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THE RIGHT TO FOOD AND ITS JUSTICIABILITY IN DEVELOPING COUNTRIES

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Abstract

This Article examines legal and jurisprudential developments on the right to food with a view to drawing lessons that could be important for food-insecure countries that strive to improve their legal and institutional frameworks to combat hunger and malnutrition. To this end, it reviews relevant laws and cases relating to the right to food and its justiciability. The right to food was first recognized in the Universal Declaration of Human Rights in 1948 and reaffirmed in subsequent UN and regional human rights instruments. An increasing number of countries have introduced concrete legislative and judicial measures to realize the right to food after the General Comment No. 12 and the Right to Food Voluntary Guidelines were adopted in 1999 and 2004 respectively. Nowadays, at least 30 constitutions explicitly recognize the right to food as a justiciable human right. 74 constitutions contain provisions that implicitly protect the right to food. Moreover, 167 States have adopted the ICESCR that expressly recognizes the right to food. Besides, many countries have adopted framework laws on the right to food or food security. Several cases relating to the right to food have also been litigated and victims of violations of the right have received judicial remedies in several developing countries. It is learned that existence of strong legal framework at domestic level, availability of liberal standing procedures that allow filing of collective and public interest litigations, and an active participation of NGOs have contributed to the success of the justiciability of the right to food at domestic levels.

Keywords: *Freedom from hunger, Food security law, Justiciability of the right to food, Right to food*

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I. INTRODUCTION

The right to food was first recognized as a component of the right to an adequate standard of living in Article 25(1) of the UDHR in 1948. Furthermore, Article 11 of the ICESCR recognizes the right to adequate food and the fundamental right to be free from hunger as two interconnected components of the right to food.¹ In addition, the 1996 World Food Summit (WFS) underlined the need for explaining the normative contents of the right to food and corresponding States obligations. In response, in 1999, the UN Committee on Economic, Social and Cultural Rights (CESCR) adopted the General Comment No.12 on the ‘Right to Adequate Food’² that explains core contents of the right to food and corresponding States’ obligations.

Moreover, the need to implement a right-based approach to combating hunger and malnutrition was emphasized in the Food and Agriculture Organization’s (FAO) Right to Food Guidelines that was adopted by consensus of 180 States in 2004.³ The Guidelines invite all Member States of the FAO, among others, to mainstream the right to food in the design and implementation of national food security policies and programmes. In particular, the Voluntary Guidelines recommend the establishment of sufficient legal framework at domestic levels which may involve the inclusion of the right to food in constitutions, adoption of a right to food or food security framework legislation, and empowerment of judicial and quasi-judicial institutions to adjudicate the right to food.⁴

Following the implementation of the Right to Food Guidelines, an increasing number of countries have incorporated the right to food into their constitutions. The FAO’s database on the level of recognition of the right to food (as of 25 August 2018) shows that at least 30 constitutions recognize the right to food explicitly as a self-standing right while 74 constitutions contain provisions that implicitly protect the right to food as part of other broader rights.⁵ Moreover, 97 countries recognise “international commitments as having the same status as constitutional provisions or the primacy of international obligations over national laws” which paved the way for the direct applicability of international instruments protecting the right to food at domestic level.⁶ The constitutional recognition of the right to food demonstrates the strongest commitment of a country to realize the right. Several countries including Angola, Armenia, Azerbaijan, Bolivia, Brazil, Burkina Faso, Colombia, Indonesia, Mexico, Mozambique, Peru, India, and Tanzania have also adopted specific framework laws on the right to food or food

¹ International Covenant on Economic, Social and Cultural Rights, 993 UNTS 3 (1966) (hereafter ICESCR).

² General Comment No. 12: The Right to Adequate Food (Art. 11 of the Covenant) (1999).

³ FAO, Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security (FAO, Rome, November 2004) *available at* <<http://www.fao.org/docrep/009/y7937e/y7937e00.htm>> (Accessed on 30 June 2018) (hereafter Right to Food Guidelines).

⁴ *Id.*

⁵ FAO, The Right to Food Around the Globe: Level of Recognition, *available at* <<http://www.fao.org/right-to-food-around-the-globe/level-of-recognition/en/>> (Accessed on 25 August 2018).

⁶ *Id.*

security.⁷ Furthermore, the Latin American Parliament (PARLATINO) introduced the Regional Framework Law on the Right to Food, Food Security and Food Sovereignty in November 2012 that represents a consensus among the continent's countries to implement a human rights-based approach to combating food and nutrition insecurity.⁸

In 2009, the Additional Protocol to ICESCR was adopted.⁹ The Protocol enshrines complaint and inquiry procedures for filing violations of economic, social and cultural rights before the CESCR which facilitate the justiciability of the right to food at the international level. Moreover, the judicial enforcement of the right to food at the domestic level has been increasing over the last two decades. A study conducted by the International Development Law Organization (IDLO) shows that more than 60 cases involving the right to food have been litigated in many countries.¹⁰ The adjudicated cases encompass three main issues: the failure to ensure freedom from hunger, the means to produce or procure food and the protection of vulnerable, marginalized and disadvantaged groups.¹¹

Despite remarkable legal and jurisprudential developments regarding the right to food at national and international levels, most countries have not yet introduced appropriate measures in this regard. Lack of political will, lack of awareness relating to the right to food as well as institutional and structural constraints challenge the progressive realization of the right to food at domestic levels.¹² Despite widespread poverty and food insecurity in the world, many countries are still reluctant to constitutionally recognize the right to food as a justiciable human right.

This Article reviews international and national legal frameworks and cases relating to right to food in developing countries. The purpose of the Article is twofold. First, it builds on the literature that supports the justiciability of socio-economic rights in general and the right to food in particular. Thus, it seeks to take forward the thesis that the right to food is not a mere directive principle of state policy, but a justiciable human right. Second, it discusses good practices regarding the adoption of legislative and judicial measures pertaining to the enforceability of the right to food and aims at drawing important lessons for food-insecure countries that would utilize the law and courts as tools of combatting hunger and malnutrition. Accordingly, it assesses constitutional and legal recognition of the right to food and draws lessons from experiences of countries in Africa, Asia, and Latin America whose courts have enforced the right to food.

The remaining part of the Article is organized as follows. Following this introduction, the second and third sections review the UN and regional human rights treaties and soft laws that

⁷ FAO, Legal Developments in the Progressive Realization of the Right to Adequate Food (Working Paper, FAO, 2014), at 5, available at <http://www.fao.org/right-to-food/resources/resources-detail/en/c/271813/>, (Accessed on 23 March 2018) (*Hereafter* Legal Developments).

⁸ *Id.*

⁹ Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, resolution/adopted by the General Assembly, A/ RES/63/117, (Accessed on 5 March 2009).

¹⁰ IDLO, Realizing the Right to Food: Legal Strategies and Approaches, (2015) available at <<http://www.idlo.int/publications/realizing-right-food-legal-strategies-and-approaches>> (Accessed on 29 April 2018).

¹¹ *Id.* at 39.

¹² Hilal Elver, Access to Justice and the Right to Food: the Way Forward, Report of the Special Rapporteur on the Right to Food, UN Doc A/GRC/2865 (Accessed on 12 January 2014).

provide for the right to food and explain corresponding States obligations. The fourth section discusses several ways of incorporating the right to food into constitutions, adoption of framework laws on right to food or food security and the inclusion of the right to food in sector-specific laws. The fifth section reviews and analyses selected cases on the right to food and draws lessons that could be important for developing countries that seek to adjudicate the right to food. The last section presents the conclusion.

II. THE RIGHT TO FOOD UNDER INTERNATIONAL LAW

A. The UN Human Rights Treaties

Article 25(1) of the UDHR recognizes the right to adequate food as an element of the right to an adequate standard of living stipulating that “everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food.” Moreover, the ICESCR, which is ratified by 167 States, enshrines two interrelated components of the right to food: the right to adequate food and the fundamental right to be free from hunger. Article 11(1) of ICESCR specifies that the “States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food.” The States Parties are required to adopt all appropriate steps to progressively ensure the full realization of the right to food to the extent of maximum resources available to them including any resource that could be accessible from the international community.¹³ Likewise, sub-article 2 of the same provision enshrines the fundamental right of everyone to be free from hunger and requires States Parties to take appropriate measures that can improve methods of production, conservation, and distribution of food.

The right to food of specific groups including that of children, women, and persons with disabilities has also been recognized under international human rights treaties. For instance, the Covenant on the Rights of the Child (CRC) stipulates the right to food and nutrition of children.¹⁴ Article 24(c) of the CRC obliges States Parties to combat disease and malnutrition through the provision of adequate and nutritious food and clean drinking water. Article 27 of the CRC further enshrines a child’s right to an adequate standard of living. The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) contains two provisions that protect the right to food of women. Article 12 of CEDAW entitles women to adequate nutrition during pregnancy and lactation. Article 14 emphasizes the need to protect women’s access to land, credit, income and social security programs as depriving women of such resources can lead to a violation of their right to food.¹⁵ Similarly, the Convention on the Rights of Persons with Disabilities recognizes the right to health and to an adequate standard of living which also implicitly include the right to food.¹⁶

¹³ ICESCR, *supra* note 1, Arts. 11(1) and 2(1).

