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**IS THE RIGHT TO FOOD JUSTICIABLE? LAW AND PRACTICE.
'THE RIGHT TO FOOD' CASE, INDIA**

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*“For those of us who cannot indulge
the passing dreams of choice
(...)
So it is better to speak
remembering
we were never meant to survive”*

Audre Lourde, A litany for survival

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I. THE RIGHT TO FOOD IN INTERNATIONAL AND SOFT LAW

The Right to Food's recognition as a human right dates back to the mid-20th century. Since then, it has passed throughout different phases, arriving to a certain degree at being considered as enforceable in the courts.

Despite this, according to data provided by the Food and Agriculture Organization of the United Nations (hereinafter FAO), the rate of undernourishment has increased some 11% in 2016 in comparison with the preceding year, even though it was still below the one registered one decade earlier¹. In fact, undernourished people in the world have been estimated to be 815 million in 2016, compared to the 777 million of 2015². These figures demonstrate that despite the progress made in recognizing the Right to Food as a justiciable right, violations of it persist.

I.1 The Right to Food: definitions and pillars

The first articulation of the Right to Food (hereinafter RtF) goes back to the 1948 Universal Declaration of Human Rights (hereinafter UDHR), where it was recognized as being inherent to the fundamental right to an adequate standard of living. Art. 25(1) of the Declaration states 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, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control”³.

However, such formulation only gives a vague account of the RtF, without actually rendering clear what this right means and which its concrete implications are. Therefore, at the time States were not inclined yet to look at the Right to Food in a pragmatic manner.

Later on, a more precise codification of the Right to Food has been provided by art. 11 of the International Covenant on Economic, Social and Cultural Rights (hereinafter ICESCR), which states:

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

¹ FAO, IFAD, UNICEF, WFP AND WHO, *The State of Food Security and Nutrition in the World 2017. Building resilience for peace and food security*, Rome, 2017, p. 2. Available online.

² *Ibidem*.

³ Universal Declaration of Human Rights of the UN General Assembly of 10 December 1948, 217 A (III), art. 25, par. 1. It was opened for signature by Resolution of the General Assembly n. 217 A (III) of 10 December 1948. It entered into force on March 1976, after having received a sufficient number of ratifications. [Hereinafter UDHR of the UN General Assembly].

2. The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed”⁴.

The Covenant again defines the RtF in function of the right to an adequate standard of living. However, it better grasps the concept by showing how the RtF actually encompasses two different dimensions: on the one hand, the *right to adequate food* and on the other hand the *fundamental right of everyone to be free from hunger*. Afterwards, General Comment No. 12 (hereinafter GC No. 12) of the Committee on Economic, Social and Cultural Rights (hereinafter CESCR)⁵ and the UN Special Rapporteur on the Right to Food⁶ more clearly defined these two aspects.

I.1.1 Through more authoritative definitions: General Comment No. 12 and UN Special Rapporteur on the Right to Food

The Committee on Economic, Social and Cultural Rights adopted General Comment No. 12 on May 12, 1999⁷. As reported by the GC No. 12 itself in paragraph 2, the adoption came about under the pressure posed by States reunited in the World Food Summit in 1996⁸. The concluding Plan for Action indeed, asked for a specification of art. 11 of the ICESCR in its Commitment 7, objective 7.4. This, required “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”⁹.

Thus, GC No. 12 elaborated what it is considered to be “the most authoritative definition”¹⁰ of the RtF. For this reason, this soft law instrument has indirectly been the basis for many disputes’ solution, as well as for

⁴ International Covenant on Economic, Social and Cultural Rights of the UN General Assembly of 16 December 1966, United Nations, Treaty Series, Vol. 993, p. 3, art. 11, paragraphs 1 and 2. It was adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966. It entered into force on January 3, 1976 in accordance with art. 27. [Hereinafter ICESCR of the UN General Assembly].

⁵ The Committee on Economic, Social and Cultural Rights (CESCR) was established by ECOSOC Resolution 1985/17 of 28 May 1985. Independent experts compose it and it is responsible for monitoring the degree of implementation of the ICESCR by its state parties. These indeed, have to submit regular reports to the Committee.

⁶ The UN Special Rapporteur on the Right to Food was established in 2000 by the UN Commission on Human Rights (replaced by the Human Rights Council). In quality of independent expert, his mandate is to examine and report on the realization of the Right to Food at the national level and to monitor the implementation and adoption of relative measures internationally, regionally and nationally.

⁷ General Comment No. 12: The Right to Adequate Food (Art.11 of the Covenant) of the UN Committee on Economic, Social and Cultural Rights (CESCR) of 12 May 1999, contained in Document E/C.12/1999/5. [Hereinafter General Comment No.12 of the CESCR].

⁸ The World Food Summit took place from 13 to 17 November in Rome at the FAO headquarters. It consisted in five days of conferences and meetings at the highest level, which had the objective of reinforcing the international efforts for reducing hunger and malnutrition. The Summit came about with the adoption of the Rome Declaration on World Food Security and the World Food Summit Plan of Action.

⁹ Rome Declaration on World Food Security and World Food Summit Plan of Action of the FAO, Rome, of 13-17 November 1996, Commitment 7, objective 7.4.

¹⁰ M. VIDAR, FAO, *The Right to Food in International Law*, November 2003, p. 8: “The most authoritative definition of the right to food as set out in Article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) is to be found in General Comment 12 (GC12) of the Committee on Economic, Social and Cultural Rights (CESCR)”. Available online.

many subsequent international community's steps in the recognition of the Right to Food as a justiciable and enforceable right.

Taking into account the RtF's first aspect, namely the *right to adequate food*, GC No. 12 states that such a right "is realized when every man, woman and child, alone or in community with others, have physical and economic access at all times to adequate food or means for its procurement"¹¹. More specifically, adequate food refers to food that is "sufficient to satisfy the dietary needs of individuals, free from adverse substances, and acceptable within a given culture"¹². For this reason, "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"¹³. Adequacy of food thus relates to the appropriateness of food according to three main elements. From the point of view of dietary needs, these consists in a "mix of nutrients"¹⁴ that a person necessitates during his or her growth, in order to fully and appropriately develop his or her mental and physical capacity, also taking into account gender and occupation¹⁵. On the other hand, adequacy also implies safety and cultural factors, in the sense that food should also be health and culturally acceptable¹⁶. However, while the importance of healthy, not contaminated or damaged food is generally understood, the relevance of cultural acceptability may be underestimated. Actually, in many cases, food is more than the main mean of subsistence; it can also be one of the element for identity's construction, especially for indigenous people.

However, food has to be *adequate* not only from a qualitative but also from a quantitative point of view. Therefore, *adequacy* is complemented by *accessibility* and *availability*, also defined by GC No. 12. *Accessibility* refers both to *economic accessibility* and *physical accessibility*. The former means that adequate food has to be accessible for a person or for a household in such a way that having it does not deprive him or it of other primary needs. In particular, economic accessibility refers to "any acquisition pattern or entitlement through which people procure their food"¹⁷. In a sense then, people need to have economic resources which are sufficient to feed themselves but without this precluding their enjoyment of other basic rights. This last point is fundamental due to the indivisibility¹⁸ of human rights and to the fact that, as previously seen, the Right to Food is considered as part of a broader right to an adequate standard of living.

¹¹ General Comment No. 12 of the CESCR, above no 7, par. 6.

¹² *Ivi*, par. 8.

¹³ *Ivi*, par. 6.

¹⁴ *Ivi*, par. 9.

¹⁵ *Ibidem*.

¹⁶ *Ivi*, paragraphs 10 and 11.

¹⁷ *Ivi*, par. 13.

¹⁸ The principle of *indivisibility* of human rights is established, *inter alia*, by the UN Human Rights Office of the High Commissioner's webpage: "All human rights are indivisible, whether they are civil and political rights, such as the right to life, equality before the law and freedom of expression; economic, social and cultural rights, such as the rights to work, social security and education, or collective rights, such as the rights to development and self-determination, are indivisible, interrelated and interdependent. The improvement of one right facilitates advancement of the others. Likewise, the deprivation of one right adversely affects the others".

The latter instead, means that also people with physical disadvantages or vulnerabilities must have access to adequate food. Physical accessibility indeed, goes beyond the resources' aspect. It indicates that also people who cannot make use of economic resources to have access to food must be guaranteed with the right to have such access. In this regard then, it is important that state- and non-state-actors pay particular attention to the needs of exposed groups¹⁹.

On the other hand, *availability* refers “to the possibilities either for feeding oneself directly from productive land or other natural resources, or for well-functioning distribution, processing and market systems that can move food from the site of production to where it is needed in accordance with demand”²⁰. As it can be seen, this last aspect of the Right to Food refers to cases in which the problem is not the lack of adequate food, but the exclusion of part of the population from the opportunity of taking advantage of it. Therefore, *availability* is particularly relevant: today many of the problems related to the enjoyment of the RtF are treated as consequences of mismanagement of resources instead of scarcity of them.

Finally, both *accessibility* and *availability* must be ensured for the present as well as for the future generations, as the idea of sustainability conveys²¹.

Conversely, as far as the *fundamental right to be free from hunger* is concerned, in GC No. 12 this is referred to as the right to have “access to the minimum essential food which is sufficient, nutritionally adequate and safe, to ensure their freedom from hunger”²².

Later on, the first UN Special Rapporteur on the Right to Food Mr Jean Ziegler gave another important definition of the RtF in his annual report of February 2001. He defined the RtF as “the right to have regular, permanent and free access, either directly or by means of financial purchases, to quantitatively and qualitatively adequate and sufficient food corresponding to the cultural traditions of the people to which the consumer belongs, and which ensures a physical and mental, individual and collective, fulfilling and dignified life free of fear”²³. Even though in other terms, such definition recalls the three pillars indicated in GC No. 12, but it adds the important element of *dignified life*.

I.1.2 Other International Law Instruments

The UDHR and the ICESCR are not the only international law instruments dealing with the Right to Food. On the contrary, there are many others among which the Convention on the Elimination of All Forms of

¹⁹ General Comment No.12 of the CESCR, above no 7, par. 13.

²⁰ *Ivi*, par. 12.

²¹ *Ivi*, par. 7.

²² *Ivi*, par. 14.

²³ Report by the UN Special Rapporteur on the Right to Food submitted in accordance with Commission on Human Rights resolution 2000/10 of the UN Commission On Human Rights, of 7 February 2001, Doc. U.N. E/CN.4/2001/53, p. 2. [Hereinafter UN Special Rapporteur Report of February 2001].

Discrimination against Women (hereinafter CEDAW) and the Convention on the Rights of the Child (hereinafter CRC).

The United Nations General Assembly adopted the CEDAW in 1979. In art. 12(2), it acknowledges the States' duty to guarantee women "adequate nutrition during pregnancy and lactation"²⁴, while in art. 14 it contains provisions for granting rural women the access to resources²⁵.

Ten years later, the UN General Assembly adopted the CRC, which is even more explicit. The Convention indeed dedicates articles 24(2)(c) and 27 to the RtF. The former refers to the Right to Food in the broader context of health care, affirming that States have the obligation "to combat disease and malnutrition"²⁶ and to provide "adequate nutrition foods and clean drinking-water"²⁷. This is again considered as being part of the right of every child to an adequate standard of living, recognized in art. 27(1)²⁸. In this respect, paragraph three of this article calls upon States to provide the necessary assistance and support programmes to families or other figures responsible for the child's enjoyment of such right. Particular attention should be posed to "nutrition, clothing and housing"²⁹.

Subsequently, the inter-relation between the two categories has been reiterated by the UN Special Rapporteur Mr Asbjørn Eide in his Updated study on the Right to Food. In that occasion, he explained how future mothers who are undernourished might give life to children who are also underfed and this has a negative effect on the full physical and mental development of the child. Consequently, the enforcement of the Right to Food in relation to women has not only an end to itself but it is also the primary step to avoid the perpetuation of such a vicious cycle³⁰.

I.2 Duty-bearers and Right-holders: some legislation for real justiciability

Defining the Right to Food and its main elements however, did not appear sufficient for its full realization. In his 2002 annual report, Mr Jean Ziegler in quality of Special Rapporteur stated that an essential ingredient for achieving the Right to Food is justiciability. Recognizing the right as justiciable means that individuals or

²⁴ Convention on the Elimination of All Forms of Discrimination Against Women of the UN General Assembly of 18 December 1979, United Nations, Treaty Series, Vol. 1249, p. 13, art. 12, par. 2. It was adopted and opened for signature, ratification and accession by General Assembly resolution 34/180 of 18 December 1979. It entered into force on September 3, 1981, in accordance with article 27(1). [Hereinafter CEDAW of the UN General Assembly].

²⁵ *Ivi*, art. 14.

²⁶ Convention on the Rights of the Child of the UN General Assembly of 20 November 1989, United Nations, Treaty Series, Vol. 1577, p. 3, art. 24, par. 2, letter c). It was adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989. It entered into force on September 2, 1990, in accordance with article 49. [Hereinafter CRC of the UN General Assembly].

²⁷ *Ibidem*.

²⁸ *Ivi*, art. 27, par. 1: "States Parties recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development".

²⁹ *Ivi*, art. 27, par. 3.

³⁰ Updated study on the Right to Food submitted by Mr Asbjørn Eide, UN Sub-Commission on Prevention of Discrimination and Protection against minorities, of 28 June 1999, Doc. U.N. E/CN.4/Sub.2/1999/12, paragraphs 23 and 24. [Hereinafter Updated study by Mr Asbjørn Eide].

groups of individuals, who are victims of violations of their RtF, can hold States accountable for this and seek remedies. In other words, it means that a case can be brought before a court³¹.

In order for justiciability to be properly fulfilled then, it is fundamental to first define who the right-holders and duty-bearers are.

Human Rights treaties consider as duty-bearers the State parties to the treaty, since by ratifying it, they have expressed their consent and they have subscribed to the resulting legal obligations. On the other hand, right-holders are identified with the individuals, either alone or in groups and communities³².

Once defined the two categories, for the RtF to be truly enforceable in the Courts, the second step is the definition and identification of the States' obligations and the recourse mechanisms available to people.

I.2.1 Duty-bearers: states' general legal obligations

As duty-bearers, States are under two main categories of international legal obligations: general and specific legal obligations. General legal obligations are listed in the key international law source concerning the Right to Food, specifically the ICESCR. Moreover, they are better specified in General Comment No. 3 on the Nature of State Parties' Obligations to the ICESCR (hereinafter GC No. 3)³³. GC No. 12 on the other hand, defines specific obligations. Both are further reiterated in Mr Jean's Ziegler's 2002 report.

As far as international general legal obligations are concerned, art. 2(1) of the ICESCR asserts that the first duty governments have to comply with is the duty to "take steps"³⁴. This implies that States have to undertake some measures directed at the attainment of the ESCR and in this specific case, of the Right to Food.

However, the nature of such activities is better clarified by GC No. 3 which explains that it is up to the Governments to decide which steps are the most appropriate ones also taking into account each one's specific situation. In the case in which it is not so evident, States should not only communicate which measures they have decided to undertake, but also why they consider them as the most appropriate ones³⁵. In general, such steps include legislative as well as other "administrative, financial, educational and social measures"³⁶. Their

³¹ Report by the Special Rapporteur on the Right to Food submitted in accordance with Commission Human Rights resolution 2001/25 of the UN Commission of Human Rights, of 10 January 2002, Doc. U.N. E/CN.4/2002/58, par. 29. [Hereinafter UN Special Rapporteur Report of January 2002].

³² FAO, *A Primer to the Right to Adequate Food. Lesson: Rights and Obligations. Learner Notes*, Rome, 2007, pages 3 and followings. Available online.

³³ General Comment No.3: The Nature of States Parties' Obligations (Art. 2, Para.1, of the Covenant) of the UN Committee on Economic, Social and Cultural Rights of 14 December 1990, contained in Document E/1991/23. [Hereinafter General Comment No.3 of the CESCR].

³⁴ ICESCR of the UN General Assembly, above no 4, art. 2, par. 1.

³⁵ General Comment No.3 of the CESCR, above no 33, par. 4.

³⁶ *Ivi*, par. 7.

adoption and implementation have to be finalized at the progressive achievement of the complete implementation of the rights the ICESCR contemplates³⁷.

The notion of *progressive realization* can be considered from two different perspectives. On the one hand, it recognizes that the fulfilment of the Right to Food as well as of other ESCR is inevitably conditioned by the economic capacity of the government in question; in such sense, the ICESCR endorse some degree of flexibility. However, this does not count as a possibility for States to underestimate the legal obligation(s) they have as parties to the Covenant: anyway, they have the obligation “to move as expeditiously and effectively as possible towards the goal”³⁸. In addition, States parties to the Covenant do not have to retrocede in their level of assurance of a certain right, in this case the Right to Food, for instance by revoking a legislative measure or financial act they have already undertaken for promoting the realization of such right. Indeed, “retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources”³⁹.

The notion of *maximum of its available resources* is embraced by art. 2(1) of the ICESCR too and it is crucial to clearly define what it stands for. A consideration for resources available to the governments, again demonstrates the drafters’ admission that the full realization of Economic, Social and Cultural Rights and thus of the Right to Food, is subjected to economic capacity and there are some steps that require more funds than others do. However, beyond indicating such concession to States, the expression also implies that governments have to use properly all the economic means at their disposal in order to meet their obligations. Moreover, where national resources are not enough, the government shall turn to the international community and seek cooperation and assistance, which can be economic or even technical⁴⁰. In the case that resource constraints prevent a State from meeting its obligations, the State itself is obliged to give proof of the fact that it has done everything in his possibilities to allocate and employ the available resources in such a way to guarantee at least the minimum obligations pending on it⁴¹. In addition, it has to demonstrate that it has looked for sustenance and help from the international community but without any result⁴².

³⁷ ICESCR of the UN General Assembly, above no 4, art. 2, par. 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 recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures”.

³⁸ General Comment No.3 of the CESCR, above no 33, par. 9.

³⁹ *Ibidem*.

⁴⁰ ICESCR of the UN General Assembly, above no 4, art. 2, par. 1.

⁴¹ General Comment No.12 of the CESCR, above no 7, par. 17.

⁴² *Ibidem*.

The *minimum core obligation* means that States have primarily “to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon”⁴³ them and thus of the Right to Food too. When a State fails to do so, then a violation of the Covenant occurs⁴⁴.

The second general obligation pending on states and affirmed in art. 2(2) of the ICESCR is the obligation not to discriminate, on any base⁴⁵. In general, discrimination refers to the practice of not guaranteeing to people the same rights or the same level of enjoyment of such rights because of some factors such as sex, religion, political affiliation or gender. This general obligation has been intended as implying the duty, for governments, to review the existing legislation and to adopt new legislative measures so to fight against discriminatory practices. In addition, governments are required to adopt specific legislative measures for the promotion of an equal enjoyment of rights⁴⁶. Such a duty differentiates itself from the duty *to take steps* because it is an immediate one, in the sense that its realization is not subject to the available resources conditions⁴⁷. Therefore, any negligence and infraction of it amounts to “a violation of the Covenant”⁴⁸.

I.2.2 Duty-bearers: states’ specific legal obligations

Going into detail, General Comment No.12 delineates three specific obligations of States with respect to the Right to Food: *to respect*, *to protect*, and *to fulfil*. The first two refers to obligations that emerge in the case people already enjoy access to adequate food. On the contrary, for the obligation to fulfil this is not the case.

The obligation *to respect*, as indicated by Mr Jean Ziegler too, is a negative obligation, in the sense that it does not require an active intervention of the State⁴⁹. On the contrary, it simply demands States to refrain from taking any action that may represent an obstacle for people’s access to food or to the means for producing or procuring it⁵⁰. An example of such measure may be the forced displacement of people from the lands. Clearly, such obligation does not require a certain amount of resources in order to be accomplished; hence, it is considered as an immediate obligation, which is not subject to the clause of progressive realization⁵¹.

On the contrary, the obligation *to protect* is a positive obligation. Saying that governments have to protect the Right to Food means that they should prohibit a violation of it by third-party actors (normally private actors, both individuals and enterprises)⁵². A case in point may be an enterprise’s monopoly on some basic foods and

⁴³ General Comment No.3 of the CESCR, above no 33, par. 10.

⁴⁴ General Comment No.12 of the CESCR, above no 7, par. 17.

⁴⁵ ICESCR of the UN General Assembly, above no 4, art.2, par. 2.

⁴⁶ C. GOLAY, *The Right to Food and Access to Justice: Examples at the national, regional and international level*, in FAO, *Right to Food Studies*, 2009, p. 15. Available online.

⁴⁷ UN Special Rapporteur Report of January 2002, above no 31, par. 41.

⁴⁸ General Comment No.12 of the CESCR, above no 7, par. 18.

⁴⁹ UN Special Rapporteur Report of January 2002, above no 31, par. 44.

⁵⁰ General Comment No. 12 of the CESCR, above no 7, par. 15.

⁵¹ UN Special Rapporteur Report of January 2002, above no 31, par. 45.

