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THE RIGHT TO FOOD:
ALTERNATIVE METHODS OF IMPLEMENTATION
The Role of Courts and Indicators

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To my parents,
to whom I owe more than words can convey.

To Andrea, Anna Rita and Fabio,
whose belief in me inspires me to be the best version of myself.

To all the friends who shared this path with me.

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CHAPTER ONE: INTRODUCTION

«In many cases, the equation is simple: those who have money eat, and those without suffer from hunger and the ensuing disabilities and often die. Yet hunger and malnutrition are by no means dictated by fate or a curse of nature; they are manmade. To die of hunger is equivalent to being murdered, while chronic and serious undernourishment and persistent hunger are a violation of the fundamental right to life. This silent tragedy occurs daily in a world overflowing with riches.»¹ With these words, the first Special Rapporteur on the Right to Food, Jean Ziegler, described the “paradox of plenty” that characterises the contemporary reality of world hunger. In fact, in line with the opinion that was strongly on the rise at the turn of the millennium and progressively reinforced by many studies he cited across his reports, Ziegler was completely persuaded that, in the absence of substantial reforms, free trade would never feed the world.²

The Special Rapporteurs are independent experts appointed by the UN Commission on Human Rights (since 2006 UN Human Rights Council), each with either a country-specific or a thematic mandate. Special Rapporteurs already existed since the 1980s, at the dependency of working groups and sub-commissions of the UN. However, in 2000, these professional figures were instituted as regular positions in the comprehensive framework of the Special Procedures of the Human Rights Council, assisted by the Office of the High Commissioner for Human Rights (OHCHR) in their task of supervising and advancing the realisation of human rights in the world. The position was further enhanced, with a prolongation of the term by one year and the creation of new thematic rapporteurs, when the Human Rights Council substituted the Commission on Human Rights in 2006. These experts investigate alleged violations of human rights – conditional on the invitation of the investigated country – and then report, providing guidance and opinions where necessary, whilst retaining impartiality and acting independently from governments. One of their main functions is their issuance of annual reports to the Commission on Human Rights (later to the Council) and to the General Assembly in which they review their activity, the evolutions of the doctrine concerning their thematic mandate and the most virtuous examples of realisation of the rights they oversee, whilst highlighting the critical aspects hindering progress. Among them is of course the Special

¹ J. Ziegler, *Report to the Commission on Human Rights*, E/CN.4/2001/53 (7 February 2001).

² J. Ziegler, *Report to the General Assembly*, A/56/210 (23 July 2001).

Rapporteur on the Right to Food, the opinions of whom have had decisive effects in highlighting the challenges to face, and determining the way forward for guaranteeing the right, through thematic studies, the development of guidelines and others.

The first part of this introduction will be devoted to providing an overview of the main features of the current global system of production, consumption and trade of agricultural goods, based on the reports of the three Rapporteurs. The following two Rapporteurs, Olivier De Schutter and Hilal Elver, essentially built upon Ziegler's work and shared his understanding of the critical aspects of the international system hindering the realisation of the right to food. As such, the initial portrayal will borrow synthetically from the extensive work of all three. Because the aim of the present work is to consider and compare different avenues to the realisation of the right to food, the issues touched upon in the reports, like land reform, biofuel production and intellectual property rights will be only briefly explained in this analysis, for the sake of the completeness of the picture, without delving into the technical implications. Likewise, for reasons of conciseness, the present work will not account for nutritional issues like obesity and micronutrient deficiencies, focusing instead on the phenomenon of world hunger. The second part of the introduction will then be dedicated to a general presentation of the two avenues of implementation that constitute the main focus of this essay, their challenges and their strengths, introducing the exploration that will take place in following chapters. Finally, the third part of the introduction will proceed to lay out the structure of the essay, with a brief overview of the content of each chapter.

1. RELEVANT FEATURES OF THE INTERNATIONAL SYSTEM

In a world of unprecedented plenty, many still suffer hunger and malnutrition, not due to an objective scarcity of resources, but to a failure, on both the global and, in many cases, the domestic level, to adequately distribute food and productive resources in a way that guarantees that everyone can benefit from sufficient and adequate nutrition. According to analyses from the Food and Agriculture Organisation of the United Nations (FAO hereafter), though the world could feed 12 billion people 2100 kcal/person/day at the current levels of production,³ the number of global hungry has

³ J. Ziegler, *Report to the Commission on Human Rights*, E/CN.4/2006/44 (16 March 2006).

once again been on the rise since the 1990s. The FAO's State Of Food Insecurity in the World (SOFI) reports pointed out exactly this trend across the last two decades: undernourishment remains a widespread problem, affecting around 821 million people worldwide⁴ — and the number has been on the rise in recent years, after decades of somewhat steady decline.⁵ As concerns the world's hungry, agricultural workers are among the most food-insecure, amounting to roughly 1.3 billion people, most of whom in developing States;⁶ it was estimated in 2008 that about 50 percent of the world's food-insecure are small household farmers, and another 20 percent are landless.⁷ Among those, women and infants are particularly vulnerable: infant undernutrition and the long-term consequences of stunting (in economic terms, a less productive future generation), together with the importance of the nutrition of women in breastfeeding age, have earned a spot of special attention in the international development debate as of late. The food-insecure most often face enormous barriers in terms of legal protection (of their work and working conditions, access to productive resources and such) and logistical impediments (often isolated, they lack proper access to markets), and their lingering condition of hunger and vulnerability testifies to the insufficient effort to address their needs thus far.⁸

Yet, the permanence of hunger is not due to a scarcity of resources: to evoke again Ziegler's words, «hunger is not inevitable, nor acceptable. We live in a world that is richer than ever before and that is entirely capable of eradicating hunger. There is no secret as to how to eradicate hunger, there is no need for new technologies, there is simply the need for political commitment to challenge existing policies that make the rich richer and the poor poorer.»⁹ The view whereby the permanence of a record number of hungry in pair with record levels of grain production most evidently signals that hunger is no longer a technical, or medical problem, but rather a political issue, has in present days become largely shared.¹⁰ Indeed, as De Schutter noticed in 2014, the increase in production achieved with the technological advances of the Green Revolution has done little to reduce the number of global hungry, and even less to reduce malnutrition.¹¹ Moreover, the increase in Greenhouse Gas (GHG) emissions that came with the progressive mechanisation of agricultural

⁴ FAO, *The State of Food Insecurity and Nutrition in the World*, Rome, 2018.

⁵ FAO, *The State of Food Insecurity and Nutrition in the World*, Rome, 2017.

⁶ H. Elver, *Report to the General Assembly*, A/73/164 (16 July 2018).

⁷ O. De Schutter, *Report to the General Assembly*, A/63/278 (21 October 2008).

⁸ H. Elver, *Report to the General Assembly*, A/73/164 (16 July 2018).

⁹ J. Ziegler, *Report to the General Assembly*, A/59/385 (27 September 2004).

¹⁰ See for example J. L. Vivero Pol, "Hunger for justice in Latin America", in M.A. Martin and J.L. Vivero Pol (eds.), *New Challenges to the Right to Food*, CEHAP, Cordoba and Huygens Editorial, Barcelona (2011).

¹¹ O. De Schutter, *Report to the Human Rights Council*, A/HRC/25/57 (24 January 2014).

production has largely offset the output increase for many developing States.¹² The orientation of global food systems to the maximisation of production that came with the globalisation of agricultural trade has failed to reduce undernutrition because it has not taken distributional issues into account. Instead, it engendered policy choices favouring regional specialisation in the production of a certain good and encouraging concentration of production in the hands of few.¹³ Nevertheless, despite the shared understanding that the problem was one of access to food, rather than availability of it, the focus on technical solutions bent on increasing the output of the agricultural production system rather than reforming its distributional shortcomings lingers on today. It was present in the final Declaration of the World Food Summit: Five Years Later of 2002,¹⁴ and it still echoes today in the words of the rising “agro-pessimism”, which pushes in the direction of yet more unnecessary food production increases.¹⁵ Between overconsumption, wastage and over-production of meat (which devotes to cattle-breeding agricultural resources that could be consumed by humans and causes enormous environmental damage through GHG emissions and deforestation)¹⁶ in developed countries, the unsustainability of the current food system has been theoretically addressed at length. Instead of doubling down on the productivist paradigm, the Rapporteurs pointed out, what is needed is a radical restructuring of the free trade-based global food system, inadequate to a universal realisation of the right to food.

Indeed, the Rapporteurs were hardly alone in their criticism: especially after the global food crisis of 2006-2008, widespread denunciation has risen against the Washington Consensus-based international system of trade, dominated by a neoliberal paradigm that has informed not only the regulations of international trade under the World Trade Organisation (WTO hereafter), but also the structural reforms imposed on developing States by the Bretton-Woods institutions, i.e. the International Monetary Fund (IMF hereafter) and the World Bank. Ziegler was especially critical of such system, recognising in its resistance to change one of the most imposing obstacles to the global realisation of the right to adequate food.¹⁷ He lamented what he described as the “schizophrenia of the

¹² Ibidem.

¹³ Ibidem.

¹⁴ FAO, *Appendix: Declaration of the World Food Summit: Five Years Later*, Rome, 2002, para. 4.

¹⁵ H. Elver, *Report to the General Assembly*, A/70/287 (5 August 2015).

¹⁶ O. De Schutter, *Report to the Human Rights Council*, A/HRC/25/57 (24 January 2014).

¹⁷ See, *inter alia*, J. Ziegler, *Report to the Commission on Human Rights*, E/CN.4/2004/10 (9 February 2004), paras. 14-23. As he states in para. 15: «Today, agricultural trade is far from being free, and even further from being fair.»

UN System”, whereby the Agencies of the UN carry out praiseworthy work for the realisation of food security worldwide, while the aforementioned bodies act in the opposite direction.¹⁸

On the widest level, the most notable way in which this happens is the liberalisation of agricultural trade, based on the Ricardian assumption that the specialisation of production along comparative advantages, together with free trade, would enrich all parties, in a positive-sum game.¹⁹ As such, in the 1980s, the Bretton-Woods institutions sponsored reforms in developing States that worked under the base assumption that liberalisation and removal of price controls would invite investment to make up for the loss of State protection. Notwithstanding, the intended effects failed to manifest, never causing the expected rise of a vibrant private sector production and making small-scale agriculture nearly unviable,²⁰ instead inviting the concentration of agricultural production in the hands of few who charge high prices on sales and pay low wages to farmers,²¹ to the detriment of consumers and producers alike. The import-dependency of developing States deepened as the neoliberal structural reforms steered their production away from the diversified model necessary for alimentary self-sufficiency, towards specific crops and tropical goods for export,²² exacerbated by in-kind food aid practices that would only later be acknowledged to have negative effects on internal production. Many migrated to the cities seeking food security, and many of those who remained in the rural countryside were reduced to subsistence farming.²³ Meanwhile, the States’ range of options to fix the situation is drastically limited by both the impossibility to pursue certain policies, due to the requisites of IMF and World Bank loans²⁴ (towards which most developing States have a crushing debt) and the progressive encroachment on State power by transnational corporations (TNCs hereafter).²⁵ As population grew, the rural exodus continued and investment in their agricultural production failed to manifest, these developing States found themselves trapped in this dependency — until the 2008 global food price crisis hit, making their vulnerability very evident, with a huge human cost.²⁶

¹⁸ J. Ziegler, *Report to the Commission on Human Rights*, E/CN.4/2002/58 (14 January 2002), p.4.

¹⁹ For the theory and applications of the economic theory of comparative advantages, consult e.g. R. G. Feenstra and A. M. Taylor, *Essentials of international economics*, 3rd edn., New York, Worth Publishers, 2014, pp. 29-57.

²⁰ Ibid.

²¹ J. Ziegler, *Report to the General Assembly*, A/56/210 (23 July 2001).

²² O. De Schutter, *Report to the Human Rights Council*, A/HRC/25/57 (24 January 2014).

²³ Ibidem.

²⁴ J. Ziegler, *Report to the General Assembly*, A/56/210 (23 July 2001).

²⁵ J. Ziegler, *Report to the Commission on Human Rights*, E/CN.4/2001/53 (7 February 2001).

²⁶ O. De Schutter, *Report to the Human Rights Council*, A/HRC/25/57 (24 January 2014).

Meanwhile, the negotiations in the WTO do not offer hope for respite, either: many developed countries (especially OECD countries) lagged heavily in the implementation of the terms of the WTO's Agreement on Agriculture (AoA) of 1992, which promotes the lowering of trade barriers whilst green-boxing agricultural subsidies. Their strongly subsidised (thus very cheap) exports therefore make their way into the markets of countries that cannot afford to enact the same subsidy policies, with detrimental effects on their alimentary self-sufficiency²⁷ as their internal production of staple crops is made impossible by the unreachable competition of these 'dumping' products. As such, the food security of internal producers, which in developing countries are mostly rural smallholder farmers, falls, as they are both unable to rely on the State for subsidies that would allow them to compete and no longer protected by trade barriers. Therefore, developing States turn into net importers that are unable to either produce the food necessary for their subsistence, or produce income sufficient to purchase it from abroad.²⁸ On many occasions did Ziegler call for these institutions to acknowledge their misdeeds and correct their course. In one of his earlier reports, he praised the proposals rising within the WTO of either considering food security a public good, or inserting a "food security" box in the AoA, both aimed at subtracting food and food production from the strict rules that govern the trade of commodities as well as allowing a degree of flexibility in the protection of non-export-oriented crops production.²⁹ However, much to his dismay, said proposals never made it into the Doha Round of negotiations. Notwithstanding the rising awareness of the disparity in WTO trade rules, the situation did not know any substantial change, save for the increasingly hostile stance of the developing States, which would culminate in the still-ongoing stall of the Doha Round.

As mentioned, agricultural workers are among the most disadvantaged; among them, some groups are particularly vulnerable: the most isolated, smallholder farmers producing for subsistence, women etc. Many emerging new challenges and phenomena progressively contributed to endangering their food security by creating new risks without being accompanied by a substantial solidification of their legal entitlements. One critical example of this is the often lacking protection of their right to property (on which access to productive resources hinges, especially for smallholder farmers), which is especially important in view of the rise of issues like large-scale land acquisitions (LSLAs), spurred by the growing demand for biofuels. While these have potentially beneficial ef-

²⁷ J. Ziegler, *Report to the Commission on Human Rights*, E/CN.4/2001/53 (7 February 2001).

²⁸ J. Ziegler, *Report to the Commission on Human Rights*, E/CN.4/2004/10 (9 February 2004).

²⁹ J. Ziegler, *Report to the General Assembly*, A/56/210 (23 July 2001).

fects for the global climate change effort, the establishment of supply chains for their production and trade, once again left in the hands of free trade mechanisms, has ended up creating detrimental effects on the food security of local farmers, often evicted from their lands without compensation, due to the scarce legal protection of their ownership.³⁰ In an effort to secure the short-term economic benefits in terms of FDI of foreign companies producing in their territory, many governments of developing States have unilaterally sold land that until that point had sustained the livelihoods of local residents. Even when they are once again hired by the companies that purchased the land (most of the times based in developed countries), it is oftentimes at exploitative conditions.³¹ Furthermore, the increased demand for land has driven up its price, as well, partly due to speculation, essentially pricing the poorer land-users out of the land market.³² Finally, other than devolving land previously dedicated to food production for local consumption to the export-oriented production (the “food vs fuel” controversy), the rise in biofuel production created great volatility for the world price of food, which is particularly concerning for import-dependent developing countries.³³

Further compromising the traditional production modalities of smallholder farmers and agricultural workers are the consequences of the patenting of genetic resources under the WTO Agreement on Trade-Related aspects of Intellectual Property Rights (TRIPS Agreement hereafter). Patenting the genetic strands of plants compromises the ability of farmers to use the seeds for replanting, as they had traditionally done with non-patented crops, which, due to the competition of cheap crops genetically engineered for mass production, are no longer economically viable in the absence of protective measures like trade barriers or agricultural subsidies. Moreover, though accidental contamination of GM crops in traditional plantations is not uncommon, the TNCs in the hands of which these intellectual property rights (IPRs) are concentrated filed numerous lawsuits against smaller farmers, with Monsanto reportedly filing as many as 475 as of 2004.³⁴ Contextually, other controversies may arise, such as the issue of illegitimate appropriation of IPRs of plant varieties traditionally used by indigenous peoples, suddenly making the utilisation of these traditional seeds costly for these communities (as was the case with US scholars patenting quinoa).³⁵

³⁰ O. De Schutter, *Report to the General Assembly*, A/63/278 (21 October 2008).

³¹ J. Ziegler, *Report to the General Assembly*, A/62/289 (22 August 2007).

³² O. De Schutter, *Report to the General Assembly*, A/63/278 (21 October 2008).

³³ H. Elver, *Report to the General Assembly*, A/70/287 (5 August 2015).

³⁴ J. Ziegler, *Report to the Commission on Human Rights*, E/CN.4/2004/10 (9 February 2004), para. 38.

³⁵ J. Ziegler, *Report to the General Assembly*, A/60/350 (12 September 2005).

Overarching all of this, the rise of corporate agribusiness poses its own set of problems. Today, global supply chains absorb a humongous 80% of world agricultural trade and 60% of global production, employing an estimated 453 million workers, often in slavery-like conditions.³⁶ Moreover, analyses have already testified how, on a global scale, unfair trade practices on their behalf are almost surely the cause for the continuous increase in food prices, despite the continuous trend of reduction of production costs since 1974,³⁷ among a number of other issues. TNC-led agricultural production is moreover mostly environmentally unsustainable, damaging biodiversity both because of deforestation (carried out with the intent to create more arable land,³⁸ be it for biofuels or food) and because of the change in the production regimen, compared to the more diversified (thus more resilient) rural smallholder-based agriculture.³⁹ The expansion of corporate agency and of their impact on the effectiveness of the decisions of State actors was however not accompanied by a commensurate evolution of accountability systems allowing to keep them in check.