¹⁴ Convention on the Rights of the Child, UNTS 1577, Arts. 24(c) and 27, (1989).

¹⁵ Convention on the Elimination of All Forms of Discrimination against Women, opened for signature 18 December 1979, 1249 UNTS 13, arts 12 and 14 (entered into force 3 September 1981) (hereafter CEDAW).

¹⁶ Convention on the Rights of Persons with Disabilities, 210 UNTS 131 (opened for signature 28 June 1952, entered into force 3 May 2008), Arts 25 and 28.

B. Regional Human Rights Treaties

Besides the aforementioned UN human rights treaties, there are also regional human rights instruments which explicitly or implicitly acknowledge the right to food.

1. Africa's Human Rights System

Although the African Charter on Human and Peoples' Rights does not expressly recognize the right to food, it enshrines that "all peoples shall freely dispose of their wealth and natural resources",¹⁷ and access to and control over natural resources is crucial to realize the right to food. In fact, the African human rights system explicitly recognizes the right to food of women and children. In this respect, the right to food security of women is recognized in a protocol to the African Charter on Human Rights that obliges States Parties to "provide women with access to clean drinking water, sources of domestic fuel, land, and the means of producing nutritious food and to establish adequate systems of supply and storage to ensure food security."¹⁸ Moreover, the African Charter on the Rights and Welfare of the Child stipulates children's right to adequate nutrition as a component of the right to health.¹⁹

The African human rights system also acknowledges the right to food of Internally Displaced Persons. To this end, the States Parties to Kampala Convention are obliged to provide these persons with adequate humanitarian assistance, including food and water²⁰ and that members of armed groups must not deny internally displaced persons the right to live in satisfactory conditions of dignity, security, sanitation, *food, water*, health, and shelter.²¹

2. The Inter-American Human Rights System

Though the American Convention on Human Rights predominantly covers civil and political rights, the Protocol of San Salvador expressly encloses the right to food.²² Article 12 of the Protocol clearly states "everyone has the right to adequate nutrition which guarantees the possibility of enjoying the highest level of physical, emotional and intellectual development." It further stipulates that:

In order to promote the exercise of this right (the right to adequate nutrition) and eradicate malnutrition, the State Parties undertake to improve methods of production, supply, and distribution of food, and to this end, agree to promote greater international cooperation in support of the relevant national policies.²³

¹⁷ African Charter on Human and Peoples' Rights, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58, (June 1981), Art 21.

¹⁸ Additional Protocol to the African Charter on Human and Peoples' Rights and the Rights of Women in Africa, (African Commission on Human and Peoples Rights, 11 July 2003), Art 15, *available at* <http://www.achpr.org/instruments/women-protocol/#16>, (Accessed on 23 August 2018).

¹⁹ African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49, (July 1990), Art. 14(c).

²⁰ African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention), (22 October 2009), Art. 9 (2) (b).

²¹ *Id.*, Art 7 (5) (c).

²² Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, opened for signature 17 November 1988, 28 ILM 156 (1989) (entered into force 16 November 1999). So far, the Protocol has been ratified by 16 States. See IDLO, *supra* note 10.

²³ *Id.* Art 14. Arts 15 and 17, in particular, protect the right to food of children and the elderly.

The Protocol requires States to introduce domestic legislation based on their constitutional processes and the Protocol which may be necessary for making the rights a reality.²⁴

3. *The European Social Charter*

Unlike the African and the Inter-American human rights systems, the European counterpart does not explicitly recognize economic, social and cultural rights in general and the right to food in particular. However, the European Social Charter,²⁵ revised in 1996,²⁶ contains some provisions which are relevant to the enjoyment of the right to food, including the right to safe and healthy working conditions (Art. 3), “the right to a fair remuneration sufficient for a decent standard of living for themselves and their families” (Art. 4), “the right to protection of health” (Art. 11), “the right to social security” (Art. 12), and “the right to benefit from social welfare services” (Art. 14).

4. *ASEAN Human Rights System*

There is no a binding regional human rights instrument in Asia. However, Article 28 (a) of the ASEAN (Association of Southeast Asian Nations) Human Rights Declaration enshrines that “every person has the right to an adequate standard of living for himself or herself and his or her family including the right to adequate and affordable food, freedom from hunger and access to safe and nutritious food.”²⁷ The Declaration explicitly provides for the right to food. Its downside is that it is a non-legally binding instrument which makes its enforceability questionable. Its scope of application is also limited to 10 Member States of the ASEAN (i.e., Brunei Darussalam, Cambodia, Indonesia, the Lao People’s Democratic Republic, Malaysia, Myanmar, Philippines, Singapore, Thailand, and Viet Nam).²⁸

C. **Non-Binding International Instruments**

In addition to the treaties overviewed earlier, several non-binding instruments²⁹ have been adopted under the UN human rights system to define the normative contents of the right to food

²⁴ *Id.* at Art 2.

²⁵ European Social Charter, Turin, in European Treaty Series 35 (18 October 1961).

²⁶ European Social Charter (revised), Strassbourg, in European Treaty Series 163 (3 May 1996).

²⁷ ASEAN Human Rights Declaration (*ASEAN*, 19 November 2012), available at <<http://asean.org/asean-human-rights-declaration/>> (Accessed on 23 August 2018).

²⁸ *Id.* at Preamble, para 1.

²⁹ The development of International legal and policy instruments (binding and non-binding) can be put chronologically. Universal Declaration on Human Rights (Art. 25) (1948), UN World Food Conference (Universal Declaration on the Eradication of Hunger and Malnutrition) (1974), The International Covenant on Economic, Social, Cultural Rights (including Art. 11 on the right to adequate food entered into force) (1976), The Committee on Economic, Social, and Cultural Rights established– and began precise legal interpretation of ESC rights (1987), The Right to Food (Art. 12) in the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (the “Protocol of San Salvador”) adopted, FAO Food World Summit convened and adopted Rome Declaration on World Food Security - the first coherent plan to make the right to food a reality (1996), The CESCR adopted General Comment N.12 on ‘The Right to Adequate Food’ (1999), The mandate of Special Rapporteur on the Right to Food was established by the Commission on Human Rights (2000), Adoption of the Millennium Development Goals, including Goal 1 to eradicate extreme poverty and hunger by 2015 (2000), Rome Declaration at the World Food Summit calling for the establishment of an intergovernmental working group to develop voluntary guidelines to achieve the progressive realization of the right to food (2002), Adoption of

and corresponding States obligations. For instance, the Rome Declaration on Global Food Security, which was adopted by 180 States at the World Food Summit in 1996, played a remarkable role in redefining the international policy on food security where States agreed to halve the number of undernourished people by 2015.³⁰ The Rome Declaration reaffirms the right of everyone to have access to safe and nutritious food, which is consistent with the right to adequate food and the fundamental right of everyone to be free from hunger.³¹ It defines food security as “existing when all people, at all times, have physical and economic access to sufficient, safe and nutritious food that meets their dietary needs and food preferences for an active and healthy life”.³² This definition involves four dimensions of food security: availability, access, utilization, and stability.³³ The FAO explains that a state of food security requires that: “sufficient food is available; all people have economic and physical access to the food they need; access and availability are ensured over time (stability), and the food is effectively utilized”.³⁴ These pillars are applied cumulatively and food insecurity exists where one of them is not realized.

The 1996 WFS adopted a Plan of Action that outlines objectives and measures deemed crucial for implementation of the commitments contained in the Rome Declaration.³⁵ The Summit also underlined the need to clarify content of the right to adequate food and the fundamental right of everyone to be free from hunger and to give attention to implementation and full and progressive realization of this right as a means of achieving food security for all.³⁶

In response, the UN Committee on Economic, Social and Cultural Rights (CESCR) introduced General Comment No. 12 on the Right to Adequate Food in 1999. The General Comment No. 12 forms the most authoritative interpretation of the right to food. It outlines the core contents of the right to food and explains corresponding States’ obligations.³⁷ Moreover, in 2002, Member States of the FAO demanded the formulation of voluntary guidelines to support the progressive realization of the right to adequate food in the context of national food security to attain the progressive realization of the right to food.³⁸ In November 2004, the FAO Council

FAO Voluntary Guidelines on the Right to Food which offers guidance to States on how to implement their obligations on the right to food (2004), Adoption of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, making the right to food justiciable at the international level (2009), Adoption of the Sustainable Development Goals, including to Achieve food and nutrition security by 2030 (2015)

³⁰ FAO, Rome Declaration on World Food Security and the World Food Summit Plan of Action (13-17 November 1996), paragraph 18 of the Plan of Action.

³¹ *Id.*

³² *Id.*

³³ FAO, Food Security Policies Formulation and Implementation: Establishment of a Food Security Policy Framework, available at <http://www.fao.org/elearning/Course/FP/en/pdf/trainerresources/learnernotes0419.pdf> (Accessed on 17 May 2018).

³⁴ *Id.* at 4.

³⁵ Rome Declaration on World Food Security (13-17 November 1996, Rome). Plan of Action and Commitments are available at <http://www.fao.org/docrep/003/w3613e/w3613e00.HTM>, (Accessed on 2 August 2018).

³⁶ *Id.* See objective 7.4.

³⁷ General Comment No. 12, *supra* note 2.