⁵² General Comment No. 12 of the CESCR, above no 7, par. 15.

the consequent prices' raise, which could prevent some groups of people from having access to them. In this case, the State should function as an intermediary between the third actor and the victims of the monopoly and pose some regulations and limits to the former's activities and discretion.

Finally, the obligation *to fulfil* is contemplated by GC No.12 as including the obligation *to facilitate* and *to provide*. *To facilitate* relates to the government's duty to undertake actions to render "people's access to and utilization of resources and means to ensure their livelihood, including food security, easier"⁵³. However, when these people are not capable of satisfying their nutritional requirements autonomously, then the State has to go further and it has *to provide* that right directly. This holds only if the people in question lack capability due to some externalities on which they have no power of control; this is why GC No. 12 includes also "victims of natural or other disasters"⁵⁴.

Defined as such, obligations are conceived purely as internal obligations that governments have *vis-à-vis* people inside their territory. Actually, they also have an international dimension so that States have to respect, to protect and to fulfil the Right to Food of people outside their territory too. Of course, if we consider this extra-territorial aspect the three obligations assume a similar but not equal meaning. A state will thus have not to negatively interfere with the access to food of individuals or groups in other countries. Secondly, it will have to provide assistance, always according to their resources, to those states that are not capable of ensuring and protecting the RtF in their own territory in an autonomous way. Finally, a government will have to facilitate and to provide access to adequate food to people in other countries, when again the foreign government itself is not capable to do so autonomously. A state can comply with all these international obligations alone or through the action of intergovernmental organizations which it is a party to⁵⁵.

I.2.3 Right-holders: international recourse mechanisms

Once having defined States' obligations, right-holders on the other hand need to be provided with some recourse mechanisms to which they can resort to in case of suffering a violation of their Right to Food. This is functional to guarantee that victims receive "adequate reparation, which may take the form of restitution, compensation, satisfaction or guarantees of non-repetition"⁵⁶.

In fact, individuals or groups of individuals can first resort to national mechanisms especially in those cases in which the State, a part from being member of the ICESCR, adopts a monist-approach in respect of international law. Monist systems indeed, are those in which international law is automatically considered part of domestic law and can be directly invoked before domestic courts. The contrary occurs in dualistic legal

⁵³ *Ibidem*.

⁵⁴ *Ibidem*.

⁵⁵ *Ivi*, par. 36.

⁵⁶ *Ivi*, par. 32.

systems, where there is the need for a specific legislation to be adopted at the domestic level in order to render the international treaty applicable⁵⁷.

However, for the purpose of this thesis, only international mechanisms will be treated. Following the distinction proposed by Christophe Golay, there exists two primary international legal remedies to claim violations of the Right to Food: individuals or groups can bring complaints to the special bodies instituted by the treaties dealing with such right, while states can bring cases before the International Court of Justice (hereinafter ICJ)⁵⁸.

The possibility for States to resort to the ICJ comes from art. 38 of the Court's Statute. The article includes international treaties among the sources of international law that the Court is called to apply when solving disputes. Consequently, governments can claim reparation from other governments who have violated the RtF by referring to the treaties that protect such right⁵⁹.

As far as the first possibility is concerned we should recall, among others, the most important treaties in protecting the Right to Food. The ICESCR as well as the CEDAW and the CRC have their respective International Complaint mechanisms. These are taken care of by the Committee on ESCR, the Committee on the Elimination of Discrimination Against Women and the Committee on the Rights of the Child respectively. These independent bodies of experts are normally responsible for the examination of States' reports on the degree of implementation of the rights protected by the Covenant in question. However, at different points in time in history, they have also been enabled to receive communications or complaints by individuals or groups of individuals whose rights had been violated, when national remedies had been exhausted. This is possible through apposite Optional Protocols adopted by the states parties to the three different Conventions.

In this domain, it is worthy to make some considerations on the CESCR's faculty. Differently from the International Covenant on Civil and Political Rights (hereinafter ICCPR)⁶⁰, the ICESCR has not been complemented with an Optional Protocol from the beginning. For long time, this meant that despite the UDHR⁶¹, and later the UNHR Office⁶², had declared the equality and interdependence of all human rights, civil and political ones were actually guaranteed with a higher level of protection.

⁵⁷ FAO, *The Right to Food Guidelines, Information Papers and Case Studies*, Rome, 2006, pages 116 and 117. Available online.

⁵⁸ C. GOLAY, *op. cit.*, p. 32.

⁵⁹ Statute of the International Court of Justice of the United Nations of 18 April 1946, art. 38, par. 1, letter c).

⁶⁰ International Covenant on Civil and Political Rights of the UN General Assembly of 16 December 1966, United Nations, Treaty Series, Vol. 999, p. 171. It was adopted by the UN General Assembly resolution 2200A (XXI) of 16 December 1966. It entered into force on March 23, 1976. [Hereinafter ICCPR of the UN General Assembly]. The Optional Protocol to the present Covenant was adopted and opened for signature and it entered into force on the same days of the ICCPR itself.

⁶¹ UDHR of the UN General Assembly, above no 3, preamble: "Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world".

⁶² See no 18.

Indeed, the adoption of the Optional Protocol to the International Covenant on Economic, Civil and Cultural Rights (hereinafter OP-ICESCR) came about only in December 2008⁶³, prompt especially by the 2008 Food Crisis' consequences, to which the following paragraph will be dedicated.

In the Preamble, States clearly declare their awareness of the importance of giving to the CESCR the competence of receiving and considering claims, in order to reach the ICESCR's objectives. Therefore, the Committee is called upon to examine the communications brought to it and eventually to take an active role in the case. Indeed, the OP-ICESCR invites the Committee to consider all the available and relevant information⁶⁴ on the notice submitted to it and then to present its appropriate considerations and recommendations to the parties concerned⁶⁵. Importantly, the objective of the Committee's empowerment is to arrive at a friendly settlement of the communication: for this reason, the Committee should provide its good offices to the parties⁶⁶. However, when it considers the situation particularly serious and urgent, the Protocol also enables the Committee both to indicate some interim measures⁶⁷ and to start an inquiry⁶⁸.

It is consequently evident that the OP represents a milestone in the recognition of the Right to Food as an enforceable right.

I.2.4 FAO Voluntary Guidelines

As mentioned in the previous paragraph, States are strongly invited to recognize the Right to Food in their internal legislations, by either incorporating international instruments or recognizing their applicability. This would guarantee higher safeguard to the RtF and would facilitate its realization at the domestic level.

However, implementation of legislative measures or programs at the national level may require some kind of assistance. To this end, through negotiation within the Committee on World Food Security⁶⁹, the FAO Council adopted the Voluntary Guidelines to support the progressive realization of the right to adequate food in the context of the national food security (hereinafter Right to Food Guidelines or VG)⁷⁰. The adoption came about on 23th November 2004 after two years of work and was the result of the 2002 World Food Summit's invitation⁷¹.

⁶³ Optional Protocol to the International Covenant on Economic, Social and Cultural Rights of the UN General Assembly of 5 March 2009, A/RES/63/117. [Hereinafter OP-ICESCR of the UN General Assembly].

⁶⁴ *Ivi*, art. 8, par. 1.

⁶⁵ *Ivi*, art. 9, par. 1.

⁶⁶ *Ivi*, art. 7, par. 1.

⁶⁷ *Ivi*, art. 5, par. 1.

⁶⁸ *Ivi*, art. 11, par. 3.

⁶⁹ The Committee on World Food Security is an intergovernmental FAO Committee established in 1974. Its role consists in developing policy recommendations and guidance in the area of nutrition and food security. Therefore, it provides a platform for discussion and it coordinates national, regional and international efforts for strengthening food security.

⁷⁰ Voluntary Guidelines to support the progressive realization of the right to adequate food in the context of national food security of the FAO General Council of 2004. [Hereinafter Right to Food Voluntary Guidelines].

⁷¹ *Ivi*, p.iii: "The declaration of the World Food Summit: five years later, in June 2002, reaffirmed the importance of strengthening the respect of all human rights and fundamental freedoms and invited 'the FAO Council to establish an Intergovernmental Working Group to develop 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'".

The Right to Food Voluntary Guidelines' purpose is to furnish national governments an instrument that can help them in "their implementation of the progressive realization of the right to adequate food in the context of national food security"⁷². In other words, VG were elaborated to fill the gap created by the need for clarification regarding some practical and policy aspects of the realization of this right.

VG are addressed to all states either they are parties or not to the ICESCR, but being *voluntary* they are just recommendations. Indeed, from a legal point of view they do not create legally binding obligations on States, which therefore are not obliged to comply with them⁷³.

Nevertheless, the Right to Food Voluntary Guidelines indicate as their back instruments fundamental international instruments among which art. 25(1) of the UDHR, articles 2 and 11 of the ICESCR and articles 55 and 56 of the UN Charter. The CRC, the CEDAW and the four Geneva Conventions of 1949 with their Additional Protocols have been taken into account too in drafting such recommendations⁷⁴. For this reason, despite being purely recommendatory instruments and thus soft law instruments, the Right to Food Guidelines are useful for helping countries in their application of legally binding international law instruments.

The States parties to the ICESCR indeed, had agreed that the adoption of recommendations is one of the methods to be used for achieving the rights recognized by the Covenant itself⁷⁵.

The 19 VG are far-reaching because they cover various policy areas that range from economic development, market systems, agriculture and nutrition, to social policy, education and emergency measures in food crises. In this sense, they engage themselves in a variety of fields that have to be considered for the realization and implementation of the Right to Food at the national level.

Furthermore, they call attention for the process of monitoring and evaluation, especially in Guideline 17, where it is also reiterated the importance of monitoring "the situation of vulnerable groups"⁷⁶. These elements help in following a right-based approach.

Finally, what has to be especially highlighted is that the VG want to serve as a tool for creating an adequate environment "in which individuals can feed themselves and their families in freedom and dignity"⁷⁷. This means that the aim is first of all to empower people to reach a condition in which they can autonomously provide for their adequate food, instead of their right be dependent on external actors, in this case governments, to be fulfilled.

⁷² *Ivi*, par. 6.

⁷³ *Ivi*, par. 9.

⁷⁴ *Ivi*, paragraphs 10, 11 and 12.

⁷⁵ ICESCR of the UN General Assembly, above no 4, art. 23.

⁷⁶ Right to Food Voluntary Guidelines, above no 70, Voluntary Guideline No. 17.5.

⁷⁷ *Ivi*, Voluntary Guideline No. 1.1.

I.3 From 2008 on: guarantying the Right to Food after the crisis

International instruments that help governments in their implementation of the Right to Food are surely extremely useful. However, in many cases governments' incapacity to *take steps* may be due to some external circumstances, more than or in addition to their lack of economic, technical or other resources and skills. Inefficient systems of distribution or poor policy measures are indeed among the most common causes for violations of the Right to Food. However, external dynamics might render the *progressive realization* even more difficult to be reached.

This has been the case for the 2008 economic and financial crisis, which affected the food market in a consistent manner and led to a veritable food crisis. Indeed, the events clearly put under pressure the governments' efforts and capability to guarantee *adequacy*, *accessibility* and *availability* with respect to the Right to Food. Given the global impact and the repercussions, from the international point of view the community reacted in order to enhance even more the focus on the Right to Food, whose violations were the order of the day.

I.3.1 Some brief remarks on the 2008 food crisis

The 2008 food crisis was essentially a price crisis. As reported by Golay, FAO and World Bank's studies, figures on price increases show that "the price of food commodities increased by 40% between March 2007 and March 2008, by 56% between January 2007 and June 2008, by 83% between February 2005 and February 2008 and by 130% between January 2002 and June 2008"⁷⁸.

Various causes have been identified for such a quick and steep increase. Among the most relevant ones, Golay indicates the increase in production of agro fuels, the increase in demand for milk and meat especially in developing countries such as China and India, and the climate change. The interrelation among these causes led at the same time to an increase in demand and a decrease in supply of cereals and other food crops. The former was due to the necessity coming from meat and milk production, while the supply's contraction emerged from the substitution of these with crops for the production of agro fuels or from the damage caused to agricultural land by flooding or drought.

Then, the increase in food prices was further accentuated by both the rise in petrol's prices and the speculative market processes with regard to cereal prices⁷⁹.

Undoubtedly, higher prices caused higher obstacles in acceding to adequate food, especially for the poorest populations and the countries that were highly dependent on food imports. Indeed, 2008 figures reported by the Director-General of the FAO during the World Food day showed that 923 million of people were suffering

⁷⁸ C. GOLAY, *The global food crisis and the Right to Food*, CETIM, Critical Report n° 3 Issue: Right to Food, Part of a series of the Human Rights Programme, Europe – Third World Centre, December 2008, pages 2 and 3. Available online.

⁷⁹ *Ivi*, p. 4.

malnourishment in the world⁸⁰. This was in sharp contrast with the 1996 World Food Summit's commitment to reduce the number of malnourished people, amounting at 816 million at that time, to 408 million by 2015⁸¹. Such dramatic situation clearly demonstrated that the Right to Food was passing through a critical moment. Concerns raised, both at the national and international level, also due to a climate of discontent and revolt in many countries.

Among the most relevant responses at the international level, there are The World Food Crisis Statement (May 20, 2008, CESCR), the HR Council Resolution (May 22, 2008) and the UN Special Rapporteur's Background Note (May 2, 2008, Mr Olivier De Schutter). These will be analysed in the following paragraph.

I.3.2 The Right to Food is under threat: CESCR, HR Council and Special Rapporteur's notices

The quick increase in energy and food prices and the following global food crisis particularly worried the Committee on Economic, Social and Cultural Rights. The Committee indeed, declared that the crisis represented "a failure to meet the obligations to ensure an equitable distribution of world food supplies in relation to need"⁸² and "a failure of national and international policies to ensure physical and economic access to food for all"⁸³. As a result, when governments fail to respect their obligations, the Right to Food is threatened or violated. But the Committee's statement goes further: it also declares that the Right to Adequate Food and the right to be free from hunger's violation was not only a problem *per se*, but more importantly it was also a menace for the enjoyment of other human rights, such as the right to life⁸⁴. For this reason, the Committee restated and renewed the obligations pending on governments affirmed in the UDHR and the ICESCR as well as in GC No. 12⁸⁵ and required States to observe them. It also called upon them to identify and work on both the immediate⁸⁶ and long-term structural causes⁸⁷ of the food crisis.

What it is important to underline is that both the CESCR's statement and the HR's Council Resolution, pay attention to countries' realization of the Right to Food not only at the internal but at the international level too. Indeed, they affirm that governments should provide humanitarian aid to populations who are in need the most, and always without discrimination. However, when providing food aid, States should "ensure that food is purchased locally wherever possible and that it does not become a disincentive for local production"⁸⁸.

The HR Council too, in its resolution S-7/1 recognized that the global food crisis undermined the Right to Food for all. It specifically declared that the right was "threatened to be violated on a massive scale, as a

⁸⁰ *Ivi*, p. 3.

⁸¹ *Ibidem*.

⁸² Statement of the UN Committee on Economic, Social and Cultural Rights (CESCR) of 20 May 2008 on The world food crisis, UN Doc E/C.12/2008/1, par. 9.

⁸³ *Ibidem*.

⁸⁴ *Ivi*, par. 4.

⁸⁵ *Ivi*, paragraphs 5 and 8.

⁸⁶ *Ivi*, par. 10.

⁸⁷ *Ivi*, paragraphs 12 and 13.

⁸⁸ *Ivi*, par. 11.

combination of several major factors, including macroeconomic factors⁸⁹ and it expressed strong preoccupation. As well as the CESCR, the HR Council too referred to the interrelatedness of human rights, stating that the realization of the Right to Food is an “essential human rights objective”⁹⁰.

Therefore, the Resolution presented itself as a further call upon States, but also institutions and other stakeholders, for their observance of the Right to Food. The Resolution posed particular attention to developing and least developed countries as well as to net food importing countries and to vulnerable groups⁹¹.

This last point had been strongly affirmed by the UN Special Rapporteur on the Right to Food Mr Olivier De Schutter too, in his Background Note⁹². De Schutter stressed how the food crisis showed the urgency of undertaking actions that would have better protected the vulnerable parts of the population at the national level⁹³. According to him too, the crisis was determining a violation and a threat of the Right to Food but his analysis was even stronger. Indeed, he clearly attributed such violation to the actions of a group of stakeholders, each with his own impact: the violation was defined as a “man-made disaster”⁹⁴. Consequently, the Special Rapporteur called upon States to refrain from any actions that could have had a negative impact on the enjoyment of the Right to Adequate Food and to be free from hunger and malnutrition. Moreover, he clearly stated that the crisis illustrated the need for a stronger focus on the domestic implementation of the Right to Food: such an implementation, he specified, did not require any peculiar or already-defined policy. On the contrary, the terms of domestic regulation could and should have been decided on a case-by-case basis, considering the exigencies and the particular situation of each country. What was fundamental, was that the international community reacted to the crisis and did so by firstly fulfilling its obligations under international law, and secondly coordinating its efforts⁹⁵.

I.3.3 HLTF AND (U)CFA: where is the third track?

A part from triggering notices from high bodies and personalities, the global food crisis that deeply shook the world also led to some concrete actions and initiatives from the international community.

The most important one has been, without doubts, the adoption of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights on December 10, 2008: as explained before, it enabled the CESCR to examine individual or groups’ complaints for the Covenant’s violation.

⁸⁹ Resolution S-7/1 of the UN Human Rights Council of 7th Special Session of 22 May 2008 on The negative impact of the worsening of the world food crisis on the realization of the right to food for all, p. 2.

⁹⁰ *Ivi*, p. 3.

⁹¹ *Ivi*, p. 2.

⁹² Background note: analysis of the world food crisis by the UN Special Rapporteur on the right to food Olivier De Schutter of 2 May 2008.

⁹³ *Ivi*, par 1.2.

⁹⁴ *Ivi*, p. 1.

⁹⁵ *Ivi*, par 1.1.

However, other mechanisms were developed for reforming the system of governance with respect to hunger and malnutrition. Amongst them, one of the most promising was the result of a United Nation's initiative. In April 2008, the High Level Task Force on Global Food and Nutrition Security (hereinafter HLTF) was established under the leadership of the Secretary-General to the UN Ban Ki-Moon. The HLTF was founded with the aim of creating a mechanism that could coordinate the work of multiple stakeholders and thus formulate and implement an elaborated and effective response to the crisis and to its relative concerns. With this in mind, the HLTF unites the Heads of the UN specialized agencies, funds and programmes, as well as relevant parts of the UN Secretariat, the World Bank, the International Monetary Fund, the Organization for Economic Cooperation and Development and the World Trade Organization⁹⁶.

After three months from its institution, the HLTF issued a Comprehensive Framework for Action (hereinafter CFA) which would have served as a groundwork for civil society, regional and international organizations, governments and other relevant stakeholders to undertake measures for facing the crisis. The HLTF wanted "to provide leadership and coordination in this respect, to help National Governments and affected communities address what constitutes a global challenge"⁹⁷. However, the CFA seemed to completely, or almost completely, disregard what should have been the third track to fight hunger and malnutrition: a part from some references to it, the Right to Food was not really taken into consideration as a third strategy to combat the crisis.

On the contrary, the CFA based itself and its strategy on a two tracks approach: the first objective was to provide instruments that could work on the short term so to address immediately the urgent needs of the crisis' victims. Secondly, the CFA wanted to work on the long-term measures to be developed and adopted for malnutrition and hunger to be fought in the long run.

To meet the "immediate needs of vulnerable populations"⁹⁸ the CFA envisaged actions to be taken with regard to four objectives in particular: "1) emergency food assistance, nutrition interventions and safety nets to be enhanced and made more accessible; 2) smallholder farmer food production to be boosted; 3) trade and tax policies to be adjusted; and 4) macroeconomic implications to be managed"⁹⁹.

On the other hand, to address long-term problems and concerns, four other key outcomes were advanced: "1) social protection systems to be expanded; 2) smallholder farmer-led food availability growth to be sustained; 3) international food markets to be improved; and 4) international biofuel consensus to be developed"¹⁰⁰.

⁹⁶ The UN Chief Executive board established the High Level Task Force on Global Food and Nutrition Security, or High Level Task Force on the Global Food Security Crisis, in April 2008.

⁹⁷ Comprehensive Framework for Action of the HLTF on the Global Food Security Crisis of July 2008, par. 16. [Hereinafter CFA of the HLTF].

⁹⁸ *Ivi*, par. 5.

⁹⁹ *Ivi*, par. 6.

¹⁰⁰ *Ivi*, par. 7.

However, at the end of 2008, the number of hungry people reached one billion¹⁰¹: the two tracks approach appeared to be unsatisfactory and ineffective for facing the global crisis. Clearly, the previous global food system had been demolished by the crisis and a new one had to be created.

Consequently, the Right to Food started to be claimed and invoked even more firmly. Ban Ki-Moon himself recognized that the time had come to “add a third track – the Right to Food – as a basis for analysis, action and accountability”¹⁰².