On a systemic level, this is the context in which the analysis articulates. While not exhaustive, this analysis of the challenges presented by the current global landscape as concerns the right to food does strive to provide an overview of the main ones and a perspective on their interconnection, which will be a useful tool for the following chapters, borrowing from the extensive work of the Rapporteurs. This collection of criticisms is in no way meant to invite a strong anti-globalisation stance; as for example Tomuschat suggested, one should not lose sight of the beneficial sides of an interconnected world, for instance, as concerns the very advancement of the human rights doctrine. Think no further than the impact that the UDHR formulations have had on national constitutions all over the world: while the inclusion of human rights in systems that did not address such concerns thereto did not change things overnight, it *is* likely to gradually change the way of thinking of the people living in such systems towards an acceptance of such principles as founding norms.⁴⁰ The correct reaction to imperfections in a system is very seldom the refusal of the system in its entirety. However, to the aims of this thesis, it is essential to understand and keep in mind the various challenges to the universal eradication of hunger that the current system entails, at the same time displaying impressive resistance to change. The Special Rapporteurs have made repeated calls for a reform of the system in the direction of the inclusion of smallholder farmers in agricultural research

³⁶ H. Elver, *Report to the General Assembly*, A/73/164 (16 July 2018).

³⁷ J. Ziegler, *Report to the Commission on Human Rights*, E/CN.4/2004/10 (9 February 2004).

³⁸ J. Ziegler, *Report to the General Assembly*, A/62/289 (22 August 2007).

³⁹ O. De Schutter, *Report to the General Assembly*, A/64/170 (23 July 2009).

⁴⁰ C. Tomuschat, *Human Rights: Between Idealism and Realism*, Oxford, New York, Oxford University Press, 2008, p. 66.

and productive practices, as well as in relevant policymaking, an increased protection of their legal entitlements and a production centred on small-scale production for local markets. Proposals for reform of the global food system have ranged from a conversion to agroecology, to a more radical restructuring like the one proposed by “food sovereignty” movements. In general terms, their proposals have always gravitated around the empowering of smallholder producers, with special attention to the most vulnerable, as they constitute a significant portion of the food-insecure, and at the same time they are key to the conversion to a more sustainable model of production. Additionally, they were increasingly argued to be more productive per cultivated acre of land — though they do intuitively create challenges for the national administration in terms of ensuring their access to markets.⁴¹ There has been progress at both the international and the national level, as will be explored during this thesis; however, much still needs to be done: especially in a time when the global number of hungry is once again on the rise, it is necessary to explore all avenues available to bring progress back on the correct track.

2. JUSTICIABILITY AND INDICATORS: AN OVERVIEW

The understanding of the relation between the right to food and food security is an essential instrument to the development of this thesis. The two concepts have undergone a difficult and extremely complex process of evolution during the last seven decades. Food security, a relatively “younger” concept, was born during the 1970s. Its progressive evolution will prove pivotal in the rise of importance of the right to food, though the latter is a more dated concept, already envisaged in the UDHR of 1948. Indeed, the two concepts have evolved in parallel, influencing and shaping each other, to the point where their current respective formulations are mutually closely resembling. A simplified understanding of the relation between the two could go as follows: food security is the ultimate objective; the right to food is one way to achieve it. However, the reality of things is that there is more to the right to food than just a means to achieving food security. While the two concepts share consistent similarities, food security is ultimately concerned with creating a situation in which there is continuous and stable access to food, whereas the right to food is to be understood as one component of an interrelated and interdependent set of human rights. That is why the issue is

⁴¹ O. De Schutter, *Report to the Human Rights Council*, A/HRC/25/57 (24 January 2014).

best framed as whether or not to “adopt a right to food approach to food security”, entailing a higher degree of stringency of the related obligations and the possibility to vindicate the entitlements by a judicial mechanism. The relation between the two remains dubious to date, but it has received some academic attention that can act as a reference framework for the present thesis.⁴² A first difference is that while food security *per se* can be based on various grounds, from moral to economic, human rights are based on the fundamental notion of human dignity, thus entailing a priori commitments and the recognition of the interrelatedness, interdependence and inalienability of all human rights, as per the Vienna Declaration of 1993. As such, while food security is a policy concept, the missed realisation of which is regrettable at best, a rights-based approach entails legal entitlements under international treaty and customary law, the missed realisation of which constitutes a violation claimable in a court of justice. This difference commands different methods of implementation: a rights-based approach, whilst recognising the need to adapt the policies to national circumstances, poses a set of procedural requirements, like non-discrimination and attention to the most vulnerable. There is moreover a difference in perspective. As a human right, the right to food is fundamentally bound to the individualist perspective of entitlements tailored onto the individual. As Chapter Three will develop, this can inform policy through a rights-based approach to policymaking and development, which entails a series of methods and procedural requirements that ensure that the individual is empowered and the entitlements deriving from their human rights respected and made to be the central concern at all times. The relation between individuals and policymaking therefore goes from the former, endowed with entitlements to be respected, to the latter. In the case of food security, the relation goes the other way around: the focus of food security is primarily on governance, and the way to organise the various aspects of a society (production, distribution, emergency procedures and so on) so as to guarantee the stability and resilience to shocks of the system as a whole. Food security is a societal value, and does not stem from the individual: rather, by acting for the amelioration of the system and society in which the individuals live, they cause a ‘fallout’ sort of benefit upon them. As concerns monitoring, food security relies on anthropometric indicators, while a rights-based approach also relies on monitoring mechanisms that are versed in human rights, thus paying mind to “accountability, transparency, participation, the independence of the judiciary and

⁴² See K. Mechlem, “Food Security and the Right to Food in the Discourse of the United Nations”, in *European Law Journal*, vol.10, no. 5, 2004, Chapter IV. See also: C. Tomuschat, *Human Rights: Between Idealism and Realism*, Oxford, New York, Oxford University Press, 2008, pp. 64-65.

the rule of law.”⁴³ As such, monitoring must be disaggregated in order to highlight vulnerable groups and possible discrimination, as well as violations. Therefore, a rights-rights-based approach is best understood as expanding upon food security, without taking anything away from it, in order to make the effort compliant with international law and less arbitrary.

The distinction between a rights-based approach and a non-rights-based approach to food security is the main divide that separates two fairly well-distinct ‘factions’ (as concerns food). On the one hand, there are the human rights bodies like the Committee on Economic, Social and Cultural Rights, which pour effort in advancing the juridical doctrine of the right to food by gradually eliminating the obstacles to justiciability. Part of this line-up is also quite a large (and growing) amount of States, which have chosen to adhere to the doctrine of the Committee and have gradually enshrined the right to food in their legal systems at various levels, or otherwise undertaken policies with a human rights-based approach to realise the right to food of individuals and communities under their jurisdiction. NGOs, CSOs and other institutions concerned with human rights advocacy also intuitively belong in such field. Many scholars, both from human rights and from other disciplines, endorse the Committee’s expansionist and violationist approach, as well. On the other hand, however, there are a number of very influential (and generally affluent) States that pose a staunch refusal of any understanding of food as engendering entitlements of any sort, and sponsor instead a vision of food as an exquisitely tradable commodity. For instance, the USA’s opposition has been unwavering over the years: they have quite a poor record of ratification of human rights instruments, having ratified none of the ones that include provisions on the right to food, and have systematically opposed the inclusion of the concept of a “human right to food” in important documents and declarations. They forward the vision whereby food security is a noble aspirational objective to be pursued in a voluntarist way, but no more than that: it cannot entail obligations. Sharing this vision are also many European States, and the EU itself has been ambivalent in its behaviour: endorsing right to food-based strategies in developing States, but never affording it legal recognition in its internal human rights instruments.⁴⁴ Canada, Australia, Poland and other countries also tend to partake in such stance, and so do very influential institutions like the G-8, the G-20, the WTO, the Bretton-Woods Institutions and the World Economic Forum — all seemingly under the conviction that

⁴³ K. Mechlem, “Food Security and the Right to Food in the Discourse of the United Nations”, in *European Law Journal*, vol.10, no. 5, 2004, p.644.

⁴⁴ See: Vivero Pol, J. L., Schuftan C., ‘No right to food and nutrition in the SDGs: mistake or success?’ *BMJ Global Health*, 2016. The topic will receive further expansion in Chapter 3.

market mechanisms for resource distribution are more efficient than rights-based schemes.⁴⁵ The corollary to such assumption is that there is nothing fundamentally wrong with the international trade regime and the neoliberal paradigm that informs it (including the exquisitely commodified conception of food), only surface imperfections that might be corrected through negotiation. A consequence of denying the existence of elements of systemic oppression in the international system is the idea whereby failure to achieve development under such system lies all on the State's own shortcomings. It is clear how the realisation of food security would be seen under a light of voluntarism, given these premises. These stances create a complex framework of different understandings of the nature of the obligations deriving from the right to food, both as concerns the relatively more peaceful dimension of the relationship between the States and their citizens, and the more controversial matter of international responsibilities for reform of the current international system.

It is against this background that the thesis will explore and compare two avenues to the universal realisation of the right to food. The first one to be analysed is the way of justiciability: based on the recognition of the human right to adequate food, this path sets out to allow all individuals and communities to have their claims heard by a judicial or quasi-judicial organ, which examines the issue and emits a judgement arranging for remedy and reparations. In essence, this avenue relies on courts as agents of transformative change, to perform actions that range from the safeguard of the human dignity of the plaintiffs (through interim measures and remedies) to the imposition of systemic adjustments, mandating the State found in violation of its human rights obligations to undertake or modify policies and programs, or possibly even laws. The benefits of this method are immediately evident: a court can be an extremely effective guardian of human rights, although its ability to generate compliance on behalf of the State can vary depending on whether it is a national, regional or international court. Relying on courts contributes to the certainty and stability of rule of law, and grants validity to human rights by creating the assurance that, since the preservation of human dignity is held to the highest standard, they shall have a way to claim violations of their rights by an organ tasked with protecting them. Moreover, the progressive accumulation of jurisprudence on the right to food allows to achieve increasingly high levels of clarity over its normative content. However, the role of courts in realising the right to food also suffers from limitations; many arguments against justiciability have pointed to these to show the inefficacy, and more importantly, the inappropriateness of taking a judicial and violationist approach to the right to food.

⁴⁵ Ibidem.

Most of these concerns have been shed behind as practice prove them to be largely unmotivated. However, some limitations are inevitable and factual; the thesis recognises two of these. Firstly, courts have a limited reach: the conditions for justiciability depend *prima facie* on whether the State has undertaken any form of relevant legal obligations, be it by enshrining it in domestic law or by ratifying international treaties and giving them direct applicability. If these conditions are not met, a domestic court can only possibly enforce the right by very far-reaching (and most likely extremely controversial) interpretation of the existing legal framework. The second limitation pertains to the bottom-up nature of the judicial approach. The thesis will show how the practice of judging the reasonableness of the State's action in compliance with its obligation of progressive realisation has made consistent strides, but it will acknowledge that, especially in light of the "tilted" and essentially unfair international system, there are indeed cases where the State's action is reasonable, and yet the rights remain violated. Herein the issue of international responsibility resurfaces; but the ability of judicial and quasi-judicial mechanisms to elicit change in the international rules framework is very questionable. The thesis does not exclude that it may become a reality in the future; but at the present State of things, that remains in the realm of speculation.

The other avenue that the thesis will explore is therefore one that avoids such weaknesses (albeit incurring in others) due to its top-down nature: the statistical avenue of indicators, based on the gathering and systematisation of data. Such data is periodically reviewed by competent bodies like the Committee on Economic, Social and Cultural Rights, which monitor the efforts of States in order to verify their progress towards the achievement of, *inter alia*, food security. Chiefly utilised in the context of the United Nations Development Group (UNDG hereafter), in the UN Development Programme (UNDP) and in the UN in general, the avenue of indicators allows to strive to achieve universal realisation of food security in a non-adversarial fashion, coordinating and offering guidance for the development of States and channelling resources in order to finance their efforts. The recent proliferation of statistical instruments in development institutions has led to them being used for a variety of purposes; they featured most prominently in the Millennium Development Goals and still do now in their successors, the Sustainable Development Goals. The use of indicators is not inherently and necessarily devoid of human rights; indeed, recent efforts from the OHCHR have gone towards the development of a set of human rights indicators. However, the thesis will account for the fact that many pitfalls underpin the use of indicators in general — from statistical biases to the consequences of their alleged neutrality — that are exacerbated when using them for such a sensitive issue as human rights. Indicators seem to respond effectively to the shortcomings of the judicial approach: firstly, they are universal, under the comprehensive MDG and SDG frameworks; secondly, as a top-down instruments to channel wealth and resources, they are

actually a cure, albeit partial, of the second limitation pointed out above. Moreover, indicators derive from their numerical nature an aura of impartiality. Though potentially misleading, such characteristic has engendered a shift in the functions of the Committee from one of monitoring to one of auditing. As the thesis will explore, however, indicators come with their own set of contraindications. One such limitation is that, despite their apparent neutrality, the numbers of indicators conceal theories that informed the selection of data sources and the interpretation of datasets; moreover, these processes are subject to statistical biases. For instance, the second Rapporteur, De Schutter, has highlighted how the new methodology adopted by SOFI reports since 2012 overestimates the progress in hunger reduction because it fails to properly take into account the non-caloric elements of nutrition, short-term undernourishment and intra-household food distribution inequalities. Furthermore, as they are based on average values, they don't account for the higher caloric requirements of rural workers.⁴⁶ In fact, biases in statistical surveys may also come as an underestimation of some categories of beneficiaries due to them being difficult to access, leading to them being cast aside in the development endeavour. Another fundamental limitation lies in their essentially voluntarist nature. Indeed, while there has been much debate since the Millennium Declaration of 2000 on how to better design indicators, and while such debate has partly translated into actual improvements of these statistical instruments in the 2030 Agenda, the UNDP continuously laments shortfalls of ODA, on the backdrop of rising numbers of world hungry. While indicators are instruments whose power can be used for great good, they ultimately hit the wall of lacking political will.

3. OUTLINE OF THE WORK

The second chapter will provide a historical overview of the evolution of the right to food and food security, as two parallel concepts that were born in different moments but constitute two essential aspects of the fight against world hunger. It will therefore retrace the birth of the right to food as an aspirational objective, with no individual and self-standing validity, enshrined in the context of an adequate standard of living in both the UDHR and the ICESCR. Then, it will highlight how the 1970s saw the birth of food security, initially understood as based on a stable supply. An evolution of the concept would come in the 1980s, when Amartya Sen famously turned the ap-

⁴⁶ O. De Schutter, *Report to the Human Rights Council*, A/HRC/25/57 (24 January 2014).

proach on its head, shifting the focus towards ‘access’ to food, understanding the problem being one of failing entitlements rather than actual scarcity. This shifted the attention from the national to the household level, also paying particular mind to the uneven distribution of control over household income and resources. Attention to individuals and entitlements created a solid basis for the human right to food. In fact, during such decade the right knew some important evolutions, from the creation of the CESCR, to its progressive inclusion in a series of regional human rights instruments. Perhaps most importantly, the then-Special Rapporteur on the Right to Food of the UN Sub-commission on the Prevention of Discrimination and the Protection of Minorities, Asbjørn Eide, published a study in 1989 that constituted a ground-breaking exploration of the right to food, along the now familiar tripartite structure of obligations: to respect, protect and fulfil. Come 1996, the World Food Summit, with its Declaration and Plan of Action, marked a milestone in the strife against world hunger, bringing it to a global scale. This entailed (and was indeed engendered by) a rising awareness of the influence of the global system on the national efforts to guarantee food security, in the context of an increasingly globalised world. Nevertheless, a scarce clarification of the concept of the right to food remained a weakness for any attempt based on such approach; therefore, invited by the Declaration, the CESCR produced its General Comment No. 12, in 1999. Yet, the new millennium opened amidst a climate of uncertainty: the international system showed its incompatibility with a universal realisation of food security. The Special Rapporteurs on the Right to Food have been on the forefront of sponsoring such human right, repeatedly highlighting the merits of a rights-based effort and of the justiciability of the right in the fight for universal food security.

The third chapter will address the nature of the obligations stemming from the right to food along two macro-sections. The first one will analyse the hoary debate on the justiciability of ESC rights, and illustrate how the CESCR’s doctrine has advanced such rights by progressively specifying their immediately applicable “core content”. This section will conclude with appraising the nature and the merit of the rising emphasis on a rights-based approach to development. Then, the second section will proceed to assess the strength of the obligations stemming from the right to food by relying on a theory of human rights constructed through a literature review of the existing debate on such topic. Having established the ‘bindingness’ of the domestic obligations along the lines sponsored by the CESCR, it will then venture into the more controversial field of global justice, in order to understand whether there is an obligation of justice to reform the international system in its oppressing traits. Having established that there is indeed a moral duty, it however considers that the (perhaps desirable) lack of a judicial mechanism to enforce such duty renders it rather weak. A final paragraph will acknowledge the limitations of the judicial approach.

The fourth chapter will then present the first of the two methods: the judicial avenue of pursuit of the right to food. The chapter will shed light on how the right to food has evolved to meet all of the requirements for its justiciability. Firstly, by accounting for the evolution of its normative content, and of the obligation arising from it towards an extra-territorial dimension. Secondly, it will explore the parallel evolution of the concept of duty-holders, probing the ground for expansion of obligations onto non-State actors. Thirdly, addressing right-holders. Fourthly, examining the legislative frameworks and judicial institutions preposed to the enforcement of the right to food at the national, regional and international level, paying special attention to the recent development of the quasi-judicial function of the CESCR under the Optional Protocol to the ICESCR. All throughout, the chapter will support its account with the relevant cases of jurisprudence. A final paragraph will contain an account of other relevant developments in the justiciability of the right that may not have been covered under the arguments presented above, and an in-depth study of the Indian case of justiciability under the *PUCL* litigation.