³⁸ FAO, Declaration of the World Food Summit: Five Years Later (Rome, June 2002), para 10, available at <http://www.fao.org/worldfoodsummit/english/newsroom/news/8580-en.html> (Assessed on 6 September 2018).

adopted the Right to Food Guidelines by consensus³⁹ to be used as a practical tool by States in developing legislation, strategies, policies, and programs to achieve food security and realizing the right to food domestically.⁴⁰ In particular, Guideline 7 invites States to:

- include provisions in their domestic law which may include their constitutions, bill of rights or legislation that directly implement the right to adequate food,
- consider administrative, quasi-judicial and judicial mechanisms to provide adequate, effective and prompt remedies, particularly for members of vulnerable groups, and
- inform the public of all available rights and remedies within states that have already established a right to adequate food within their legal system.

The Guidelines are significant to improve legal and accountability frameworks of States. The FAO's recent data shows at least 30 countries include the right to food in their constitutions explicitly as a justiciable human right and that 74 constitutions contain provisions that protect the right to food implicitly as a component of other broader rights.⁴¹ Dozens of countries have also enacted framework laws on the right to food or food security over the last few years.⁴²

In 2012, the FAO Council adopted other voluntary guidelines regarding access to productive resources such as land, fisheries, and forests to support the progressive realization of the right to food in the context of national food security.⁴³ Likewise, the UN Human Rights Council introduced the Guiding Principles on Extreme Poverty and Human Rights in 2012 which contain a section dedicated to the right to food in the context of people in extreme poverty.⁴⁴

III. MEANING OF THE RIGHT TO FOOD AND CORRESPONDING OBLIGATIONS OF STATES

A. Meaning of the Right to Food

In its General Comment No. 12, the UN Committee on Economic, Social, and Cultural Rights (CESCR) states that:

The right to adequate food is realized when every man, woman, and child, alone or in community with others, has physical and economic access at all times to adequate food or means for its procurement. The right to adequate food shall therefore not be interpreted in a narrow or restrictive sense which equates it with a minimum package of calories, proteins, and other specific nutrients. The right to adequate food will have to be realized progressively. However, States have a core obligation to take the necessary action to

³⁹ FAO, Right to Food Guidelines, *supra* note 3.

⁴⁰ DUBRAVKA BOJIC BULTRINI, MARGRET VIDAR, & LIDIJA KNUTH, GUIDE ON LEGISLATING FOR THE RIGHT TO FOOD 12 (FAO, Rome, 2009).

⁴¹ FAO, The Right to Food around the Globe, *supra* note 5.

⁴² FAO, Legal Developments, *supra* note 7.

⁴³ FAO, Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (Rome, May 2012).

⁴⁴ M Sepúlveda Carmona, Final Draft of the Guiding Principles on Extreme Poverty and Human Rights, Submitted by the Special Rapporteur on Extreme Poverty and Human Rights, UN Doc. A/HRC/21/39, (18 July 2012).

mitigate and alleviate hunger as provided for in paragraph 2 of article 11 even in times of natural or other disasters.⁴⁵

Furthermore, Jean Ziegler, the first UN Special Rapporteur on the Right to Food, explained the right to food in the following manner:

The right to food is the right to have regular, permanent and free access, either directly or by means of financial purchases, to quantitatively and qualitatively adequate and sufficient food corresponding to the cultural traditions of the people to which the consumer belongs, and which ensures a physical and mental, individual and collective, fulfilling and dignified life free of fear.⁴⁶

Oliver De Schutter, the second former Special Rapporteur on the Right to Food, also emphasized that:

The right to food is not primarily the right to be fed after an emergency. It is the right for all to have legal frameworks and strategies in place that further the realization of the right to adequate food as a human right recognized under international law.⁴⁷

Article 11(2) of the ICESCR recognizes the right to be free from hunger which is the minimum core content of the right to food. The CESCR underlined that “a State must ensure, for everyone under its jurisdiction, access to the minimum essential food which is sufficient, nutritionally adequate and safe to ensure their freedom from hunger.”⁴⁸ It also stressed that States violate the ICESCR “when they fail to ensure the satisfaction of, at the very least, the minimum essential level required to be free from hunger.”⁴⁹ Scholars have also attempted to define the right to be free from hunger. For instance, Alston defines it as “the minimum content of the right to food.”⁵⁰ Moreover, Texier defines freedom from hunger as the minimum threshold below which one should never, in principle, fall under any circumstances.⁵¹ Golay, on his part, defines it as “the right to have access to the minimum essential food which is sufficient and adequate to ensure everyone is free from hunger and physical deterioration that would lead to death.”⁵²

B. Obligations of States

Like other economic, social and cultural rights, there are general and specific obligations related to the right to food.

⁴⁵ General Comment No. 12, *supra* note 2, para 6.

⁴⁶ J Ziegler, Report by the Special Rapporteur on the Right to Food, Doc. U.N. E/CN.4/2001/53, (7 February 2001), para 14.

⁴⁷ Oliver De Schutter, Countries Tackling Hunger with a Right to Food Approach, United Nations Rapporteur on the Right to Food, UN Doc Briefing Note 01 (2010), *available at* <http://www2.ohchr.org/english/issues/food/docs/Briefing_Note_01_May_2010_EN.pdf> (Accessed on 2 July 2017).

⁴⁸ General Comment No 12, *supra* note 2, para 14.

⁴⁹ *Id.* at para 17.

⁵⁰ Philip Alston, International Law and the Right to Food, *in* FOOD AS A HUMAN RIGHT 167 (Eide A., *eta, eds.*, United Nations University, 1988).

⁵¹ As cited in C GOLAY, THE RIGHT TO FOOD AND ACCESS TO JUSTICE: EXAMPLES AT THE NATIONAL, REGIONAL AND INTERNATIONAL LEVELS 14 (FAO, Rome, 2009).

⁵² *Id.*

1. *General Obligations of States*

General obligations relating to the progressive realization of economic, social and cultural rights are contained in Article 2(1) of the ICESCR and explained in General Comment No 3.⁵³ States must take *all appropriate steps*, including legislative measures, to progressively achieve the full realization of economic and social rights. The measures must be “deliberate, concrete and targeted.”⁵⁴ While the States are free to determine the appropriate steps in their contexts, appropriate measures may comprise enacting laws or implementing economic, administrative, educational, financial or social reforms.⁵⁵ To ensure the full realization of the right to food, the States Parties must “move as expeditiously and effectively as possible”.⁵⁶ A State which might argue that it lacks resources to meet the minimum core obligation (i.e., to provide essential foodstuff) must show that it has made every effort by using resources at its disposal and resources obtained from the international community.⁵⁷

There are also some obligations which must be applied immediately regardless of resource availability.⁵⁸ The obligations to ensure non-discrimination and the fundamental right to be free from hunger must be applied immediately. Articles 2(2) and 3 of the ICESCR enshrine all States Parties must ensure equal enjoyment of economic and social rights, including the right to food, by “providing objective and reasonably same protection for all persons regardless of race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”⁵⁹ This obligation also requires States to identify the most vulnerable groups within its jurisdiction and take proactive steps, usually referred to as ‘special measures’, to bring the level of enjoyment of the right to food of these groups in line with the rest of the population.⁶⁰

2. *Specific Obligations of States*

The CESCR explained the specific nature of States obligations in its General Comment No. 12. Like other human rights, the right to food imposes three types of specific obligations of States: to respect, protect and fulfil, which the CESCR explained as follows:

The obligation to respect existing access to adequate food requires States parties not to take any measures that result in preventing such access. The obligation to protect requires measures by the State to ensure that enterprises or individuals do not deprive individuals of their access to adequate food. The obligation to fulfil (facilitate) means the State must proactively engage in activities intended to strengthen people's access to and utilization of resources and means to ensure their livelihood including food security. Finally, whenever

⁵³ General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para.1, of the Covenant) (UN CESCR, 1990).

⁵⁴ *Id.* at para 9.

⁵⁵ Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, (*ESCR-Net*) available at <<https://www.escr-net.org/resources/limburg-principles-implementation-international-covenant-economic-social-and-cultural>> (Accessed on 2 July 2017).

⁵⁶ General Comment No. 3, *supra* note 52, at para 9.

⁵⁷ General Comment No. 12, *supra* note 2, at para 36.

⁵⁸ *Id.* at para 5.

⁵⁹ ICESCR, *supra* note 1, at Art 2.2.

⁶⁰ IDLO, *supra* note 10, at 20.

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. This obligation also applies to persons who are victims of natural or other disasters.⁶¹

The *obligation to respect* the right to food is a negative obligation and a State is required not to take any action that would impede people's existing access to food through production or procurement.⁶² For instance, any government intervention that restricts people's access to natural resources that they use as a source of food, or threatening a well-functioning market may lead to a violation of this obligation.⁶³ A State also violates the obligation to respect if it introduces a law or policy that would cause an arbitrary eviction of people from their land, particularly, where the land is their main source of livelihood.⁶⁴ Likewise, a suspension or repeal of social security benefits in a situation where vulnerable people do not have an alternative means to provide for themselves might cause a violation of the obligation to respect the right to food.⁶⁵

With respect to the *obligation to protect*, a State must take a proactive measure to regulate the conduct of non-state actors (third parties including individuals, corporations, and others) that can violate the right to food.⁶⁶ For instance, a State should take a regulatory measure against a company that grabs land or other natural resources that peasants and indigenous population depend on to feed themselves.⁶⁷ Enacting laws and policies governing consumer protection and food safety can also be regarded as part of the obligation to protect the right to food.