The Special Rapporteur too invited the international community to use a new approach in the establishment of such a new system. For him, the clear establishment of the Right to Food as an enforceable human right was the missing piece. The food crisis indeed created numerous victims and demonstrated that the “in order to effectively combat hunger and malnutrition, producing more or increasing aid will not suffice. It is equally important to ensure that those who are hungry or malnourished are identified, that they are specifically targeted by support agricultural and social schemes, and that no individual in need is left out”¹⁰³. What Olivier De Schutter underlined, is that good governance was not enough to address the crisis, and that what was needed was a clear system of right-holders’ empowerment and duty-bearers’ accountability. This right-based approach had to stand as a guiding principle for any actions taken under the two tracks approach.

The Expert Panel too continued along this path, claiming that the RtF stood as an imperative factor in designing, implementing and monitoring the response to the food crisis. Consequently, it had to be added as a complementary track to the two traditional ones¹⁰⁴.

Given these demands, the HLTF agreed to elaborate an Updated Comprehensive Framework for Action (hereinafter UCFA), which could better integrate the Right to Food in the strategy advanced to combat hunger. The document was adopted in September 2010.

With respect to the initial CFA, elements of a right-based approach are evident in different parts of the new framework. Firstly, the updated document clearly indicates the implementation of “strengthened information monitoring and accountability systems”¹⁰⁵ as an outcome to be achieved, namely outcome 3.1. These systems indeed had to guarantee the decision makers’ accountability and were considered fundamental, *inter alia*, for assessing the status of the Right to Food’s enjoyment, where this again means the status of empowerment and

¹⁰¹ BAN KI-MOON, *Remarks to High-Level meeting on Food Security for All*, 27 July 2009, Madrid. Available online.

¹⁰² *Ibidem*.

¹⁰³ Statement by Mr Olivier De Schutter Special Rapporteur on the right to food, Interactive Thematic Dialogue of the UN General Assembly on the Global Food Crisis and the Right to Food, Trusteeship Council Chamber, New York, of 6 April 2009, p. 2.

¹⁰⁴ FAO, *Expert Panel on the role of the Right to Food in addressing the global food crisis*, 16 October 2009, FAO, Austria Room, p. 1. Available online.

¹⁰⁵ Updated Comprehensive Framework for Action of the HLTF on The Global Food Security Crisis of September 2010, p. 32. [Hereinafter UCFA of the HLTF].

liability¹⁰⁶. On the contrary, the first version of the CFA did not mention this assessment as an objective of monitoring and surveillance systems¹⁰⁷.

Among the actions to be undertaken in order to reach this outcome, a major role is performed by the adoption of remedial mechanisms, including administrative and judicial ones. The UFCA indeed states that individuals, alone or in group, and especially the most vulnerable ones, must be guaranteed with the possibility to seek remedies in case their entitlements are not guaranteed to them.

In addition, the Updated Framework dedicates Topic boxes number 17 and 18 to *the progressive realization of the Right to Food* and to *the indicators to access to and utilization of food* respectively¹⁰⁸.

Such boxes represent an additional demonstration of the HLTF's intention to increase the focus on a right-based approach and to develop an instrument that could be useful to States for following this approach at the domestic level. At this proposal, Topic box number 17 for example gives national governments some suggestions on how to monitor, in an efficient and effective manner, the status of implementation of the Right to Food, offering also some practical examples coming from Tanzania, Guatemala, Kenya and India¹⁰⁹.

Despite these progresses, the UCFA neither implemented a true third-track approach. The document itself indeed, declares that it still follows the two tracks approach¹¹⁰.

I.3.4 Another attempt: mainstreaming the Right to Food in the Global Strategic Framework

While the HLTF was working on the elaboration of the Updated Comprehensive Framework for Action, another important step towards the improvement in the food system of governance was taken by the FAO. On October 17, 2009 the reform of the Committee on World Food Security (CFS) was approved¹¹¹. The aim was that of transforming the Committee into “the foremost inclusive international and intergovernmental platform for a broad range of committed stakeholders to work together in a coordinated manner and in support of country-led processes towards the elimination of hunger”¹¹². One of the instruments that the reform document of the CSF presented as an instrument to be developed for realizing the aim of coordination and guidance, was the Global Strategic Framework for Food Security and Nutrition (hereinafter GSF)¹¹³.

¹⁰⁶ *Ivi*, par. 78: “Well-functioning information, monitoring and accountability systems are important for a) revealing the current status of agriculture development, food and nutrition security and the enjoyment of the right to food”.

¹⁰⁷ CFA of the HLTF, above no 96, section 3.1, p. 33: “Stronger assessment, monitoring and surveillance systems are needed to better prepare for tomorrow’s crises and to ensure that actions taken by governments and the international community are minimizing risks and mitigating the effects of high food prices on the most vulnerable. The actions outlined in the CFA require significant financial and policy investments at all levels – actions which may reduce resources available for alternative investments. Accordingly, it is necessary to improve the knowledge of those factors, policies and trends which may impact on the level of food prices and food security and to evaluate the efficiency and effectiveness of national and global response mechanisms”. Evidently, there is no mentioning of the Right to Food.

¹⁰⁸ UCFA of the HLTF, above no 105, pages 56-59.

¹⁰⁹ *Ivi*, p. 56.

¹¹⁰ *Ivi*, p. xii: “Still based on the twin track approach, the UFCA (...)”.

¹¹¹ Reform of the Committee on World Food Security, Final version of the FAO of Thirty-fifth Session of CFS, Rome, of 14, 15 and 17 October 2009. [Hereinafter Reform of the CFS of the FAO].

¹¹² *Ivi*, par. 4.

¹¹³ Global Strategic Framework for Food Security and Nutrition. First draft of the Committee on World Food Security, Rome, of 15-20 October 2012. [Hereinafter Global Strategic Framework of the CFS, first version].

The CFS came up with the adoption of the GSF's first version during its 39th session, in October 2012. The document did not create legally binding obligations for States; it was intended as an advisory instrument that provided governments and other relevant stakeholders with recommendations and guidelines¹¹⁴. Moreover, the Framework was conceived to be opened to reviews, so to always fit circumstances¹¹⁵.

The relevance of this framework derives from the fact that it explicitly assumes a right-based approach towards the fight against hunger and malnutrition and it invites governments and other relevant stakeholders to follow the same path. Indeed, the framework gives particular importance to the Voluntary Guidelines on the Right to Food and it defines which the recommended steps for their implementation are. Among these, step three invites countries to assume a national human-rights-based approach at the internal level too, for the progressive realization of the Right to Food¹¹⁶.

However, in order to implement such a right-based approach, as early explained, it is important to identify duties and entitlements. At this proposal and following the reformed CFS' vision, the GSF gives relevance to the strengthening of accountability as a way to combat hunger and to realize the Right to Food. Indeed, the CFS had recognized among its main roles the one of promoting accountability and sharing best practices at all levels¹¹⁷ and the GSF states that accountability mechanisms are fundamental for making the Right to Food a reality, and that these mechanisms, as well as monitoring ones, should be human rights based¹¹⁸.

All these elements demonstrate how the GSF was intended to be another response to the call for the Right to Food's integration in the post-2008 scenario.

More in general, what can be concluded from the analysis of international and soft law instruments regarding the Right to Food is that throughout history there has been a progress towards the recognition of it as a fundamental human right. Consequently, steps have been undertaken in order to render it justiciable and thus enforceable into the courts.

The next step then will be the demonstration of concrete enforcement of the Right to Food at the national level.

¹¹⁴ *Ivi*, par. 8.

¹¹⁵ Reform of the CFS of the FAO, above no 111, par. 6 iii).

¹¹⁶ Global Strategic Framework of the CFS, first version, above no 113, par. 75.

¹¹⁷ Reform of the CFS of the FAO, above no 111, par. 6 ii).

¹¹⁸ Global Strategic Framework of the CFS, first version, above no 113, paragraphs 92 and 93.

II. CONCRETE ACTION: *PUCL V. UNION OF INDIA AND OTHERS*, ‘THE RIGHT TO FOOD CASE’

After having analysed the main international and soft law instruments in the first chapter, this second one will illustrate one of the most relevant cases regarding the Right to Food’s jurisprudence at the national level: *People Union for Civil Liberties v. Union of India & Others* (hereinafter PUCL or PUCL litigation). It is no coincidence that this case has been renamed *The Right to Food Case*, due to its duration but most of all to its relevance.

The chapter aims at bringing evidence of a valid national adjudication of the Right to Food and at analysing this in light of the provisions and measures previously treated. However, first it is essential to introduce briefly the country’s scenario, in which the case took place.

II.1 The Indian paradox and the case

During many decades, India has been living a paradoxical situation. On the one hand, the country is one of the fastest growing economies in the world; on the other hand, it is still inside the “serious” category in the Global Hunger Index ranking¹¹⁹.

According to data provided by the World Bank, Indian GDP has passed from 36.536 Billion in 1960 to 2.264 Trillion in 2016 (Current US\$)¹²⁰ classifying itself at the sixth position in the 2016 GDP ranking¹²¹. Further data show that 2017 represented a year of GDP growth too, especially during the last three months, when Indian economy showed an expansion of 7.2%¹²².

However, the other side of the coin does not show a so brilliant performance. The International Food policy Research Institute (hereinafter IFPRI) in its Global Hunger Index (GHI) Report 2017, places India at the third position in all Asia. India registered a GHI of 31.4% in 2017 so that its situation has been classified as a “serious” one despite the Index has notably decreased in the last twenty-five years. IFPRI has also underlined the seriousness of children’s under nutrition and stunting: more than one-fifth of Indian children under five are underweight and over a third do not reach the height suitable to their age. Stunting rate was 38.4% in 2017: still high despite having markedly lowered with respect to the 61.9% of 1992¹²³.

¹¹⁹ The Global Hunger Index (GHI) is a multidimensional measure that describes the status of hunger at the national, regional and global level. The International Food Policy Research Institute (IFPRI) calculates it every year with the objective of raising awareness and thus stimulating action for hunger reduction. The GHI is based on four different but interrelated parameters: a) Undernourished population; b) Child wasting; c) Child Stunting; d) Infant mortality rate. On the basis of these parameters, the Index ranks countries on a scale going from 0 to 100, where 0 states for no hunger while 100 is the worst score.

¹²⁰ Data are available at the World Bank’s website in the Section on India.

¹²¹ See World Development Indicators database of the World Bank of 15 December 2017. Available online.

¹²² See Trading Economics online platform, India GDP Annual Growth Rate.

¹²³ S.P. SHARMA, *India ranks 100th among 119 countries on Global Hunger Index, 2017*, 2017. Available online.

Evidently, there is a paradox: increasing aggregate wealth but persistent high level of hunger and under nutrition coexist. Even more clearly, the Right to Adequate Food as defined by GC No. 12 is not respected: not every man, woman and child is guaranteed physical and economic access to adequate food or to the means necessary to procure it¹²⁴. This is not a consequence of lack of resources, but of an inefficient system of distribution, lack of political will or corruption.

II.1.1 The case's scenario

The situation presented at the central level is reproduced at the state level too, and it offered the scenario for one of the most valuable Right to Food's adjudication, the PUCL litigation.

At the time, the State of Rajasthan, which has been one of the protagonists of the case, was suffering a serious livelihood and hunger crisis. However, as it occurs still today at the central level, the problem was more a problem of discharging responsibilities than a problem of lack of resources. A severe and extended drought had been hitting the territory for several years but the state's failure to provide the required employment and food relief was what further exacerbated the situation.

While people were starving, between 50 and 60 million tonnes of grains were laying unused in the Food Corporation of India's (FCI)¹²⁵ godowns¹²⁶; this stock was substantially over the buffer stock requirements, which were around twenty million tonnes. However, the surplus was not delivered to those in needs nor used for drought relief and hunger's alleviation. Even worst, it was left rotting.

Faced with this unacceptable situation, the Rajasthan unit of People Union for Civil Liberties¹²⁷ and Colin Gonsvales¹²⁸ of the Human Rights Law Network filed a writ petition to the Supreme Court, as a response to the government's incapability of managing the grain production surplus in such a way to combat the disastrous consequences of the long and harsh drought. Writ Petition (Civil) No. 196 (hereinafter Writ Petition) was presented to the Supreme Court of India in April 2001, claiming the recognition of the Right to Food.

¹²⁴ See no 11.

¹²⁵ The Food Corporation of India (FCI) is a corporation fully controlled and managed by the Indian government. It was created by the Food Corporation Act of 1964 with three aims in particular. First, it had to guarantee "effective price support operations for safeguarding the interests of the farmers"; secondly, it had to distribute "foodgrains through the country for public distribution system"; thirdly, it had to maintain "satisfactory level of operation and buffer stocks of food grains, to ensure National Food Security". Further information available at the FCI's official website.

¹²⁶ The term is the one used in Writ Petition (Civil) No. 196/2001 *People Union for Civil Liberties v. Union of India*.

¹²⁷ People Union for Civil Liberties (PUCL) is an organisation originally born as People Union for Civil Liberties and Democratic Rights (PUCLDR) in 1976 with the idea of making it open to all political affiliations. In 1980, it was re-christened as PUCL and it was re-created as an organisation with branches all over the country. The organisation is involved in many fields, from poverty to detention, bonded labourers or violence. It supports many movements' actions and it organises its own activities. Among these, it monthly publishes the PUCL Bulletin, an English journal. Further information available online.

¹²⁸ Colin Gonsvales is the founder of the Human Rights Law Network (HRLN), a collective of Indian Lawyers and social activists that wants to provide legal support and access to justice to all, especially to the vulnerable and disadvantaged sections of society. C. Gonsvales is also a Senior Advocate to the Supreme Court of India.

II.1.2 Writ Petition (Civil) No. 196/2001

The petitioners presented themselves as a voluntary organisation that aims at the protection of citizens' civil liberties and thus is engaged in reporting and denouncing cases of fundamental rights' violation¹²⁹. The Writ Petition's primary objective was indeed to protect the fundamental right to life guaranteed by article 21 of the Indian Constitution¹³⁰. According to the petitioners, infringement of such right was occurring because of the Right to Food's violation. Indeed, even though the Writ Petition did not contain an explicit reference to them, it is possible to look at its content from the point of view of the UDHR and the ICESCR discussed above. As in those international instruments the right to an adequate standard of living is intended to encompass different dimensions among which food, the petitioners too disregarded the concept of right to life as simply referring to animal needs. Paragraph 26 of the Writ Petition indeed states that right to live "implies the right to food, water, shelter, education, medical care and a decent environment"¹³¹. Consequently, one of the three main law questions the petitioners posed to the Supreme Court was exactly if article 21 of the Indian Constitution included the Right to Food¹³².

Referring to the violation of the RtF, the petitioners took into particular consideration the two dimensions of *accessibility* and *availability*, as illustrated by GC No. 12. The Writ Petition indeed stressed the scenario in which starvation deaths were occurring: the country was not witnessing a scarcity of food. On the contrary, warehouses were overflowing of food grains at the point that the FCI's godowns had no more storage space¹³³. However, these were either wasted or exported, instead of rendered available for the victims of hunger: buffer stocks requirements had been even overcome, but they were not actually used to safeguard the Right to Food, as their purpose mandates¹³⁴. Therefore, the real issue was the "non-availability of food"¹³⁵: people were denied of the possibility of feeding themselves due to distribution systems that did not work as they should have done. This was against government officials' statement that the drought's consequences had not been addressed with proper relief measures due to a scarcity of funds¹³⁶.

Lack of *availability* brought also to a lack of *accessibility*. Since food grains were produced but not made available, market systems brought to extremely high prices that further affected people's possibility to have economic access to the food resources¹³⁷. Furthermore, the spreading unemployment did not contribute to ameliorate the situation: in the villages, most of the people were occupied in the agricultural sector but the

¹²⁹ Writ Petition (Civil) No. 196 of 2001 (India), *People Union for Civil Liberties v. Union of India*, par. 1. [Hereinafter Writ Petition No. 196/2001].

¹³⁰ Art.21 of the Indian Constitution: "No person shall be deprived of his life or personal liberty except according to procedure established by law".

¹³¹ Writ Petition No. 196/2001, above no 129, par. 26.

¹³² *Ivi*, par. 2, question B: "Does the right to life under Article 21 of the Constitution of India includes the right to food?".

¹³³ *Ivi*, par. 45, letter d).

¹³⁴ *Ivi*, paragraphs 11 and 12.

¹³⁵ *Ivi*, par. 3.

¹³⁶ *Ivi*, par. 44.

¹³⁷ *Ivi*, par. 3.

intense and perseverant drought had strongly menaced the possibility of working on the land¹³⁸. For this reason, people were denied not only of the direct access to food grains, but also to the other means, in this case income, necessary to procure their food.

Given the denial of both *availability* of and *accessibility* to adequate food and the scenario in which this occurred, it was clear that the respondents had incurred in a violation of the Right to Food: the non-compliance with obligations clearly came from *unwillingness*, not from *inability*¹³⁹.

In the first instance, the central and the state governments failed *to protect* people's Right to Food since they had not taken any positive action preventing commercial shops' increase of the food resources' prices. Secondly, due to people's inability to have access to the nutrition resources, governments should have provided them directly with the necessary food. Indeed, victims of starvation had to be assisted due to their impossibility of controlling the external circumstances, namely the drought and the distribution system.

For these reasons, in addressing the Supreme Court, the petitioners asked clearly if the Right to Food implied "that the State has a duty to provide food especially in situations of drought, to people who are drought affected and are not in a position to purchase food"¹⁴⁰. More specifically, the Writ Petition wanted to clarify if the State's duty implied that food grains had to be moved, free of costs, from the surplus stocks to the people in need¹⁴¹. Recalling GC No. 12 this is exactly what *availability* means, namely to "move food from the site of production to where it is needed, in accordance with demand"¹⁴². The effect would have been *physical accessibility* for the most exposed to the drought's consequences. The petitioners also added that *economic accessibility* had to be restored through "open-ended employment at the legal minimum wage for all willing to avail of it in the drought affected areas"¹⁴³.

All these actions had to be necessarily undertaken for alleviating starvation and misery.

Following the analysis the petitioners made of the serious situation that was affecting the Rajasthan State, they addressed their Writ Petition to some respondents in particular. The Union of India and principally the Ministry of Food and Consumer Affairs were indicated as the first respondents, since they were the primary responsible for the allocation of food at the state level and more in general those who managed the distribution system¹⁴⁴. Secondly, the Writ Petition was addressed to the Food Corporation of India and finally to the State Governments that were those who provided for the management of public distribution system in their specific territory¹⁴⁵. Indeed, as the Writ Petition itself explains, the Central and the State governments manage jointly

¹³⁸ *Ivi*, par. 24.

¹³⁹ General Comment No.12 of the CESCR, above no 7, par. 17: "In determining which actions or omissions amount to a violation of the right to food, it is important to distinguish the inability from the unwillingness of a State party to comply".

¹⁴⁰ Writ Petition No. 196/2001, above no 129, par. 2, question C.

¹⁴¹ *Ivi*, par. 2, question A.

¹⁴² General Comment No.12 of the CESCR, above no 7, par. 12.

¹⁴³ Writ Petition No. 196/2001, above no 129, par. 19.

¹⁴⁴ *Ivi*, par. 2.

¹⁴⁵ *Ibidem*.

the public distribution system. More in particular, the first responsible of handling the food economy of the country is the Department of Food and Public Distribution¹⁴⁶.

Initially, the State governments called into questions were only six. Later, it was the Supreme Court itself to extend the claim to all the State governments.

II.1.3 What has made the case legally possible?

As seen, the Writ Petition was brought to the Court not by the affected people themselves but by a voluntary organization. Moreover, it was not addressed to individuals or privates but to the central government, to the States and to public and governmental entities. This puts into evidence how the first pillar that made the case legally possible is an important law instrument: namely, the Public Interest Litigation (hereinafter PIL).

The Indian legal system defines the PIL as “litigation for the protection of public interest”¹⁴⁷, which is brought to a court not by the victims but by the court itself or, as in this case, by any other private party. The aggrieved party does not necessarily have to be physically present in before the court. In addition, the respondents will be the state or the central government, or some entities acting on behalf of them, not a private body.

Such an instrument has been fundamental in the PUCL litigation due to the marginalisation and exclusion of the victims of hunger and starvation deaths. Indeed, the adversities and misery in which they lived constituted a strong limit for them to accede to the Court. Thus, without the possibility for a private entity such as the PUCL to bring the case on their behalf, the public injury would have not been reported and denounced and violations of the Right to Food, so of the right to life too, would have persisted. Indeed, as Jean Drèze reports in his article “Democracy and the Right to Food”, the Right to Food as well as economic insecurity, social discrimination or lack of education, are mainly due to the fact that Indian Democracy is not really a participatory democracy. At the same time, since the poorest, the less educated or the minorities are not able to participate, then public policies do not reflect their needs and wishes. This, creates a vicious circle that keeps in existence both exclusion and hardship¹⁴⁸.

However, another important factor has strongly contributed to make the case legally possible: namely, the Supreme Court’s interpretation of the Constitution both in the present case and in a precedent one.