The fifth chapter will finally explore the statistical avenue of implementation, based on indicators. It will begin with general considerations on indicators: an analysis of their proliferation as statistical tools, their significance and potential impact for development, their merits and, finally, the change that they have engendered in the monitoring activity of the CESCR. It will do this by placing particular attention on human rights indicators, a specific brand of statistical instruments that has been developed to strike a balance between the need to monitor State compliance with human right treaty obligations and the actual enjoyment of the rights. It will also pay special mind to highlighting how their impartiality is actually misleading, and the pitfalls that can await on the statistical avenue. It will then proceed with an assessment of the role of indicators in the MDGs and SDGs as universal statistical instruments allowing for cross-country comparison, and the effects that they have had in forwarding the programmes and policies of developing States. Finally, it will assess the fundamental weakness of the statistical approach: its voluntarist nature. It will do so by drawing a nexus between the chronic shortfalls of ODA, the growing levels of inequality and the lack of political will highlighted thereto.

The conclusion will contain reflections on the interconnections between the two avenues, and offer some concluding reflections concerning the synergies that they can construct with each other, and the shortcomings that both, even when considered together, still suffer from. Most importantly, the impossibility to engender a reform of the international regulatory framework. A final consideration will invite further analysis on the possibility of an exogenous shock, such as the massive expansion of China, to engender such transformative change.

CHAPTER TWO: THE DIFFICULT PATH OF REALISING THE RIGHT TO FOOD

The fight against world hunger has been oftentimes fragmentary, and sometimes contradictory, as the relevant jurisprudence strove to keep up with the new challenges of the accelerating progress, which in turn generated an ever-evolving understanding of the root causes and the nature of the problem. The effort has been guided by multiple different guiding principles, from economic interest, to humanitarian concerns in situations of conflict; the present chapter will however consider only one of these, that of the human right to food. Though international human rights law included a human right to food ever since its inception in 1948, compared to other human rights the right to food was afforded a weaker regime of protection due to its inclusion among Economic, Social and Cultural (ESC) rights when the two Covenants were drafted in 1966. As such, its implementation, and more specifically its justiciability, was greatly hindered by a series of arguments that will be explored later on during the present work. Moreover, the rise of the current globalised economic system increased the interconnections between the various actors, brought to the emergence of new ones, and sparked the theoretical understanding that all human rights are, despite their inclusion in two different covenants, interconnected and mutually-dependent. This generated increasing calls for a cross-sectoral approach that reflected on the right to food in an increasing attention to issues pertaining to health and nutrition (which in turn reflected in an evolution of its conceptual definition) and a heightened attention to the impact of labour laws and climate change.

In order to arrive at a formulation of the right to food and food security that will constitute the basis for the following sections of this thesis, the first chapter will reconstruct their historical development. It will therefore track the way in which they have been addressed throughout the last century, analysing the juridical framing and the evolving conceptualisations through which they have passed.

1. EARLY MODERN FORMULATIONS: THE UNIVERSAL DECLARATION OF HUMAN RIGHTS

The 1948 Universal Declaration of Human Rights (UDHR) already explicitly envisaged the human right to food, as part of the right to an adequate standard of living; Art.25 of the Declaration recites: «1. Everyone has the right to a standard of living adequate for the health and well-being of himself and his family, including food (...) and the right to security in the event of (...) lack of livelihood in circumstances beyond his control.» Herein we can thus find a formulation of a human right to food the security of which needs to be guaranteed when the right cannot be enjoyed for reasons beyond the right-holder's control.

Also relevant is Article 22, which asserts that each member of society has the right to social security, and is thus entitled «to the realisation, through national effort and international cooperation and in accordance with the organisation and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.» In even more general terms, Article 28 proclaims: «Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realised.» Together, these two articles establish the principle of international cooperation for the realisation of an internationally enabling environment in which everyone can enjoy the rights that allow them to fully realise themselves as individuals. These articles will be central in Chapter 3, in relation to the analysis of the obligations of States to realise such international order *vis a vis* the manifest unfairness of it at the present state.

Significant though it is, the UDHR remains a declaration, therefore lacking binding force; as such, it does not specify the duties arising from the right, nor does it lay out any accountability, monitoring or enforcement mechanism. Rather, as per its preamble, it represents a “common standard of achievements”. Nevertheless, due to the unequivocal centrality of the document in international human rights law, many a jurist has argued for it to have binding force, or to be considered customary international law; an interpretation that seems to hold considerable sway is to consider it as a “living document”.¹ Lending to this interpretation is the power that factually the UDHR exerts on national legal systems, like in the case of the Spanish Constitution, which in Article 10.2 states

¹ K. Vasak, “A 30-Year Struggle”, *The UNESCO Courier*, no. 20 (November 1997): pp. 29-32.

that the constitutional provisions are to be interpreted in conformity with the Declaration and the other relevant documents. The lack of formal binding force is because the declaration was approved with a Resolution by the UN General Assembly (UNGA), thus legally classifies as a Recommendation. Indeed, it was envisaged as the first component of an International Bill of Rights made of three documents: the Declaration, a Covenant with legally binding effects and a document with measures for implementation. It is to be noted, however, that the 1948 human rights Declaration is one of only very few UN Declarations that carry the solemn adjective “universal”. The other prominent one is the UNESCO Declaration of the human genome (1997).

2. THE ICESCR: A BINDING FORMULATION OF THE RIGHT TO FOOD

The document with binding effects enforcing the UDHR was indeed approved in 1966 (entering into force in 1976), but ended up being split into two, loosely mirroring the ideological gash between West and East that characterised the then ongoing Cold War: the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). Such separation, perpetuated by the fact that a minority of States are not party to both Covenants,² intuitively lends to some controversies. One such controversy is that, while the right to life is only enshrined in the ICCPR, the right to food and the right to health, inarguably indispensable components of it, are only enshrined in the ICESCR. There are therefore States that vowed to guarantee the right to life, without explicitly vowing to guarantee the right to food or health - which is glaringly paradoxical. The division was in large part due to the type of obligations that the two sets of rights were perceived to entail, the Economic, Social and Cultural (ESC) ones allegedly entailing a much larger dimension of positive engagement on behalf of the State than Civil and Political (CP) ones, traditionally considered exquisitely negative rights (i.e. only entailing a duty upon the State not to infringe on them). This perception evolved over time, and the two categories of rights are gradually coming closer to each other, as will be elaborated upon further on in the next chapter.

² Notably, the United States of America (USA) have signed but have yet to ratify the ICESCR; the same situation is mirrored by the People’s Republic of China (PRC) for the ICCPR. Furthermore, some States have not signed one, or either one of the documents; among such group figure Saudi Arabia, UAE, Oman and Malaysia.

The ICESCR thus contained the first binding formulation of the right to food in Article 11 - once again framed within the right to an adequate standard of living. Contrary to the formulation contained in the Universal Declaration, however, Paragraph 2 of the same article recognises a «fundamental right of everyone to be free from hunger». As is the case for all the ESC rights, the Covenant envisages an obligation for States to realise it progressively, through both national action and international cooperation (Art. 2; Art. 11.2), «to the maximum of (...) available resources (...) particularly [through] the adoption of legislative measures.» Notably, there is a contraposition between the imposition of the employment of all available resources, and two other elements, namely: a) the principle of progressive realisation, and b) the term “available resources” itself, which introduces another criterion of flexibility, as it entails considerations on the hierarchy of priorities that a State should serve. Certainly, this flexibility is necessary: a poor country cannot be expected to progress at the same speed as a developed State. It does however have important limitations in the “principle of non-regression” — i.e. the forbiddance of acting in a way that is expressly detrimental to the achievement of the right to food — and in the principle of non-discrimination, which cannot be considered subject to “progressive realisation”.³ Moreover, when compared with the ICCPR, which in Article 2.3 clearly dictates the duty to provide effective judicial remedy domestically, the complete lack of a similar provision in the ICESCR - together with the other elements pointed out thus far - gives a clear perspective of the different, laxer regime of protection afforded to ESC rights. There is however an explicitly formulated obligation to realise the right by reforming the national food production and distribution system as appropriate (Art. 11.2 (a)).

The document also stresses the global vocation of the engagement, stating that, «(...) taking into account the problems of both food-importing and food-exporting countries, [State parties are obliged] to ensure an equitable distribution of world food supplies in relation to need» (Art. 11.2 (b)). Concerning the international dimension of the commitment, it is also important to recall Article 1 of the Covenant, which sets forth the right to self-determination of peoples, and also contains a provision stating that under no situation shall a people be deprived of their own means of self-subsistence. Moreover, the Covenant specifies in Article 23 that the international cooperation to which the States commit under its terms «includes such methods as the conclusion of conventions, the adoption of recommendations, the furnishing of technical assistance and the holding of regional

³ J. Ziegler, *Report to the General Assembly*, A/56/210 (23 July 2001).

meetings and technical meetings for the purpose of consultation and study organised in conjunction with the Governments concerned.»

Finally, Part IV of the document lays down the monitoring system, requiring States to elaborate implementation programmes in collaboration with the Economic and Social Council of the United Nations (ECOSOC), and to periodically submit their reports for said body to evaluate. ECOSOC may then submit recommendations to the General Assembly of the United Nations (Article 21), but also to other UN organs and specialised agencies, in order to help them decide over the appropriateness of international measures liable to influence the enjoyment of the rights contained in the Covenant (Article 22).

3. FOOD SECURITY AND ACCESS TO FOOD

Awareness on the perverse effects of the in-kind food aid that had become common practice after the Second World War⁴ increased over the following decades, with the rising recognition that they increased the vulnerability of the countries of the global South by increasing their import-dependency and pushing them away from alimentary self-sufficiency. It was pointed out how food aid perverts the market, as it constitutes a subsidy to domestic producers,⁵ and has a crowding-out effect on the local markets due to the low prices of imports.⁶ This was only one of the elements that, over the following decades, would make it increasingly evident how guaranteeing freedom from hunger on a global scale was difficult, due to the immense amount of factors at play. On the backdrop of the 1972-74 world food crisis, strongly restricting the food supply of donor countries and creating staggering volatility of food prices in the global market, some important changes evolved the international community's approach to the problem of world hunger. A number of developments took place in this time of crisis; one of these was the creation of the FAO's Committee on World Food Security (CFS) in 1974, an intergovernmental forum that would prove pivotal in the evaluation of both national and international policies for food security. Moreover, the appearance

⁴ A. Magnan, "Economy of Agriculture and Food", *Encyclopedia of Food and Agricultural Ethics*, P. B. Thompson and D. M. Kaplan (eds.), Dordrecht, Springer, 2014, pp. 533-540.

⁵ R. Cardwell, "Food Assistance and International Trade", *Encyclopedia of Food and Agricultural Ethics*, P. B. Thompson and D. M. Kaplan (eds.), Dordrecht, Springer, 2014, pp. 853-860.

⁶ T. Schultz, "Value of U.S. Farm Surpluses to Underdeveloped Countries", *Journal of Farm Economics*. Vol.42, No.5 (1960), pp. 1019-1030.

during this decade of multi-sectoral nutrition planning signals the birthing awareness of the inter-connection of hunger with poverty, and the medical aspects of nutrition.

Borrowing from the evolution of the public discourse around world hunger, the World Food Conference (WFC), held in Rome in 1974, had the merits of both providing the earliest comprehensive formulation of the concept of “food security”, and deciding for the establishment of the International Fund for Agricultural Development (IFAD) in 1977, today on the forefront of the fight against world hunger together with FAO and the World Food Programme (WFP). The document in which the WFC culminated, the “Universal Declaration on the Eradication of Hunger and Malnutrition”, defined food security as the «adequate availability of, and reasonable prices for, food at all times, irrespective of periodic fluctuations and vagaries of weather and free of political and economic pressures(...)».⁷ The Declaration likewise recognised that «society today already possesses sufficient resources, organisational ability and technology and hence the competence to achieve [universal freedom from hunger]», and had thus a responsibility to «work together for higher food production and a more efficient and equitable distribution of food between and within countries».⁸ Both the provided definition of food security and the commitment to increase food production are revealing of a clear focus on the dimension of availability, i.e. of the conviction that the permanence of hunger in the world was chiefly due to a physical lack of sufficient food for feeding every individual.

However, shortly thereafter, the “Green Revolution” of the 1980s presented the world with a new dilemma: despite the great increase in food availability achieved through technological innovation in agricultural production, a staggeringly high number of people remained undernourished. Contextually, Nobel Prize economist Amartya Sen’s theories changed the approach to an emphasis on the dimension of “access to food”. Already in 1981, he postulated an analytical framework based on “entitlements”, which he used to showcase how starvation did not necessarily come from the physical lack of food to eat, but rather from lack of entitlement to it, most notably because an accentuation in the inequality of income distribution. In other words, it is the lack of means to gain entitlement over a comprehensive basket of necessary goods including quantitatively and qualitatively adequate food, whichever modalities of acquisition of entitlement the system may determine, that causes starvation. Netting the structure and functioning of the market, the availability of such

⁷ FAO, *Universal Declaration on the Eradication of Hunger and Malnutrition*, Rome, 1974.

⁸ Ibidem.

entitlements to individuals depends on the state-offered social security systems. In Sen's analysis, that is what the existence of famines depends on, in both capitalist and socialist economies, and typically such policies precede drastic increases in the availability of food. Eventually, the reason why famines are eradicated thus harkens back to shifts in the entitlement systems.⁹ Sen's theories signalled a ground-breaking shift from an understanding of food security based on the aggregate measure of food supply, to a more household-based — and, therein, individual-based — perception based on entitlements. Increasing attention was paid to the issues of the distribution of control over income and resources within the households, shedding light on the often-present discrimination of women and children, today one of the elements on the forefront of any food security-related effort (especially considering how essential women are for the production of food in most developing States).¹⁰

The ripple waves of this concept did not tarry to manifest: already in 1983, a report from the then-Director General of FAO, Edouard Saouma, reappraised the concept of food security to include the important dimension of access.¹¹ This evolution notwithstanding, echoes of the concern for the quantities of food produced still reverberate today: as mentioned in the introduction, the current global food production system remains oriented to a productivist template based on output maximisation.

Another important evolution was the introduction of a diachronic perspective to food security. Soon thereafter, a World Bank report introduced the further element of the differentiation between the concepts of chronic hunger, deriving from inherent systemic instabilities, and transitory hunger, deriving from temporary shocks like natural disasters, economic crises or conflict, thus introducing a temporal element in the definition of food security that will later on substantiate in the further requisite of “sustainability”.¹²

⁹ A. Sen, *Poverty and Famines*, New York, Oxford University Press, 1981.

¹⁰ K. Mechlem, “Food Security and the Right to Food in the Discourse of the United Nations”, in *European Law Journal*, vol.10, no. 5, 2004, p. 635.

¹¹ Food and Agriculture Organisation, *World Food Security: a Reappraisal of the Concepts and Approaches* (Rome: FAO, 1983).

¹² World Bank, *Poverty and Hunger* (Washington D.C.: World Bank, 1986).

4. PROGRESS ON THE FRONT OF THE RIGHT TO FOOD

The shift of the focus from the aggregate measure of food supply to the entitlements of individuals in the discourse on food security was intuitively a great contribution to the one on the right to food. During the 1980s, some very important developments took place on such front; most notably, the creation of the Committee on Economic, Social and Cultural Rights and the clarification on the normative content of the right by Asbjørn Eide.

In 1985, through a resolution of the UNGA, the ECOSOC Working Group tasked with the oversight of the implementation of the ICESCR was reorganised into the “Committee on Economic, Social and Cultural Rights” (CESCR), finally creating a proper oversight body for the Covenant (which the ICCPR already had in the Human Rights Committee). Instead of State representatives, this body would now be composed of eighteen independent human rights experts selected according to the principle of adequate geographical representation. The importance of this step cannot be overstated, as the obstacle to the creation of such body was strictly connected to the nature of the obligations arising from ESC rights, which will be explored more in depth in the next chapter. Putting the monitoring functions into the hands of a non-governmental body was symbolically (and, in time, practically) a consistent step forward towards providing efficient and effective accountability for ESC rights. The Committee has two primary functions: it clarifies the normative content of and obligations arising from the Covenant, most notably through its General Comments; and receives periodic reports from States, which it analyses in order to understand the critical aspects hindering their efforts to realise ESC rights for people under their jurisdiction (including possibly a lack of effort altogether) and elaborate suggestions and recommendations to guide States in overcoming them. Though its suggestions and recommendations lack binding force, and they ultimately rely on a self-reporting that may be imprecise due to lack of appropriate statistical instruments and expertise, or altogether not submitted, the Committee has important functions as concerns the advancement of ESC rights. As per its General Comment No. 1 issued in 1989, the reporting practice has the objective to ensure that States undertake comprehensive review of their legislation, administrative practices and policies in order to ensure compliance with the Covenant. Moreover, it aims to ensure constant monitoring by the State on the advancement as concerns the enjoyment of the rights of the Covenant by all individuals under their jurisdiction, which will provide a basis for informed and targeted policymaking and strategy elaboration, which the Committee will assist. The reports will furthermore provide a basis on which to evaluate progress at a further point, help States better understand their key issues and obstacles and encourage data-sharing for comprehensive global reali-

sation of the rights contained in the Covenant. As concerns the other function, that of normative clarification, the critical role of the Committee's General Comments will appear clear as this thesis proceeds. The challenges that the Committee would face in its monitoring and doctrinal functions were immediately clear at the time of its creation: the vagueness of the normative content of most of the Covenant's rights and the ambivalent stance of most States created already then a difficult environment to navigate.¹³

Another important development was the publication in 1989 of a study from the then-Special Rapporteur on the Right to Food of the UN Subcommission on the Prevention of Discrimination and the Protection of Minorities, Asbjørn Eide. Seeking to clarify the normative content of the controversial right to food, the document presented the now-familiar tripartite structure that is currently used as a template for understanding the obligations of any human right: the obligations to protect, to respect and to fulfil.¹⁴ The perspective presented in the report will ripple far and wide, and the General Comment No. 12, vital in clarifying the normative content of the right to food, will borrow heavily from it.¹⁵ Further insight as to what each of these obligations entail will come further ahead, in the section dedicated to the General Comment.