The *obligation to fulfil* requires States to take appropriate legislative, administrative, budgetary, judicial and other measures towards full realization of the right to food. This obligation involves two elements: facilitate and provide. The duty to facilitate the right to food requires States to take steps aimed at enhancing people's ability to have means and resources to support their subsistence, for example, by adopting and implementing food and agriculture policies or enforcing minimum wage regulations.⁶⁸ In addition, the duty to facilitate the right to food requires States to implement policies that take into account the special need of vulnerable groups and create conducive environment to ensure access to food or a means of procuring it.⁶⁹

Furthermore, a State must directly *provide* food for persons who cannot provide for themselves due to reasons beyond their control. A State would violate the obligation to fulfil if it fails to provide an emergency food aid for starving population in its territory where they do not

⁶¹ General Comment No. 12, *supra* note 2, at para 15.

⁶² Husen Ahmed Tura, *Linking Land Rights and the Right to Adequate Food in Ethiopia: Normative and Implementation Gaps*, 35(2) NORDIC JOURNAL OF HUMAN RIGHTS 85 (2017).

⁶³ *Id.*

⁶⁴ Jean Ziegler, Preliminary Report of the Special Rapporteur of the Commission on Human Rights on the Right to Food, UN Doc. A/56/210, para 27, (Accessed on 23 July 2001).

⁶⁵ *Id.*

⁶⁶ *Id.* at para 28.

⁶⁷ *Id.*

⁶⁸ OHCHR and FAO, Fact Sheet No 34: The Right to Adequate Food (2010), at 18.

⁶⁹ Ziegler, *supra* note 64, at para 29.

have any other means to provide for themselves.⁷⁰ The obligation to provide is crucial to realize freedom from hunger which is the minimum core obligation of the right to food.

IV. ESTABLISHING APPROPRIATE LEGAL FRAMEWORK AT DOMESTIC LEVELS

To invoke a violation of the right to food, it must first exist in an applicable law (domestic, regional, international or combination of these). Therefore, the Right to Food Guidelines urges States to include provisions in their domestic law, which may include their constitutions, bills of rights or legislation, to directly implement progressive realization of right to adequate food.⁷¹ There are several mechanisms to incorporate the right to food into a domestic legal system which include the following.

- Creation of a constitutional right to food,
- Adoption of a framework law on the right to food or food security and nutrition,
- Introducing sector-specific legislation that facilitates enforcement of the right to food, and/or
- Constitutional or legal recognition of direct applicability of international human rights treaties providing for the right to food

In what follows, we shall discuss the legal basis for the right to food at the domestic level which takes the form of constitutional recognition, framework legislation and/or sectoral laws.

A. Incorporating the Right to Food into Constitutions

The inclusion of human rights in a constitution provides the strongest protection since constitutions are the supreme laws of the land. Any legislative or administrative action that contradicts with a constitution is of no effect, and laws or a State's conduct which contradicts with constitutional provisions could be quashed through a judicial review procedure.⁷² Moreover, it is not easy to amend a constitution which makes the removing of the right to food difficult.

States may constitutionally recognize the right to food in four ways: 1) explicit and direct recognition as a self-standing right, 2) implicit recognition as part of other rights, 3) explicit recognition as a goal or directive principle of state policy, and/or 4) recognition of the direct applicability of international or regional treaties providing for the right to food.⁷³

1. *Explicit Recognition as a Self-Standing Right*

Explicit recognition of the right to food paves the way for its enforcement because it avoids the ambiguity of judicial interpretation. At least 30 countries expressly recognize the right to food for all, or for specific groups including children, prisoners or indigenous peoples.⁷⁴ These include but not limited to Brazil, Colombia, Costa Rica, Republic of Congo, Egypt, Fiji, Guatemala,

⁷⁰ Husen, *supra* note 61; Ziegler *supra* note 64, at para 29.

⁷¹ FAO, Right to Food Guidelines, *supra* note 3, at Guideline 7.

⁷² De Schutter, *supra* note 47.

⁷³ FAO, The Right to Food around the Globe: Methodology, available at <<http://www.fao.org/right-to-food-around-the-globe/methodology/en/>> (Accessed on 25 August 2018).

⁷⁴ FAO, The Right to Food around the Globe: Level of Recognition, *supra* note 5.

Honduras, Kenya, Malawi, Maldives, Mexico, Moldova, Nepal, Nicaragua, Niger, Panama, Paraguay, Philippines, South Africa, and Zimbabwe.⁷⁵

In this regard, Mexico's constitution enshrines "every person has the right to food that is nutritious, sufficient, and of quality. The state shall guarantee this right."⁷⁶ Article 27 of the South African constitution also states "everyone has the right to have access to: (b) sufficient food and water, (c) social security, including, if they are unable to support themselves and their dependents, appropriate social assistance", and that "the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of each of these rights."⁷⁷ In the same vein, Article 36(1-2) of the constitution of Nepal enshrines that "each citizen shall have the right to food" and that "every citizen shall have the right to be protected from a state of starvation, resulting from lack of food stuffs". Moreover, it states that "every citizen shall have the right to food sovereignty as provided for in law".⁷⁸

Some constitutions explicitly recognize the right to food of certain groups such as children, indigenous peoples or prisoners. For instance, Article 44 of the Columbian constitution stipulates that "children have fundamental rights to life, integrity, health and social security and *adequate food*."⁷⁹ Similarly, the constitutions of Cuba, Guatemala, Honduras, Panama, and Paraguay contain explicit provisions protecting the right to food of children.⁸⁰ The right to food of prisoners and detainees is protected in the South African Constitution.⁸¹

2. *Implicit Recognition as Part of Broader Human Rights*

The right to food is linked to other several human rights. Thus, a constitutional recognition of broader rights like the right to adequate standard of living, the right to development and the right to human dignity leads to an implicit recognition of the right to food. A FAO study finds that the constitutions of Algeria, Burundi, Cuba, Cyprus, the Czech Republic, the Dominican Republic, El Salvador, Equatorial Guinea, Eritrea, Ethiopia, Indonesia, Iraq, Malawi, Senegal, Peru, Sao Tome and Principe, Seychelles, Syria, Thailand, Togo, Turkey, and Bolivia implicitly recognize the right to food.⁸² For instance, Article 42 of the Constitution of Belarus provides that:

Employees shall be guaranteed a just share of remuneration for the economic results of their labour in accordance with the quantity, quality and social significance of such work, but it shall not be less than the level which shall ensure an independent and dignified living for them and their families.⁸³

⁷⁵ FAO, Legal Developments, *supra* note 7.

⁷⁶ Constitution of the Mexican United States, 1917 (as amended to 2010).

⁷⁷ Constitution of the Republic of South Africa, s 27 (1996).

⁷⁸ The Constitution of the Federal Democratic Republic of Nepal, (2015).

⁷⁹ Republic of Colombia Constitution, (1991, as amended to 2011).

⁸⁰ Lidija Knuth and Margret Vidar, Constitutional and Legal Protection of the Right to Food around the World' (2011), 21, available at <<http://www.fao.org/docrep/016/ap554e/ap554e.pdf>>, (Assessed on 23 March 2018); FAO, The Right to Food around the Globe: Level of Recognition, *supra* note 5.

⁸¹ Constitution of South Africa, *supra* note 77, at s 35.2(e).

⁸² FAO, Legal Developments, *supra* note 7, at 3; FAO, The Right to Food around the Globe: Level of Recognition, *supra* note 5.

⁸³ Belarus's Constitution of 1994 (as amended to 2004).

Similarly, Article 43 of Constitution of Ethiopia enshrines the “Peoples of Ethiopia as a whole, and each Nation, Nationality, and People in Ethiopia in particular, have the right to improved standards of living and to sustainable development”⁸⁴, and that “the basic aim of development activities shall be to enhance citizens’ capacity for development and to meet their basic needs.”⁸⁵

3. Directive Principles of State Policy

The right to food can also be included in “directive principles”⁸⁶ of state policy in which States are committed to realizing economic, social and cultural rights for all citizens without stipulating claims of rights holders. At least 102 constitutions stipulate a State’s obligation to facilitate access to food under directive principles of state policy.⁸⁷

Although the inclusion of access to food in directive principles of state policy does not automatically create a legal basis for the justiciability of the right to food, courts can use such principles as tools of judicial interpretation and thereby protect the right.⁸⁸ For example, the Indian Supreme Court, while interpreting Article 47 of the Indian Constitution,⁸⁹ in *Olga Tellis v. Bombay Municipal Corporation*, ruled that “the Directive Principles, though not enforceable by any court, are nevertheless fundamental in the governance of the country.”⁹⁰ Subsequently, the Court enforced the right to food as part of the right to life (Article 21) by interpreting Article 47 (that obliges the government to improve the level of nutrition of its people).⁹¹

4. Direct Applicability of International Treaties in Domestic Legal Systems

Several countries have incorporated international and regional human treaties into their domestic laws via their constitutions and paved the way for the direct applicability of ratified treaties in their jurisdictions. In fact, international treaties have different status in *monist* and *dualist* systems. In countries that adopt a *monist* system, for example, France and the Netherlands, international human rights treaties are directly applicable as the international law is automatically included into domestic law. On the other hand, in *dualist* systems, including the UK and Australia, international law does not immediately become part of the domestic law as additional steps must be taken to include treaties into the domestic legal system.⁹²

Even though the status of international human rights instruments varies depending on legal systems, the inclusion of statements in constitutions regarding the direct applicability of the

⁸⁴ CONSTITUTION, Proclamation No 1/1995, FED. NEGARIT GAZETA, 1st Year No.1, 1995 (here after FDRE CONSTITUTION), Art. 43(1).