Indian Constitution was adopted in 1949 following India’s independence from the British Empire. The text presents a clear division between Fundamental Rights (articles 12-35) and Directive Principles (articles 36-51). While Fundamental Rights are enforceable into the courts and any laws that is in violation of at least one of these rights is void¹⁴⁹, Directive Principles to State policy are defined as provisions not enforceable into the courts, even if the State shall consider them when making laws¹⁵⁰.

¹⁴⁶ *Ivi*, paragraphs 4 and 5.

¹⁴⁷ The definition of *Public Interest Litigation* is not provided by any legal act or statute but the judges have interpreted it. A definition is thus available at the Legal Service India webpage.

¹⁴⁸ J. DRÈZE, *Democracy and Right to Food*, in *Economic and Political Weekly*, April 2004, p. 1725. Available online.

¹⁴⁹ Art. 13, par. 2 of the Indian Constitution.

¹⁵⁰ Art. 37 of the Indian Constitution.

Due to this distinction, the petitioners could have found themselves into a stalemate. First, the right to life as articulated in the Constitution does not expressly refer to the Right to Food: the wording indeed seems to refer exclusively to Civil and Political Rights¹⁵¹. Secondly, while the right to life is protected under article 21 and thus classified as a fundamental right enforceable into the Courts, the Right to Food is not. Indeed, it is Directive Principle number 39(a) that affirms that “the State shall, in particular, direct its policy towards securing - that the citizen, men and women equally, have the right to an adequate means of livelihood”¹⁵². In addition, Directive Principle number 47 establishes the duty of the State to raise “the level of nutrition and the standard of living and to improve public health”¹⁵³. Consequently, the petitioners had to overcome both the difficulty of condemning the violation of the fundamental right to life in the name of the violation of the Right to Food, and the one obtaining the Court’s enforcement of the latter.

However, at the time of filing, the Supreme Court had already engaged itself in a broader interpretation of article 21 of the Indian Constitution. In a previous case¹⁵⁴, the Supreme Court had interpreted the fundamental right to life as the right to live in dignity “and all that goes with it, namely, the bare necessities of life such as adequate nutrition”¹⁵⁵. On the grounds of this constitutional precedent, in the PUCL litigation the Court again reaffirmed the right to life as including the Right to Food and thus rendered the latter justiciable and enforceable.

Such a progressive interpretation has been a fundamental step in the recognition of the Right to Food’s justiciability, so that the Special Rapporteur Mr. Jean Ziegler too recognized its relevance in his 2008 Report. In that occasion, he affirmed that “India provides one of the best examples in the world in terms of the justiciability of the Right to Food. (...) As it has interpreted these provisions, the Supreme Court of India has found that the Government has a constitutional obligation to take steps to fight hunger and extreme poverty and to ensure a life with dignity for all individuals”¹⁵⁶.

Indeed, after having found an infringement of the Right to Food and the right to life, the Supreme Court based on article 32(2) of the Indian Constitution started to issue a series of interim orders¹⁵⁷. The article attributes to the Supreme Court the power “to issue directions or orders or writs, including writs in the nature of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari*, whichever may be appropriate for the enforcement of any of the rights conferred”¹⁵⁸.

¹⁵¹ Art. 21 of the Indian Constitution. See no 123.

¹⁵² Art. 39, letter a) of the Indian Constitution.

¹⁵³ Art. 47 of the Indian Constitution.

¹⁵⁴ Decision of the Supreme Court of India of 13 January 1981, *Francis Coralie Mullin v. The Administrator, Union of India*. The Case is reported in L.BIRCHFIELD, J. CORSI, *Between Starvation and Globalization: Realizing the Right to Food in India*, in *Michigan Journal of International Law*, Volume XXXI, Issue 4, 2010, p. 693. Available online.

¹⁵⁵ L.BIRCHFIELD, J. CORSI, *op. cit.*, p. 696.

¹⁵⁶ J. ZIEGLER, C. GOLAY, C. MAHON, S. WAY, *The Fight for the Right to Food: Lessons learned*, 2011, p. 265.

¹⁵⁷ An interim order is an order passed by the court when the trial is still pending. Such order is of temporary nature but the parties to which is addressed are bound to act in accordance with it until the final judgment is given.

¹⁵⁸ Art. 32, par.2 of the Indian Constitution.

Consequently, to better grasp why the Supreme Court's interim orders have represented a real turning point in the establishment of the Right to Food's as a justiciable and enforceable right, the following paragraph will treat some of them more in detail. The analysis will again be based on the international and soft law instruments illustrated in chapter one.

II.2 Supreme Court's decisions

Following the Writ Petition No. 196's filing, the case was definitely opened as a PIL case on July 23, 2001, when the Supreme Court of India issued a response. After expressly declaring the petition was not "an adversarial litigation"¹⁵⁹ between two private parties but a question that regarded the public interest, the Court straight identified the problem. In agreement with the petitioners, the first interim order affirmed that starvation deaths and hunger were not the consequence of lack of food resources, since plenty of food was available; the real matter was the scarce and non-existent "distribution of the same amongst the very poor and the destitute"¹⁶⁰, which impeded both *accessibility* and *availability*.

Thus, according to the steps necessary for rendering a right actually justiciable as illustrated in the first chapter, the Court immediately identified right-holders and duty-bearers. The most vulnerable people, namely "the aged, infirm, disabled, destitute women, destitute men who are in danger of starvation, pregnant and lactating women and destitute children"¹⁶¹ were identified as the principal right-holders: the Court gave to them the right to be provided with food especially in the case they could not have economic access to it.

On the other hand, the Union of India as well as the States and the FCI were indicated as the duty-bearers. Subsequent interim orders went more into details: at the States level, the Chief Secretaries or Administrators of the States or Union Territories were to be held responsible in case of further violations of the Right to Food or non-compliance with the Court's interim orders¹⁶². At the Central level instead, the Attorney General¹⁶³ was the government's representative¹⁶⁴.

The Central and the State governments indeed were under a double legal obligation, both at the international and at the national level. The international obligations came from the Indian accession to the ICESCR on April 10, 1979 and to the CRC on December 11, 1992, but also from the ratification of the CEDAW on July 9,

¹⁵⁹ Interim order of the Supreme Court of India of 23 July 2001, Writ Petition (Civil) No. 196/2001. [Hereinafter July 23, 2001 interim order].

¹⁶⁰ *Ibidem*.

¹⁶¹ *Ibidem*.

¹⁶² Interim order of the Supreme Court of India of 29 October 2002, Writ Petition (Civil) No. 196/2001, par. 4, letter b). [Hereinafter October 29, 2002 interim order].

¹⁶³ The Attorney General is the Indian government's chief legal advisor and he or she is the highest law officer in the country. He or she is appointed by the President and remains in office during the latter's pleasure.

¹⁶⁴ Interim Order of the Supreme Court of India of 28 November 2001, Writ Petition (Civil) No. 196/2001. [Hereinafter November 28, 2001 interim order]; the same concept is express in October 29, 2002 interim order, above no 162.

1993¹⁶⁵. At the national level instead, the obligations came from the Constitution itself, so from the supreme law of the land.

II.2.1 Duty-bearers' obligations: the first interim orders

Once established duty-bearers and right-holders, the second step identified in the previous chapter is to attribute specific obligations to the former and to provide specific mechanism for the latter. As far as specific recourse mechanisms are concerned, it is already evident that victims of Right to Food and right to life's violations, or better the PUCL acting on behalf of them, had resorted to a national mechanism. Indeed, they looked for reparation into the Indian Supreme Court¹⁶⁶ and therefore the Court itself established concrete obligations. However, in doing so, the judges adopted a different approach during the subsequent interim orders.

In the earlier ones after the case's opening, the Supreme Court indeed submitted to the Central and the State governments only general duties with the aim of letting the food to reach the hungry¹⁶⁷. The idea was to let them free of deciding how to reach this objective and to limit the Court to ensure that appropriate measures were undertaken¹⁶⁸. To this objective, in the first interim order of July 23, 2001, the only immediate step the governments were required to take was to re-open and to operationalize the Public Distribution Shops that had been closed. In addition, the judges called upon them simply to submit reply affidavits within two weeks from the order¹⁶⁹.

A month later, on August 20, 2001, another interim order reiterated the necessity of distributing the surplus of food grains' production to the victims of hunger and starvation but without indicating other specific measures to be adopted.

The Supreme Court's approach to the Case started to change from September 17, 2001 interim order: the judges did not only reinforce their orders towards the States to distribute the food grains to those in need, but called upon them also to identify those who were below the poverty line¹⁷⁰. Most importantly, they indicated a certain number of schemes to be implemented. Among these, the Mid-Day Meal Scheme (hereinafter

¹⁶⁵ Ratification is an act by which a state indicates its consent to be bound by a treaty and it is preceded by a signature. Accession instead, despite having the same legal effects of ratification, is not preceded by signature and it is an expression of consent once the treaty has already been signed and negotiated by other states.

¹⁶⁶ The resort to national mechanisms is probably also because India has acceded to the ICESCR and the CRC and it has ratified the CEDAW, but it has not ratified the respective Optional Protocols.

¹⁶⁷ Interim order of the Supreme Court of India of 20 August 2001, Writ Petition (Civil) No. 196/2001. [Hereinafter August 20, 2001 interim order]. It declares: "The prevention of the same is one of the prime responsibilities of the Government - whether Central or the State. How this is to be ensured would be a matter of policy which is best left to the Government. All that the Court has to be satisfied and which it may have to ensure is that the food grains which are overflowing in the storage receptacles, especially of FCI godowns, and which are in abundance, should not be wasted by dumping into the sea or eaten by the rats. (...). What is important is that the food must reach the hungry."

¹⁶⁸ *Ibidem*.

¹⁶⁹ July 23, 2001 interim order, above no 159.

¹⁷⁰ *Below Poverty Line* is a criterion used by the Indian government to identify who are those families or individuals most in need of assistance. The line is calculated according to different parameters and factors in the different States.

MDMS), the Integrated Child Development Scheme (ICDS), the Public Distribution Scheme for BPL (below poverty line) & APL (above poverty line) families, the National Benefit Families Scheme and the Old Age Pension scheme¹⁷¹.

It is important to underline that the Central Government itself had already provided for these schemes. However, due to the lack of adequate implementation, the Court required the Union Territories and States to apply them and to fill a Status report or a report indicating the reasons for an eventual lack of application¹⁷². Indeed, “mere schemes without any implementation are of no use”¹⁷³.

However, the real watershed interim order was issued on November 28, 2001. With this, the Supreme Court went even further, determining the details for the schemes’ implementation. The PUCL litigation thus became a landmark case not only for its role in the Right to Food’s recognition as a justiciable and enforceable right, but also for standing as an example of enforcement mechanisms’ concrete outlining.

For the purposes of this paper, two schemes in particular will be analysed, namely the MDMS and the ICDS starting from the November 28, 2001 interim order but analysing also some of the following ones. However, the aim is not to verify the validity of these programmes and their actual impact on the Indian fight against hunger but to assess the Court’s enforcement of these schemes as a response to the violation of the Right to Food and to life.

II.2.2 The Mid-Day Meal Scheme

One of the most important actions undertaken by the Court was the enforcement of the Mid-Day Meal Scheme, which traces back its origins to the pre-independence era. In 1925 the Madras Municipal Corporation under the British administration introduced the first Mid-Day Meal programme. Then, by the 1980s, the Scheme had been introduced in three states, namely Tamil Nadu, Gujarat and Kerala and in the Union Territory of Pondicherry, until expanding to twelve states by the 1990s.

However, the first central government’s initiative came only in 1995 with the launching of the National Programme of Nutritional Support to Primary Education (NP-NSPE) in August 15. The programme’s objective was to increase the enrolment, retention and attendance of school while also to ameliorate the children’s nutritional levels. It is popularly known as the Mid-Day Meal Scheme¹⁷⁴.

¹⁷¹ Interim order of the Supreme Court of India of 17 September 2001, Writ Petition (Civil) No. 196/2001. [Hereinafter September 17, 2001 interim order]. The schemes indicated by the Court are the following: “Employment Assurance Scheme which may have been replaced by a Sampurna Gramin Yojana, Mid-day Meal Scheme, Integrated Child Development Scheme, National Benefit Maternity Scheme for BPL pregnant women, National Old Age Pension Scheme for destitute persons of over 65 years, Annapurna Scheme, Antyodaya Anna Yojana, National Family Benefit Scheme and Public Distribution Scheme for BPL & APL families”.

¹⁷² *Ibidem*.

¹⁷³ August 20, 2001 interim order, above no 167.

¹⁷⁴ For these and more information on the Mid-Day Meal Scheme see the official webpage dedicated to it by the Ministry of Human Resource Development, Department of School Education & Literacy.

In 2001 then, in the context of the PUCL litigation the Supreme Court stepped in providing a clear definition and a true enforcement of the Scheme. Interim order of November 28, 2001 indeed, precisely mandated that the Mid-Day Meal had to be a freshly cooked meal provided to each child attending every Government and Government assisted Primary Schools. Furthermore, the meal had to provide the children “with a minimum content of 300 calories and 8-12 grams of protein each day of school for a minimum of 200 days”¹⁷⁵ and had to consist in “fair average quality grain”¹⁷⁶.

The fact that meals had to be prepared and not dry was an essential issue: the governments that continued to provide dry rations had to pass to cooked meals within three months in at least half of the District of the States, defined on the basis of poverty’s order. Another lap of time of three months was conceded for extending the measure to the other districts¹⁷⁷. Following this approach, a proposal for substituting hot and unprocessed foods with biscuits was rejected in 2007¹⁷⁸. Biscuits could have not replaced a meal firstly due to their different amount of proteins and other nutritional substances such as vitamins, minerals or anti-oxidants, with respect to the ones required by the Mid-Day Meal Scheme and necessary for an appropriate growth and development. Secondly, substituting decentralised prepared meals provided at the school level with pre-packaged biscuits would have meant disregarding the cultural aspect of food. Meals prepared by the different schools indeed allowed “children to get culturally appropriate meals, using local ingredients, which is closest to what they would be eating at home”¹⁷⁹.

The Court’s interference in the Mid-Day Meal Scheme through similar directions thus indicates the judges’ willingness to underline that food had not only to be *available*, but also *adequate*. Strong attention indeed, was given to the children’s needs for developing and growing with the necessary nutritional intake and to the food’s safety and cultural acceptance, in a sense recalling the two dimensions of the Right to Adequate Food as indicated by General Comment No.12¹⁸⁰.

Accessibility too was taken into consideration, both physical and economic. In a subsequent order dated April 20, 2004 the Court established that “the conversion costs for a cooked meal, under no circumstances, shall be

¹⁷⁵ November 28, 2001 interim order, above no 164, par. 3, letter ii): “We direct the State Governments/Union Territories to implement the Mid-Day Meal Scheme by providing every child in every Government and Government assisted Primary School with a prepared mid-day meal with a minimum content of 300 calories and 8-12 grams of protein each day of school for a minimum of 200 days”.

¹⁷⁶ *Ivi*, par. 3 letter iii): “We direct the Union of India and the FCI to ensure provision of fair average quality grain for the Scheme on time. The States/ Union Territories and the FCI are directed to do joint inspection of food grains. If the food grain is found, on joint inspection, not to be of fair average quality, it will be replaced by the FCI prior to lifting”.

¹⁷⁷ *Ivi*, par. 3 letter ii): “Those Governments providing dry rations instead of cooked meals must within three months start providing cooked meals in all Govt. and Govt. aided Primary Schools in all half the Districts of the State (in order of poverty) and must within a further period of three months extend the provision of cooked meals to the remaining parts of the State”.

¹⁷⁸ Response to the Proposal to replace hot cooked meals in the Mid-Day Meal Scheme with biscuits of Dr. N.C. Saxena, Commissioner and Mr. Harsh Mander, Special Commissioner to the Supreme Court in the case PUCL v UOI & Others Writ Petition (Civil) 196/2001 of 26 December 2007.

¹⁷⁹ *Ivi*, par. 3, letter h).

¹⁸⁰ See numbers 12-16.

recovered from the children or their parents”¹⁸¹; on the contrary, the Central government itself had to guarantee the funds necessary for covering such costs¹⁸². The reference to physical accessibility instead is especially visible in the Court’s decision establishing that “in drought affected areas, Mid-Day meal shall be supplied even during summer vacations”¹⁸³. This demonstrates a specific concern for the most vulnerable people.

In the same interim order further directions were given. For instance, the Court decreed that the Central and the State governments had to improve not only the nutritious content of the meal but also both the basic infrastructure and the facilities’ quality: kitchen sheds had to be constructed and safe drinking water and other facilities provided¹⁸⁴.

Moreover, the Court went further: it related the Right to Food’s enforcement to other critical issues such as marginalisation and exclusion. Interim order of April 20, 2004 mandated that “in appointment of cooks and helpers, preference shall be given to Dalits, Scheduled Castes and Scheduled Tribes”¹⁸⁵, so that more than simply facilitating and providing access to adequate food, the scheme could also convey a message and function as an instrument of social inclusion. In this respect, the scheme indirectly reiterates the indivisibility of human rights.

II.2.3 The Integrated Child Development Scheme

Along with the Mid-Day Meal Scheme, the India Supreme Court called upon States governments and Union Territories to implement fully the Integrated Child Development Scheme (ICDS)¹⁸⁶. This scheme too had already been introduced by the Indian government in 1975 with the objective of breaking the vicious cycle of children malnutrition, mortality and lack of education. More in details, the programme has five aims:

- “To advance the nutritional and health standing of children in the age-group 0-6 years.
- To create a system that tackles the proper psychological, physical and social development of the child.
- To fight the rate of mortality, morbidity, malnutrition and school dropout.
- To have all the various ministries and departments work in a coordinated fashion to achieve policy implementation and create an effective ECCE system.
- To support the mother and help her become capable of providing of the necessary nutritional and development needs of the child and aware of her own needs during pregnancy¹⁸⁷”.

¹⁸¹ Interim order of the Supreme Court of India of 20 April 2004, Writ Petition (Civil) No. 196/2001, point 3. [Hereinafter April 20, 2004 interim order].

¹⁸² *Ivi*, point 5.

¹⁸³ *Ivi*, point 7.

¹⁸⁴ *Ivi*, points 5 and 9.

¹⁸⁵ *Ivi*, point 4.

¹⁸⁶ November 28, 2001 interim order, above no 164, par. 6 letter i): “We direct the State Govts. / Union Territories to implement the Integrated Child Development Scheme (ICDS) in full”.

¹⁸⁷ For these and more information on the Integrated Child Development Scheme see the official webpage dedicated to it by the Ministry of Women and Child Development. The objectives were also re-called by the April 29, 2004 interim order.

Especially from the last point, it is possible to see how the scheme did not intend to benefit only children but also pregnant women and lactating mothers; recalling UN Special Rapporteur Mr Asbjørn Eide's point of view¹⁸⁸, the idea is again that of a strong interconnection among women and children's living conditions.

Recognizing the importance of such a scheme for the enforcement of the Right to Food, as well as the right to life, the Indian Supreme Court called upon States Governments and Union Territories to follow the programme and to ensure that:

- “(a) Each child up to 6 years of age to get 300 calories and 8-10 grams of protein;
- (b) Each adolescent girl to get 500 calories and 20-25 grams of protein;
- (c) Each pregnant woman and each nursing mother to get 500 calories and 20-25 grams of protein;
- (d) Each malnourished child to get 600 calories and 16-20 grams of protein;
- (e) Have a disbursement centre in every settlement”¹⁸⁹.

With regard to the last point, “disbursement centre” refers to the distribution centres responsible for supplying the food, namely the Anganwadi Centres (hereinafter AWCS). In this regard, in the April 29, 2004 interim order, the Supreme Court precisely decreed that the AWCS' number had to be increased. At the time indeed, there were six *lac*¹⁹⁰ centres in the all territory, but this was not in conformity with the Central government's norms according to which there had to be one centre each 1000 people (a part from tribal area where a population of 700 was enough). Therefore, the Court called upon the Government of India to raise the number of AWCS to fourteen *lac*¹⁹¹. An affidavit had to be issued within three months from the Indian government itself, for declaring when it planned to comply with such mandate¹⁹².

The Chief Secretaries instead were called upon to file reports by July 31, 2004, declaring “how many children, adolescent girls and pregnant and lactating women were supplied nutritious food supplement and for how many days”¹⁹³ during the period going from April 1, 2003 to March 31, 2004. An additional requirement was added in December 13, 2006 interim order, according to which “rural communities and slum dwellers should be entitled to an ‘Anganwadi on demand’ (not later than three months from the date of demand) in cases where a settlement had at least 40 children under six but no Anganwadi”¹⁹⁴.

In the same interim order, precise indications were given also referring to the economic issue. The Court indeed mandated that “all the State Governments and union Territories shall fully implement the ICD scheme by, inter alia,

¹⁸⁸ See no 30.

¹⁸⁹ November 28, 2001 interim order, above no 164, par. 6, letter i).

¹⁹⁰ A *Lac* is an Indian unit of the Indian numerical system, which corresponds to a hundred thousand in the western numerical system (100 000 or 10⁵).