5. REGIONAL AND INTERNATIONAL RECOGNITION OF THE RIGHT TO FOOD

Meanwhile, the right to food made its appearance in a number of important regional instruments. The Protocol of San Salvador of 1988 (which would enter into force in the year 2000) determined its entrance in the American Convention on Human Rights of 1969. The right to food is therein framed as the right to an adequate nutrition, envisaging a positive obligation for the States to improve the internal production, supply and distribution, and to engage in international cooperation

¹³ See: P. Alston, 'Out of the Abyss: The Challenges Confronting the New U. N. Committee on Economic, Social and Cultural Rights', in *Human Rights Quarterly*, John Hopkins University Press, Vol. 9, No. 3 (1987), pp. 332-381. Alston also draws an interesting parallel with the European Social Charter (explored in chapter 3), arguing that as its success came not at the hands of benevolent States, but of the activity of the Committee of Experts tasked with its supervision, so would the CESCR have to perform the same task with regard to the Covenant.

¹⁴ The author of the present thesis was unable to retrieve the document. Nevertheless, the source is referenced in a number of other authoritative documents, e.g. Ziegler, J. (February 2001), para. 26.

¹⁵ Mechlem, K., "Food Security and the Right to Food in the Discourse of the United Nations", in *European Law Journal*, vol.10, no. 5, 2004, p. 638.

to support such national policies. While not expressly mentioning the right to food, the European Social Charter, after its revision in 1996, also declares a right to a standard of living in relation to the level of wages. Lastly, the African Charter on Human and Peoples' Rights of 1986 explicitly recognises the right to food, contextually to the right to health. Moreover, on the international level, the 1990 Convention on the Rights of the Child and the 2006 Convention on the Rights of Persons with Disabilities also deserve mention in this reconstruction, as two instruments that expressly, though contextually, protected the right to food; however, their formulations add nothing of particular substance to the considerations advanced thus far on the protection afforded to the right by the relevant international instruments. Moreover, the Convention on the Elimination of All Forms of Discriminations Against Women (CEDAW) of 1979, while not directly touching upon the right to food, contains important provisions on ensuring that women have equal access to land, credit, income and social assistance - all pivotal components of the right to food.

6. RIGHT TO FOOD AND FOOD SECURITY: TOWARDS A COMPREHENSIVE FORMULATION

6.1. FOOD SECURITY: THE 1996 WORLD FOOD SUMMIT

Following the strong resolve to end world hunger showcased by the States in occasion of the 1992 International Conference on Nutrition, co-organised by FAO and World Health Organisation (WHO), the States, hosted by the FAO, convened in the first World Food Summit (WFS) in 1996, drafting the Rome Declaration on World Food Security and the connected Plan of Action. Almost fifty years from the first international recognition of a right to food, a first coherent plan of action for the realisation of food security on a global scale was finally drafted, including a shared commitment to act each within their national framework, increasing cooperation at all levels and monitoring the implementation of action for further evaluation,¹⁶ with the declared objective of halving the number of global hungry by 2015. The Plan of Action also provided the definition of food security that is still widely used today, saying it «exists when all people, at all times, have physical, so-

¹⁶ FAO, *Rome Declaration on Food Security and World Food Summit Plan of Action*, Rome, 1996, Commitment Seven.

cial and economic access to sufficient, safe and nutritious food that meets their dietary needs and food preferences for an active and healthy life». Note that the inclusion of “social”, entailing considerations as to the local population’s practices of distribution of food among its members, was added in 2001.¹⁷ This definition of food security hinges on four elements: availability (physical presence of adequate food), accessibility (physical and economic ability to procure such food), utilisation (proper use of food resources) and stability (meaning that the system must be built in a way such that these criteria are ensured in a lasting fashion, lowering its vulnerabilities to short-term or systemic shocks). Food insecurity may thus come as the consequence of the lack of one or more of these elements in the food system. In particular, while food security had thus far been considered in a static, picture-like assessment of the current welfare status of a population, the inclusion of stability among the considerations on the issue has evolved the concept into a dynamic, forward-looking perspective. It can therefore be noticed how the definition offered by the Plan of Action essentially synthesised all the elements that, as explored, had appeared thereto. The Declaration also underlines the links of the fight against world hunger with a series of other factors, already then highlighting the necessity for a cross-cutting approach that would become increasingly clear in the following decades. After the shift from supply to access, and that from quantity to quantity and quality (in line with the rising awareness of the links between nutrition and health, especially during the 1990s), this signalled a third, important shift, from a national/local understanding to a global perspective.¹⁸ The two documents also include two references to the right to food. The formulation in the Declaration was left rather vague, as a consequence of the diplomatic opposition from those States that systematically refused to recognise a right to food.¹⁹ The other reference can be found in Commitment 7.4 of the Declaration, in which the States requested clarification on the juridical content of the Right to Food as contained in the ICESCR from competent bodies, especially the CESCR.

6.2. RIGHT TO FOOD: GENERAL COMMENT 12 ON THE RIGHT TO FOOD

Accommodating the request, the CESCR produced the document “General Comment No. 12: the Right to Adequate Food (Art. 11 of the Covenant)”, in 1999. Drafted based on a comprehen-

¹⁷ FAO, *The State of Food Insecurity in the World*, Rome, 2001, Glossary.

¹⁸ Mechlem, K., “Food Security and the Right to Food in the Discourse of the United Nations”, in *European Law Journal*, vol.10, no. 5, 2004, p. 637.

¹⁹ Ibidem, p. 641.

sive review of the relevant documents from the Commission on Human Rights (replaced in 2006 by the Human Rights Council) and the Sub-Commission on the Prevention of Discrimination Against Minorities, the document constitutes one of the most important elements of the evolving doctrine of the right to food to date. The Comment clarifies the normative content of Article 11 of the ICESCR in the context of the rest of the Covenant's provisions, as well as the obligations arising from it; it provides guidance on implementation and monitoring, and even envisages a set of international obligations arising on States towards right-holders beyond their borders. What follows is a basic recollection of the elements contained in the document.

A. NORMATIVE CONTENT

«The right to adequate food is realised when every man, woman and child, alone or in community with others, has physical and economic access at all times to adequate food or means for its procurement. The right to adequate food shall therefore not be interpreted in a narrow or restrictive sense which equates it with a minimum package of calories, proteins and other specific nutrients.»²⁰ The Comment clarifies that the content of the right to food is to be understood as follows: «The *availability* of food in a *quantity* and *quality* sufficient to satisfy the *dietary needs* of individuals, *free from adverse substances*, and *acceptable within a given culture*; The *accessibility* of such food in ways that are *sustainable* and that *do not interfere with the enjoyment of other human rights*»²¹ (emphasis added).

Reflecting the evolutions mentioned thus far, and closely recalling the conclusions reached by the States three years prior as concerns food security, the document promotes an understanding of the right to food hinging on the so-called “Three A’s” required for the satisfaction of the right: availability, accessibility and adequacy.

Availability refers to both «the possibilities... for feeding oneself directly from productive land or other natural resources» and «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.»²² Therefore, availability is not to be intended as merely the physical presence of food, but also the adequate ability of the system to guarantee fluid movement of such food.

²⁰ UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 12: The Right to Adequate Food (Art. 11 of the Covenant)*, 12 May 1999 [UN CESCR, *General Comment No. 12* hereinafter], Para. 6.

²¹ *Ibidem*, Para. 8.

²² *Ibidem*, Para. 12.

As concerns accessibility, it can be satisfied through access either to food, or to the means to procure it (i.e. the productive resources) — or a combination of the two. Accessibility has two dimensions. Physical accessibility is important especially as concerns the most vulnerable, be it because physically impaired (disabled individuals, elderly, children, infants, pregnant women) or because victims of natural disaster. Economic accessibility is essentially the affordability of adequate food, i.e. the possibility to buy food that is sufficient and nutritionally adequate in a way that does not constitute a trade-off with other fundamental rights; targeted action may be necessary in order to ensure economic accessibility for the more vulnerable groups. It is furthermore clarified in Paragraph 7 that availability and accessibility must be secured in a sustainable fashion, i.e. with an intergenerational perspective; as mentioned above, this part of the Comment is a link between the right to food and food security, which is measured also based on the long-term resilience of the food system.

In order to be adequate, food has to be a) «in a quantity and quality sufficient to satisfy the dietary needs of individuals», therefore barring mere calculations of minimum intakes of calories and other nutrients, instead accounting for environment, social habits, gender, physique and nutrition patterns (e.g. breastfeeding); b) «free from adverse substances», accounting for both adulteration and environmental contamination; and c) «acceptable within a given culture», therefore taking into account the non-nutrient-based values that food may assume for the consumer.²³

Finally, it is also relevant to note that the right is shaped as an individual and collective one, as per the formulation “alone or in community with others”.²⁴ The implications of such formulation will be explored more in depth in the paragraph dedicated to the notion of “right holders” in Chapter 4 of the present thesis.

B. OBLIGATIONS

Like any human right, the right to food generates upon States obligations to respect (negative obligation not to engage in activities that prevent the enjoyment of the right), protect (positive obligation to regulate actions from third parties preventing the enjoyment of the right) and fulfil. The last one in turn has two dimensions: a) “facilitate”, the positive obligation to proactively strengthen people’s access to and utilisation of resources and means to ensure their livelihood, in-

²³ Ibidem, paras. 8-9-10-11.

²⁴ Ibidem, para. 6.

cluding food security; b) “provide”, the positive obligation to realise the right for those whom, due to reasons beyond their control, cannot feed themselves. This tripartite basic structure constitutes the essential framework upon which all discussion on human rights obligations move, according to the generally accepted doctrine. As to what they substantiate into in the complex, interconnected globalised world, that is the most contentious point — together of course with the matters of implementation and monitoring.

«The *right to adequate food* will have to be realised progressively. However, States have a core obligation to take the necessary action to mitigate and alleviate hunger as provided for in paragraph 2 of article 11, even in times of natural or other disasters.»²⁵ Therefore, regardless of the circumstances, the States must *act* at all times, to the maximum of available resources, in order to alleviate the suffering of the hungry; it has to do this as a matter of ‘core obligation’. Inaction or insufficient action constitute a violation of its obligations under the right to food. The principle of progressive realisation only refers to the obligation to *facilitate* the right: the State has to take all necessary action to create an enabling environment that allows everyone to enjoy their right, in accordance with the normative content displayed above. Even here, such principle is limited by the ‘core obligation’ to take action. Like the obligations to respect, the obligation to provide is immediate, and not subject to such principle. In fact, the Comment distinguishes among long-term obligations and the ones “of a more immediate nature”. For instance, «[e]very State is obliged to ensure for everyone under its jurisdiction access to the minimum essential food which is sufficient, nutritionally adequate and safe, to ensure their freedom from hunger».²⁶ Herein one can see displayed the “minimum core content” of the right to food, which the State has the obligations to realise at all times. Whenever a State fails to comply with such obligation, upon it falls the onus of proving that such failure was due not to malfeasance or neglect, but to the lack of resources, which the State has unsuccessfully attempted in earnest to obtain, including by invoking international assistance.²⁷

Violation of the right to food can come as the result of action or omission on behalf of the State; forced evictions, arbitrary land expropriation without appropriate compensation and elimination of social assistance programmes without proper assessment of the impact on food security all constitute examples of failures to respect the right to food. However, violations can also come from the actions of others. Failing to properly control or regulate the activities of third parties under its

²⁵ Ibidem, para.6.

²⁶ Ibidem, Para. 14.

²⁷ Ibidem, para. 17.

jurisdiction whose behaviour harms others' enjoyment of the right also constitutes a violation of the obligation to protect on behalf of the State. Since a plethora of actors other than the States can affect the right to food, the Comment recognises a responsibility to its realisation upon them, as well; however, the States ultimately remain the sole actors that can be held *legally* accountable for violations, and have thus the duty to ensure an environment that facilitates the other actors in doing their part for the realisation of the right.

C. IMPLEMENTATION

Though allowing for elasticity according to national circumstances, national plans for the realisation of the right to food must be drafted. These must have appropriate mechanisms of monitoring, including relevant benchmarks for national and international evaluation and set specific goals and time-frames within which to achieve them. The suggested modality through which to provide the effective protection of the right to food on national grounds is the adoption of framework laws, clearly stating their purpose and deadlines, and creating tracks for the policies and specific regulatory activity to follow. The elaboration of the framework law and its benchmarks should actively involve Civil Society Organisations (CSOs), and the drafting should be assisted by international organisations with technical expertise like FAO or UNICEF. All available resources must be employed to this aim, in a cost-effective fashion, without discrimination and sustainably.

Furthermore, because every right must have appropriate remedy in case of infraction, the States must provide their citizens with an efficient judiciary to provide redressal and remedy, in the form of «restitution, compensation, satisfaction or guarantees of non-repetition»²⁸ when the right is not adequately realised. The incorporation of international instruments recognising the right to food into the national legal system should be encouraged at all times. Nevertheless, the Comment likewise mentions the possibility of obtaining remedy at the international level — which, as we have seen, was at the time of writing virtually inexistent. There is therefore notably an explicit provision for the national and international justiciability of the right to food as a remedy against violations.

D. INTERNATIONAL DIMENSION

The final section of the document addresses the international dimension of the obligations arising onto states for the realisation of the right to food in the global scenario. The recommenda-

²⁸ Ibidem, para. 32.

tions to this regard consist in taking into account the realisation of the right to food in other countries, respecting it (especially when drafting international agreements), protecting it (by duly regulating actors under their jurisdiction), facilitating access to adequate food (also considering the establishment of further international instruments to that aim), and providing international aid when necessary. States should to this last objective cooperate to the full extent of their available resources with organisations providing food aid as emergency assistance and relief: WFP, UNHCR, FAO and UNICEF. Moreover, «food aid should, as far as possible, be provided in ways which do not adversely affect local producers and local markets, and should be organised in ways that facilitate the return to food self-reliance of the beneficiaries»,²⁹ respecting the requisites of safety and cultural acceptability laid down above. Lastly, usage of food as an instrument of political pressure (e.g. food embargoes) should be off-limits at all times.

As concerns the obligations of the UN Organisations, they should enhance cooperation as much as possible, and deepened cooperation is specifically invited between FAO, WFP, IFAD, UNDP and UNICEF, World Bank and regional banks. Specifically, the World Bank and the IMF should pay more attention to the respect of the right to food in their lending policies.

7. STRENGTHENING COMMITMENTS: SUSTAINABLE DEVELOPMENT, THE RIGHT TO FOOD GUIDELINES AND THE WORLD SUMMIT ON FOOD SECURITY

The new millennium saw an unprecedented flurry of global-scale gatherings of States which, through consecutive negotiations, progressively strove to hammer out the direction of the global commitment to create a more just world order. Within such far-reaching objective, was included the fight against world hunger. In fact, in 2000, leaders from all over the world gathered in the UN Headquarters (New York) for the Millennium Summit, in what was regarded as the largest gathering of leaders up to that point.³⁰ The outcome of such summit, after three days of negotiation, was the United Nations Millennium Declaration, a comprehensive package that contained the commit-

²⁹ Ibidem, Para. 39.

³⁰ 'UN Summit Agenda', *BBC News*, 7 September 2000, <http://news.bbc.co.uk/2/hi/904903.stm>, (Accessed 28 October 2018).

ment of all the UN member States and several international organisations to pursue a great number of goals on, *inter alia*, human rights, poverty, and development. These were later synthesised into a comprehensive framework made of eight Millennium Development Goals (MDGs). While this framework constituted an unprecedented effort to act in global concert to achieve a comprehensive and united march towards development, many critiques were advanced against the framework. For instance, some criticised the very drafting process to have been dominated by the more affluent States, thus hindering national appropriation of the Goals from those who were most closely concerned.³¹ The Goals also scarcely incorporated human rights as guiding principles; specifically as concerns world hunger and poverty, a harsh critique was moved against the framework for strongly diluting the commitment of the 1996 WFS through a new, more permissive poverty line sponsored by the World Bank: from halving the number of global hungry, to halving their ‘proportion’. Together with the cunning shifting of the baseline against which to consider the proportion back to 1990, thus allowing to count in the calculation the millions lifted out of poverty in the rise of China, the target was substantially lowered.³² A follow-up meeting to review the implementation was held in 2005, under the name of World Summit; the Outcome Document of the Summit contained, among others, a commitment to increase the financing afforded to MDG-related efforts and the establishment of the Human Rights Council in lieu of the dysfunctional Commission on Human Rights, which it substituted in 2006. Indeed, the Commission increasingly discredited for being a heavily politicised body and allowing into its membership countries that were accused of performing gross violations of human rights. The reform aimed to create an institution that would be more tightly bound by rules, especially as concerns membership, so as to overcome the credibility crisis of its predecessor.³³

One of the most significant developments for the doctrine of the right to food in the new millennium was the approval from the FAO Council of the “Voluntary Guidelines to Support the Realisation of the Right to Adequate Food in the Context of National Food Security” — also known more simply as “Right to Food Guidelines”. The sequitur to the 1996 World Food Summit, the 2002 World Food Summit: Five Years Later, culminated in a Declaration that invited the FAO Council to establish an Inter-Governmental Working Group (IGWG) to elaborate such a text (Arti-

³¹ For a literary review of these and other critiques, see: M. Fehling, B. D. Nelson, S. Venkatapuram, ‘Limitations of the UN Millennium Development Goals: a Literature Review’, in *Global Public Health* Vol. 8 No. 10, November 2013.