⁸⁵ *Id.* at Art 43(4).

⁸⁶ Directive principles of state policy are “the values to which a society aspires although at the time of drafting they may not reflect a broad societal reality, which guides governmental action but do not necessarily provide individual or justiciable rights.” Knuth and Vidar, *supra* note 80, at 33.

⁸⁷ FAO, The Right to Food around the Globe: Level of Recognition, *supra* note 5.

⁸⁸ IDLO, *supra* note 10, at 24.

⁸⁹ Constitution of the Republic of India, Art 47 (1949, as amended to 2012).

⁹⁰ *Olga Tellis v Bombay Municipal Corporation* 2 Supp SCR 51 (1985).

⁹¹ M J McDermott, *Constitutionalizing an Enforceable Right to Food: A Tool for Combating Hunger*, 35(2) BOSTON COLLEGE INTERNATIONAL AND COMPARATIVE LAW REVIEW 543 (2012).

⁹² C Courtis, Socio-Economic Rights before the Courts in Argentina, in JUSTICIABILITY OF ECONOMIC AND SOCIAL RIGHTS: EXPERIENCES FROM DOMESTIC SYSTEMS 309, 314 (F Coomans eds., 2006).

international standards at the domestic level has resulted in the adjudication of the right to food in some countries. For instance, the Kenyan Supreme Court cited the ICESCR and the African Charter besides the Kenyan Constitution to render its judgment in *Ibrahim Sangor Osman v. Minister of State for Provincial Administration & Internal Security*.⁹³

B. Adoption of Legislation on the Right to Food or Food Security

The constitutional recognition of economic, social and cultural rights is obviously significant, but insufficient condition to put the rights into practice. As constitutional provisions are normally written in general terms⁹⁴, it is important to enact a specific legislation and/or regulations, which “set out in more detail mechanisms for implementation, assign specific responsibilities, and provide for redress mechanisms in the event of violations.”⁹⁵ There are two approaches to adopting a national legislation on the right to food or food security: introducing an overarching framework legislation or including the right to food into a sector-specific legislation.

1. Framework Laws on the Right to Food or Food Security

Specific framework legislation is crucial to operationalize the right to food as it elucidates on the general principles.⁹⁶ A framework law on the right to food or food security:

- can determine the scope and content of the right,
- sets out obligations for state authorities and private actors,
- establishes necessary institutional mechanisms,
- provides for a legal basis for subsidiary legislation and other necessary measures, and
- provides grounds for redress.⁹⁷

The FAO methodology for assessing framework laws pinpoints two distinctive sets of framework laws: 1) framework laws that acknowledge and support the realization of the right to food, and 2) framework laws that are not overtly founded on human rights but specify an institutional framework for coordination and implementation.⁹⁸

A food security framework law under the first category must satisfy the following criteria: “1) an explicit recognition of the right to food as a human right, the objective of the law being the realization of the right to food, or substantive provisions of the right to food; and 2) incorporation and consideration of at least three human rights principles for the implementation of the law, including participation, accountability, non-discrimination, transparency, human dignity, empowerment, rule of law, and equality.”⁹⁹

⁹³ *Ibrahim Sangor Osman v Minister of State for Provincial Administration & Internal Security* (2011) eKLR Constitutional Petition No 2 (2011).

⁹⁴ F Coomans, *supra* note 92., at 7-8.

⁹⁵ Oliver De Schutter, A Rights Revolution: Implementing the Right to Food in Latin America and the Caribbean: Briefing Note 6 (2012).

⁹⁶ BULTRINI *et al*, *supra* note 40, at 57.

⁹⁷ *Id.*, at 53–65.

⁹⁸ *Id.*

⁹⁹ FAO, Legal Developments, *supra* note 7, at 5.

An increasing number of countries have adopted right to food or food security framework laws which create food security and nutrition coordination mechanisms and/or clearly enshrine the right to food. These are: Republic of Angola (2010), Argentine Republic (2003), Armenia (2002), Republic of Azerbaijan (1999), Bolivia (2011-2014), Brazil (2006) Burkina Faso (2007-2008), Republic of Cabo Verde (2013), Colombia (2009), Republic of the Congo (2008-2009), Ecuador (2008-2009), El Salvador (2009), French Republic (2010), Guatemala (2005) India (2013), Honduras (2010-2011), Indonesia (2012), Kyrgyzstan (2008), Mexico (2004), Republic of Mozambique (2010), Nicaragua (2009), Panama (2012), Paraguay (2013), Peru (2008-2013), Republic of Tajikistan (2010), Turkmenistan (2000), Venezuela (2008), and Tanzania (2011).¹⁰⁰

Furthermore, the Latin American Parliament (PARLATINO) implemented the “Regional Framework Law on the Right to Food, Food Security, and Food Sovereignty” in 2012. This framework law demonstrates a heightened commitment of the Latin American countries to implement a human rights-based approach to combating hunger and malnutrition.

2. Sectoral Laws

Sectoral laws can also play a positive role to realize the right to food. For instance, a legislation pertaining to access to land and other natural resources can enhance access to food for rural populations who produce food not only to feed themselves but also supply a surplus to the market for procurement to feed urban dwellers.¹⁰¹ A trade legislation also affects food affordability. Agricultural laws scaffold situations for food production. Labour laws are also significant to regulate a minimum wage and social protection to sustain an adequate standard of living. Other examples of sectoral legislation which could facilitate the progressive realization of the right to food include:

- A legislation creating entitlements to food subsidies and transfers in cash or in kind for food security (India, 2013);
- Food safety and consumer protection legislation (Montenegro, 2007); and
- School feeding legislation (Brazil, 2009 and Peru 2013).¹⁰²

V. JUSTICIABILITY OF THE RIGHT TO FOOD

Justiciability can be defined as “the possibility of a human right, recognised 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.”¹⁰³ Several international, regional and national laws provide for the justiciability of economic, social and cultural rights in general and the right to food in particular. For instance, the UDHR enshrines “everyone has the right to an effective remedy by the competent national tribunal for acts

¹⁰⁰ *Id.*

¹⁰¹ *Id.* 6; Husen, *supra* note 61.

¹⁰² FAO, Legal Developments, *supra* note 7, at 7-8.

¹⁰³ *Id.* at 9.

violating the fundamental rights granted to him by the constitution or law.”¹⁰⁴ Similarly, the General Comment No. 9 of the CESCR states that “appropriate means of redress or remedies must be available to any aggrieved individual or group and appropriate means of ensuring governmental accountability.”¹⁰⁵ Moreover, the General Comment No 12 enshrines “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 including those provided by quasi-judicial mechanisms.”¹⁰⁶

The success of justiciability of the right to food depends on three main conditions: existence of a strong legal basis that can be invoked by rights holders, availability of legal remedies and their application to protect the victims from violations of the right to food and the recognition of the right to food by implementing bodies and their ability to ensure the respect, protection, and fulfilment of the right.¹⁰⁷

Some scholars, who consider economic, social and cultural rights as imprecise, resources demanding, and subject to available resources and progressive realization, argue that the right to food is not a justiciable right.¹⁰⁸ There are also practical obstacles to the justiciability of the right which stem from lack of government’s political will, lack of awareness of rights holders, and structural as well as institutional constraints.¹⁰⁹ Cases involving the right to food are limited in practice although an increasing number of countries are enforcing the right to food over the last few years. In this regard, the International Development Law Organization reviewed more than 60 cases involving a government’s failure to ensure: the right to be free from hunger, the means to produce or procure food, and the protection of vulnerable, marginalized and disadvantaged groups.¹¹⁰ The cases relating to the States’ failure to ensure freedom from hunger were brought before courts in Argentina, Brazil, Colombia, India, and Nepal.¹¹¹ Moreover, cases involving the means to produce or procure food have focused on land and fishing as sources of livelihood and the economic means to obtain food and the role of the State.¹¹² In addition, cases concerning the protection of vulnerable, marginalized or disadvantaged groups have targeted the right to food of prisoners or detained persons, indigenous peoples, children, and refugees or asylum seekers.¹¹³

A. Cases Involving the Right to Food

This section investigates selected cases involving the right to food which were brought before courts in Asia, Latin America, and Africa. The cases were selected purposely based on important

¹⁰⁴ Universal Declaration of Human Rights (1948), Art 8.

¹⁰⁵ CESCR, General Comment No. 9, E/C.12/GC/19, para 9, (4 February 2008).

¹⁰⁶ General Comment No. 12, *supra* note 2, at para 32.