¹⁹¹ Interim order of the Supreme Court of India of 13 December 2006, Writ Petition (Civil) No. 196/2001, point 2, p.1. [Hereinafter December 13, 2006 interim order].

¹⁹² Interim order of the Supreme Court of India of 29 April 2004, Writ Petition (Civil) No. 196/2001. [Hereinafter April 29, 2004 interim order].

¹⁹³ *Ibidem*.

¹⁹⁴ December 13, 2006 interim order, above no 191 point 2, p. 8.

- (i) allocating and spending at least Rs. 2 per child per day for supplementary nutrition out of which the Central Government shall contribute Rs. 1 per child per day.
- (ii) allocating and spending at least Rs. 2.70 for every severely malnourished child per day for supplementary nutrition out of which the Central Government shall contribute Rs. 1.35 per child per day.
- (iii) allocating and spending at least Rs. 2.30 for every pregnant women, nursing mother/adolescent girl per day for supplementary nutrition out of which the Central Government shall contribute Rs.1.15”¹⁹⁵.

Thus, it is clear how the Indian Supreme Court contributed to transforming a scheme into a real legal entitlement, defining right-holders and duty-bearers but also the concrete measures to be adopted for the realization of this entitlement. The aim was to guarantee, in an effective manner, the Right to Food to underprivileged sections of the population. However, with regard to this programme too both the Indian Government and the Supreme Court recognized the indivisibility of human rights: the ICDS indeed had been designed as a comprehensive scheme that had to cover not only the nutritional aspect but also other services ranging from sanitary and health services, to pre-school and non-formal education services and immunization services. For a real universalization of the scheme thus, not only the Right to Food had to be considered; all the other services had to be extended.

II.3 How the case became important: monitoring and enforcement

As the previous paragraph has demonstrated, the PUCL litigation has been made legally possible by the Indian judicial system’s functioning, namely by the possibility of bringing a PIL before the Supreme Court and by the judges’ progressive interpretation of the Indian Constitution which permitted the transformation of some programmes into legal entitlements.

However, the case is generally known as the ‘Right to Food Case’ not thanks to the legal aspect only; on the contrary, its specificity and what contributed to its success and relevance, has been the interrelation between the judicial system on the one hand and the civil society on the other. For this reason, this paragraph will consider how social mobilisation, along with the judicial enforcement, has strongly contributed to the Right to Food’s recognition. Indeed, if the schemes that the Indian Government had already adopted at the time of PUCL litigation became true legal entitlements for the right-holders, this success is also attributable to the work of the Commissioners appointed by the Supreme Court itself as well as to that of the Right to Food Campaign. They and their work will be better analysed in the following sections.

¹⁹⁵ *Ivi*, point 4, p. 8. *Rs* stands for *Rupees* which is the Indian Currency. At the time of writing 1 rupee corresponds to 0.012494 euros.

II.3.1 The Commissioners

Apart from precise measures and programmes or schemes to be adopted, the Right to Food's real enforcement as well as other human's rights enforcement requires the implementation of these programmes to be monitored. In this respect, the Indian Supreme Court through its interim orders anticipated the FAO Voluntary guidelines' call for monitoring and enforcement mechanisms' implementation on the part of the States.

Through interim order dated May 8, 2002 indeed, the judges appointed two Commissioners of the Court to bring about "effective monitoring and implementation"¹⁹⁶ of the Court's orders but also to report to the Court on the implementation status of the various schemes and programmes at the State level¹⁹⁷. In order to hold this position, Dr N.C Saxena and Mr S.R. Shankaran were chosen: the former had been a Planning Secretary of the Indian government while the latter had been the Secretary for the Rural Development department of the Indian Government¹⁹⁸.

The Supreme Court also empowered the Commissioners with the possibility to "take the assistance of individuals and reliable organizations in the State and Union Territories"¹⁹⁹. Thus, the various Chief Secretaries or Administrators of the different States and Union Territories, by consulting the Commissioners, were called upon to appoint Commissioners' advisors²⁰⁰. In addition, both the central and the States governments had to appoint a Nodal Officer each, who would have served as a further point of reference and source of information. He or she would have indeed kept him- or herself in contact with the Commissioners and their assistants²⁰¹. Such a decentralized and multi-level monitoring system gave the possibility to the Commissioners to remain in direct contact with the different realities and to gather information and data both from the central and the state governments. Therefore, this allowed them to submit to the Court exhaustive and comprehensive regular reports that constituted a functioning guide for the litigation's development.

For each food scheme, the Commission report provided "an overview of the scheme and notes, at both national and state levels, coverage, quality of coverage, financial allocations, and key issues"²⁰². In addition, it offered the Supreme Court "recommendations for scheme-specific actions"²⁰³. At the same time, the States, feeling themselves under constant and close supervision, were stimulated to follow the Court's orders and mandates.

The strong influences that the Commissioners and thus advisors' activities have had for the definition and implementation of the Right to Food in India, clearly emerges from the Supreme Court's directions themselves. Indeed, the consecutive interim orders and the practical and concrete measures the Court indicated to the

¹⁹⁶ Interim order of the Supreme Court of India of 8 May 2002, Writ Petition (Civil) No. 196/2001, letter l). [Hereinafter May 8, 2002 interim order].

¹⁹⁷ October 29, 2002 interim order, above no 162, letter d).

¹⁹⁸ May 8, 2002 interim order, above no 196, letter j).

¹⁹⁹ *Ivi*, letter l).

²⁰⁰ October 29, 2002 interim order, above no 162, par. 5, letter e).

²⁰¹ *Ivi*, letters f) and g).

²⁰² L. BIRCHFIELD & J. CORSI, *op. cit.*, p. 728.

²⁰³ *Ibidem*.

central and the state governments, had been expressly based on the Commissioners' reports on the degree of implementation. A case in point are the above-mentioned directions given in April 20, 2004 interim order with respect to the Mid-Day Meal Scheme: as the Court clearly declared, they have been based on the Commissioners' reports²⁰⁴.

However, the Commissioners' action was not limited to the interplay with the Supreme Court. On the contrary, the Commissioners had also a strong link with the civil society and this relation was a reciprocal one. On the one hand, the Commissioners beyond reporting and advising the Court itself, tried to reach the people too and to inform them on the PUCL litigation's development; on the other hand, civil society networks and organisations involved in the issue represented a further source of information and data that contributed to elaborating even more detailed and precise reports.

In this respect, the Commissioners developed a tie especially with the Right to Food Campaign (hereinafter the Campaign), which represents the other actor that strongly brought to the PUCL's litigation success.

II.3.2 The Right to Food Campaign

“The Right to Food Campaign is an informal network of organisations and individuals committed to the realisation of the right to food in India”²⁰⁵. Its origins go up exactly to the PUCL litigation when different individuals and organizations started to focus more on the fight for the Right to Food's enforcement: in an informal manner, the Campaign began to reunite these different actors and their efforts²⁰⁶. However, over the years the Campaign has come to include numerous members from various groups, going from women's right groups and single women's networks, child rights organizations, agricultural, construction or migrant workers' unions, to Dalit rights groups, homeless people and others. Indeed, despite its primary commitment is the Right to Food's realization, the Campaign acknowledges that such aim can be reached only if related issues are taken into account too: in its own words, “not only equitable and sustainable food systems, but also entitlements relating to livelihood security such as the right to work, land reform and social security”²⁰⁷ matter.

The recognition of the Right to Food as a legal entitlement is clearly expressed in the Campaign's foundation statement, which declares that “everyone has a fundamental right to be free from hunger and under nutrition”²⁰⁸ and that “the primary responsibility for guaranteeing these entitlements rests with the state”²⁰⁹.

²⁰⁴ April 20, 2004 interim order, above no 181: “Having regard to the aforesaid, in respect to the cooked mid-day meal scheme, we issue the following orders”. The “aforesaid” refers to the Commissioners' reports in which it was indicated the degree of implementation of the Court's orders at the state level, and that where fully or at least partially implemented, the Mid-Day Meal Scheme was functioning in the fight against hunger and school's non-attendance.

²⁰⁵ Foundation Statement of the Right to Food Campaign of 2001. [Hereinafter Foundation Statement of the RtF Campaign].

²⁰⁶ Collective Statement of the Right to Food Campaign of the Bodh Gaya Third Convention on the Right to Food and Work of April 2007, preamble. [Hereinafter Collective Statement of the RtF Campaign].

²⁰⁷ Foundation Statement of the RtF Campaign, above no 205.

²⁰⁸ *Ibidem*.

²⁰⁹ *Ibidem*.

Moreover, even without a clear reference to that international law instrument, it is possible to see how since its beginning the Campaign follows the ICESCR's approach in different points. First, the Campaign too refuses economics constraints as a justification, on the part of a State, for non-compliance and discharge of its responsibilities²¹⁰. Secondly, the Campaign too recognises the importance of equity for the true realization of the Right to Food: it is committed to put the concern for "discrimination based on caste, gender, religion or other attributes"²¹¹ at the centre of its work on the Right to Food.

Looking at the Right to Food as a fundamental right, from its emergence the Campaign brings a significant contribution to the public opinion's formation as well as to effective government policies' implementation. The Campaign's initiatives indeed function as an essential tool both to render people conscious about the rights to which they are entitled, and to build an accountability's system in which governments are stimulated and pushed towards orders' compliance and rights' deliverance. This is possible thanks to a wide range of activities and initiatives directed both to the Supreme Court and thus to the central and state governments, and to the society.

With respect to the Campaign's influence towards the judicial system, in the PUCL litigation specifically this has been exercised directly and indirectly at the same time. On the one hand, the Campaign has engaged itself in filing its own interlocutory applications to the Court with the aim of conditioning and contributing to the issuance of interim orders: the Campaign indeed looked for concrete state policies and schemes' adjustments and improvements. On the other hand, the Campaign has constituted a fundamental source of information for the advisors and the Commissioners. By providing the data that functioned as the basis for the reports, it has contributed to the definition of specific directions given by the Court to the respondents. This cooperation is indeed recognized by the Campaign's collective statement itself, which declares that even if the Commissioners are independent from the Campaign, "there has been a close association (including mutual consultation) between the two"²¹².

However, the Campaign soon realized the necessity of guaranteeing that the same orders it wanted to influence, would have become action. For this reason, the Campaign's activities did and do not address the judicial system only but also the people: it played and continues to play the role of informer towards the society too. Material such as pamphlets, primers or journals are distributed to other organizations and individuals, in order to raise awareness with respect to the schemes and programmes' implementation or to other issues related to the Right to Food's enforcement²¹³. In addition, mobilization has soon become another important element of the Campaign's fight for the Right to Food's realization and wide range of initiatives and events have started

²¹⁰ *Ibidem*: "Lack of financial resources cannot be accepted as an excuse for abdicating this responsibility".

²¹¹ Collective Statement of the RtF Campaign, above no 206, par. 4.

²¹² *Ivi*, par. 19.

²¹³ For further information on the Right to Food Campaign's activities, see the Campaign's website.

to take place. Among these, examples include public hearings, rallies, conventions, action-oriented research and media advocacy. A case in point has been the “Day of action on mid-day meals” that took place on April 9, 2002: it constituted an occasion to put pressure on state governments to introduce the programme and the Court’s directions. The event saw the mobilisation of many people and it was organized in places such as the village schools or the parks. Moreover, strategic locations were chosen for preparing the Mid-Day meals for children, such as places attended by officials and other institutional exponents. The media coverage also helped in the effectiveness and impact of the initiative: many journals and newspapers spoke about it, and Supreme Court’s orders were distributed to large sections of the society.

However, probably the most important action undertaken by the Right to Food Campaign comes from its involvement in the passing of the National Food Security Act (NFSA) of 2013, which has determined the case’s dismissal.

The Indian National Congress had expressed its willingness “to enact a Right to Food law that guarantees access to sufficient food for all people, particularly the most vulnerable sections of society”²¹⁴ since 2009. From that moment on, the Campaign has engaged itself in developing some “Essential demands” related to the Act itself also formulating its own proposal under the name of Food Entitlements Act²¹⁵. However, it took four years until the final draft was adopted by the Parliament: during these years, the Campaign strongly struggled for reaching a draft that did not focus only on food’s distribution to the poorest but also on issues such as minimal wages, agricultural production or access to resources. Indeed, on January 30, 2012, in its critique to the 2011 National Food Security Bill the Campaign stressed, *inter alia*, that the bill was based on a limited vision of what was necessary to guarantee the Right to Food, since it was “restricted mainly to grain handouts under the Public Distribution System”²¹⁶.

For the purpose of this dissertation, the NFSA’s provisions, their limits and their strengths will not be analysed in details. However, what it is important to consider is that the entry into force of the National Food Security Act led to the case’s ending. Since “an Act to provide for food and nutritional security in human life cycle approach, by ensuring access to adequate quantity of quality food at affordable prices”²¹⁷ had been adopted, according to the Indian Supreme Court there were no more reasons for keeping the case pending. The Act contains provisions regarding some entitlement schemes such as the Targeted Public Distribution System and the Integrated Child Development Scheme²¹⁸, and some others regarding women empowerment²¹⁹ and the

²¹⁴ Manifesto of the Indian National Congress, Lokh Sabha Elections of 2009, p. 11.

²¹⁵ Food Entitlements Act, 2009 of the Right to Food Campaign of 22 July 2009.

²¹⁶ Critique to the National Food Security Bill of 2001 of the Right to Food Campaign of 30 January 2012.

²¹⁷ National Food Security Act, 2013 of the Indian Parliament, No. 20 of 2013, New Delhi, of 10 September 2013. [Hereinafter National Food Security Act, 2013 of the Indian Parliament].

²¹⁸ *Ivi*, chapter II.

²¹⁹ *Ivi*, chapter VI.

identification of eligible households²²⁰. Moreover, it indicates the Central and the State governments' obligations as well as the local authorities' ones and the grievance redressal mechanisms available to people²²¹. As a consequence, considering the Act an important step towards the recognition of the Right to Food, after more than a decade and about one hundred of interim orders, the Indian Supreme Court finally dismissed the Case on February 10, 2017: the Writ Petition was disposed as well as the pending applications. If the petitioner had any complaint on the NFSA's implementation or on other aspects of it, the Court clarified, he should file a new petition²²².

II.3.3 The Case's significance

The PUCL litigation's analysis has clearly demonstrated that India offers a valid example of the Right to Food's justiciability and enforceability. As Birchfield has noted indeed, "overall, the realization of the Right to Food in India sets forth a model that includes the identification of a right, concrete explication of what that right means in terms of policy, and subsequent court-monitored implementation and monitoring of those policies"²²³.

However, as seen, the case has been structured essentially on the basis of national provisions instead of on the Indian obligations under the international human rights treaties to which it is party, and in front of domestic legal institutions instead of international recourse mechanisms. On the other side, as the analysis has demonstrated, even without clear references to the treaties it is inevitable to establish many points of contact between the Writ Petition and the interim orders on the one hand and international law instruments on the other. For this reason, India stands as a symbol of the "implementation of the progressive realization of the right to adequate food in the context of national food security"²²⁴ that the FAO Voluntary Guidelines wants to reach. Moreover, the country can be seen as an example of compliance with the CESCR's advice, according to which the ICESCR's "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"²²⁵.

Finally, "the Indian case shows that there is more to the right to food than the law, since the realisation of the right (...) depended on action across"²²⁶. The Commissioners as well as the different organizations and movements united within the Right to Food Campaign but not only, have played the fundamental role of

²²⁰ *Ivi*, chapter IV. The term *eligible households* refers to those households and people that respect the criteria for having the right to be covered by the Targeted Distribution Public Scheme, which is one of the Scheme the government had provided and the Court enforced.

²²¹ *Ivi*, chapter VII.

²²² Final order of the Indian Supreme Court of February 10, 2017, Writ Petition (Civil) No. 196/2001.

²²³ L. BIRCHFIELD & J. CORSI, *op. cit.*, p. 732.

²²⁴ See no 72.

²²⁵ General Comment No. 9: The domestic application of the Covenant of the Committee on Economic, Social and Cultural Rights of 3 December 1998, UN. Document E/C.12/1998/24, par. 2.

²²⁶ S. KHOO, *The Right to Food, Legal, Political and Human Implications For A Food Security Agenda*, in *Trócaire Development Review*, 2010, pages 42 and 43. Available online.

mediators: this has permitted to reinforce the right-holders' and the duty-bearers' awareness of their rights and obligations respectively. Thus, the case has demonstrated how civil society's involvement is what gives concreteness to the opportunities created by the legal institutions and instruments, in the realisation of the Right to Food.

For this reason, after drawing conclusions on the Right to Food's justiciability, the last chapter will deal with some civil society's forums and networks at the international level.

III. IS THE RIGHT TO FOOD JUSTICIABLE?

The previous chapters can bring us to the conclusion that through history and especially starting from the second half of the twentieth century, the Right to Food has come to be largely recognized as a justiciable and right. For this reason, this last chapter wants to recall the objections traditionally advanced to the Economic, Social and Cultural rights' justiciability and to dismantle them on the basis of what has been analysed. For the purposes of this dissertation, this will be done with special attention to the Right to Food. However, first and foremost it is fundamental to define clearly what *justiciability* means.

Justiciability refers to “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”²²⁷. In other words, recalling also the UN Special Rapporteur definition²²⁸, a right is justiciable when a judicial or quasi-judicial authority's pronouncements on its enforcement are regarded as admissible, and when the same authorities can express themselves on appropriate remedies.

Justiciability then is strictly related to the principle according to which *ubi jus ibi remedium*; namely where there is a right there is a remedy. A remedy indeed becomes necessary only in case of violation, but a violation can be asserted only if the right in question is regarded as justiciable²²⁹. Such a principle is contemplated by the Universal Declaration of Human Rights too in article 8, which establishes that:

“Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law”²³⁰.

Consequently, the question may emerge spontaneously: why have Social, Economic and Cultural Rights, including the Right to Food, been considered as not justiciable for long, in contrast to Civil and Political Rights?

III.1 Economic, Social and Cultural Rights' justiciability: the challenges

Starting from the 1950s, there has generally been a reluctance in recognizing Civil and Political rights on the one hand and Social, Economic and Cultural rights on the other, at the same level, despite the UDHR had

²²⁷ Information Paper: Justiciability of the Right to Food of the 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, Rome, of October 2004, par. 6. [Hereinafter IGWG RTFG/INF 7].

²²⁸ See no 31.

²²⁹ P. GARGI DUTTA, *Justiciability of Right to Food*, in *International Journal of Scientific and Research Publications*, Volume V, Issue 1, January 2015, p.1. Available online.

²³⁰ UDHR of the UN General Assembly, above no 3, art. 8.

affirmed their equality²³¹. For this same reason, two different Conventions were drafted and approved with two distinct Optional Protocols: it should be recalled that the ICESCR's Optional Protocol was approved only in 2008²³² and it is still not ratified by many countries.

The reasons lying at the basis of this understanding are numerous, and they have brought to a shared objection to the recognition of ESCR as enforceable in front of the courts. Therefore, the Right to Food too has suffered from the repercussions.

III.1.1 The challenges: too vague and imprecise

In the first place, States have traditionally considered ESCR and especially the Right to Food as too general and vague: it was not clear what the Right to Food meant concretely and what States themselves had to do for guaranteeing such right. Therefore, it was believed that judicial and quasi-judicial bodies could not be able to intervene and to hold a State responsible for a violation. While it was clear how to determine if a government had deprived an individual of his or her personal freedom, for example through incarceration, it was deemed as too difficult to determine whether or not a State had deprived an individual of his or her Right to Food.

However, two counter-objections can be advanced to this argument. First of all, as the first chapter has demonstrated the international community has, through the years, worked for developing international and soft law instruments that could clarify both the legal content of the RtF and the deriving legal obligations. A fundamental step in this regard has been the GC No. 12's approval: from that moment on, different but similar definitions of the Right to Food have been provided and the respective duties have been first established and then reiterated in different occasions. Thus, "such arguments on 'vagueness' are (...) receding through the work of legal scholars, General Comments and evolving practice at the national, regional and international level"²³³.

Secondly, the Indian case brings evidence of how judicial activity itself is what can really contribute to clarify a right's implications, both for duty-bearers and right-holders. Especially for the Right to Food as well as for other rights such as the right to water or to education indeed, even though legal and soft law instruments establish obligations, duties and rights in concrete terms are strongly related to the specific conditions and context of the concerned country. "The perceived vagueness of the right to food, therefore, should not prevent it from being recognized as justiciable"²³⁴; on the contrary it should constitute an additional motivation.

However, the admissibility of the importance of judicial activity does not prevent other questions to emerge, especially on the courts' capability and possibility to judge due to the ESCR and the Right to Food's *specific nature*.

²³¹ See no 61.

²³² See no 63.

²³³ IGWG RTFG/INF 7, above no 227, par. 66.

²³⁴ *Ivi*, par. 67.

III.1.2 The challenges: progressive realization and available resources as limits

As underlined in the first chapter, the ICESCR has put ESCR under the two conditions of *progressive realization* and *available resources*, where this means that their fulfilment actually depends on some external constraints, especially economic ones. Consequently, governments have perceived and still perceive these rights as rights of a specific nature, and thus not suitable for judicial enforcement.