³² See: T. Pogge, *Politics as Usual: What lies behind the pro-poor rhetoric*, Cambridge, Polity Press, 2010, pp. 57-74.

³³ ‘UN creates new human rights body’, BBC News, 15 March 2006, <http://news.bbc.co.uk/2/hi/europe/4810538.stm> (accessed 30 January 2019).

cle 10). It has been suggested that the usage of the term “right to adequate food in the context of national food security”, while oblique as concerns the relation between right to food and food security, signals an understanding of the right to food as amounting to more than a means to achieving food security.³⁴ While the text still represents an important step for the right to food, the adoption of the form of “guidelines” rather than a more stringent “code of conduct” once again signalled the open refusal of some States, during the two years of negotiation, of recognising a binding right to food.³⁵ The Guidelines were finally approved by the FAO Council in 2004, after a two-year long drafting process that saw the active participation of a number of NGOs and CSOs. The document is preceded by a series of thematic information papers that explore the relation between food aid and the right to food, provide guidance for implementation and monitoring, delve into the relation between the right to food and international trade, explores the justiciability of the right, the implications of the ICESCR on parties and non-parties alike, the current state of national recognition and the role of social assistance, concluding with six case studies. The actual Voluntary Guidelines provide definitions of food security and the right to food in their introduction. As concerns the former, it establishes that «Food security exists when all people, at all times, have physical and economic access to sufficient, safe and nutritious food to meet their dietary needs and food preferences for an active and healthy life. The four pillars of food security are availability, stability of supply, access and utilisation.»³⁶ The meaning of this should be clear in light of what has been said on the topic thus far. As concerns the latter, «[t]he progressive realisation of the right to adequate food requires States to fulfil their relevant human rights obligations under international law. These Voluntary Guidelines aim to guarantee the availability of food in quantity and quality sufficient to satisfy the dietary needs of individuals; physical and economic accessibility for everyone, including vulnerable groups, to adequate food, free from unsafe substances and acceptable within a given culture; or the means of its procurement.»³⁷ Significantly, the document expressly establishes that food security is to be considered as the outcome of the realisation of existing rights, encouraging States to adopt rights-based approaches in their pursuit of it, recognising the universality, interrelatedness, interconnection and indivisibility of all human rights as expressed in the Vienna Declaration of 1993.³⁸ Recent-

³⁴ K. Mechlem, “Food Security and the Right to Food in the Discourse of the United Nations”, in *European Law Journal*, vol.10, no. 5, 2004, p. 642-643.

³⁵ G. Kent, *Freedom from Want*, Georgetown University Press, Washington D.C., 2005, p. 58.

³⁶ FAO, *Voluntary Guidelines to Support the Realisation of the Right to Adequate Food in the Context of National Food Security*, Rome, 2004, Introduction, para 15.

³⁷ *Ibidem*, Para. 16. Para. 17 then goes on to reiterate the obligations arising from the ICESCR, which will be further elaborated on during the next chapter.

³⁸ *Ibidem*, Para. 19.

ly, the Guidelines have been praised by the Special Rapporteur Elver saying that, albeit non-binding, they had a major impact, especially Guideline 7, which guides States in strengthening domestic legal frameworks. They complemented the 1996 PoA and constituted a great instrument for MDG progress.³⁹

Yet another global event was held in 2009: the World Summit on Food Security, at the behest of the FAO Council. On the backdrop of the world food prices crisis that started in 2008, acknowledging with alarm the status of chronic hunger affecting roughly one billion people globally, the Summit's unanimous Declaration pledged to even further increase the still insufficient economic aid to agriculture in developing States, with the objective of their achieving self-sufficiency. Moreover, the text of the declaration expressly refers and recognises the "right to adequate food" in multiple points. Specifically, in paragraph 2, pledging to facilitate the achievement of the right, and Principle 3, pledging to achieve food security following a "twin-track approach": immediately addressing the hunger of the most vulnerable, and engaging in medium/long-term development effort to tackle the root causes of the problem "including through the progressive realisation of the right to adequate food. Additionally, within Principle 3, paragraph 16 recognises the right to adequate food, following the formulation of it given by the CESCR in General Comment No. 12.

However, come the deadline of the MDG project (2015) most of the Goals were not on the correct track to be fully met by that term; this was especially grave, considering how the target for MDG 1 was already greatly lowered. Realising the entity of the challenges ahead, the States engaged in a three-year long negotiation in 2012 in order to decide on the 'Post-2015 Development Agenda'. The shape this took concretised in 2016, in the form of the 2030 Agenda for Sustainable Development, and its 17 Sustainable Development Goals (SDGs). They constituted a concerted effort of unprecedented dimension and scope, in what was essentially a bigger and stronger version of the MDGs. An in-depth analysis of the MDGs and SDGs is beyond the scope of this thesis, which focuses on two specific avenues to the realisation of the right to food, and despite the connection of the avenue of indicators with the Goals, it will focus on the use of indicators for human rights-monitoring. Nevertheless, a short overview of the relevant features and shortcomings of the new framework is still useful for highlighting some important global dynamics, which will reflect in both the next chapter and in the concluding considerations of the thesis. While concerted action of such scale should always be welcomed, one should also not avert their eyes from its weaknesses.

³⁹ H. Elver, *Report to the General Assembly*, A/69/275 (7 August 2014).

Specifically, the new framework did improve on the old one in numerous respects; data collection facilities had developed over time, allowing for more timely and effective collection of data, also benefiting in some cases from the development of human rights indicators – which will be explored in Chapter 5 of the present thesis. Moreover, most SDGs did indeed incorporate human rights as their guiding principles; much in spite of the decades of progress described in this chapter, however, ‘SDG 2: Zero Hunger’ was utterly devoid of the right to food, thus making a human rights-based approach to development in such field completely optional. Specifically, it has been pointed out how a great shortcoming of the SDGs from a human rights perspective (which calls for an immediate obligation to address the needs of the poor and destitute) is their ultimate voluntarist nature, which reflects in the lack of a clearly-set division of labour among the relevant parties – a regrettable inheritance of the previous framework.⁴⁰ While the articulation of commitments in a “nationally appropriate” fashion (following the principle of common but differentiated responsibilities) responded to the legitimate concern that universally applicable Goals and Targets would be used to name and shame the poorest countries for their failure to live up to excessive expectations, it is unfortunate that it was articulated in such fashion.⁴¹ An extremely praiseworthy development of the Agenda is, on the other hand, the fact that it moved from a diluted goal, to “[ending] poverty in all its forms, everywhere”. However, the lack of specification of the responsibility of developed countries to reform the international regulatory system and raise the – currently dwindling – levels of ODA is indeed reason for concern on the potential impact of the framework, entering its fourth year as of the time of writing this thesis.⁴²

8. A TURNING POINT FOR JUSTICIABILITY: THE OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

Nevertheless, a further point was indeed scored on the “justiciability” side of the fight against world hunger. In 2008, coinciding with the 60th anniversary of the adoption of the UDHR,

⁴⁰ See: T. Pogge and M. Sengupta, ‘Assessing the Sustainable Development Goals from a Human Rights Perspective’, *Journal of International and Comparative Social Policy*, Vol. 32, Issue 2, 2016.

⁴¹ Ibidem.

⁴² Ibidem.

the UNGA approved an Optional Protocol to the ICESCR (OP-ICESCR) that opened to the possibility of individual appeal for international justiciability of the rights contained in the Covenant, effectively closing the gap with the ICCPR. Herein the Protocol will receive a summary exploration; a more in-depth reflection on it will however be provided in Chapter Four. A new way was made available for the CESCR to advance the jurisprudence on ESC rights and guaranteeing enhanced coverage - provided of course that the individual (or group thereof, as per Article 2) has exhausted domestic remedies or when domestic remedies are unreasonably prolonged (Article 3.1). Third parties may raise the case on behalf of the presumed victims, even without their consent when reasonable justification is provided (Article 2). After receiving the communication, the Committee may request the States to take interim measures so as to avoid irreparable damage to the victim should the allegation prove true; this does not entail a judgement on the admissibility of the case (Article 5). The Committee will consider the communications referring to a plethora of sources, including documents from UN and non-UN international organisations and regional human rights instruments. Moreover, it will consider the compliance of the measures taken by the accused State with the principle of progressive realisation under Part II of the Covenant, reviewing the “reasonableness” of all manners of steps that the State has taken (Article 8). Then, it will communicate its recommendations to the parties; the State shall give it due consideration and respond, within six months, «including information on any action taken in light of the [recommendations]» (Article 9). With the consent of the State, the Committee may request competent bodies of the UN for technical advice and assistance (Article 14). There are furthermore two opt-in procedures, one enabling States to start — and be targeted by — “Inter-State Communications”(Article 10), and one allowing the Committee to carry out Inquiry Procedures to address systematic violations of human rights (Article 11, to which Article 12 is connected).

The Protocol did indeed enter into force in 2013, once a sufficient number of ratifying parties had been achieved. However, while the importance of the recognition of a judicial authority at the international level truly cannot be overstated on the theoretical level, theory inevitably clashes with reality after a glance to the state of ratification of the Protocol. To date (January 2019), only 45 States have signed the agreement; fewer yet, 24, have ratified it (four of which without previous signature, totalling 49 States to have taken action), the latest accession being that of Venezuela, in October last year. Only 5 have also adhered to the opt-in articles thus far: Belgium, El Salvador, Finland, San Marino and Portugal. The reduced number of ratifiers may be due to the gradual ex-

clusion from the final draft of softer proposals that were raised during negotiation, like the one of an “à la carte” approach allowing the States to select for which rights to allow the procedure contained in the Protocol.⁴³ Moreover, the rate of accession seems to be on the decline: after an average of three States a year from 2010 to 2013, and a peak in 2014-2015 registering ten new accessions, the last three years have seen a low total of three ratifications.

⁴³ M. Langford, ‘Closing the Gap? - an Introduction to the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights’, *Nordic Journal of Human Rights*, vol. 27, no. 1 (2009).

CHAPTER THREE: THE CONTROVERSIAL STANDING OF THE RIGHT TO FOOD

The thesis has thus far displayed how the concepts of the right to food and food security have developed in parallel to each other, and highlighted the various important developments the doctrine of the right has undergone over time. For all such developments, however, international efforts to create a globally shared document recognising food as a matter of stringent individual and collective obligations inevitably run into many obstacles. Indeed, the fight against under/malnutrition has for long been undertaken as a matter of charitable action, or under the recognition of the economic benefit of a healthy and well-nourished population.¹ A rights-based approach, on the other hand, would command that same action be taken as a matter of obligation, revolving around the fundamental notion of human dignity. As natural rights, human rights do not exist because a State decides to “recognise” and “guarantee” them; rather, they exist regardless of a State’s action, which may, at worst, violate them. That is the fundamental difference between a rights-based approach and a non-rights-based one: the former entails a stringent obligation, with a series of requisites (which will be explored in the dedicated section ahead); the latter on the other hand uses arguments (again, presented over the course of the chapter) to hold that making ESC rights justiciable is essentially impossible and undue due to the very nature of such rights.

The concept of “natural rights” does not find universal consensus in the academic debate, either. For instance, it was deemed by Amartya Sen to be dubious and lacking in cogency; he proposed instead that human rights be understood as having an ethical nature which may, as a matter of option, be enshrined in law.² This thesis does agree that there may be alternative ways to advance the right to food than through its justiciability and, indeed, the third paragraph of this chapter will explain the limitations inherent to a judicial approach. However, in line with the thought advanced by the CESCR and the Specialised Agencies of the UN, it holds the legal incorporation and justiciability of the right to food to be, while not sufficient, necessary requirements if the fight against world hunger is to bring about consistent results.

¹ G. Kent, *Freedom from Want*, Georgetown University Press, Washington D.C., 2005, p. 47.

² A. Sen, ‘Elements of a Theory of Human Rights’, *Philosophy and Public Affairs*, Vol. 32, No. 4 (Fall 2004).

The analysis proposed in the present chapter aims to clarify the existing gap between these two lines of thought. In order to do so, it will proceed as follows. The first paragraph will explore the hoary debate on the justiciability of economic, social and cultural rights, and describe how the gap between the two categories has been filled over time. Part of this evolution will only be clarified in the next chapter, concerning the justiciability of the right to food. A final section of this paragraph will complete the picture by specifying what is meant for “rights-based approach”. The theoretical evolution towards a violationist approach from the CESCR does not however find universal consensus. The second paragraph will thus perform a literary review to present the arguments of the two sides of the philosophical debate, with a view to assessing the nature of the obligations arising from the right to food, whether they should be rightly treated as only aspirational objectives or as claimable entitlements. It will do so with a focus on both the national and the international level of obligations, as the two are object of different kinds of controversy. It will conclude that the current international system and the challenges it presents command a rights-based approach for reasons of coherency and effectiveness of human rights law, and for moral reasons based on a cosmopolitan perspective which it holds to be more appropriate for both describing the current international scenario and prescribing behaviours consequently. While the second paragraph will contain arguments in favour of the justiciability of the right, the third paragraph will also acknowledge the limitations of such approach. First and foremost among these, its incapability, due to the ultimate sovereignty of the States to adopt it or not, to bridge the gap of lacking political will. As such, it will illustrate the necessity of parallel non-rights-based efforts to bring about consistent progress while the former approach gradually, but slowly, takes hold.

1. THE DEBATE ON THE JUSTICIABILITY OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS

In 1966, the two Covenants were drafted on the background of the Cold War. The separation of the human rights contained in the UDHR into two separate documents mirrored the ideological divide that separated the two blocs. This structure engendered a legal doctrine that divided human

rights among different “generations”, a classification that until not long ago still held consistent sway.³ For long, however, the different understanding of the nature of economic, social and cultural (ESC) rights, on one hand, and civil and political (CP) rights, on the other, has been used to justify a different treatment of the two. The differences are self-evident from a glance at the text of the two Covenants. The International Covenant on Civil and Political Rights (ICCPR hereafter) contains a straightforward provision establishing that States must adapt their legal system by adopting «such legislative or other measures as may be necessary to give effect to the rights contained in the present Covenant.»⁴ By contrast, the ICESCR formulation is much more complex and nuanced, laying out a duty to realise the rights contained therein progressively, through individual action and international cooperation, to the maximum of available resources «by all appropriate means, including particularly the adoption of legislative measures.»⁵ Many elements were inserted herein counterbalancing their duty to the realisation; they will be analysed more in depth shortly ahead. For now, suffice it to notice how the provision of “all appropriate means, *including particularly* [...] legislative measures” (emphasis added) seems to indicate that a State could not be held accountable — provided of course the existence of an otherwise efficient accountability system — for *not* incorporating the Covenant’s rights in national law, so long as their realisation is achieved. From the very second article, the ICESCR implicitly opens up to the possibility of pursuing its objectives in a non-legally-binding fashion. More to the point, the provisions on the establishment of judicial mechanisms for oversight and compliance are especially telling of the difference between the two Covenants. The ICCPR explicitly posits the States’ obligations to provide effective remedy for everybody in cases of violations. As concerns what kind of remedy, development of the judicial form is clearly encouraged at all times, but it can be accompanied by remedies offered by the competent administrative or legislative authorities, or others as provided by the State’s legal system.⁶ On the other hand, the ICESCR is completely devoid of any such provision, altogether. A further difference between the two, reflecting the lack of consensus during the drafting of the latter, is that while the former had an Optional Protocol (OP-ICCPR 1) already attached to it in 1966, creating a dedicated oversight mechanism that could also act as a quasi-judicial mechanism, the latter saw oversight functions entrusted to the intergovernmental ECOSOC. As seen in Chapter 1, the creation of a dedicated mech-

³ K. Vasak, “A 30-Year Struggle”, *The UNESCO Courier*, Vol. 20. November, 1997.

⁴ UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, Article 2.2.

⁵ UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3, Art. 2.1.

⁶ ICCPR, Art. 2.3.

anism under the ECOSOC (the CESCR) came only two decades later, and two more decades would pass before the Committee would be endowed with a quasi-judicial function.

Indeed, the justiciability of ESC rights has traditionally been a controversial topic in international law. Detractors have argued such rights to be non-justiciable based on four main arguments: the fact that they entail positive obligations, the principle of “progressive realisation”, the vagueness of the normative content of the right, and the absence of national legislations on the matter that any judicial organ could enforce.⁷ Let us now explore them more in depth, in order to understand how the debate around them has evolved. The counter-arguments that will be presented are meant to show the fallacy of such sort of criticisms, advanced against the justiciability of ESC rights. While lacking binding force, thus being unable to command a judicial evolution of the enforcement of such rights, as authoritative documents the General Comments do, at minimum, confer legitimacy to it. Indeed, the authority and influence of the human rights bodies can be seen in the fact that their General Comments, concluding observations and (for those which offer such possibility) decisions on cases of individual complaints not only shape the work of UN Agencies and NGOs in their advocacy efforts,⁸ but are also at times cited by international,⁹ regional¹⁰ and national courts.¹¹ As concerns the right to food, such legitimacy is further reinforced by the likewise authoritative opinion of the Special Rapporteurs, all three of whom have, with varying emphasis, encouraged a justiciable evolution of the right. Granted, merely establishing legitimacy is far from enough, especially considering that the problem, as concerns the right to food, is one of lacking political will; that is, the States that lack the political will to realise the right to food, if not forced to, will not willingly establish or otherwise submit to judicial mechanisms able to, in turn, force them to comply with the relevant obligations. These evolutions taking place in supranational institutions do not automatical-

⁷ J. Ziegler, *Report to the Commission on Human Rights*, E/CN.4/2002/58 (10 January 2002).

⁸ A.J. Rosga, M. L. Satterthwaite, 'The Trust in Indicators: Measuring Human Rights', *Berkeley Journal of International Law*, Vol. 27, Issue 2, 2009, pp. 289-293.