¹⁰⁷ Christophe Golay, *The Right to Food and Access to Justice: Examples at the National, Regional and International Levels*, (FAO, Rome, 2009), at 59, available at <<http://www.fao.org/right-to-food/resources/resources-detail/en/c/49305/>> (Accessed on 23 March 2018).

¹⁰⁸ FAO, *Legal Development*, *supra* note 7, at 12.

¹⁰⁹ Elver, *supra* note 12.

¹¹⁰ IDLO, *supra* note 10, at 39.

¹¹¹ *Id.*, at 37-40.

¹¹² *Id.*, at 40-44.

¹¹³ *Id.*, at 45-48.

issues involved in them such as the justiciability of core contents of the right to food and corresponding States obligations discussed earlier.

1. India

India has taken exemplary steps in enforcing the right to food in general and the right to be free from hunger in particular. Its parliament adopted the Food Security Act in 2013 and the Indian Supreme Court has enforced the constitutional right to food as a part of the right to life since 2001. The *People's Union for Civil Liberties v. Union of India* is one of the most cited cases in relation to the right to food.¹¹⁴ This case was brought before the Indian Supreme Court regarding the occurrence of chronic famines and hunger-related deaths in drought-affected regions of the country, in particular, the State of Rajasthan.¹¹⁵

People's Union for Civil Liberties (PUCI), which is a prominent human rights organization in India, instituted a public interest petition before the Supreme Court in 2001 alleging that the government has failed to provide essential foodstuff to the people exposed to hunger due to successive droughts for three years. The PUCI contended that the right to food, which obliges the State to provide food to people in drought-affected areas who cannot purchase or produce it themselves, is implicitly recognized in the right to life under Article 21 of the Constitution.¹¹⁶ The PUCI requested the Court to order the government to enforce food distribution schemes, policies and legislation in force that stipulate the release of grain stocks in times of famine.¹¹⁷ The petitioners emphasized that it was unacceptable for the government not to tackle hunger and starvation in the situation where there were surplus grain supplies which remained unexploited and depreciated in warehouses because of insufficient storage facilities.¹¹⁸

The Supreme Court notably recognized that plenty of food is available, but the distribution of the same amongst the very poor and the destitute is scarce and non-existent.¹¹⁹ It found that "the basic cause of the hunger and malnutrition was hardly lack of resources, but ineptitudes and failure to apply legislation and policies in force."¹²⁰ The Court further argued that mere schemes without any implementation are of no use and emphasized that "what is important is that the food must reach the hungry."¹²¹ The Court issued numerous interim orders demanding the government to apply existing policies, schemes, and legislation. It also specified actions to be adopted, particularly regarding vulnerable groups, to safeguard the implementation. Among others, the Court ordered that every state government must afford cooked mid-day meals for all children in

¹¹⁴ *People's Union for Civil Liberties v Union of India* (2003) Writ Petition (Civil) No 196 of 2001 and Interim Order of 2 May 2003.

¹¹⁵ L Birchfield and J Corsi, *Between Starvation and Globalization: Realizing the Right to Food in India*, 31 (4) MICHIGAN JOURNAL OF INTERNATIONAL LAW 691, 697-698 (2010).

¹¹⁶ *People's Union for Civil Liberties v. Union of India* (n 113), at para 50.

¹¹⁷ *Id.*, at paras 49 and 50.

¹¹⁸ *Id.*, at para 11.

¹¹⁹ *People's Union for Civil Liberties v Union of India and Others*, Interim Order of 23 July 2001(2001).

¹²⁰ V. GAURI AND D. BRINKS, *COURTING SOCIAL JUSTICE: JUDICIAL ENFORCEMENT OF SOCIAL AND ECONOMIC RIGHTS IN THE DEVELOPING WORLD* (Cambridge University Press) 348 (2008).

¹²¹ *People's Union for Civil Liberties v Union of India and Others*, *supra* note 114.

public schools or government-assisted school programs.¹²² It also computed the minimum amounts of food to be allocated to each child.¹²³

The Court also gave numerous interim orders in subsequent years. For instance, in 2003, the Court ordered, *inter alia*, that:

- grain allocation for the Food for Work schemes be doubled and financial support for schemes be increased;
- ration shop licensees must stay open and provide grain to families below the poverty line at the set price;
- the government should publicize the rights of families below the poverty line to grain to ensure that all eligible families are covered; and
- all individuals without means of support (older persons, widows, disabled adults) are to be granted a ration card for free grain.¹²⁴

Interim orders of the Supreme Court eventually resulted in the transformation of the government's food schemes in place into legal entitlements deriving from the right to food that is embedded in the Constitution, and the beneficiaries into "stakeholders of justiciable rights."¹²⁵

2. Nepal

The 2007 Interim Constitution of Nepal protects the right to food and the country has ratified the ICESR.¹²⁶ Thus, the Supreme Court of Nepal has interpreted this right in the light of the right to adequate food and the right to be free from hunger that is enshrined in Article 11 of the ICESCR.¹²⁷ In *Kumar Basnet v. Prime Minister & Ors*, the petitioners instituted a writ before the Supreme Court to order the government of Nepal to provide food for populations exposed to hunger.¹²⁸ Although the Court clearly acknowledged that the government is responsible to protect the right to life, it failed to eventually pass the order that was sought by the petitioners.¹²⁹

Another case involving the violation of the right to food in Nepal was brought before the Supreme Court in 2008. In *Prakash Mani Sharma and others on behalf of Forum for Protection of Public Interest (Pro Public) v. Government of Nepal*, the petitioners claimed that the shortage of food, inefficiencies in food distribution, and the dissemination of rotten food caused pervasive hunger and disease in some parts of the country.¹³⁰ The petitioners sought the adoption of a sufficient legal framework, the establishment of infrastructures, storage facilities, and the

¹²² *People's Union for Civil Liberties v Union of India and Others* (2001) Interim Order of 28 November 2001.

¹²³ *Id.*

¹²⁴ IDLO, *supra* note 10, at 40.

¹²⁵ HUMAN RIGHTS LAW NETWORK, FOOD SECURITY & JUDICIAL ACTIVISM IN INDIA, (Human Rights Law Network, 2007).

¹²⁶ *Id.*

¹²⁷ M Langford and A Bhattarai, *Constitutional Rights and Social Exclusion in Nepal*, 18 INTERNATIONAL JOURNAL ON MINORITY AND GROUP RIGHTS 387, 402 (2011).

¹²⁸ *Kumar Basnet v Prime Minister & Ors*, Writ No 3341, (1998).

¹²⁹ Langford and Bhattarai, *supra* note 127, at 402; IDLO, *supra* note 10, at 40.

¹³⁰ *Prakash Mani Sharma and others on behalf of Forum for Protection of Public Interest (Pro Public) v Government of Nepal*, as cited in *id.* at 402-403.

introduction of an effective food distribution scheme.¹³¹ The Supreme Court stayed a final judgment but issued an interim order that acknowledged the fundamental right to a dignified life and demanded the concerned government bodies to directly provide food in affected districts.¹³² Moreover, the Court passed the final judgment in 2010 and reiterated that “the right to food, health... social security is all basic human rights” and that the State is obliged to realize them.¹³³ It is worth noting that Article 36 of the Constitution of Nepal (as amended in 2015) explicitly recognizes the right to food and food sovereignty.

3. *Malaysia*

In 2002, a case concerning the link between land and indigenous people’s means of livelihood was brought before the Malaysian Court of Appeal. In *Kerajaan Negeri Johor v. Adong bin Kuwau*, members of the *Orang Asli* indigenous community in Malaysia invoked a violation of their right to life following the Malaysian government’s decision to build a dam on their ancestral land.¹³⁴ Their claim was based on provisions of the constitution, in particular, the right to life, domestic legislation (i.e., the Aboriginal Peoples Act), and common law.¹³⁵ The Malaysian Court of Appeal ruled in favor of the claimants and found that “the community’s livelihood depended on hunting animals and collecting forest products on their land”¹³⁶ and argued that “it was settled beyond argument in our jurisdiction that deprivation of livelihood may amount to a deprivation of life itself and that state action which produces such a consequence may be impugned on well-established grounds.”¹³⁷

4. *Brazil*

Brazilian courts have adjudicated cases involving the state’s failure to realize the right to food and tackle extreme poverty. For instance, a case was filed against the Municipality of *Maceió* in 2007 concerning the deteriorating living conditions affecting about 1,500 families.¹³⁸ This case becomes an important precedent regarding the justiciability of economic, social and cultural rights of vulnerable communities in the country.¹³⁹

The National Rapporteur on the Right to Food, Water, and Land studying the community’s condition discovered that residents of the *Orla Lagunar favelas* in the city of *Maceió* subsisted in “extreme poverty, used mud and plastic sheeting for housing, lacked basic infrastructure and adequate sanitation, and children suffered from severe malnutrition.”¹⁴⁰ The principal sources of

¹³¹ IDLO, *supra* note 10, at 40.

¹³² Langford and Bhattarai, *supra* note 127, at 403.

¹³³ IDLO, *supra* note 10, at 40, See also B Adhikari, Nepalese Supreme Court Decision on the Right to Food in Right to Food and Nutrition Watch in CLAIMING HUMAN RIGHTS: THE ACCOUNTABILITY CHALLENGE (2011) at 94-95.