Indeed, “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”²³⁵. In other words, while civil and political rights do not require the public authorities’ interference, realizing ESCR requires their positive action and that of market parties²³⁶. The State does not need to use resources for abstaining from torturing, persecuting or guaranteeing the freedom of speech; on the contrary, “houses must be built, schools equipped, the environment protected and food produced”²³⁷. Consequently, it is not in the Courts’ powers and capabilities to rule on the ESCR and specifically on the Right to Food.

However, counter-arguments to such consideration too can be developed. First, it is not true that Civil and Political Rights imply negative obligations only: “personal security, for example, requires that states refrain from torturing or otherwise injuring their citizens; that they protect them from injury at the hands of others; and that they provide a system of justice for the injured, to which all equally have access”²³⁸. All this can have a cost: the establishment and maintenance of police forces, judicial systems and prisons, as well as of the relative bureaucratic and administrative apparatus, imply huge costs for a State²³⁹.

“Similarly, subsistence rights require that states do not deprive citizens of their means of livelihood; that they protect them against deprivation at the hands of others; and that they provide a system of basic social security for the deprived. The examples are entirely parallel”²⁴⁰.

Indeed, looking at the first chapter’s analysis, it is evident Right to Food does not imply positive obligations only. The duty *to respect* for instance simply requires the State not to take any action that could infringe the

²³⁵ *Ivi*, par. 70.

²³⁶ B. VAN DER MEULEN, I. RĂTESCU, *Food Prints on Human Rights law paradigms*, in *European Institute for Food Law Working Paper Series 2017/02*, 2017, p. 24. Available online.

²³⁷ *Ibidem*.

²³⁸ D. BEETHAM, *What Future for Economic and Social Rights?*, in *Political Studies*, Volume XLIII, issue 1, March 1, 1995, p. 51. Available online.

²³⁹ S. M. OKIN, *Liberty and welfare: some issues in human rights theory*, in J. R. PENNOCK AND J. W. CHAPMAN (eds), *Human Rights: Nomos XXIZI*, New York, p. 240, reported in D. BEETHAM, *op. cit.*, p. 51. Available online.

²⁴⁰ D. BEETHAM, *op. cit.*, p. 51.

Right to Food's realization so that its judicial enforcement would not entail any resource implications. As far as the obligations *to protect* and *to fulfil* are concerned instead, undeniably they are subject to resources' limitations. However, as the PUCL litigation has showed, in most of the cases Right to Food's violations do not reflect *available resources*' issues but rather the resources' management. For this reason, "justiciability here would simply help bringing social spending within the ambit of the rule of law"²⁴¹ and in any case, the Courts would take into consideration the idea of *available resources* and economic constraints both in the judgment and in the eventual remedies²⁴², differentiating between *unwillingness* and *inability*²⁴³.

For these reasons, it cannot be said that there is a difference in the type of obligation CPR and ESCR entail. At the same time, it cannot be argued that since ESCR are resources demanding, judges cannot rule on their realization: *available resources* indeed, may prevent a judge from identifying a violation but not from judging in general²⁴⁴.

The *progressive realization* condition neither can be regarded as a limit to the Right to Food's justiciability. Firstly, there are obligations such as the ones *to respect* and *not to discriminate*, which are not subject to the limits of progressive realization. Secondly, with respect to the other obligations, as seen in the first chapter the States do not have to interpret the condition as a justification not to comply with their duties. Therefore, this condition neither prevent a Court from judging; at most, it can prevent it from holding a State responsible of a Right to Food's violation. However, the Court's role may be fundamental to verify the State has done everything in its powers and possibilities. The PUCL litigation for example demonstrates that also thanks to the Commissioners' appointment, the Indian Supreme Court has been able to verify the implementation status of the Right-to-Food related schemes.

III.1.3 The challenges: separation of powers is under threat

Once assessed the judges' capability to rule on the Right to Food despite the apparent limits that the two highlighted conditions could raise, another objection remains to be overturned; namely, the idea of judicial interference. Indeed, what it is still under question is the admissibility of the judges' intervention.

The fact that ESCR are seen as strongly linked to the economic conditions of the country has led to a considerable degree of scepticism with regard to the compatibility of judicial adjudication with the separation of powers. Not considering those obligations holding regardless of the economic aspect, hesitation remains. Governments indeed, perceive the Court's enforcement as an interference within their role: even when a Court does not step in imposing a specific resources demanding remedy but simply requiring a fairer re-allocation of resources, the judgment may be perceived as an intrusion in the governmental role of establishing priorities

²⁴¹ IGWG RTFG/INF 7, above no 227, par. 70.

²⁴² *Ivi*, par. 72.

²⁴³ See no 139.

²⁴⁴ IGWG RTFG/INF 7, above no 227, par. 78.

with respect to resources' allotment. The executive and the legislative organs of a State may indeed fear a threat to their autonomy in deciding which the primary objectives to be reached and in which to invest are. However, while the legislative and executive branches' autonomy should be guaranteed in the name of the separation of powers principle, the Courts are called at verifying the compliance of these organs' decisions with both the Constitution and the human rights law. "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"²⁴⁵. In addition, "Courts may also be called upon to enforce decisions already made by the legislative or executive wings, as was the case in the India PUCL case cited above"²⁴⁶. Finally, "in finding a violation, Courts may also refrain from deciding on remedies, but instruct relevant government organs to find ways to redress the situation"²⁴⁷. Consequently, this argument too can be easily invalidated if the Court's role is looked from a different and more appropriate point of view.

At this point, as Malcolm Langford has sustained in his dissertation, it is possible to consider the long-standing debate on ESCR and on the Right to Food's justiciability as closed: the presumed Courts' lack of democratic legitimacy and institutional capacity to enforce such rights have been taken down.²⁴⁸

However, the theoretical argumentations must be complemented by a case law analysis: this constitutes a further demonstration of the fact that various judicial and quasi-judicial bodies, beyond the Indian Supreme Court, have been able to surmount the obstacles posed to the possibility for their judicial oversight. These cases show that it is no possible anymore to argue that the Right to Food, as well as the other social rights, is not justiciable²⁴⁹.

At this proposal, the next section will develop a brief analysis of some judicial cases as to bring evidence of a clear adjudication of the State's obligations *not to discriminate* as well as *to respect, to protect* and *to fulfil* the Right to Food.

III.1.4 Concrete responses to the challenges: real action

In 1995, the Swiss Federal Supreme Court hold the Swiss State responsible for non-compliance with the obligation *not to discriminate*. In the case *V. gegen Einwohnergemeinde X. und Regierungsrat des Kantons Bern*, three brothers brought a case before the Court after the Swiss State excluded them from programmes of social assistance and welfare. The brothers had been living in Switzerland since 1980 as recognised refugees, but after seven years, they were expelled to Czechoslovakia for criminal offences until 1991, when they

²⁴⁵ IGWG RTFG/INF 7, above no 227, par. 68.

²⁴⁶ *Ibidem*.

²⁴⁷ *Ibidem*.

²⁴⁸ M. LANGFORD, *The Justiciability of Social Rights: From Practice to Theory*, in M. LANGFORD (ED.), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law*, Cambridge University Press, 2008. Available online.

²⁴⁹ *Ibidem*.

illegally re-entered Switzerland. At this point, the Swiss State could not re-expel them since what became the Czech Republic annulled their citizenship, but it refused to guarantee the three brothers with the same social support programmes provided to the other citizens: the justification was that they were staying in Switzerland illegally.

However, the Federal Supreme Court held that “for the duty on the State to assist people staying on its territory who have fallen into need, the legal relationship between the State and that person is not relevant”²⁵⁰. Even if not explicitly recognized by the Swiss Constitution, according to the judges there was an implied obligation for the State to guarantee a “fundamental right to subsistence” which had to be ensured to both Swiss and foreigners²⁵¹, without discrimination. This right included the Right to Food too, fundamental for ensuring at least the minimum conditions of subsistence.

The case demonstrates the Swiss Federal Supreme Court’s capability to enforce ESCR and the Right to Food without interfering with the executive and legislative spheres. Indeed, the Supreme Court itself declared that the necessary State expenditure was “recognized on the basis of social assistance legislation in the cantons”²⁵², thus it did require “no further basic financial policy decisions”²⁵³.

In 2007 instead, the High Court of South Africa called upon the government to draft a new act regarding fishing activities and marine resources, which would have respected the people’s Right to Food. In *Kenneth George and Others v. Minister of Environmental Affairs and Tourism* indeed, about 5000 artisanal fishers individually or as part of organisations brought applications to the High Court and the Equality Court of the Cape of Good Hope Province. The claimants sustained that the government had violated the obligation *to respect* their Right to Food since through the Marine Living Resources Act it had prevented them from having access to the sea and thus to marine resources.

The Court stood on the fishers’ part and required the State to adopt a new act that respected the “international and national legal obligations and policy directives to accommodate the socio-economic rights of [small-scale] fishers and to ensure equitable access to marine resources for those fishers”²⁵⁴. The result was the drafting of a new law.

Apart from having enforced the obligations *to respect* and *not to discriminate*, which are the so-called negative obligations and thus the easiest ones to be enforced, judges have been capable to enforce positive obligations too. Other cases stand as a demonstration.

²⁵⁰ Judgment of the Swiss Federal Supreme Court of 27 October 1995, *V. gegen Einwohnergemeinde X. und Regierungsrat des Kantons Bern*, BGE 121 I 367, Switzerland, Ground no 3, letter a).

²⁵¹ *Ivi*, Ground no 2, letter d).

²⁵² *Ivi*, par. 2, letter c).

²⁵³ *Ibidem*.

²⁵⁴ Decision of the South African High Court of 2 March 2007, *Kenneth George and Others v. Minister of Environmental Affairs & Tourism*, Case n. EC 1/2005, reported in INTERNATIONAL DEVELOPMENT LAW ORGANIZATION (IDLO), *Realizing the Right to Food. Legal Strategies and Approaches*, 2014, p. 13.

In March 1996, with communication 155/96, two non-governmental organisations lodged a complaint before the African Commission (hereinafter ACHPRCom): the Social and Economic Rights Action Centre (hereinafter SERAC) and the Centre for Economic and Social Rights (hereinafter CESR) brought a communication claiming that different human rights of the Ogoni people in Nigeria had been violated. The responsible were on the one hand two oil companies, namely the state oil company called Nigerian National Petroleum Company (hereinafter NNPC) and the Shell Petroleum Development Corporation (SPDC), and on the other hand the Nigerian government itself. The complainants claimed that the Nigerian government, despite its obligation to protect the rights of its people, let the two companies conducting irresponsible activities on the Ogoni's land, which brought to the degradation and pollution of their territory and environment. This resulted into the contamination of soil, water and air, the destruction of homes and shelters and the privation of many natural and food resources. The government indeed, did not require any safety measures and did not monitor the two companies' operation in the Ogoni's territory²⁵⁵. In addition, it was deemed responsible of having placed its legal and military forces at the disposal of the oil companies, so to further accentuate and facilitate their illegal and violent practices²⁵⁶.

The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria case (hereinafter The "Ogoni Case") was opened and in 2001 the African Commission arrived to its final decision. It found that "despite its obligation to protect persons against interferences in the enjoyment of their rights, the government of Nigeria facilitated the destruction of the Ogoniland"²⁵⁷. In so doing, the government had incurred into the violation of many rights protected both by the African Charter itself and by the ICESCR, to which Nigeria is a party²⁵⁸. In particular, the government had violated the right to non-discriminatory enjoyment of rights, the right to life, the right to property, the right to health, the right to family rights, the right of people to dispose freely of their wealth and natural resources and the right of people to a satisfactory environment²⁵⁹. Moreover, "by its violation of these rights, the Nigerian government trampled upon only the explicitly protected rights but also upon the right to food implicitly guaranteed"²⁶⁰. Indeed, while "the Nigerian government should not (...) allow private parties to destroy or contaminate food sources, and prevent peoples' efforts to feed themselves"²⁶¹, it "allowed private oil companies to destroy food sources; and, through terror,

²⁵⁵ Decision of the African Commission on Human and Peoples' Rights of 27 May 2002, regarding Communication No. 155/96, Case n. ACHPR/COMM/A044/1, *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*, par. 4.

²⁵⁶ *Ivi*, par. 3.

²⁵⁷ *Ivi*, par. 58.

²⁵⁸ *Ivi*, par. 52. Nigeria has been a State party to the ICESCR since 1993.

²⁵⁹ *Ivi*, par. 10: "The communication alleges violations of articles 2, 4, 14, 16, 18(1), 21 and 24 of the African Charter".

Under the latter, these articles correspond to: Right to Freedom from Discrimination (art.2), Right to Life (art.4), Right to Property (art.14), Right to Health (art.16), Family rights (art.18), Right to Free Disposal of Wealth and Natural Resources (art.21) and Right to a General Satisfactory Environment (art.24). For further details see the African Charter on Human and People Rights, adopted on 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force on the 21 October 1986.

²⁶⁰ *Ivi*, par. 64.

²⁶¹ *Ivi*, par. 65.

(...) created significant obstacles to Ogoni communities trying to feed themselves”²⁶². Thus, the Nigerian government was in violation of “what is expected of it as under the provisions of the African Charter and international human rights standards, and hence, (...) in violation of the right to food of the Ogonis”²⁶³, in particular of the duty *to protect*.

Finally, the African Commission made some recommendations to the Nigerian government on adequate measures to be taken to really protect the Ogoni people’s fundamental rights. Among these, the government was called upon to stop the attacks on the communities, to clean up damaged and contaminated lands and rivers, to undertake an investigation of both human rights violations and environmental and social impact and to prosecute and punish the responsible security forces’ officials²⁶⁴.

To conclude, the obligation *to fulfil* too has been the object of judicial determination in different cases. As seen in the previous chapter, the Indian Supreme Court reinforced this obligation through its numerous interim orders but it has not been the only one.

In *Sawhoyamaxa Indigenous Community v. Paraguay*, the Inter American Court of Human Rights (hereinafter IACHRCourt) was called upon to judge on the forced eviction of the Sawhoyamaxa Community from the Paraguayan Chaco region’s lands. In 1991 indeed, the non-governmental organization TierraViva a los Pueblos Indígenas del Chaco (hereinafter “TierraViva”), on behalf of the community, brought a domestic claim before the Inter-American Commission of Human Rights to ask for the restitution to the community of their ancestral lands that had been bought by private companies. In 2005 then, the Commission referred the case to the Inter-American Court of Human Rights that came to a final decision on March 29, 2006. Until that moment, the Community and its members suffered “a state of nutritional, medical and health vulnerability”²⁶⁵ that constantly threatened “their survival and integrity”²⁶⁶.

Due to this, as in the previous case, here too the Court found a violation of different rights, among which the right to a fair trial and judicial protection, the right to recognition as a Person before the law, the right to property and the right to life²⁶⁷; thus, it ruled that Paraguay had violated both the obligation *to facilitate* and *to provide*.

With respect to the former the judges ruled that “at the moment of the occurrence of the events, the authorities knew or should have known about the existence of a situation posing an immediate and certain risk to the life of an individual or of a group of individuals, and that necessary measures were not adopted within the scope of their authority which could be reasonably expected to prevent or avoid such risk”²⁶⁸. In other words, the

²⁶² *Ivi*, par. 66.

²⁶³ *Ibidem*.

²⁶⁴ *Ivi*, par. 71.

²⁶⁵ Judgment of the Inter-American Court of Human Rights of 29 March 2006, *Sawhoyamaxa Indigenous Community v. Paraguay*, par. 2.

²⁶⁶ *Ibidem*.

²⁶⁷ *Ivi*, paragraphs 74 and followings.

²⁶⁸ *Ivi*, par. 155.

State had not undertaken the necessary actions *to facilitate* people access to basic resources in a situation in which this access was threatened. Moreover, even once it was clear that the community's members had been impoverished, deprived of the traditional means of subsistence and thus had become more vulnerable, the Paraguayan government did not provide the Sawhoyamaya Indigenous with these means directly. As a consequence, the Court reinforced this obligation and established that until the land's restitution was accomplished, the State had *to provide* sufficient drinking water, medical care, food, schooling, and sanitation²⁶⁹. In addition, Paraguay had *to provide* “an efficient mechanism to claim the ancestral lands of indigenous peoples enforcing their property rights and taking into consideration their customary law, values, practices and customs”²⁷⁰, by adopting effective domestic legislation.

Finally, even in this case the Court ruled on some measures to be undertaken in order to repair the victims for material and non-material damages²⁷¹.

Therefore, from the above analysis, it is clear that there is nothing that can prevent the Right to Food to be justiciable and thus able to be submitted to judicial oversight. In different cases, the Courts have been able to determine a violation and to indicate the relative measures to be undertaken.

However, as the PUCL litigation too has demonstrated, “ensuring that victims of violations of the Right to Food have effective access to justice at the national level, (...) 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”²⁷². For this reason, access to justice will be considered in the following section, as a fundamental element for real enforceability.

III.1.5 From justiciability to enforceability: the importance of access to justice

The cases illustrated in the previous section as well as the PUCL litigation have showed the importance of access to justice. In all of them, it has been a non-governmental organization on behalf of the victims to bring the case before a Court: this means that access to justice is often an obstacle. Consequently, it can be affirmed that justiciability is just one aspect of real enforceability, since the utilization of the remedies provided by the human rights system “requires a significant degree of understanding of that system, and the resources and skills to advocate for the rights that are breached. Ironically, it is those most in need of assistance when their

²⁶⁹ *Ivi*, par. 230: “the Court orders that, while the members of the Community remain landless, the State shall immediately, regularly and permanently adopt measures to: a) supply sufficient drinking water for consumption and personal hygiene to the members of the Community; b) provide medical check-ups, tests and care to all members of the Community, especially children, elder people and women, together with periodic parasite removal and vaccination campaigns, respecting their practices and customs; c) deliver sufficient quantity and quality of food; d) set up latrines or other type of sanitation facilities in the settlements of the Community, and e) provide the school of the “Santa Elisa” settlement with all necessary material and human resources, and establish a temporary school with all necessary material and human resources for the children of the “Kilómetro 16” settlement”.

²⁷⁰ *Ivi*, par. 235.

²⁷¹ For detailed information on the damages, see the judgment or a summary of the judgment.

²⁷² IGWG RTFG/INF 7, above no 227, par. 91.

human rights are breached that are often least able to access such a system”²⁷³. Hence, beyond the call upon States to enforce the Right to Food and to recognize the power of the Courts to rule on it, there is the call upon them for rendering easier the access to remedies and resources²⁷⁴.

Too often indeed, there are some barriers that render insufficient the three elements that Golay had indicated as those necessary for individuals to have access to justice. According to him “first, the right to food must be enshrined in the legal system in question, it must have a legal basis. Second, legal remedies must be available and applied to protect the victims from violations of the right to food. Third, the petitioned oversight bodies must recognize the right to food and their role as guarantor of the respect, protection, and fulfilment of the right to food”²⁷⁵. However, in many cases low access to information and education, the high cost of legal advice as well as other costs deriving from the use of judicial mechanisms impede the extreme poor to have real access to justice²⁷⁶. If this is the case, real enforceability is not achieved.

It is in this context that civil society comes into play both at the national and international level, with a fundamental role to play.

III.2 For a real enforceability: civil society is needed

The awareness about the insufficiency of the judicial system alone to guarantee an effective Right to Food’s enforcement has soon emerged among the international community too; consequently, actions have been undertaken in order to create organizations or mechanisms that could function as intermediaries between the people on the one hand and the judicial system on the other. International civil society organizations movements and networks, as the Right to Food Campaign and other mechanisms at the domestic level, work for empowering people to claim their rights at the international level. In the same way, they put pressure on governments and authorities for the realization of the Right to Food and try to involve right-holders in the Right to Food’s articulation too.

However, these international civil society organizations have an additional value with respect to the national ones: they can create net of individuals, groups, movements and so on, which cross national boundaries. In so doing, they can transform what would remain divided national fights in one single and interrelated global fight. The first international human right organization advocating for the Right to Food and one of the most active ones at the global level is the FIAN international, formerly FoodFirst Information and Action Network.

²⁷³ E. BALDRY, R. MCCAUSLAND, *Social Justice in Development*, unpublished paper, 2008, p.14, cited in NATIONAL PRO BONO RESOURCE CENTRE, *Occasional Paper No 1: What is Social Justice?*, October 2011, p. 3. Available online.

²⁷⁴ N. RAMANUJAN, N. CAIVANO, S. ABEBE, *From Justiciability to Justice: Realizing the Human Right to Food*, in *McGill International Journal of Sustainable Development*, Volume II issue I., 2015, p.5. Available online.

²⁷⁵ C. GOLAY, *The Right to Food and Access to Justice*, *op. cit.*, p. 59.

²⁷⁶ N. RAMANUJAN, N. CAIVANO, S. ABEBE, *op. cit.*, p.15.