⁹ See e.g. *Prosecutor v Tadić IT-94-1, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction*, T 45 (International Criminal Tribunal for the Former Yugoslavia, 2 October 1995), para.45: the Tribunal cited the reasoning of the Human Rights Committee as presented in its General Comment No. 14 and in an individual complaint decision as an interpretive reference. See also International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, paras. 109-110 and 136: the ICJ also used the Committee's practice as an interpretive effort with reference to the principle of 'jurisdiction' and the acceptability of derogatory measures, respectively. As pointed out in [note 8 above].

¹⁰ See e.g. *Kurt v Turkey*, Appl. No. 15/1997/799/1002, (European Court of Human Rights, 25 May 1998), para. 65: the ECtHR also cited the Human Rights Committee's views in multiple individual cases as interpretive aid concerning forced disappearances. As pointed out in [note 8 above].

¹¹ See e.g. *State v Makwanyane and Another*, CCT 3/94 (Constitutional Court of South Africa, 6 June 1995), paras. 63-67: the Court also referenced the Human Rights Committee's reasoning as interpretive aid concerning the death penalty. As pointed out in [note 8 above].

ly entail that the States will be on board; however, neither can they happen in a void of consensus. Deconstructing the theoretical obstacles to the justiciability of these rights is a necessary step towards more compelling formulations, and the gradual progress on the front of legal incorporation of the right to adequate food as reported by the FAO (in the next chapter) seems to lend credibility to the transformative effect of this doctrinal evolution.

1.1. CRITIQUE NO. 1: POSITIVE OBLIGATIONS

While CP rights were largely held to entail exquisitely negative obligations, the realisation of ESC rights were held to imply positive obligations, i.e. a proactive and costly engagement on behalf of the State. Therefore, giving a court the power to oblige the State to pass law or enact policies that require resources expenditure entails an encroachment of the judiciary on the other two powers, which is an infraction of the separation of powers democracies base themselves on.

Nevertheless, multiple points of such argument invite responses. A first consideration that can be advanced concerns the Vienna Declaration and Plan of Action of 1993: the fact that no fewer than 171 states agreed by consensus on the text makes the document, though not binding, at least a very authoritative one, reflecting a shared understanding of the nature of human rights.¹² The document is particularly relevant to the topic at hand, as it asserts that «[all] human rights are universal, indivisible, interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis.»¹³ It is therefore easy to understand how the CESCR would comment that «[the] adoption of a rigid classification of economic, social and cultural rights which puts them, by definition, beyond the reach of the courts would [...] be arbitrary and incompatible with [said] principle».¹⁴ It argues thusly on the grounds that, while it is indeed important to respect the separation of powers, it is likewise «appropriate to acknowledge that courts are generally already involved in a considerable range of matters which have consistent resource implications.»¹⁵ This is effectively a rejection of the hoary postula-

¹² See J. Ziegler, *Report to the Commission on Human Rights*, E/CN.4/2002/58 (10 January 2002).

¹³ UN General Assembly, *Vienna Declaration and Programme of Action*, 12 July 1993, A/CONF.157/23, Para. 5.

¹⁴ UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 9: The domestic application of the Covenant*, 3 December 1998, E/C.12/1998/24, [UN CESCR, *General Comment No. 9* hereinafter] Para. 10.

¹⁵ *Ibidem*.

tion whereby CP rights would only give rise to negative obligations. Such idea is indeed obsolete, as such rights still entail a set of positive ones, like the training of the bodies tasked with their protection, the setting up of institutions proposed to facilitating the enjoyment of said rights and of investigations on alleged violations.¹⁶

1.2. CRITIQUE NO. 2: THE PRINCIPLE OF “PROGRESSIVE REALISATION”

As explored in the previous chapter, Article 2.1 of the ICESCR establishes an important limitation to the States’ obligations regarding the right to food in the “principle of progressive realisation”. As per the CESCR’s interpretation, such principle’s intended purpose is to allow some degree of flexibility in the implementation of the terms of the Covenant, according to national circumstances and resource-availability. The rest of the same article, after all, does posit a stringent obligation to take concrete steps to realise the right. Nevertheless, regrettably, the principle has been consistently interpreted as remitting implementation to the States’ goodwill,¹⁷ thus constituting a strong obstacle against justiciability of the right due to the argued “informal” and non-stringent nature of the ensuing obligations. It has indeed been argued that a judicial mechanism is ill-suited for the implementation of such rights, as they are subject to progressive realisation, and the Covenant refrained from setting forth individual entitlements; as such, it is hardly conceivable for a court to adjudicate on the matter based only on the Covenant, without national legislation.¹⁸

There are however substantive limitations to such principle, as marginally explored in the previous chapter. The CESCR was very clear in specifying that, while the principle of progressive realisation and the acknowledgement of resource constraints are meant to confer flexibility, a number of provisions contained in the Covenant are liable of immediate application. These are part of the “core content” of the rights, which should be uncontroversially justiciable in domestic courts. One such provision is certainly the obligation of non-discrimination: under no circumstances can

¹⁶ C. Tomuschat, *Human Rights: Between Idealism and Realism*, Oxford, New York, Oxford University Press, 2008, p. 53.

¹⁷ J. Ziegler, *Report to the Commission on Human Rights*, E/CN.4/2002/58 (10 January 2002).

¹⁸ See for example C. Tomuschat, *Human Rights: Between Idealism and Realism*, Oxford, New York, Oxford University Press, 2008, p. 54: the argument on “individual entitlements” is presented based especially on the vagueness of the Covenant’s formulation of the obligation to *fulfil* (pp. 43-44).

the principle of progressive realisation be used to justify a discriminatory distribution of resources, as per ICESCR Art. 2.2.¹⁹

Another limitation pointed out by the Committee is what could be named “minimum level and non-regression”. As concerns the minimum level, General Comment No. 12 establishes that «States have a core obligation to take the necessary action to mitigate and alleviate hunger [...] even in times of natural or other disasters».²⁰ In addition, General Comment No. 3 contains a formulation for a minimum core obligation for every State to «to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights [contained in the Covenant].»²¹ Significantly, the Committee specified the vital importance of recognising such ‘minimum level’, stating that «[if] the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its *raison d’être*.»²² Therefore, States have a stringent duty to do all that is in their power to ‘provide’ a basic minimum level of resources for subsistence to everybody, even during crises. It is necessary to remember herein that the obligation to fulfil is to be understood as targeting those whom, for reasons beyond their control, are unable to realise the right for themselves. In such cases, the State must intervene to provide them with a minimum level so as to prevent an infraction of their rights. General Comment No. 12 further elaborates that, in case they fail to achieve such objective, they must demonstrate having done all that was in their power, including appealing for international assistance.²³ Once again, it needs herein to be pointed out that, in case the State appeals for international assistance and receives none or an insufficient amount of it, it remains dubious at least what the consequences would be in terms of assessing the responsibility of the international community at large for not helping, and even more so, in terms of establishing punishment or remedy. An attempt to answer such question will take place in Paragraph 2.2 of this chapter. Finally, further expanding on the formulation of ‘minimum content’, Ziegler pointed

¹⁹ UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)*, 14 December 1990, E/1991/23, [UN CESCR, *General Comment No. 3* hereinafter] Para.1. See also: C. Tomuschat, *Human Rights: Between Idealism and Realism*, Oxford, New York, Oxford University Press, 2008, p. 50.

²⁰ UN CESCR, *General Comment No. 12*, Para.6.

²¹ UN CESCR, *General Comment No. 3*, Para.10.

²² *Idem*. The Committee’s view seems to echo the words of Alston, whom in 1987 argued that failing to recognise that the Covenant’s rights have a minimum content that must be realised and held justiciable disregarding the circumstances would void the whole purpose of elevating such claims to the rank of rights in the drafting of the Covenant, and make the whole document ultimately risible. (P. Alston, ‘Out of the Abyss: The Challenges Confronting the New U. N. Committee on Economic, Social and Cultural Rights’, in *Human Rights Quarterly*, John Hopkins University Press, Vol. 9, No. 3 (1987), pp. 352-353.)

²³ UN CESCR, *General Comment No. 12*, Para. 17.

out the principle of non-regression, whereby States must in no way act in a manner that worsens the achieved food security status of their population.²⁴

Thirdly, closely evoked by such principle is the limitation posed by the obligation to respect: as a merely negative one, it cannot be subjected to the principle of progressive realisation.²⁵ Largely escaping all of the objections advanced against the justiciability of ESC rights, purely negative obligations arising from those should unobjectionably be immediately justiciable. The obligation to protect would also seem to be relatively peaceful, but the next chapter will highlight how some controversies arise in light of the evolutions of the concepts of duty-holder and right-holder.

We have thus far explored limitations that concern fundamental procedural aspects (non-discrimination), respect and non-regression, protection and provision of ESC rights. The first three are relatively peaceful, as they do not evidently burden the State and constitute rather limits to its action. The latter is more contested, as it entails positive obligations; however, especially as concerns the right to food, the duty to save people from starvation has an immediate moral appeal that is hard to refuse. No State would ever take the position that it is desirable to leave people to starve; it is difficult to even hypothetically come up with any reason why that would be acceptable. Rather, States oppose this based on the fact that they might not be able to comply with such obligation due to a physical lack of resources; as such, it would be inappropriate for a court to hold them accountable for the violation, as they had no means to comply. More on this controversy in the next paragraph. However, the most controversial obligation is widely held to be that to “facilitate” the right to food: the obligation to bring about a situation whereby the individuals are enabled to stably enjoy their own rights. Indeed, to such regard, the Committee found another limitation to the principle of progressive realisation in the duty to “take steps” towards the full realisation of the rights, as per Article 2.1 of the Covenant, using “all appropriate means, including particularly the adoption of legislative measures.”²⁶ The Limburg Principles developed in 1986 already asserted that the progressive realisation of ESC rights cannot be understood as an excuse to indefinitely put off the realisation of Covenant rights; while some may be immediately justiciable, the others must become justiciable over time.²⁷ The Committee specified that contained within the immediately applicable content of the obligation to “take steps” is also the obligation to make effective remedy available for

²⁴ J. Ziegler, *Report to the Commission on Human Rights*, E/CN.4/2002/58 (10 January 2002).

²⁵ *Ibidem*.

²⁶ *Ibidem*, Paras. 2-4.

²⁷ *The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights*, 1986, paras. 16-34.

the rights that may be considered justiciable in the domestic juridical system. Concerning which these right might be, the CESCR stated that some articles of the Covenant “would seem to be capable of immediate application by judicial and other organs in many national legal systems.” While the list does not include Article 11, it was purposefully left open-ended, suggesting an intent to leave it open to further expansion as the doctrine evolves.²⁸ Given how resource constraints are the main motor behind the principle of progressive realisation, it is also noteworthy that the Committee specified the duty to monitor progress not to be in any way subject to such considerations.²⁹ It will be immediately evident, however, how to include among the “core content” the obligation to take steps is controversial. Indeed, in this case the controversy becomes a matter of what criterion a court could possibly use to evaluate State action. An answer to this comes from South Africa, and the practice of the Committee under the OP. Indeed, in his reports, Ziegler also pointed out that further limitations yet to the principle of progressive realisation could be found in the national articulations of the right to food. The example of the South African Constitution, one of the most progressive ones as concerns the right to food, is illuminating to that regard: it explicitly establishes that the State’s duty of securing the right to food of those who are not in a condition to feed themselves (i.e. inmates and infants) is not subject to progressive realisation.³⁰ Exactly with regard to the principle of progressive realisation, the landmark sentence of the South African Constitutional Court in *Government of the Republic of South Africa. & Ors v Grootboom & Ors* (1999) makes for a paramount example of how national courts can evaluate whether the effort of the State can be deemed compliant with the requirements put forth by ICESCR article 2.1. In such case, the Court found the State to have violated the right to housing of the plaintiffs, enshrined in Article 26 of the Constitution, by not engaging in a sufficiently broad and far-reaching housing programme: it held that the State had not taken sufficient action towards the progressive realisation of the right, as it did not guarantee a minimum level of satisfaction. As such, the Court ordered the governments to “devise, fund, implement and supervise measures to provide relief to those in desperate need.” While the resulting commitment of the State was insufficient to providing appropriate remedy, giving rise to further legal action to such end, the case had enormous repercussions on the South African housing policy and acted as a basis for a wealth of successful ESC litigation globally.³¹ Among the reverberations,

²⁸ Ibidem, para. 5.

²⁹ Ibidem, para. 11.

³⁰ Ibidem.

³¹ *Government of the Republic of South Africa. & Ors v Grootboom & Ors* 2000 (Constitutional Court of South Africa 1999). Text available at: <https://www.escr-net.org/caselaw/2006/government-republic-south-africa-ors-v-grootboom-ors-2000-11-bclr-1169-cc>

as will be clarified in the next chapter, was most notably the adoption of the same practice by the CESCR in the vest of quasi-judicial organ under the OP-ICESCR. The importance of this ruling can be stressed further, in light of the fact that many violations of ESC rights come from a failure of the State to take action (or to take sufficient steps).³² Enabling a court to evaluate compliance of the State with the vaguely-worded Article 2.1 of the ICESCR (to take steps, to the maximum of available resources, to progressively realise the rights by all means available, especially legislative ones), assess whether the State has done enough and compellingly invite it to further action was a groundbreaking development.

In light of the content of this paragraph, it stands to reason that, even if the principle of progressive realisation does pose limits to the justiciability of the right to food, the areas of the right that have been specified by the Committee not to be subject to such principle should be understood as immediately justiciable. Wrapping up, such areas are: the prohibition of discrimination; the obligations to respect and protect the right; the principle of “non-regression”; the obligation to do all that is in a State’s power in order to guarantee a ‘minimum level’ under all circumstances; and the obligation to continuously take steps. The latter two remain the most debated ones to date.

1.3. CRITIQUES NO. 3 AND 4: NORMATIVE CONTENT AND LEGISLATIVE FRAMEWORKS

The third critique to ESC rights explored above concerned the vagueness of their normative content, which made it impossible to establish clear obligations upon definite duty-holders to the benefit of likewise precise right-holders. Naturally, for the sake of thematic pertinence, the present thesis will not proceed to clarify the content of all ESC rights. It will however explain that, while such critique did indeed hold considerable sway some four decades ago, the progressive evolution of the doctrine surrounding the right to food explored in Chapter Two has greatly voided it of its validity. The same goes for the fourth critique, i.e. the absence of legal systems enshrining the norm in a binding fashion for a court to enforce, in light of the progressive incorporation of the right to food

³² B. Porter, ‘Reasonableness and Article 8(4)’, in M. Langford, B. Porter, R. Brown and J. Rossi (eds.), *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: A Commentary*, Pretoria University Law Press, 2016, p. 176.

in many legal systems worldwide. The present sub-paragraph will not however proceed to establish exactly how that is, delegating the exploration of national, regional and international recognition of the right to the next chapter.

1.4. A HUMAN RIGHTS-BASED APPROACH TO DEVELOPMENT

The evolution of the CESCR's doctrine has thusly largely shed the first two critiques on the justiciability of ESC rights in general, the latter two being more acknowledgments of factual limitations than procedural objections. In 2014, De Schutter surmised that the right to food had undergone an evolution from a mere aspiration, at the time of its inclusion in the Covenant, to an operational tool considered indispensable for the success of food security strategies. From the 1996 Plan of Action's Commitment 7, to General Comment No. 12, to the 2004 Guidelines, to the 2009 World Summit on Food Security and the Five Rome Principles for Sustainable Global Food Security, the right to adequate food (and water) has been used as a fundamental reference time and time again. The CFS was reformed in the same year, with the right to food at its core. After all this theoretical development, the right to food has finally entered a phase where implementation is at the centre of effort.³³ The international effort sponsored by the CESCR and the UN specialised agencies has oriented itself in favour of a rights-based approach to development. This is perhaps best explained with reference to the right to food. De Schutter repeatedly stressed that the right to adequate food is not primarily the right to be fed (e.g. after catastrophic events and crises), but rather the right to an environment in which everyone has at any time all the means necessary to feed themselves.³⁴ For human rights to have meaning, following the lines of what was considered thus far, this environment is to be brought about via a rights-based approach, i.e. understanding that the respect, protection, facilitation and provision of the right to food are all obligations responding to entitlements of individuals, which must be enshrined in law. The right to food must be the basis and the compass for policymaking.³⁵ The meaning of a rights-based approach to the right to food can be further understood when taking into account the PANTHER framework sponsored by the FAO, consisting in

³³ O. De Schutter, *Report to the Human Rights Council*, A/HRC/25/57 (24 January 2014).

³⁴ See for example: O. De Schutter, FAO, *Countries Tackling Hunger with a Right to Food Approach, Significant Progress in Implementing the Right to Food at the National Scale in Africa, East Asia and Latin America*, Briefing Note, 01, May 2010.