¹³⁴ *Kerajaan Negeri Johor & Another v. Adong bin Kuwau & Others*, Malaysian Court of Appeal, (2002).

¹³⁵ *Id.*

¹³⁶ IDLO, *supra* note 10, at 41.

¹³⁷ *Kerajaan Negeri Johor*, *supra* note 133, at para 7.

¹³⁸ Action No 4.830/07, 2^a Vara da Infância e Juventude de Maceió (2007) s II (1-10). Translation by FAO, Right to Food: Making it Happen Progress and Lessons Learned through Implementation (2011).

¹³⁹ De Schutter, *supra* note 47, at 11.

¹⁴⁰ FAO, Right to Food Case Study Brazil, UN Doc. IGWG RTFG /INF 4/APP.1 (2004); IDLO, *supra* note 10.

subsistence were found to be a garbage dump and small-scale fishing.¹⁴¹ Not all residents were beneficiaries of the social benefits programs in force, especially those who did not have the necessary documents for eligibility, including a birth certificate or identity card were ineligible.¹⁴² According to an FAO study, public programs particularly focusing on the community were insufficient and programs in force were underfunded.¹⁴³ Moreover, the community did not qualify as a “high approach priority” region because it was an urban community inside the State capital.¹⁴⁴

In reaction, some public prosecutors from the State Public Ministry (Ministério Público Estadual) brought a public interest litigation against the municipality asking the fulfilment of the right to food, life, and well-being of children and teenagers living within the area.¹⁴⁵ The court rendered a judgment in September 2007 which is later described as one of the sharpest defences of economic, social and cultural rights in Brazilian jurisprudence to date.¹⁴⁶ The court held the Municipality of *Maceió* accountable for violating the rights to food, health, and education of the children and teenagers of the *Orla Lagunar* communities. Both international human rights treaties¹⁴⁷ and domestic provisions stipulating the right to food¹⁴⁸ were utilized in the court’s reasoning and judgment.

Several specific remedies were ordered to remedy the violations of the right to food, housing, health, and education of the children of the affected communities. The court fixed a 60-day due date for the municipality to stretch out social administrations to the inhabitants of the affected communities.¹⁴⁹ The court also required the district to submit a proposal for the usage of an extensive variety of public policies and strategies, including:¹⁵⁰

- establishing a multidisciplinary commission to analyze the socio-economic profile of children and adolescents living in the favelas within 30 days;
- ensure that sufficient resources are allocated to these solutions in the municipality’s budget and prepare a contingency plan if enough resources cannot be found; and
- expediting the registration of children and adults.

5. Kenya

The Kenyan High Court considered the link between the right to food and the right to housing in *Ibrahim Sangor Osman v. Minister of State for Provincial Administration & Internal Security*.¹⁵¹

¹⁴¹ De Schutter, *supra* note 47, at 11.

¹⁴² FAO, Brazil, *supra* note 140, at 56.

¹⁴³ IDLO, *supra* note 10, at 38.

¹⁴⁴ *Id.*

¹⁴⁵ The claim was filed with the District Court for Children and Adolescents (28^a Vara Cível Da Capital - Infância e Juventude, Estado de Alagoas).

¹⁴⁶ De Schutter, *supra* note 47; IDLO, *supra* note 10, at 38.

¹⁴⁷ The rights of the child protected in Article 19 of the American Convention on Human Rights.

¹⁴⁸ Article 277 of the Brazilian Federal Constitution (as amended by Constitutional Amendment No 65, 2010) recognizes the right to food of children and adolescents.

¹⁴⁹ Action No 4.830/07, *supra* note 138, at 70.

¹⁵⁰ IDLO, *supra* note 10, at 51.

¹⁵¹ *Ibrahim Sangor Osman v Minister of State for Provincial Administration & Internal Security*, Kenyan High Court, Constitutional Petition No 2 (2011).

The Kenyan government forcefully evicted more than 1,000 people from their homes on public land that they had to possess since the 1940s.¹⁵² Their homes were eventually demolished and building materials and family goods had been destroyed in the course.¹⁵³

The High Court realized that after the eviction, the claimants have been forced to stay and sleep in the open without housing, meals, water, sanitation, and healthcare¹⁵⁴ and moved to an environment where there was no single basic necessity of life and disabled not to feed themselves.¹⁵⁵ The Court held the right to life and to be free from hunger were violated along with the right to adequate housing, the right to water and sanitation among others.¹⁵⁶ The Court primarily grounded its ruling on the Kenyan constitution, the ICESCR, and the African Charter emphasizing that any international treaty ratified by Kenya is a part of the domestic law.¹⁵⁷

The court passed a mandatory injunction obliging the state to return the petitioners to the land from which they were displaced and to rebuild their homes and/or deliver substitute housing and other facilities such as schools.¹⁵⁸ Moreover, the government was ordered to restrain from taking a similar conduct in the future and to compensate all petitioners.¹⁵⁹

6. South Africa

Kenneth George and Others v. Minister of Environmental Affairs & Tourism (South Africa) involved a marine resources law that introduced a quota system for fishing.¹⁶⁰ Several communities lost access to the sea and their means of survival. Their nutritional condition worsened considerably as they encountered growing food insecurity and poverty.¹⁶¹ Some NGOs assisted the communities to bring a class action against the Minister of Environmental Affairs and Tourism before the High Court (Cape of Good Hope Provincial Division). After an extensive negotiation, the fishing communities and the government reached a settlement that allowed the traditional fishermen to fish and sell their products.¹⁶² The High Court, moreover, gave an order entailing the assignment of permits to the fishermen and the introduction of a new legislative and policy framework that would accommodate traditional fishers more effectively.¹⁶³ The court specified that “such a framework should take into account international and national legal obligations and policy directives to accommodate the socio-economic rights of these fishers and to ensure equitable access to marine resources for those fishers.”¹⁶⁴

¹⁵² *Id.*, at 12 and 13.

¹⁵³ *Id.*, at 8.

¹⁵⁴ *Id.*, at 13.

¹⁵⁵ *Id.*, at 19.

¹⁵⁶ *Id.*, at 20.

¹⁵⁷ *Id.*, at 11.

¹⁵⁸ *Id.*, at 20.

¹⁵⁹ *Id.*, at 20-21.

¹⁶⁰ Golay, *supra* note 107, at 54-55.

¹⁶¹ *Id.*

¹⁶² *Kenneth George and Others v. Minister of Environmental Affairs and Tourism*, SA 297 (EqC), High Court (Cape of Good Hope Provincial Division) (2005).

¹⁶³ *Id.*, at para 8.

¹⁶⁴ *Id.*

A commercial fishermen's association later opposed an agreement between the South African government and small-scale fishermen that discharged the latter from legislation outlawing some fishing practices and fishing of certain species such as lobsters.¹⁶⁵ Nevertheless, the agreement was upheld by the Western Cape High Court that endorsed the claim that "the small-scale fishermen relied on the resources delivered by the sea and traditional fishing methods as the only means to feed themselves and their families."¹⁶⁶

7. Nigeria

A case was brought before the African Commission alleging that the Nigerian government had violated the right to food of indigenous communities. In the *SERAC v. Nigeria*,¹⁶⁷ the claimants contended that:

The Nigerian government destroyed and threatened Ogoni food sources through a variety of means. The government participated in irresponsible oil development that poisoned much of the soil and water upon which Ogoni farming and fishing depended. In their raids on villages, Nigerian security forces have destroyed crops and killed farm animals. The security forces have created a state of terror and insecurity that made it impossible for many Ogoni villagers to return to their fields and animals. The destruction of farmlands, rivers, crops, and animals created malnutrition and starvation among certain Ogoni communities.¹⁶⁸

The claimants alleged the Nigerian government had violated its obligations to respect and protect the right to food of the Ogonis by directly destroying their food sources and by failing to monitor and control the actions of oil companies on the Ogoni land that had violated the right to food.

The African Commission, on its part, argued that the right to food is implicitly recognized under the African Charter in relation to the right to life (Article 4), the right to health (Article 16) and the right to economic, social and cultural development (Article 22)¹⁶⁹ and held that:

The right to food requires that the Nigerian Government should not destroy or contaminate food sources. The government has destroyed food sources through its security forces and State Oil Company and through terror, has created significant obstacles to Ogoni communities trying to feed themselves. The Nigerian Government, hence, is in violation of the right to food of the Ogonis.¹⁷⁰

The Commission ordered the Nigerian government to implement various activities including payment of compensation and tidying up dirtied or damaged soil and rivers.¹⁷¹ The Commission also requested the government to undertake social and ecological impact assessments before

¹⁶⁵ *West Coast Rock Lobster Association v Minister of Envtl. Affairs & Tourism* 532/09 (2010) ZASCA 114.

¹⁶⁶ IDLO, *supra* note 10, at 44.

¹⁶⁷ *Social and Economic Rights Action Center (SERAC) & the Center for Economic and Social Rights v. Nigeria* (African Commission on Human and People's Rights, Communication No. 155/96, May 2002), para 9.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*, at paras 64-66.

¹⁷⁰ *Id.*, at paras 65-66.

¹⁷¹ *Id.*, at paras 70-72.

implementing future oil projects.¹⁷² The Commission also encouraged the government to provide information to the community on health and environmental effects of oil operations.¹⁷³

B. Lessons Learned from the Cases Involving Right to Food

In general, the following lessons can be drawn from the cases reviewed earlier.

Legal Framework: The existence of a clear and sufficient legal framework is essential to claim the enforcement or violation of the right to food. In the countries where the right to food was litigated successfully, there has been a strong legal basis deriving from both international and domestic laws. The countries have ratified international conventions stipulating the right to food and explicitly recognize the right in their constitutions that form the legal basis for claims of the petitioners and judgments of the courts. For instance, constitutions of Brazil, Kenya, Nepal, and South Africa explicitly recognize the right to food as a justiciable human right. Moreover, their parliaments have enacted specific framework legislation on the right to food or food security. The courts have applied international human rights instruments such as the ICESCR in addition to domestic laws while adjudicating cases involving the right to food.

Widening Standing has a huge impact on the justiciability of socio-economic rights. The success of strategic litigations concerning the right to food is strongly linked to legal procedures that allow individuals or groups to file suits without necessarily having a vested interest on a case particularly relating to collective interests of certain groups or public interest litigations. Many Latin American countries like Argentina, Brazil and Columbia have introduced the *Amparo* (protection) procedure in which any person can file a claim before the courts, including constitutional court, to request measures to stop or prevent unlawful act by a public authority violating a constitutional right.¹⁷⁴ Argentina and Brazil, in particular, allow for collective complaints to be filed by any person. In Brazil, collective interest is protected by the *ação civil pública* (public civil action), which can be initiated by the public prosecutor or trade unions and NGOs regarding environmental rights, consumer rights or any other ‘collective interest’.¹⁷⁵

In India and Nepal, domestic laws or judicial practice empower the courts to entertain public interest litigation or collective claims filed by any person without necessarily being a victim or representing all victims.¹⁷⁶ Legal standing requirements in Kenya, which allow an initiation of the public interest litigation by every person representing himself or others including an association acting in the interest of one or more of its members, are enclosed in Article 22 of the Constitution.¹⁷⁷ In general, the experience demonstrates that introducing a legal procedure that would facilitate the filing of collective interest or public interest litigation plays a crucial role in enhancing the judicial enforcement of economic and social rights.

¹⁷² *Id.*, at para 71.

¹⁷³ *Id.*

¹⁷⁴ IDLO, *supra* note 10; at 29.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ Constitution of the Republic of Kenya 1969 (as amended to 2010) s 22.

Justiciable matter: The reviewed cases involve several issues relating to core contents of the right to food and corresponding States obligations. For instance, the government's failure to ensure freedom from hunger has been the basic issue in the cases adjudicated in India and Nepal. The protection of the right of children was also subject of litigation in the cases of *People's Union for Civil Liberties v. Union of India* and the *Maceio* case in Brazil. Moreover, violations of State obligations to respect, protect and fulfil the right to food have been the subject of litigation in the cases. For instance, the High Court of Cape of Good Hope Province held that the government of South Africa had violated its duty to respect the right to food of fishing communities by limiting their access to marine resources since it adopted a repressive marine law.¹⁷⁸ In the *Ogoni* case, the African Commission held the Nigerian government responsible for violating the obligation to respect by destroying the *Ogoni's* food resources.¹⁷⁹ Moreover, the Nigerian Government was held accountable for violating its obligation to protect the right to food of the *Ogonis* by failing to control the oil companies that had destroyed and contaminated food sources of the communities.¹⁸⁰ Furthermore, the justiciability of the obligation to facilitate the right to food has been established in cases litigated in Brazil, India, and Nepal among others. The protection of the right to food of indigenous peoples, which is greatly linked to their access to land (in Malaysia and Kenya), fishing communities (South Africa), and the food assistance programs based on the right to life (Indian case), has been adjudicated at national levels. The government's failure to distribute available food to areas where there had been starvation due to a shortage of physical availability of food has also been a justiciable matter in India and Nepal.

Therefore, a lesson that could be drawn from the experiences is that various issues related to the right to food can be justiciable matters. The right to food can be violated when a government fails to ensure the fundamental right to be free from hunger (the minimum core obligation of the right to food) by not providing an essential foodstuff for people exposed to starvation due to reasons beyond their control; when the government restricts an existing access to natural resources (such as land, fishery and forest) that people use as basic sources of food or its procurement; when a government fails to control and monitor private entities who encroach access to food; and when a government fails to protect the right to food of specific groups such as children, women, prisoners, indigenous peoples, and refugees.

Role of NGOs: The success of litigations concerning the right to food was also enhanced by an active participation of NGOs. As discussed earlier, most public interest or collective litigations were brought before the courts by various NGOs. For instance, the People's Union for Civil Liberties (PUCL) in India, Forum for Protection of Public Interest in Nepal, Centre for Minority Rights (Kenya) and Civil Liberties Organization in Nigeria have actively participated in the public interest litigations on behalf of vulnerable, marginalized or disadvantaged groups. In particular, the PUCL has extensively promoted the right to food and its justiciability in India since 2001 by conducting a series of awareness-raising campaigns. Thus, poor countries should not underestimate the role of NGOs in protecting and promoting socio-economic rights.

¹⁷⁸ *Kenneth George and Others v Minister of Environmental Affairs and Tourism*, *supra* note 161, at paras 94-96.

¹⁷⁹ *SERAC v Nigeria*, *supra* note 167, at paras 65-66.

¹⁸⁰ *Id.*

Remedies: Availability of remedies in a national legal system enhances the judicial enforcement of the right to food. Victims of violations of the right must be entitled to adequate remedies which may take the form of restitution, compensation, satisfaction, or guarantees of non-repetition.¹⁸¹ Existing remedies at the domestic level may vary based on the facts of the case and the legal, political and social setting where judges work.¹⁸² Some constitutions comprise provisions on remedies. For instance, the Constitution of India stipulates that the “Supreme Court shall have the power to issue directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari which may be appropriate for the enforcement of any of the rights conferred by this Part (Part III.—Fundamental Rights).”¹⁸³ The South African Constitution also gives the judges enough discretion to determine effective remedies enshrining that “when deciding a constitutional matter within its power, a court may make any order that is just and equitable.”¹⁸⁴ In the aforementioned cases, more conventional remedies such as compensation, restitution, and declarations were issued. In addition, detailed orders (including interim orders and mandatory injunctions) were delivered.

VI. CONCLUSION

The ICESCR and other UN and regional treaties recognize the right to adequate food and the fundamental right to be free from hunger. Over the last two decades, the right to food has developed as a justiciable human right. This development was passed through three important phases. First, the 1996 World Food Summit decided that the normative contents of the right to food and corresponding states obligations must be defined. In response, the UN CESCR adopted the General Comment No.12 on the Right to Adequate Food in 1999. Moreover, the FAO then adopted a comprehensive Right to Food Guidelines in 2004. Among others, the Voluntary Guidelines encourage States to take legislative and judicial steps to ensure the progressive realization of the right to food. Following the Right to Food Guidelines, an increasing number of countries have amended their constitutions and afforded constitutional protection to the right to food. While some countries explicitly recognize the right to food as a justiciable human right, others implicitly recognize it as part of broader human rights like the right to adequate standard of living, the right to a dignified life or the right to development. Some constitutions include food security in directive principles of state policies which oblige governments to facilitate access to food without enshrining claims of rights holders. In countries such as India, directive principles are transformed into justiciable human rights through judicial interpretation of the right to life.

Including the right to food into constitutions is an important step but insufficient condition in itself to enforce it. Thus, scores of countries have adopted specific right to food or food security framework laws that define the normative contents of the right to food and corresponding States obligations and establish a legal basis for judicial enforcement of the right at domestic levels. Some countries include provisions on the right to food in sectoral laws.

¹⁸¹ General Comment No.12, *supra* note 2, at para 32.

¹⁸² IDLO, *supra* note 10.

¹⁸³ Constitution of the Republic of India, Art 32(2) (1950).

¹⁸⁴ Constitution of the Republic of South Africa, Section 172(1)(b) (1996).

The justiciability of ESCR has long been contested. Obstacles such as lack of political will, lack of awareness, and institutional as well as structural constraints hinder the justiciability of the right to food in many countries. This Article shows, however, that an increasing number of countries are using the right to food as a tool for combating hunger and malnutrition in their jurisdictions. Several cases involving violation of the right have been successfully litigated and victims have received effective remedies in many countries in Africa, Asia, and Latin America.

It is found that a clear and sufficient legal framework at domestic level, widening of standing rules, active participation of NGOs in the protection and promotion of human rights and availability of remedies in a domestic legal system enhance the justiciability of the right to food. Thus, States should strive to strengthen their legal frameworks on the right to food and empower courts to adjudicate cases involving economic and social rights. In particular, governments should work towards incorporating the right to food into their constitutions and should adopt framework laws on the right to food or food security to define the contents of the right and recognize its justiciability. To ensure accountability for violation of the right to food, States should also allow initiation of public interest litigations by any person including NGOs thereby ease the requirement of legal standing. States should also raise the awareness of rights holders concerning their right to food. Moreover, governments should renew their political commitment to adopt and implement policies that ensure the progressive realization of the right to food.

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