III.2.1 FIAN international

FIAN international was created in 1986 as an international action network on the Right to Food. In quality of no-profit organization, without any political or religious affiliation, it is active in about fifty countries and it enjoys a consultative status within the Economic and Social Council of the United Nations (ECOSOC). FIAN's vision is "a world free from hunger, in which every person fully enjoys all human rights in dignity and self-determination, particularly the human right to adequate food and nutrition"²⁷⁷ as laid down in the Universal Declaration of Human Rights and other international human rights instruments. Among these instruments, FIAN considers especially the ICESCR with the relative General Comment No.12 and Optional Protocol²⁷⁸, as well as other relevant ones such as the CEDAW and the CRC²⁷⁹.

On the basis of these international law instruments and in pursuit of its vision, FIAN works in order to guarantee people with the access to adequate food and to the necessary resources to feed themselves by contributing to the effective implementation of the international and soft law provisions. To this purpose, the network organizes campaigns and other activities to put pressure on governments.

Secondly, it is engaged in rendering visible cases of Right to Food and Nutrition's (hereinafter RtFN)²⁸⁰ violation and guaranteeing that these are adequately treated; hence, the fight for the Right to Food becomes a fight against discrimination and marginalisation too, in name of the interdependence and indivisibility of all human rights. According to this mission, FIAN International "responds to requests from individuals and groups whose human right to adequate food and nutrition is threatened or has been violated"²⁸¹ and after having analysed and documented the facts concerning the violation, it "denounces and demands investigation and punishment of the actors responsible"²⁸². In other words, it cooperates with people struggling for their human rights, in order to guarantee to them access to law and to render states or other authorities accountable.

One of the cases that testifies FIAN contribution to the fight for the RtFN's realization is reported in its publication on the occasion of the twenty-five years from the FIAN International's foundation, in 2011²⁸³. Two years before, a Colombian local community named *Las Pavas* had been evicted from its lands by the police after the orders obtained by two palm-oil producing companies. Having been deprived of their lands, they had been deprived of the possibility to have access to adequate food. For this reason, the community organized itself and filed a claim asking the reversal of the judicial decision that had ordered their eviction.

²⁷⁷ FIAN International Statutes reformed as of International Council Meeting 2014 of the FIAN International of 2014, par. 2. [Hereinafter International Statutes of the FIAN].

²⁷⁸ *Ivi*, par. 3.

²⁷⁹ International Strategic Plan 2008-2013 of the FIAN International approved at the IC meeting in Nepal of November 2017, par. 1.1. [Hereinafter International SP of the FIAN]

²⁸⁰ FIAN International adopts the term "right to food and nutrition" instead of the simpler "right to food" because it wants to reach a more holistic understanding. According to FIAN International, to speak about the human Right to Food inevitably requires speaking about Nutrition; otherwise, food production will always remain separated from malnutrition.

²⁸¹ International Statutes of the FIAN, above no 277, par. 5.

²⁸² *Ibidem*.

²⁸³ FIAN INTERNATIONAL, *FIAN – 25 years supporting the struggle for the Human Right to Adequate Food*, September 2011. Available online. [Hereinafter FIAN, 25 years].

In this scenario, FIAN stepped in giving its strong contribution, which has been recognised by the Las Pavas community's leader too. "FIAN initiated two Urgent Actions, asking its international membership to write to the Colombian President to take the necessary steps to formalize the families' possession of the land. In 2009 FIAN, with other organizations, sent an Amicus Curiae brief to the judge in charge of the case, offering information to assist the Court in deciding the matter"²⁸⁴. The final judgment came on May 2011: the Court declared the illegality of the forced eviction and ordered the restitution of the lands²⁸⁵.

Apart from its general mission, FIAN international also sets strategic goals periodically, in the so-called Strategic Plan (hereinafter SP). The last SP is the one covering the period 2018-2023 and approved during the International Council²⁸⁶ meeting in November 2017 in Nepal: its overarching goal is the strengthening of "People's struggle for the Right to Food and Nutrition (RtFN) and related human rights"²⁸⁷. This brings with it three other more specific objectives, namely: 1) to increase people's understanding of their RtFN and their capacity of using it in their struggles; 2) to increase people's capacity to claim for respect, protection and realization of the RtFN and related human rights; 3) to strengthen FIAN international as an international organization both through the articulation and organization of its sections' activities and through the construction of alliances with other movements that share the same fight for RtFN and other human rights²⁸⁸. Thus, considering the plan, it is possible to see how FIAN international aims at helping people to realize their RtFN and its justiciability²⁸⁹. Indeed, the Plan itself declares that the major challenge is to resist the dismantling of democracy and of "the democratic promise that governments will respect, protect and fulfil human rights"²⁹⁰. FIAN tries to do so by enlarging the space left to civil society and by enforcing its impact: the international network proposes itself as a point of contact and interconnection among different struggles and organizations or movements. Indeed, it believes that "struggles for the Right to Food and Nutrition are manifold and interlinked, although often fragmented"²⁹¹ and thus it is fundamental to reunite them.

III.2.2 Civil Society Mechanism

On the same thinking and view that gave birth to FIAN international, another initiative was launched in 2010 by the Reformed Committee on Food Security²⁹²: namely an international Civil Society Mechanism (hereinafter CSM). The proposal came about during the thirty-six session of the CFS, held in Rome on October

²⁸⁴ *Ivi*, p. 13.

²⁸⁵ *Ibidem*.

²⁸⁶ According to par. 11.1 of the International Statutes of FIAN, the International Council is the body vested with the "ultimate authority for the conduct of the affairs of FIAN International" and it is "composed of the delegates of the National Sections". For further information, see the whole par. 11.

²⁸⁷ International SP of the FIAN, above no 279, p. 6.

²⁸⁸ *Ibidem*.

²⁸⁹ *Ivi*, par. 1.1.

²⁹⁰ *Ivi*, par. 1.1, point 4).

²⁹¹ *Ivi*, par. 1.8.

²⁹² See no111.

11-14 and 16, 2010, following the CFS's reform document that had invited civil society organizations, NGOs and their networks to "autonomously establish a global mechanism for food security and nutrition"²⁹³.

As well as FIAN International, the Mechanism was ideated as a "space for dialogue between a wide range of civil society actors where different positions can be expressed and debated"²⁹⁴: nowadays, the CSM is the largest international forum in which civil society organizations, social movements and NGOs involved in the hunger eradication are united. Its participation is open to all²⁹⁵, but some organizing principles are followed: in hearing and considering all the views coming from the different participants and stakeholders, "priority will be given to ensuring that the voices of smallholder producers, fisherfolk, pastoralists, indigenous, urban poor, migrants, agricultural workers etc. are heard"²⁹⁶. Moreover, attention is "given to peasant and indigenous food producers and workers affected by hunger and marginalization because they represent a large majority of the hungry people in the world and produce the largest proportion of the food in the world"²⁹⁷. This testifies that the CSM has been especially ideated for giving voice to the most vulnerable sections of population.

However, from a certain point of view, the mechanism differentiates itself from FIAN international: the space of dialogue it creates has been intended especially as functional for developing relations with the United Nation Committee on Food Security itself. Its primary role indeed "is to facilitate the participation of CSOs in the work of the CFS, including input to negotiations and decision-making"²⁹⁸. It has to "present common positions to the CFS where they emerge and the range of different positions where there is no consensus"²⁹⁹.

On the view of this essential role, some of the mechanisms' members are guaranteed with a seat at the CSF's plenary sessions: the seats will be again decided giving priority to developing countries and to the most disadvantaged ones, but also respecting regional and constituency criteria³⁰⁰. Participation in the CSM is indeed based on a structure divided in global and sub-regional units. For the formers, these are organized in eleven constituencies that represent specific sectors: these are Smallholders Family Farmers, Artisanal Fisherfolk, Herders/Pastoralists, Landless, Urban Poor, Agricultural and Food Workers, Women, Youth, Consumers, Indigenous Peoples, NGOs³⁰¹. Sub-regional units instead, reunite organizations and movements that work in a specific sub-region but cross different constituencies: these are North America, Central America and Caribbean, Andean Region, Southern Cone, West Europe, East Europe, North Africa, Central Africa, East Africa, West Africa, South Africa, South Asia, Southeast Asia, Central Asia, West Asia, Australasia and

²⁹³ Reform of the CFS of the FAO, above no 111, par. 16.

²⁹⁴ Proposal for an International Food and Nutrition Civil Society Mechanism for relations with CFS of the CFS, Thirty-fifth Session of the CFS, Rome, of October 11-14 and 16, 2010, par. 4. Available online.

²⁹⁵ *Ivi*, par. 9

²⁹⁶ *Ivi*, par. 10.

²⁹⁷ *Ibidem*.

²⁹⁸ *Ivi*, par. 4.

²⁹⁹ *Ibidem*.

³⁰⁰ *Ivi*, par. 39.

³⁰¹ *Ivi*, par. 14.

Pacific³⁰². A Coordination Committee decides the participation quota of the different constituencies and sub-regional units³⁰³.

This Committee has been created, *inter alia*, to organize an annual meeting to be held before the annual session of the CFS: during this, the participants discuss on relevant issues on the Right to Food, identify urgent matters, and try to converge on common positions to be presented at the CSF³⁰⁴. These positions are then articulated and organized into real political inputs by the so-called Policy Working Groups, in order to be brought to the CFS's attention.

However, the CSM's work does not end at the annual meeting. Rather, there is an on-going Work Programme³⁰⁵ comprehensive of different activities at the local, regional and national level, including "lobbying and advocacy, shared learning, promotion of specific working groups, capacity building, and monitoring"³⁰⁶.

Consequently, what can be concluded is that the Civil Society Mechanism tries to work on the aspect coming before access to justice. While FIAN international aims at uniting the civil society's struggles and efforts mainly for monitoring the Right to Food's observance, enforcing accountability and facilitating access to justice in cases of violation, the CSM works on the previous step. Its main objective is to increase civil society's access not to justice but to the decision- and policy-making processes: in other words, to involve civil society not only in the Right to Food's defence, but also in its affirmation.

The importance of this other aspect for the Right to Food's enforceability has been later reiterated by the so-called Global Network for the Right to Food and Nutrition (hereinafter GNRFN) too, launched in 2013.

III.2.3 The Global Network for the Right to Food and Nutrition

The Network's launch came about during the Vienna + 20 Conference³⁰⁷ as "an initiative of public interest civil society organizations and social movements, which recognizes the need to act jointly for the realization of the human Right to Adequate Food and Nutrition"³⁰⁸. Its roles had been already clarified since the beginning: the Network has been ideated as a common base for the coordination and organization of those actors who have an interest and who advocate for fighting and condemning Right to Food's violations. Hence, with a Secretariat hosted by FIAN International itself, the Network has been created as a space of dialogue

³⁰² *Ivi*, par. 20.

³⁰³ *Ivi*, par. 26.

³⁰⁴ *Ivi*, par. 18.

³⁰⁵ *Ivi*, par. 7.

³⁰⁶ *Ibidem*.

³⁰⁷ The Vienna+20 CSO Conference was a conference held on June 25 and 26, 2013, in Vienna. It reunited more than 140 persons from various CSOs. The outcome was the adoption of the "The Vienna+20 CSO Declaration" which underlined the importance of human rights and called for a Third World Conference on Human Rights in 2018.

³⁰⁸ A call for joint action of the Global Network for the Right to Food and Nutrition of 24 June 2013, p. 2.

and as an additional accountability mechanism³⁰⁹. The international and soft law instruments previously analysed, constitute the common ground on which the different social movements and civil society organizations work.

As intended by the GNRFN's Charter indeed, the Right to Food and Nutrition's content consists in "having regular, permanent and unrestricted access to quantitatively and qualitatively adequate and sufficient food supported by culturally sensitive, nutrition-relevant information"³¹⁰, where "this access must respect both cultural traditions and the principle of non-discrimination"³¹¹. It is clear then, that this definition reaffirms the three components of *adequacy*, *availability* and *accessibility* already stated in the ICESCR.

Secondly, the Charter recalls the duty-bearers obligations as defined in the General Comment No. 12, *to respect*, *to protect* and *to fulfil*³¹², both at the domestic and at the international level³¹³, either alone or as a member of an international organization³¹⁴.

Thus, it could be concluded that the Network is actually focused mainly on the aspect of accountability and justice, as well as FIAN international.

However, this is not the case. The GNRFN also inserted an innovative element in the Right to Food and Nutrition's understanding with respect to the traditional definitions. Indeed, apart from recognizing the obligations and the three Right to Food's dimensions, the members have underlined how the Right to Food and Nutrition includes also "the right to people's informed participation in the decision making and elaboration of public policies"³¹⁵. This clarification explicitly demonstrates that the Network follows a right-based approach also similar to the CSM. The *availability* of and *accessibility* to adequate food does not have to constitute a mere act of charity: right-holders and duty-bearers have to work jointly for its enforcement, and the monitoring activities conducted by the Network itself is not limited to analyse if, how many and which kind of people are guaranteed with their right. On the contrary, it aims also at guaranteeing that the same people are informed about it and the progress made at the judicial level, and that they are rendered able to participate in the Right to Food's articulation, not only in its defence.

At this proposal, among the GNRFN's commitments it appears the continuance of the publication of the so-called Right to Food and Nutrition Watch. The first volume had already been published in 2008 under the pressure and challenges posed by the global food crisis. It asked to the International Court of Justice "to issue

³⁰⁹ Announcement and Invitation to a Public Event: A Call for Action – The Launch of the Global Network for the Right to Food and Nutrition of the Vienna+20 CSO, Centre for International Development, of 24 June 2013, p. 1.

³¹⁰ Charter of the Global Network for the Right to Food and Nutrition, principle no 1, June 2013.

³¹¹ *Ibidem*.

³¹² *Ivi*, principle no 2, letter b).

³¹³ *Ivi*, principle no 2: "States, as duty bearers, have clear national obligations under International Human Rights Law including their extraterritorial obligations".

³¹⁴ *Ivi*, principle no 2, letter c): "Meet their obligations as global actors, including in their role as members of intergovernmental organizations".

³¹⁵ *Ivi*, principle no 1.

an advisory opinion on the kinds of international policies that violate the Right to Food, and human rights in general, and to define a set of criteria to make sure that international policies, such as those in the fields of trade, finance and development assistance, will not violate human rights treaties, with special attention to the right to adequate food”³¹⁶. Since then, it constitutes an analysis and advocacy instrument for supervising “key policies, processes and issues related to the Right to Adequate Food and Nutrition at the global, regional, national and local level”³¹⁷ and “to give visibility to people’s struggles and efforts on the ground”³¹⁸.

The 2012 volume has also recognized that the Civil Society Mechanism, as an autonomous mechanism of the CFS, has permitted an increase in the “level of participation of a range of civil society actors”³¹⁹, which demonstrates that participatory approaches to governance for food security and nutrition are possible within international decision-making processes.

III.3 Final considerations: the way forward

“It is paradoxical, but hardly surprising, 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”³²⁰.

Undeniably, what Philip Alston wrote in 1984 it is still a reality: there are still many people, worldwide, that do not have their Right to Food guaranteed. Alston affirmed that this was strongly because of a general “devaluation of the actual international law norm – the Right to Adequate Food”³²¹ so that the issue is often transformed “into a vague ethical or moral one thereby (...) divesting it of its normative status”³²².

However, as the analysis has shown, through the history there has been a progress towards the consideration of the *accessibility* to and *availability* of adequate food as the result of an entitlement, not of a mere act of charity. Moreover, advantages of justiciability have been recognized. First of all the judiciary is often indicated by the national constitutions as the guardian of the rights of the people: once the judges express themselves on the rights of the people their enumeration becomes binding on any other authority. Consequently, the judiciary is the most appropriate one in ensuring enforceability. Indeed, the political system is subject to instability so that letting the enforcement of the Right to Food in the political branches’ hands would not constitute a guarantee. On the contrary, when decisions are taken by the judiciary it is possible to apply the doctrine of precedent, so that the decision comes to be perceived as an obligation by the executive, the legislative and the

³¹⁶ FIAN INTERNATIONAL, *Right to Food and Nutrition Watch 2008: Zero Issue, The World Food Crisis and the Right to Food*, October 2008, point 8, p. 10. Available online.

³¹⁷ This definition is provided by the RtFN’s watch webpage, in the section Home.

³¹⁸ *Ibidem*.

³¹⁹ FIAN INTERNATIONAL, *Right to Food and Nutrition Watch 2012: Who Decides About Global Food and Nutrition? Strategies to Regain Control*, October 2012, p. 14. Available online.

³²⁰ P. ALSTON, *International law and the Human Right to Food*, in P. ALSTON, K. TOMASEVSKI (EDS.), *The Right to Food*, Netherlands, 1984, p. 9. Available online.

³²¹ *Ibidem*.

³²² *Ibidem*.

administration too. Moreover, when judging the Courts usually apply international human rights standards to domestic legislation and in so doing the victims can receive a more adequate support. Finally, as seen, the judiciary's role is fundamental in the case a law is not clear on a point³²³.

Once this is recognised, “success would mean that the eradication of hunger and malnutrition would become a serious priority concern for all governments”³²⁴, and there is a step undertaken by the governments that may be a positive signal in this respect.

In September 2015, the General Assembly of the United Nations adopted the 2030 Agenda for Sustainable Development, based on the purposes and principles of the UN Charter, the UNDHR and on the other relevant international human rights treaties, as well as on the Millennium Declaration and the 2005 World Summit Outcome³²⁵. In this occasion, the States agreed on 17 Sustainable Development Goals (hereinafter SDGs) and 169 targets, in order to reach five main goals. Among these, the governments resolved to “end hunger and poverty everywhere”³²⁶ before 2030.

Goal number 2 indeed is dedicated to “end hunger, achieve food security and improve nutrition and promote sustainable agriculture”³²⁷; this means to, “by 2030, end hunger and ensure access by all people, in particular the poor and the people in vulnerable situations, including infants to safe, nutritious and sufficient food all year round”³²⁸. Moreover, it means to, “by 2030, end all forms of malnutrition, including achieving, by 2025, the internationally agreed targets on stunting and wasting in children under 5 year of age and address the nutritional needs of adolescent girls, pregnant and lactating women and older persons”³²⁹.

These commitments clearly show an awareness, on the part of the States, of the matter's urgency.

³²³ P. GARGI DUTTA, *op. cit.*, p. 2.

³²⁴ P. ALSTON, K. TOMASEVSKI (EDS.), *op. cit.*, p. 8. Available online.

³²⁵ Resolution 70/1 of the UN General Assembly of the seventh session of 25 September 2015 on Transforming our world: the 2030 Agenda for Sustainable Development, A/RES/70/1, par. 10.

³²⁶ *Ivi*, par.3: “We resolve, between now and 2030, to end poverty and hunger everywhere; to combat inequalities within and among countries; to build peaceful, just and inclusive societies; to protect human rights and promote gender equality and the empowerment of women and girls; and to ensure the lasting protection of the planet and its natural resources”.

³²⁷ *Ivi*, Sustainable Development Goal no 2.

³²⁸ *Ivi*, Sustainable Development Goal no 2.1.

³²⁹ *Ivi*, Sustainable Development Goal no 2.2.

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SOMMARIO

Il presente elaborato si prefigge l'obiettivo di dimostrare la *justiciability* del diritto al cibo. A tale proposito viene condotta un'analisi degli strumenti di diritto internazionale e di *soft law* che dalla metà del XX secolo in poi hanno contribuito a delineare e definire il contenuto normativo di tale diritto. Alla luce di quanto emerso dallo studio degli atti giuridici, viene poi analizzato il caso *PUCL v. Union of India and others* (PUCL), dove le decisioni della Corte Suprema Indiana costituiscono un esempio di valida affermazione del diritto al cibo a livello nazionale. Dallo studio sia delle norme internazionali che di un caso giuridico concreto, si arriva quindi a demolire le obiezioni tradizionalmente avanzate all'idea di *justiciability* dei diritti economici, sociali e culturali e quindi del diritto al cibo stesso. Infine, prendendo in considerazione la rilevanza dell'intervento della società civile nel caso indiano, l'elaborato illustra alcuni dei meccanismi attivi a livello internazionale, che vedono un'importante partecipazione di questa nella lotta per la *justiciability* e l'*enforceability* del diritto al cibo.

Un diritto diviene *justiciable* una volta riconosciuta l'autorità di un organo giudiziario o semi-giudiziario ad esprimersi sulla sua applicazione e sugli eventuali rimedi in caso di violazione. Per questo, la *justiciability* è strettamente legata al principio secondo cui *ubi jus ibi remedium*, ovvero laddove c'è un diritto c'è un rimedio, riconosciuto anche dall'articolo 8 della Dichiarazione Universale dei Diritti Umani del 1948.