³⁵ Ibidem.

the seven cardinal principles of participation, accountability, non-discrimination, transparency, human dignity, empowerment and rule of law. The importance of these principles is best understood through the words of Kent,³⁶ who explained how, while an authoritarian regime may satisfy the need for food of its people, this does not amount to satisfying their human right to food. The fundamental difference lies in the founding concept of human rights: human dignity. The dignity, that is, to choose, to have a say in the structuring of the system on which one's livelihood depends, in order to make sure that the food that one has access to is not only sufficient, but also adequate. The dignity that stems from having a voice and being able to ensure that one is not left behind by unevenly-distributed progress, empowering the most vulnerable instead, in a non-discriminatory fashion. Finally, the dignity that comes from having the assurance that one can be defended by a judicial system against any mutation of the circumstances that would endanger their access to adequate food, as their right is enshrined in law. That is why all the letters of the PANTHER approach represent indispensable aspects of a rights-based approach to food security; and that is why only in a *lato sensu* democratic context can these points be comprehensively integrated.³⁷ Among others, Mechlem has also contributed to the exploration of the merits of a rights-based approach.³⁸ In the context of the increasingly wide recognition that mainstreaming human rights is finding in the UNDG programmes, she highlighted various dimensions of a rights-based approach to development. Firstly, the “dignity dimension”, which comes with a shift from basic needs to rights, thus from understanding individuals as beneficiaries of policies to understanding them as claimants of entitlements that respect and realise their human dignity. Secondly, the “acknowledgment dimension”, i.e. acknowledging that States have obligations that set requirements not only for the outcome, but also for the process (which is to be carried out according to the elements outlined above). Thirdly, the “transparency dimension”, whereby progress “needs to be monitored against defined benchmarks and standards”, therefore commanding “the development of indicators and other evaluation tools”. Fourthly, the “accountability dimension”: only when actors can be held accountable through political, administrative or judicial means, can a human right truly be realised. Finally, the “empowerment dimension” commands ensuring that everyone, including the most vulnerable, can meaningfully participate in public affairs, thus ensuring that those with the most urgent needs are addressed immediately and effectively. This should be reminiscent of the thought of the Rapporteurs outlined

³⁶ Kent, G., *Freedom from Want*, Georgetown University Press, Washington D.C., 2005, Chapter 3.

³⁷ The words used by Kent have been herein paraphrased and expanded, without distorting their meaning, in order to account for all the elements present in the PANTHER framework.

³⁸ Mechlem, K., “Food Security and the Right to Food in the Discourse of the United Nations”, in *European Law Journal*, vol.10, no. 5, 2004, Chapter V.

in Chapter One: it has been highlighted how the most vulnerable are both key to engendering transformative change and the ones in direst need of assistance. To this regard, a human rights-based approach has the merit of focusing on these groups and providing them with instruments to both obtain remedy against violations of their rights by a court, and for such courts to impose structural adjustments to ensure that the same violations are not repeated in the future. This is intuitively relevant as concerns the courts' ability to engender transformative change at the national level. Concerning on the other hand the implications of a rights-based approach for the international system described in the Introduction, Mechlem stated that international organisations and donor agencies must adopt a rights-based approach in their work, supporting the States' fulfilment of their obligations. However, the point of a justiciability approach is to create a mandatory system whereby compliance with such principles can be enforced by the appropriate bodies. As will be clarified in the next chapter, while this latter view was indeed shared over time by many an authoritative voice in the UN system, progress towards envisaging human rights obligations upon international organisations, though underway, is still far from reaching completion in the form of a shared acceptance. Whether that is desirable, however, will more closely be the point of Paragraph 3 herein.

2. HOW STRONG AN OBLIGATION?

The insight provided in the next chapter will highlight how there *is* indeed a human right to food, though not a universally recognised one. The lack of recognition comes transversally from poor and wealthy countries alike. Even States that would easily have the resources to realise the right and should theoretically not fear that a judicial mechanism would hold them accountable for something they did not have the resources to do have pronounced themselves against any legal entitlement-entailing understanding of food; most notably, the USA, Canada, Australia and many EU States. There is no clear consensus in the doctrine as to the reasons why they forward this vision, which is in most cases painted in ideological colours: a rebuttal of the “socialist” idea of an expansive welfare State, able to guarantee ESC rights for its population, depriving them of their responsibility to, *inter alia*, feed themselves. This has led some to chalk the refusal up to an anachronistic heirloom of the Cold War divide. Such explanation is arguably overly simplistic, as it stands to rea-

son that there are many, more nuanced reasons to the stance of these actors.³⁹ It has been hypothesised that the refusal of a right to food reflects an earnest conviction that, even for such a vital resource, “a market-based resources distribution is far more efficient than a rights-based scheme”. The privatisation of productive inputs that they sponsor and the absolute commodification of the produced food would be in line with this thought, forwarded also by the international institutions that these actors control: the WTO, the Bretton-Woods Institutions and the World Economic Forum.⁴⁰ These arguments need to be kept in mind; however, due to the impossibility, at least in the scope of the present thesis, to truly understand their core motives, what will be focused on will rather be the academic perspective under which these points have been forwarded.

The fact that the situation of the estimated 821 million people suffering hunger today should be addressed with a rights-based approach does not find universally shared agreement. Nor does the doctrine forwarded by the CESCR, from the overcoming of the critiques displayed above to the rather expansionist decision to establish an OP endowing it with a quasi-judicial vest. The debate has been tackled by many an author, with a wealth of different perspectives; covering the whole range of these variegated arguments would be unthinkable in the scope of the present work. Therefore, this chapter will attempt to restrictively focus the analysis on what is inarguably the centrepiece of the controversy: the extent and nature of the obligation of States (not their content, mind, which has already been specified and will receive some more clarification in the next chapter). Such obligations can be articulated merely on a domestic scale, or possibly even have an international dimension. The latter deserves some reflection, and will therefore have a dedicated sub-paragraph. Once one has established whether such obligation exists, then comes the most difficult step: establishing the nature of the obligation. This entails opting for either a loose moral responsibility treating the fight against world hunger as an aspirational objective and relinquishing action to the goodwill of States (as a matter of, in essence, charity); or, as per the doctrine consistently forwarded, *inter alia*, by the CESCR, for a legally binding one, entailing the possibility of judicial remedy and, therefore, adjudication. As mentioned, the Committee has maintained a rather agnostic stance on the existence of a legal obligation to incorporate the Covenant’s rights in domestic law, conscious of its role, and

³⁹ As argued in M.J. Dennis and D.T. Stewart, ‘Justiciability of Economic, Social, and Cultural Rights: Should There Be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing, and Health?’, *The American Journal of International Law*, Vol. 98, No. 3 (July, 2004), pp. 466-467. The authors argued the critiques on the justiciability of ESC right to be at the origin of the separation among the two Covenants, and for most such critiques to be still valid today.

⁴⁰ J.L. Vivero Pol and C. Schuftan, *No right to food and nutrition in the SDGs: mistake or success?*, BMJ Global Health 2016.

of the difficult position of the rights it oversees. However, a strong encouragement in the direction of legal incorporation and the provision of judicial (or other, as appropriate) remedy to victims of violation has remained a *fil rouge* of its doctrine. As such, the present paragraph will proceed with the analysis of the less-controversial (though by no means universally shared) domestic obligations, and then of the international ones, which perhaps due to their far-reaching and demanding nature have not received extensive elaboration in the academic debate. Before moving into such considerations, however, it is appropriate to proceed with a brief hiatus on a general theory of human rights.

2.1. A THEORY OF HUMAN RIGHTS

Assessing the nature of the obligation depends on an underlying, coherent theory of human rights. The first question which such theory has to come to terms with is whether the UDHR can be taken as a universal set of human rights, that finds agreement everywhere in the world. To this regard, it is useful to borrow from Amartya Sen and distinguish among the “recognition” level and the “legislation” level.⁴¹ As concerns the former, the universal status of ratification certainly seems to suggest that all countries agree that the rights enshrined therein are of the highest importance and must be realised and protected at all times. However, looking at the practice, both the non-universal ratification of the Covenants and the other human rights conventions and the questionable application of their terms in many States reveal that such laudable universal theoretical consensus regrettably finds no likewise universal confirmation in practice. It has been much debated whether this is due to fundamental cultural differences that could not be filled by any stretch of common intent, or whether there is a common idea of human dignity that emerges time and time again from a diachronic and synchronic analysis of world cultures, irrespective of the dominant culture at any given time.⁴² While that very controversial discussion is a mire in which the thesis aims not to plunge, it is necessary to take a stance on this fundamental point in order to further other considerations stemming from it. To such regard, the thesis holds the most convincing argument to be the one advanced

⁴¹ See: A. Sen, ‘Elements of a Theory of Human Rights’, *Philosophy and Public Affairs*, Vol. 32, No. 4 (Fall 2004), pp. 342-345.

⁴² See for example: C. Tomuschat, *Human Rights: Between Idealism and Realism*, Oxford, New York, Oxford University Press, 2008, pp. 69-96 (after an analysis of the existing cultural differences, Tomuschat concludes that there is wide consensus that it is a government’s duty to ensure a dignified life for its citizens, and that disagreements mainly harken to the different understanding of the means to enforce it).

by Amartya Sen that, beyond cultural and ideological differences, it is possible to see the emergence of a set of human rights from an unhindered and all-inclusive global debate.⁴³ Indeed, the argument is presented as a rebuttal of the existing arguments on the exquisite “westernness” of human rights (e.g. by S. Huntington), presenting the logical fallacies of them. Having accepted the fact that human rights are not inherent to any specific culture, another point of Sen’s theory that the thesis agrees with is that there is no reasonable objection to the inclusion of ESC rights among human rights.⁴⁴

However, Sen argues thusly based on a very weak understanding of human rights, only ethical and non-inherently legal, which means that it is not necessary to include them in legal systems. Indeed, justiciability might be undesirable in cases of Kantian “imperfect obligations”;⁴⁵ the problem with this is that ESC rights are largely made of this latter kind of obligation. And certainly, it is difficult to imagine that a judicial institution would rule on a human right without any legal basis whatsoever. However, exactly for this reason, stating that it is not fundamental for human rights to be enshrined in law is in contrast with the understanding of human rights that is brought forth by the CESCR and the other human rights bodies, which instead sponsor a rights-based approach, entailing all the dimensions of the PANTHER framework, amongst which rule of law and availability of remedy. The reason why the Committee has not openly recognised an obligation to incorporate human rights in legal systems is arguably of a political nature; the need, that is, to encourage progressive change rather than a schismatic one. As the repeated encouragement to adopt legislative measures with regards for example to the right to food demonstrates, it is at least held to be highly desirable that individuals enjoy some solid degree of protection of their rights. It is correct to argue that the UDHR represents a “common standard of achievements”. However, a standard has no meaning if its thresholds can be crossed at will, with impunity; not only does it practically take away the compass of human rights from its function of guiding the progress both within and between States in the global scenario, it also defeats the purpose of solemn statements declaring world hunger an unacceptable global injustice. For human rights to have meaning, they must be solid barriers the violation of which must give rise to litigation. Indeed, it was argued that many States entered the Covenant precisely because of the intended vagueness of its formulations, allowing to reap

⁴³ See: A. Sen, ‘Elements of a Theory of Human Rights’, *Philosophy and Public Affairs*, Vol. 32, No. 4 (Fall 2004), pp. 348-355. See also, on the neutrality of human rights, T. M. Scanlon, *The Difficulty of Tolerance. Essays in Political Philosophy*, Cambridge University Press, December 2009, pp. 113-123.

⁴⁴ Ibidem, pp. 345-348.

⁴⁵ Ibidem, pp. 338-342.

a reputational benefit without a corresponding price in terms of legally-binding compliance.⁴⁶ This cannot be the sole function of human rights.

The entire system loses credibility when hugely influential actors like the ones mentioned above arbitrarily refuse to recognise a human right to food, whilst declaring their recognition of the right to life, as though the two had no relation to each other. To this regard, one could notice that the Human Rights Committee itself, tasked with the monitoring of the less-controversial CP rights, has already in 1982 stated that the right to life has too often been interpreted restrictively, and actually requires the States to undertake positive measures (including against malnutrition) to guarantee it.⁴⁷ The content of the widely-signed Vienna Declaration (among the signatories, notably, were also the USA) echoed in a number of other human rights documents.⁴⁸ The principle of interrelatedness and interconnection between all human rights has likewise become a staple principle advocated by the Human Rights Council of the United Nations.⁴⁹ It is now widely recognised that each human right represents an irrefutable dimension of human dignity, that is interconnected and, most importantly, interrelated with the others. That is, the enjoyment of other rights is thwarted whenever a human right is infringed upon.⁵⁰ A person might have little reason to rejoice of their ability to cast a vote when their ability to take an informed decision is sabotaged by them not being guaranteed a right to education. Or by the lifelong impairment of their mental capabilities due to stunting that ensued at a young age because they were not recognised an entitlement to adequate food when they or their family were not able to fend for themselves (for reasons beyond their control). It is self-evident that this does not in any way undermine the sacred importance of the right to vote; but it does say something about what it means for a person to conduct a dignified existence. The reason why human rights law has evolved thusly is not due to some ambitious or misguided cosmopolitan project, but because human rights must be guidelines liable of being enforced with a reasonable de-

⁴⁶ As argued in M.J. Dennis and D.T. Steward, 'Justiciability of Economic, Social, and Cultural Rights: Should There Be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing, and Health?', *The American Journal of International Law*, Vol. 98, No. 3 (July, 2004), pp. 511-512.

⁴⁷ UN Human Rights Committee (HRC), *CCPR General Comment No. 6: Article 6 (Right to Life)*, 30 April 1982, para. 5.

⁴⁸ Declaration of Montreal, Part 2; Yogyakarta Principles, p.7; CRPD, p.1.

⁴⁹ Cited multiple times, also with specific reference to the right to food, in United Nations, General Assembly, *Report of the Human Right Council, Twenty-seventh special session (5 December 2017) Thirty-seventh session (26 February–23 March 2018) Twenty-eighth special session (18 May 2018) Thirty-eighth session (18 June–6 July 2018)*, A/73/53 (2018).

⁵⁰ See C. Tomuschat, *Human Rights: Between Idealism and Realism*, Oxford, New York, Oxford University Press, 2008, p. 61: "Human rights are part of a system of mutually supportive elements. To rely on them alone does not suffice to protect the human being from encroachments on his/her rights. A proper constitutional structure must provide the foundations of a polity where a life in dignity and self-fulfilment becomes an actual opportunity for everyone."

gree of rigidity, to ensure that some principles will not be sacrificed to competing interests, because we hold such principles to be sacred. It is logical and necessary that human rights would be part of a framework that is as interconnected as the challenges posed to their realisation, especially on the backdrop of an international system that largely lacks the appropriate tutelage of such interests and is largely dominated by market concerns (even as concerns food, inarguably an essential component of an individual's life). For these reasons, the thesis agrees instead with Alston (former chair of the CESCR), arguing that failure to recognise a minimum content that must be guaranteed disregarding different circumstances would void the whole meaning behind elevating a claim to the status of right in the drafting of the Covenant.⁵¹ Insofar as such minimum content as was displayed in the previous paragraph is concerned, there are no reasonable arguments against the justiciability of a right, right to food included.

There is therefore a fracture between two different understandings of human rights. On the one hand, the States that follow and endorse the CESCR's violationist approach, holding that the obligations to respect, protect and fulfil have a "minimum core" that is immediately applicable as stated above, some of which have even chosen to remit themselves to the quasi-judicial function of the Committee. On the other, all those States that instead reject the right to food and in general the justiciability of ESC rights, the approach of which has been argued thus far to be worthy of condemnation.

2.2. THE NATURE OF INTERNATIONAL OBLIGATIONS

While the nature of human rights obligations has been argued to be stringent thus far, the topic becomes possibly more controversial once the analysis turns to the international level of obligations. On the international level, the debate is on whether States have obligations towards people beyond their borders. There are two fundamental questions this gives rise to. The thesis here recalls that the main reason that is most widely brought to justify an opposition to justiciability boils down to the fact that a State might not have the capacity to (especially) facilitate the right to food. It has likewise been stressed that the success of national efforts also depends on an enabling international environment. Essentially, the question boils down to "who is at fault for hunger". This is a contro-

⁵¹ P. Alston, 'Out of the Abyss: The Challenges Confronting the New U. N. Committee on Economic, Social and Cultural Rights', in *Human Rights Quarterly*, John Hopkins University Press, Vol. 9, No. 3 (1987), pp. 352-353.

versial debate underlying most ESC rights-related negotiations that States tend to steer clear of. Dennis and Stewart reported how the issue was a controversial one in the negotiations of the OP-ICESCR, arguing against the inclusion of an inter-State procedure that would allow States to accuse each other of wide-ranging action and policies responsible to bring about the current international order. In the end, the inter-State procedure was made an opt-in one to which only 5 States thus far have agreed to partake. It appears herein important to underline that the contested responsibility of States for the creation of an inarguably tilted international system is probably what lies at the origin of many developed States' refusal to recognise a human right to food. Even as the logical grounds underlying the arguments against justiciability are progressively eroded, some States will never join the roster of those subscribing to the CESCR's approach, as the nature of their opposition is inherently political. Herein we give further validity to the quote from Ziegler that opened this thesis.

Before proceeding with this analysis, a methodological premise is in order. The thesis holds realist perspectives to fail both on a descriptive and on a prescriptive level. Descriptively, the reality of globalisation shows that there is much more than inter-State relations in terms of relevant events and interactions on the global level. One needs to look no further than the extreme wealth of some TNCs, or the creation of a Civil Society Mechanism in the CFS. Prescriptively, it is morally questionable that the first concern should be the States', especially considering what has been said about the UDHR and the fact that human rights are not *octroyée* by the States, but inherent to a fundamental dignity of human being, and so it must be if development is to bring about a world that resembles one in which any individual would want to live. On the other hand, a cosmopolitan perspective passes the test of reality, insofar as it does not deny that the States have a pre-eminent role as the actors responsible for setting the rules of global interaction, with treaties and agreements.

Prescriptively, the merits of a cosmopolitan perspective in complementing the binding understanding of human rights this thesis subscribes to is best understood through the words of Thomas Pogge. He points out how, in the post-Westphalian, globalised world, poverty and hunger are the main source of human misery, causing myriad deaths each year. Not only has inequality in the global distribution of wealth and income at dramatically high levels, it remains on the rise. Perhaps most importantly, most of these deaths would be avoidable through a mere 2% shift in global household income from the more affluent countries to the developing ones. Yet, as it is, the levels of ODA are continuously reported by the UNDG to be insufficient, despite the threshold having already been lowered by 1% to 0,7% of GNP. The question therefore becomes to assess whether the current international system is unjust, and whether there is a duty to reform it. Pogge argues that "[i]n the modern world, the rules governing economic transactions — both nationally and interna-

tionally — are the most important causal determinants of the extent and depth of severe poverty and other HR deficits.”⁵² What makes the international system so unjust is the fact that it is due to its regulations that the wealth and income inequalities keep accumulating over time and increasing the gap between developing and developed States. The way in which it favours the accumulation of wealth and income in the global North has been explored in the introduction, through the words of the Rapporteurs: from regulations that guarantee formal equality but disregard the factual dimension (e.g. the issue of AoA and agricultural subsidies) to an unfair IP regime that brings benefit to the countries with the resources to invest in R&D, at enormous costs for the poorer ones. Not only does the system fail to realise the moral principle of Article 28 of the UDHR (as the empirical observation of inequalities shows): it also fails comparatively to other imaginable systems that do not allow such high numbers of preventable deaths and violations of human rights. A first counter-argument to the unfairness of the system is the fact that it was not imposed unilaterally by the developed States of the G7, but was instead built with the consensus of the developing ones; therefore, “*volenti non fit iniuria*”. Pogge’s response touches upon several aspects. Most relevantly, he argues that no amount of consent can justify an order that causes avoidable violations of human rights, especially when considering that children, who do not have a say in expressing such consent, are overrepresented among the victims of the violations. Indeed, the fact that such consent was given in the absence of tolerable alternatives says nothing about the fairness of the ensuing system of regulations.⁵³ The argument of consent is further thwarted when considering the uneven distribution of expertise (in terms of ability to foresee the consequences of the terms of a treaty) and bargaining power due to a past history of colonial crimes.⁵⁴ The thesis does acknowledge that it can be controversial to evoke the past wrongs of colonisation, as the sons should not bear the sins of the fathers; but it is no more controversial than arguing that it is fair for the sons to benefit from the unfair advantage generated by such sins. Beyond any consideration of guilt, the bottom line remains that no international system is acceptable that causes unnecessary deaths, if there is any conceivable and feasible alternative. Enter thus the second counter-argument: does it ‘cause’ such deaths, or merely fail to do enough to prevent them? The fact that some States managed to achieve great progress under such system lends to the argument that failure to do so must be imputable to the State’s actions and decisions. Pogge’s analysis however shows how the virtuous examples could develop in such

⁵² T. Pogge, *Politics as Usual: What lies behind the pro-poor rhetoric*, Cambridge, Polity Press, 2010, p. 52.

⁵³ Ibidem, pp. 40-42.

⁵⁴ Ibidem, pp. 21-24.

way because of surrounding circumstances that allowed them to act in disregard of much of the international regulatory framework that is herein under analysis.

One more point with which Pogge takes issue is the resource and borrowing privilege afforded under international law to dictatorial regimes, regardless of how they acquired power. Not only does it act as an incentive to violently seize the power, it also legitimises these governments to drive the State in debt for the purchase of means of coercion (used to maintain power) under the ‘international arms privilege’. While the benefits of the debt are only reaped by the corrupt elite and the selling party, the cost is borne by the nation as a whole, and the debt will thwart the attempts of subsequent democratic governments to perform the policies and reforms that are needed to ameliorate the conditions of the country’s poor.⁵⁵ He therefore concludes that neither national circumstances nor the international system alone cause the current widespread violations of human rights; it is a synergic harm that sees both at fault. However, the fact that neither single one is entirely responsible is no reason to ignore the effects that, through their interplay, they cause.⁵⁶

In the eyes of the author, it is therefore a moral duty to repay the victims of the damage caused by such system, and not to participate in a system that foreseeably and avoidably causes such vast violations of human rights. Pogge argues that a reform of the system is not only desirable, but also feasible. Indeed, a reform of the institutional system has a number of benefits. Firstly, it helps avoid the primary pitfall of a voluntarist approach, most evident in the shortcomings of ODA; that is, a “prisoner’s dilemma” of sorts: individual and collective actors are constantly put under counter-moral pressures, as nobody wants to take the disadvantages coming from a unilateral commitment to step up their effort without the assurance that others will do the same. To this regard, an institutional reform would distribute the cost equitably, in terms of opportunity costs coming from the reform of the aspects of the international system that currently unfairly funnel resources in the hands of the more affluent. Secondly, the cost would be very small for those who pay it, but bring enormous benefits for the poorer States. Thirdly, institutional reform is much easier to assess in its impact and to correct in its course than individual actions.⁵⁷

Having established the desirability of such systemic international reform, the thesis now highlights the fact that Pogge envisaged it as a “moral” obligation to fix a situation that engenders

⁵⁵ Ibidem, pp. 16-21 and 47-50.

⁵⁶ Ibidem, 44-46.

⁵⁷ Ibidem, pp. 52-56.

grave violations of human rights. It therefore begs the question whether such an action could be within the reach of the enforcement from a quasi-judicial mechanism, like the CESC under the OP, in line with what Dennis and Stewart have admonished against when considering the possibility of an interstate complaints mechanism (see above). Insofar as the problem is truly one of a “prisoner’s dilemma”, where the reluctance of the more affluent States to aid the poorer ones stems primarily from their unwillingness to suffer a comparative disadvantage vis a vis other States unwilling to undertake such effort, it would seem credible that States would accept a top-down effort of such nature. Insofar as instead there is a will to hold down the developing States in their poverty for geo-strategic reasons, as Edkins seems to suggest,⁵⁸ then the chances look indeed slim. Even in the former case, however, it appears dubious at best that a litigation between two States could invite such a far-reaching recommendation from the Committee as to envisage a duty of all States to reform the regulatory framework. More dubious still, that such recommendation could command compliance, especially in light of the erga-omnes nature that it would have. In any case, the still scarce rate of ratification that the protocol has invited, the fact that only five States have opted into the articles permitting interstate procedures and the cautious jurisprudence that the Committee has adopted in its quasi-judicial function thus far make the prospect incredible in the foreseeable future. A more practicable avenue to this regard could perhaps be the ongoing evolution towards the recognition of duties to mainstream human rights obligations within MLIs, which will receive further exploration in the next chapter, although such evolution is likewise in a larval stage, and seems unlikely to bring results in the reasonable future.

3. THE LIMITS OF JUSTICIABILITY: CONCLUDING OBSERVATIONS

There are therefore good reasons to argue for a justiciable approach. Indeed, it is fundamental that human rights find judicial enforcement; without it, the whole decision to elevate such claims to the rank of ‘rights’ during the drafting of the ICESCR loses much of its meaning. Justiciable rights achieve progressive clarification of their content and their correct application through the jurisprudence of courts, and their acceptance and diffusion across legal systems gradually increases as

⁵⁸ Edkins, J., ‘Whose Hunger? Concepts of Famine, Practices of Aid’, in *Borderline Series*, Minneapolis, University of Minnesota Press, vol. 17, 2000. The author argues that the failure to prevent world hunger serves a well-recognisable strategic function of hampering the development of the States of the Global South and “rob the poor of greater political voice”.

the juridical practice sediments and consolidates. After all, more States become parties to international human rights instruments than leave them. It can therefore be said that a “build it and they will come” approach to the OP-ICESCR would not seem as unreasonable as some would have it.⁵⁹ Moreover, court cases can be raised to public attention and increase awareness and have are arguably able to engender transformative social change. In general, justiciability is an indispensable instrument. It both confers credibility to the strength of the individual entitlements to all that composes human dignity by promising remedy in cases of violation and creating insurmountable barriers which must not be crossed to State action. It confers to the fight against hunger the compulsory character that the urgency of the problem commands, and contributes to it, in the most far-reaching judgements like *Grootboom* or *PUCL*,⁶⁰ by commanding wide-ranging systemic adjustment and thus guiding institutional change in a human rights-friendly direction. In no way undermining its importance, however, it is essential to recognise that justiciability is not the only avenue through which the right to food (and ESC rights in general) may be pursued; at times, it may not be the most effective one, either. Certainly, it is not immune of problems and limitations.

Firstly, in light of the uneven national and international viability of a judicial avenue to the solution of a violation, there are States in which the individuals have no access to such kind of remedy. Indeed, as concerns the right to food, some States have no legally viable way to claim a right to food by a domestic court, nor have they subscribed to regional mechanisms — or even less, to the international one under the OP-ICESCR. Certainly, litigation under other related rights is a possibility, as the following chapter will explore, but not always a viable one. Even in States where there is indeed a possibility for right to food litigation, there are issues concerning access to justice. Especially the poorest and most marginalised individuals, such as smallholder farmers, intuitively face resource constraints in undertaking judicial litigation, which can be costly and protracted. Especially when it is not the first court they access that grants them the remedy they seek, and they have to appeal to higher, possibly even international courts, a long time can pass between their claim and the remedying of their situation. Some courts have the ability to command the States to take interim measures to halt the effects of the violation pending judgement, but it is not a universally shared practice. However, access to justice in relation to the needs of the destitute is only one of the fields

⁵⁹ See: M.J. Dennis and D.T. Steward, ‘Justiciability of Economic, Social, and Cultural Rights: Should There Be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing, and Health?’, *The American Journal of International Law*, Vol. 98, No. 3 (July, 2004), p. 475.

⁶⁰ *People’s Union For Civil Liberties v. Union of India and others Civil Original Jurisdiction, Writ Petition (Civil) No.196 of 2001* (Supreme Court of India, November 2001), the case will receive further exploration in a dedicated section in Chapter 4 of the present thesis.

in which such principle is worthy of exploration. An analysis from Francioni⁶¹ can provide some useful insight as to two further important elements: the general possibility to bring a case before a court and have it adjudicated, and the procedural requirement that the process be fair, impartial and effective. These are essential requirements of access to justice, a principle today enshrined in international human rights law. Exactly with reference to these two principles, however, the author notes how access to justice is currently addressed in international human rights instruments as a procedural guarantee (therefore finding its importance in its connection to another human right), rather than a self-standing human right with a validity in and of itself, often deferring to national legal systems for an exact declination. Some consistent judicial practice analysed by the author however points to the direction of an increasingly expansive interpretation of access to justice as an individual right, gradually evolving it towards a self-standing and justiciable right. However, despite this evolution (which is still *in fieri*), access to justice also finds its applicability further constrained in international law in other ways. Firstly, due to its conflict with the competing legitimate interest of ensuring national or international peace and security: this is the case of derogation from human rights obligations in times of emergency, afforded by the international instruments in which they are enshrined. The author however points to a consistent body of jurisprudence that highlights the need to ensure a basic level of access to justice, so as to guarantee a minimum enjoyment of the offended rights, under all circumstances. A similar evolution is also detected for the other two fields in which access to justice may be constrained: the legal immunities of States, and compliance with the UN measures aimed at ensuring international peace and security, with specific reference to the ‘smart sanctions of the Security Council. A paradoxical consequence of this expansive approach, declaring the acceptability of an increasing amount of cases, is an overload of courts that often results in denial of justice for many. Therefore, in all these fields, an approach based on reasonableness and proportionality must be adopted so as to ensure a fair balance between the competing interests above, and the interest of ensuring judicial protection under rule of law. This however does mean that there will be instances in which the reach of justiciability will be legitimately constrained. This is especially true for ESC rights like the right to adequate food: indeed, the author places among the criteria for consideration to ensure reasonableness and proportionality in striking a balance the importance of the right for which judicial protection is sought. In light of the lesser degree of cogency

⁶¹ See: F. Francioni, ‘The Rights of Access to Justice Under Customary International Law’, in F. Francioni (ed.), *Access to Justice as a Human Right*, Oxford, New York, Oxford University Press, 2007, pp. 1-56.

still generally afforded to ESC rights, it is inevitable to conclude that these limitations will be particularly felt for this category of human rights.

Moreover, lack of information over one's rights is a common problem, especially in uneducated rural countrysides. To this regard, the activity of advocacy carried out by numerous NGOs, like FIAN, Amnesty International and others, can provide a solution for such problems, as these entities can bring the cases of the downtrodden to otherwise scarcely-accessible courts.

Another issue that courts may face, even when they are indeed able to apply the right to food in their judgements, is their ability to induce compliance. It has been shown already how the doctrine has shed concerns over the alleged undemocraticity of courts judging resource allocation. However, in light of the emphasis placed in the UNDG over the need for national governments to have ownership of programmes and policies aiming at furthering development under a rights-based approach, it would be possible to argue that their imposition by a judicial organ, especially if supra-national, could engender refusal on behalf of the State to comply with the judgement. Indeed, many cases of litigation, especially under regional courts, find trouble in the phase of enforcement of the courts' decisions. While most of these cases saw additional legal action to ensure the realisation of the sentence of the court, the ability of judicial and quasi-judicial organs, especially if international, to generate compliance from State actors remains a sensitive issue.

Finally and most importantly, a fundamental point that needs to be taken from the last paragraph is that justiciability does indeed find limitations in the ability and resources of States. One relevant critique that Tomuschat advances against the justiciability of ESC rights is that the argument whereby the two categories of rights both entail positive obligations is misleading, as it masks the different entity of such obligations. While CP rights can ultimately be discharged with an attitude of passivity (save for enshrining them in law and setting up monitoring, judicial and enforcement mechanisms), ESC rights most often require, in developing States, progressive and extensive restructuring of the systems that are in place to serve them.⁶² It is not necessary to share Tomuschat's conclusion that adjudication of the obligation to facilitate ESC rights is unfeasible to realise that this is a very real element that must be acknowledged. States need international assistance if they are to discharge successfully their obligations deriving from ESC rights. However, the previ-

⁶² C. Tomuschat, *Human Rights: Between Idealism and Realism*, Oxford, New York, Oxford University Press, 2008, p. 54. See also F. Francioni, 'The Rights of Access to Justice Under Customary International Law', in F. Francioni (ed.), *Access to Justice as a Human Right*, Oxford, New York, Oxford University Press, 2007, pp. 1-56.

ous paragraph and the introduction have illustrated how their resources are thwarted by an international system that is increasingly recognised as unfair. Such system moreover seems impervious to reform efforts, as the current stall in the WTO negotiations testifies, and courts do not seem plausible ways to bring about such reform, either, despite it being part of the reasonably-conceived obligations of States. Indeed, the only way that this thesis recognises as plausible for bringing about such change through justiciability would be inter-State litigation under the Optional Protocol to the ICESCR, but both the scarce state of adoption of such opt-in procedure and the necessity for the CESC to adopt a conservative and moderate jurisprudence make that highly unlikely in the foreseeable future. Yet, insofar as the result of national efforts (and even capacity to undertake them in the first place, considering national debt) largely depends on the regulatory framework, fighting against world hunger is necessarily, to an extent, a matter of challenging the existing international paradigm. For all that has been said on the ability of courts to review the effort poured by the State to guarantee a certain level of satisfaction of human rights, enforcing justiciability at the national level without questioning the economic system that perpetuates the situation in the first place can be somewhat akin to beating a dead horse. Economic development creates the *prima facie* conditions for a universal satisfaction of the right to food, beyond a merely “survivalist” approach; as long as the poor remain poor, the role of courts in punishing the State will remain a palliative measure. That is part of the reason why the Asian States performed so well in reducing hunger levels by focusing on economic development. But it is also true that their economic development was ultimately due to specific characteristics that cannot be expected to be enjoyed by all developing States.⁶³

It is furthermore necessary to advance some reflections on the “neutrality” of human rights, on the backdrop of establishing the current international system to be unjust. Indeed, making a connection between the current international system and the obligations under articles 22 and 28 of the UDHR naturally invites, as presented above, cosmopolitan reflections on global justice. Especially insofar as it appears evident that the more developed States have a disproportionate share of responsibility in creating a system that not only leads to many avoidable deaths by poverty and starvation, but also hampers the developing States’ ability to remedy such situations, the logical consequence is that the former are going against the provisions of the UDHR.⁶⁴ If human rights have such a say on the economic setting at the international level as to even envisage an obligation to reform such system, this calls into question the political neutrality of human rights, as it creates an evident polarisa-

⁶³ T. Pogge, *Politics as Usual: What lies behind the pro-poor rhetoric*, Cambridge, Polity Press, 2010, p. 42-44.

⁶⁴ Articles 55 and 56 of the UN Charter may also be called into question to such regard.

tion between the global South, which attempts to use them as an instrument to engender such change, and the global North, entrenched in the defence of their privilege. It is evident that most States were keenly aware of this issue from the fact that, during the negotiations for the Optional Protocol to the ICESCR, the possibility to create an interstate complaints procedure was for long regarded as «a “Pandora’s Box”, which all parties prefer to keep shut.»⁶⁵ However, reducing human rights to instruments in a power struggle means gravely underestimating their importance, which lies in ensuring that the benefits of development are shared among all individuals, and that vital entitlements pertaining to their human dignity be protected and guaranteed at all times. Nevertheless, in assessing whether it is desirable that such debate comes to light, it is necessary to account for the fact that the inevitable political implications of human rights call into question their neutrality, a controversy that underlies the current disenchantment that affects these moral guidelines.

It is therefore apparent that courts cannot shoulder all the weight of the fight against world hunger. That is why, while the next chapter will analyse the concrete impact and application of the avenue of justiciability, presenting court cases of adjudication of the right to food as factual examples of the contribution to the right offered by judicial litigation, the fourth and final one will instead focus the analysis on the top-down provision of food and policy assistance provided by the UNDG through the use of the statistical instruments known as ‘indicators’. While justiciability is an adversarial and rights-based approach aiming to exact from the State compliance with its obligations, the other one has a more uncertain connection with the right. Indeed, the Specialised Agencies of the UN oftentimes refer to it and sponsor a rights-based approach; on the other hand, however, the MDGs and the SDGs, despite containing reference to many other human rights, ended up being completely devoid of any reference to the right to food. The avenue of indicators has the strength of favouring development by instead channelling the resources of other States through ODA. The corresponding weakness is that, due to its shaky connection with the right to food and its stringent nature, the influx of resources is largely left to the goodwill of donors. Indeed, practice shows that the levels of ODA constantly dwindle, and are far below the necessary level for the eradication of world hunger. