); Venezuela (80, 81, 86); Viet Nam (59, 67).

Constitutional provision of minimum wage

Armenia (29); Azerbaijan (38); Belarus (42); Bolivia (157); Brazil (7); Bulgaria (48); Costa Rica (57); Croatia (55); Cuba (9); Democratic Republic of the Congo (37); Ecuador (35); El Salvador (37, 38); Guatemala (102); Honduras (128); India (43); Italy (36); Kazakhstan (28); Kyrgyzstan (29); Lesotho (30); Lithuania (48); Madagascar (63); Mexico (123); Namibia (95); Nicaragua (82); Nigeria (16); Norway (110); Panama (62); Paraguay (92); Peru (24); Portugal (59); Russian Federation (7); Slovakia (39); Spain (35); Turkey (55); Turkmenistan (31); Uzbekistan (39); Venezuela (91).

Constitution provides for State responsibility for food safety, consumers, promotion of agriculture etc.

Andorra (29); Argentina (42); Brazil (200); Bulgaria (21); Cambodia (64); Costa Rica (46); Ecuador (42, 43); El Salvador (69); Germany (74); Guatemala (96); Haiti (247,249); Honduras (146, 347); Iran (43); Nicaragua (105); Panama (114); Paraguay (72); Philippines (13); Republic of Moldova (37); Sierra Leone (7); Spain (51); Ukraine (50); Venezuela (305); Yemen (9).

Broad constitutional provisions on the right to health, which could include the right to food

Albania (59); Bangladesh (18); Burkina Faso (26); Cape Verde (68); Comoros (Preamble); India (47); Philippines (13); Portugal (64); Romania (33); Russian Federation (7); Seychelles (29); Spain (43); Uruguay (44).

State Parties to the ICESCR in which it is constitutionally directly applicable (Brackets refer to Article or Section of the Constitution, or to the source of the information)

Albania (122); Algeria (132); Angola (21); Armenia (6); Austria (9); Azerbaijan (148,151); Belarus (21); Belgium (1993/1997 Report to CESCR); Benin (146); Brazil (5); Bulgaria (5:4); Burundi (10); Cambodia (31); Cape Verde (11);

Central African Republic (69); Chad (222); Congo (176); Costa Rica (7); Croatia (134); Cyprus (169); Czech Republic (10); Democratic Republic of the Congo (200); Djibouti (37); Ecuador (18); Egypt (151); El Salvador (144); Estonia (3); Ethiopia (9:4); Finland (1999 Report to CESCR); France (55); Gabon (114); Georgia (6); Germany (25); Ghana (37); Greece (28); Guatemala (46); Guinea (49); Honduras (16); Côte d'Ivoire (87); Kyrgyzstan (12); Latvia (89); Lithuania (138); Madagascar (82); Malawi (211); Mali (116); Republic of Moldova (8); Mongolia (10); Namibia (144); Netherlands (93); Nicaragua (46); Niger (132); Norway (110c); Paraguay (141); Peru (55); Philippines (XIII); Poland (91); Portugal (8:2); Republic of Korea (6); Romania (11); Russia (15:4); Rwanda (190); Senegal (79); Serbia and Montenegro (16, 124:2); Seychelles (48); Slovakia (11); Slovenia (8); Spain (10, 96); Sri Lanka (XXVI); Suriname (105, 106); Switzerland (189, 191); Tajikistan (10); The Former Yugoslav Republic of Macedonia (98); Timor-Leste (9); Togo (140); Turkey (90); Ukraine (9); Venezuela (23).

ANNEX III

ASSESSED LEVEL OF CONSTITUTIONAL PROTECTION

The list below shows the assessment made of whether the constitutional provisions of different countries, taken together, are deemed to be high, medium high, medium, medium low or low, with reference to the Article(s) or Section(s) of the Constitution in brackets.

High level of constitutional protection of the right to food

- *These are the constitutions containing explicit provisions relating to the right to food.* Bangladesh (15); Brazil (6); Democratic People's Republic of Korea (25); Ecuador (23); Ethiopia (90); Guatemala (99); Guyana (40); Haiti (22); Iran (Islamic Republic of) (3, 43); Malawi (13, 30); Nicaragua (63); Nigeria (16); Pakistan (38); Panama (106); Puerto Rico (2); Republic of Moldova (47); South Africa (27); Sri Lanka (25); Suriname (24); Uganda (14, 22); Ukraine (48).

Medium high level of constitutional protection of the right to food

- *These constitutions protect the right to food implicitly, through broader provisions dealing with the right to an adequate standard of living, as well as through provisions on either social security or worker's rights - or both, cumulatively, providing a high degree of protection of the right to food. The protection thus afforded may be in one or several sections of the Constitution.* Belgium (1, 23); Bolivia (8, 157, 158, 164, 199); Colombia (44, 46, 47, 48, 49); Congo, Democratic Republic of (37, 47, 48, 50); Cyprus (9); Dominican Republic (8); El Salvador (35, 37, 38, 66, 69, 70, 101); Eritrea (preamble, 10, 21); Finland (19); Germany (1, 20, 74); Ghana (36, 37); Honduras (121, 123, 128, 142, 146, 150, 347); India (21, 39, 41, 43, 47); Indonesia (28, 28b, 34); Ireland (45); Israel (courts); Liberia (8); Netherlands (20); Norway (110, 110c); Paraguay (53, 54, 57, 58, 70, 95); Peru (2, 4, 10, 11, 24); Republic of Korea (34); Romania (33, 43, 45, 46); Russian Federation (7, 39); Sierra Leone (7, 8, 22); Slovakia (39); Spain (Preamble, 35, 39, 41, 43, 49, 50, 51); Sudan (11, 14); Sweden (2); Switzerland (11, 12, 41); Syrian Arab Republic (44, 46); Tajikistan (1, 39, 340); United Republic of Tanzania (8, 11); The former Yugoslav Republic of Macedonia (34, 35, 36, 40, 42); Venezuela (3, 78, 80, 81, 86, 91, 299, 305).

Medium level of constitutional protection of the right to food

- *These constitutions either protect the right to adequate standard of living, or social security and worker's rights.*

Armenia (29, 33); Azerbaijan (38); Belarus (42, 47); Bulgaria (48, 51); Croatia (55, 57, 58, 64); Cuba (9, 48); Italy (36, 38); Kazakhstan (24, 28, 29); Kyrgyzstan (27, 29); Lithuania (48); Madagascar (30, 63); Mexico (123); Mozambique (41); Portugal (59, 63, 72); Trinidad and Tobago (1); Turkey (55, 60, 61); Turkmenistan (31, 34); Turks and Caicos Islands (2); Uzbekistan (39); Vanuatu (5).

- *These countries provide for direct applicability of the ICESCR, which is assessed as equivalent to medium level of constitutional protection. Only those countries are listed which would otherwise not be listed at all or would be ranked as having lower level of protection.*

Albania (122); Algeria (132); Angola (21); Austria (9); Benin (146); Burundi (10); Cambodia (31); Cape Verde (11); Central African Republic (69); Chad (222); Congo (176); Costa Rica (7); Côte d'Ivoire (87); Czech Republic (10); Djibouti (37); Egypt (151); Estonia (3); France (55); Gabon (114); Georgia (6); Greece (28); Guinea (49); Latvia (89); Mali (116); Mongolia (10); Niger (132); Philippines (XIII); Poland (91); Rwanda (190); Senegal (79); Serbia and Montenegro (16, 124:2); Seychelles (48); Slovenia (8); Timor-Leste (9); Togo (140).

Medium low level of constitutional protection of the right to food

- *These constitutions protect only the right to social security or the right to minimum wage.*

Andorra (30); Bahrain (3); Burkina Faso (18); Chile (19); China (45); Costa Rica (57); Timor-Leste (20, 21, 56); Hungary (70e); Iceland (76); Kuwait (11); Lesotho (30); Liechtenstein (26); Luxembourg (11, 23); Maldives (28); Malta (17); Marshall Islands (15); Nepal (26); Oman (12); Qatar (23); Sao Tome and Principe (27, 43); Saudi Arabia (27); Thailand (52, 54, 55); United Arab Emirates (16); Uruguay (44, 46, 67); Vietnam (59, 67);

Low level of constitutional protection of the right to food

- *These constitutions have other, less important provisions, such as protection of the rights of the child, or promotion of agriculture, food safety etc.*

Argentina (42); Canada (7);³² Comoros (Preamble); Yemen (9).

³² It has been argued that this article protects social rights, but it is uncertain (See Right to Food Case Study: Canada).