L'affermazione del diritto al cibo come *justiciable* è il risultato di un lungo percorso iniziato con il riconoscimento di esso come un vero e proprio diritto umano attorno alla metà del XX secolo. La prima articolazione del diritto al cibo si trova nell'articolo 25(1) della Dichiarazione Universale dei Diritti Umani, la cui formulazione tuttavia sancisce ancora il diritto al cibo solo come uno degli aspetti del diritto ad un adeguato standard di vita, e quindi in maniera vaga e poco pragmatica. Circa due decenni dopo, l'articolo 11 della Convenzione Internazionale sui Diritti Economici, Sociali e Culturali entrata in vigore il 3 Gennaio 1976 definì nuovamente il diritto al cibo in funzione del diritto ad un adeguato standard di vita ma specificandone due diverse dimensioni: il diritto ad un cibo adeguato e il diritto fondamentale di ogni individuo alla libertà dalla fame. Fu poi il Commento Generale n. 12 adottato il 12 Maggio 1999 dal Comitato sui Diritti Economici, Sociali e Culturali dell'ONU a specificare il contenuto delle due dimensioni e gli obblighi che ne derivano. Secondo quella che viene considerata una delle più autorevoli definizioni, il diritto ad un cibo adeguato ricopre le tre dimensioni di adeguatezza, disponibilità e accessibilità, mentre il diritto fondamentale di ognuno alla libertà dalla fame indica il diritto ad accedere ad un livello minimo essenziale di cibo che sia sano e nutriente. Inoltre, altri strumenti di diritto internazionale come la Convenzione sull'Eliminazione di ogni forma di discriminazione contro le donne e la Convenzione internazionale sui diritti dell'infanzia trattano il diritto al cibo con riferimento a specifiche categorie quali donne e bambini.

Una volta affermata l'esistenza del diritto al cibo, al fine di arrivare ad una vera e propria *justiciability* è poi fondamentale definire da un lato i portatori di doveri con i rispettivi obblighi e dall'altro i titolari di diritti con i meccanismi di ricorso e i rimedi a loro disposizione.

Per quanto riguarda la prima categoria, gli Stati che hanno ratificato un trattato sono considerati come coloro su cui pendono gli obblighi legali derivanti dal trattato stesso. Con rispetto ai diritti economici, sociali e culturali, gli Stati si trovano sotto due principali categorie di obblighi, generali e specifici, sia a livello interno sia a livello internazionale. Tra gli obblighi generali, la Convenzione sui diritti Economici, Sociali e Culturali identifica il dovere di operare (*to take steps*) al fine di raggiungere progressivamente la completa implementazione di tali diritti, sempre tenendo in considerazione le risorse a propria disposizione, e il dovere di non discriminare (*not to discriminate*). Gli obblighi specifici riguardo al diritto al cibo sono invece individuati dal Commento Generale n. 12 e si riferiscono al dovere di rispettare (*to respect*), proteggere (*to protect*) e rendere effettivo (*to fulfil*) il diritto al cibo. Il primo costituisce un obbligo di natura negativa, dove allo stato si richiede semplicemente di astenersi dall'intraprendere ogni azione che potrebbe ostacolare l'accesso delle persone al cibo o ai mezzi per procurarselo, mentre il secondo e il terzo dovere sono di natura positiva. Ad ogni stato viene chiesto di proibire la violazione del diritto al cibo da parte di terzi attori e di rendere più facile l'accesso al cibo o di fornirlo direttamente quando le persone non possono soddisfare autonomamente tale diritto a causa di fattori esterni che esulano dal loro controllo.

I titolari di diritti sono invece gli individui, da soli, in gruppo o comunità. In caso di una violazione del proprio diritto al cibo, gli individui possono in primo luogo appellarsi a meccanismi di ricorso nazionali: questo sarà efficace soprattutto nei casi in cui lo Stato adotta un approccio cosiddetto "monista" per cui considera la legge internazionale come parte della legge interna che può quindi essere direttamente invocata di fronte ad una corte domestica.

Tuttavia, l'elaborato prende in considerazione soltanto quelli che sono i meccanismi di ricorso internazionali. A tale livello, gli Stati hanno la facoltà di portare un caso di fronte alla Corte di Giustizia Internazionale, mentre gli individui possono avvalersi di corpi speciali istituiti dai trattati che regolano il diritto in questione. In relazione al diritto al cibo quindi, gli individui o gruppi di individui possono riferirsi ai meccanismi internazionali di reclamo rispettivamente della Convenzione sull'eliminazione di ogni forma di discriminazione contro le donne, della Convenzione sui diritti dell'infanzia e della Convenzione Internazionale sui Diritti Economici, Sociali e Culturali. Quest'ultima è stata dotata del proprio meccanismo di reclamo soltanto in seguito alla crisi del 2008, quando l'adozione del Protocollo Opzionale ad essa relativo dichiarò la consapevolezza da parte degli Stati, della necessità di dare al Comitato sui Diritti Economici, Sociali e Culturali la competenza di ricevere e considerare reclami, il ruolo di fornire i propri buoni uffici per arrivare ad una composizione amichevole e anche la possibilità di indicare alcuni provvedimenti provvisori o di iniziare un'indagine.

In seguito al raggiungimento di una più chiara e concreta definizione del diritto al cibo e dei doveri che ne conseguono e in seguito ad un periodo di confronti e negoziati tra i vari soggetti interessati, il Consiglio della FAO nel 2004 arrivò all'adozione, all'unanimità, di alcune linee guida per l'implementazione del diritto al cibo a livello nazionale (*Voluntary Guidelines to support the progressive realization of the right to adequate food in the context of national food security*). Essendo volontarie, tali linee guida non danno vita a obblighi legali ma costituiscono un valido strumento per aiutare gli stati ad applicare gli strumenti di diritto internazionale da loro ratificati, oltre che per monitorare e valutare lo status di garanzia e protezione del diritto al cibo.

L'attenzione della comunità internazionale verso il diritto al cibo aumentò però soprattutto in seguito alla crisi economica e finanziaria del 2008, la quale ebbe ripercussioni negative anche sul mercato del cibo e sulla capacità dei governi di garantire adeguatezza, accessibilità e disponibilità. Il notevole aumento dei prezzi infatti causò inevitabilmente degli ostacoli all'accesso al cibo adeguato, soprattutto per le popolazioni più povere e per i paesi fortemente dipendenti dalle importazioni. Nel 2008, secondo le stime della FAO, 923 milioni di persone nel mondo soffrivano di malnutrizione.

La comunità internazionale dunque riconobbe che il diritto al cibo stava attraversando un momento critico. A questo proposito, le risposte più rilevanti arrivarono dal Comitato per i Diritti Economici, Sociali e Culturali con il *The World Food Crisis Statement*, dal Consiglio per i Diritti Umani con la Risoluzione S-7/1 e dal Relatore Speciale dell'ONU per il diritto al cibo, il quale definì la violazione di quest'ultimo come un "*man-made disaster*". Lo scenario internazionale mostrava una chiara violazione del diritto al cibo che costituiva anche una minaccia al godimento degli altri diritti; tanto il Comitato quanto il Consiglio e il Relatore Speciale quindi, richiamarono gli Stati e le istituzioni al rispetto degli obblighi internazionali, all'analisi delle cause della crisi sia di breve che di lungo termine, e ad una particolare attenzione per le popolazioni più vulnerabili. Tuttavia, oltre a provocare avvisi e richiami, la crisi globale portò anche a delle azioni e iniziative concrete. Oltre all'adozione del Protocollo Opzionale sopra discusso, furono sviluppati alcuni meccanismi volti a riformare il sistema di *governance* con rispetto alla fame e alla malnutrizione.

Tra questi, nell'Aprile 2008 il Segretario Generale delle Nazioni Unite Ban Ki-Moon stabilì la *UN High Level Task Force on Global Food and Nutrition Security* (HLTF) come meccanismo di coordinamento del lavoro di diversi *stakeholders*. Dopo tre mesi dalla sua istituzione, tale meccanismo emise il *Comprehensive Framework for Action* (CFA) per guidare i governi nazionali nella lotta a quella che veniva vista come una sfida globale. Il CFA però adottava un *two tracks approach* focalizzato da un lato su misure a breve termine per affrontare i bisogni immediati delle popolazioni più deboli, e dall'altro su misure a lungo termine, senza tuttavia considerare il diritto al cibo.

Tuttavia, alla fine del 2008, il numero di persone affamate nel mondo raggiunse un milione rendendo quindi evidente che l'inclusione del diritto al cibo nella strategia di azione contro la crisi era ormai inevitabile. Di

conseguenza, il CFA venne riformato nell'*Updated Comprehensive Framework for Action* (UFCA) che include dei riferimenti specifici al diritto al cibo anche se dichiara di seguire ancora un *two tracks approach*. Un ulteriore tentativo di integrare il diritto al cibo nella strategia di azione contro la crisi venne fatto con l'adozione, nel 2012, del *Global Strategic Framework for Food Security and Nutrition* (GSF) da parte del Comitato per la Sicurezza Alimentare Mondiale dopo la sua riforma del 2009. IL GSF fu ideato come strumento consultivo a disposizione dei governi e di altri soggetti interessati: l'elemento innovativo fu l'esplicita adozione di un *right-based approach* nei confronti della fame e della malnutrizione. A questo proposito, il GSF riconosce tra i suoi ruoli più importanti quello di promuovere la responsabilità degli attori interessati.

Un chiaro esempio di messa in pratica, a livello nazionale, di un *right-based approach* in conformità con gli strumenti internazionali di diritto e di *soft law*, è rappresentato dal caso *People Union for Civil Liberties v. Union of India & Others* (PUCL). Nell'aprile 2001 l'unità della *People Union for Civil Liberties* dello stato federato indiano del Rajasthan e Colin Gonsvales del *Human Rights Law Network* presentarono una petizione alla Corte Suprema indiana. Nella presente, i firmatari denunciavano l'incapacità del governo di gestire l'eccedenza della produzione del grano che giaceva inutilizzata nei magazzini della *Food Corporation of India* (FCI), mentre la popolazione moriva di fame a causa della siccità che stava colpendo lo stato del Rajasthan da alcuni anni. Nella petizione infatti, il governo centrale, i governi dei vari stati, la FCI e il Ministero del cibo e dei consumatori vennero dichiarati colpevoli della violazione del diritto al cibo e quindi del più ampio diritto alla vita, garantito dall'articolo 21 della Costituzione Indiana come diritto fondamentale.

Secondo i firmatari, i *respondents* erano venuti meno agli obblighi di proteggere (*to protect*) il diritto al cibo della popolazione e di provvedere (*to provide*) quest'ultima delle risorse necessarie alla loro nutrizione. Il governo centrale e quelli statali infatti, non avevano intrapreso alcuna misura per impedire che i negozi aumentassero il prezzo dei beni alimentari e allo stesso tempo non avevano assistito le vittime della fame, le quali mancavano di ogni possibilità di controllo tanto sugli inefficienti sistemi di distribuzione quanto sugli effetti della perseverante siccità.

Il caso fu quindi definitivamente aperto il 23 Luglio 2001 quando la Corte Suprema Indiana emise la propria risposta. In primo luogo, la Corte riconobbe che la questione era di interesse pubblico e concordò con i firmatari della petizione sul fatto che le morti per fame non erano la conseguenza di una mancanza di risorse ma di una mancanza di accessibilità e di disponibilità di queste. In secondo luogo i giudici, una volta identificati titolari di diritti e portatori di doveri, definirono le misure concrete da adottare per la realizzazione del diritto al cibo e quindi del diritto alla vita.

L'approccio adottato dalla Corte cambiò notevolmente dall'apertura del caso alla sua chiusura nel 2017: nei primi *interim orders* infatti i giudici si limitarono a ribadire il dovere degli Stati e del governo centrale di fare in modo che il cibo venisse reso disponibile per le vittime della fame, lasciando tuttavia alle autorità la scelta di quali misure adottare per raggiungere tale obiettivo. Successivamente invece, la Corte indicò una serie di

schemi che dovevano essere implementati dai governi, al fine di garantire il diritto al cibo: tra questi figuravano il *Mid-Day Meal Scheme* e l'*Integrated Child Development Scheme*. Gli schemi erano già stati previsti dal governo indiano ma mai realmente implementati; per questa ragione, i giudici intervennero definendo anche i dettagli per la loro realizzazione effettiva. Inoltre, la Corte decise di nominare dei commissari per portare avanti un monitoraggio del grado di implementazione di tali schemi: avvalendosi dell'assistenza di individui e organizzazioni a livello locale, i Commissari avevano il compito di supervisionare la messa in atto delle misure indicate dalla Corte sia a livello nazionale che statale e di fornire dei rapporti a riguardo.

L'approccio utilizzato dalla Corte e soprattutto l'interpretazione data alla Costituzione indiana furono determinanti per la riuscita del caso e per la sua affermazione come pilastro per l'ammissibilità della *justiciability* del diritto al cibo. Infatti, il testo costituzionale invocato dai firmatari della petizione non vede il diritto alla vita includere espressamente il diritto al cibo; al contrario, il primo sembra riferirsi quasi esclusivamente a diritti civili e politici. Inoltre, mentre il diritto alla vita è inserito tra i diritti fondamentali e quindi ritenuto *enforceable*, il diritto al cibo è inserito tra i *Directive Principles*, i quali devono indirizzare il governo nell'adozione delle leggi ma non sono *enforceable* nelle corti.

Nonostante questi limiti, la Corte Suprema Indiana, sulla base di un precedente costituzionale e riprendendo implicitamente il punto di vista della Dichiarazione Universale dei Diritti Umani e della Convenzione Internazionale sui diritti Economici, Sociali e Culturali, interpretò il diritto fondamentale alla vita come il diritto a vivere in dignità e dunque come comprendente il diritto ad una adeguata nutrizione. Tale interpretazione rese possibile la *justiciability* del diritto al cibo.

Tuttavia, il caso divenne importante anche grazie all'interazione tra il sistema giudiziario e la società civile, rappresentata soprattutto dalla *Right to Food Campaign*. La campagna nacque proprio nel seno del caso PUCL, con l'obiettivo di riunire i diversi attori interessati e i loro sforzi nella lotta per l'affermazione del diritto al cibo come diritto legale. Fungendo da promotore di mobilitazione e da fondamentale risorsa di informazione, e attraverso una serie di iniziative e attività rivolte alla Corte, ai commissari e alla popolazione, la campagna contribuì a costruire la consapevolezza delle vittime da un lato e un sistema di responsabilità dei governi dall'altro. Il suo ruolo quindi, dimostra che per la piena realizzazione del diritto al cibo l'aspetto legale deve inevitabilmente essere affiancato da un coinvolgimento e una mediazione della società civile, che diano concretezza alle opportunità create dal sistema legale stesso.

Il caso venne definitivamente chiuso dalla Corte Suprema il 10 Febbraio 2017, data l'approvazione nel 2013 del *National Food Security Act of 2013*: i giudici ritennero che data la sua entrata in vigore, non sussistevano più le ragioni necessarie per mantenere il caso aperto.

Sulla base di quanto analizzato a livello normativo e casistico, è possibile quindi affermare che nel corso della storia il diritto al cibo è arrivato ad essere riconosciuto come *justiciable*. Per questo motivo, l'elaborato vuole ribattere alle critiche tradizionali contro la *justiciability* dei diritti economici, sociali e culturali e quindi anche del diritto al cibo.

La presunta imprecisione della formulazione del diritto al cibo costituì una delle prime ragioni in nome delle quali veniva rifiutata la sua *justiciability*: non essendo chiaro che cosa tale diritto significasse concretamente e quali fossero gli obblighi derivanti, i corpi giudiziari o semi-giudiziari non venivano visti come capaci di intervenire e dichiarare uno Stato responsabile per la violazione del diritto al cibo. Tuttavia, le Corti possono contribuire ad un delineamento più preciso dei diritti e dei doveri: la presunta vaghezza dovrebbe quindi costituire un motivo per permettere ai giudici di esprimersi, piuttosto che un deterrente.

Inoltre, anche quando lo sviluppo delle norme internazionali e di *soft law* chiarirono il contenuto normativo del diritto al cibo, un'obiezione maggiore continuò ad essere presentata. Essendo strettamente legato a fattori economici e sottoposto alle clausole di "risorse disponibili" e "realizzazione progressiva", il diritto al cibo non era ritenuto sottoponibile al giudizio delle corti: i paesi più poveri semplicemente non possono garantire il diritto al cibo e l'interferenza delle corti nelle questioni economiche significherebbe una violazione del principio di separazione dei poteri. Tuttavia, anche tali affermazioni sono facilmente obiettabili: in primo luogo, nel giudicare, le Corti tengono in considerazione la differenza tra *unwillingness* e *inability*, dove solo la prima provoca una violazione del diritto. E' quindi deducibile che la condizione di "risorse disponibili" non deve ostacolare la facoltà di una Corte di poter esprimere il proprio giudizio, ma soltanto garantire che venga tenuta in considerazione la situazione effettiva dello Stato in questione. Inoltre, la condizione di "realizzazione progressiva", non deve costituire una giustificazione per gli Stati per la mancata inosservanza dei loro doveri. Anche l'idea di interferenza con il principio di separazione dei poteri può in realtà essere controbattuta: se da un lato il potere esecutivo e legislativo devono prendere le proprie decisioni in autonomia, dall'altro il potere giudiziario è chiamato a verificare che tali decisioni siano in conformità con la legge riguardante i diritti umani e con la Costituzione nazionale. Inoltre, in alcuni casi al potere giudiziario è semplicemente richiesto di rendere effettive delle decisioni già intraprese dal potere legislativo e dal potere esecutivo.

Pertanto, non è più possibile sostenere la presunta mancanza di legittimità democratica e capacità istituzionale della Corte di *enforce* il diritto al cibo e i diritti economici, sociali e culturali. A prova di ciò, l'elaborato analizza brevemente alcuni casi giurisprudenziali in cui gli organi giudiziari si sono espressi sui doveri dello stato di non discriminare, rispettare, proteggere e rendere effettivo il diritto al cibo.

Tutti i casi descritti però, mostrano l'importanza della società civile: in ognuno di essi infatti, è una organizzazione non governativa in nome delle vittime, a portare il caso di fronte ad una Corte. Questo fattore è la dimostrazione del fatto che l'impossibilità per le vittime di accedere direttamente alla giustizia rende la *justiciability* solo uno degli aspetti per una vera e propria *enforceability*. Benché un diritto sia ritenuto

justiciable, se la popolazione manca degli strumenti economici o educativi per prendere consapevolezza dei loro *entitlements* e per poterli rivendicare di fronte ad un organo giudiziario, le violazioni rimangono impunte.

Anche a livello internazionale, la consapevolezza dell'insufficienza del sistema giudiziario di garantire un *enforcement* effettivo del diritto al cibo è presto emersa. Di conseguenza, sono stati creati appositi meccanismi che potessero rendere consapevoli le persone dei propri diritti, dargli il potere di reclamarli, porre pressione sui governi e sulle autorità e coinvolgere i titolari di diritti nell'articolazione, e non soltanto nella difesa, del diritto al cibo.

Il primo di tali meccanismi è *FIAN International*, un'organizzazione senza scopo di lucro, nata nel 1986 con l'obiettivo di garantire l'accesso al cibo adeguato o alle risorse necessarie per procurarselo, e di rendere visibili casi di violazione del diritto al cibo.

Nel 2010 venne inoltre lanciato il Meccanismo della Società Civile per le relazioni con il Comitato sulla Sicurezza Alimentare Mondiale. Come indicato dal nome, tale meccanismo serve a sviluppare relazioni con il Comitato delle Nazioni Unite e dare voce, all'interno di quest'ultimo, agli interessi di diversi gruppi della società civile. In questo modo tuttavia, il Meccanismo si differenzia in parte da quello che è il ruolo di *FIAN International*: se quest'ultima agisce principalmente sul coinvolgimento della società civile *a posteriori* e dunque sull'accesso alla giustizia, il Meccanismo vuole invece rafforzare il coinvolgimento della società civile nei processi di presa di decisione e sviluppo di politiche inerenti al diritto al cibo, adottando quindi un approccio *a priori*.

Come sintesi di entrambi gli aspetti, nel 2013 fu lanciato il *Global Network for the Right to Food and Nutrition*, nel seno della *Vienna + 20 Conference*. Il Network venne pensato come un ulteriore spazio di dialogo e *accountability mechanism*, dove i diversi movimenti sociali e le varie organizzazioni della società civile lavorano sulla base comune costituita dagli strumenti di diritto internazionale e *soft law*. L'obiettivo del Network è allo stesso tempo quello di garantire l'accesso al cibo adeguato e il rispetto da parte degli stati degli obblighi che ne conseguono e di garantire il diritto di informazione e partecipazione delle persone.

La partecipazione di una vasta gamma di attori della società civile attraverso i vari meccanismi permette di dare concretezza al riconoscimento della *justiciability*. Una volta garantita quest'ultima e i suoi vantaggi, e rafforzata la capacità delle persone di poter accedere alla giustizia, ciò che è necessario è che i governi interpretino la lotta alla fame e alla malnutrizione come una priorità. A questo proposito, sembra un segnale positivo l'adozione da parte dell'Assemblea Generale delle Nazioni Unite, dell'Agenda 2030 per lo Sviluppo Sostenibile. In quest'ultima infatti, i governi si impegnano a “porre fine alla fame, raggiungere la sicurezza alimentare, migliorare la nutrizione e promuovere un'agricoltura sostenibile” entro il 2030.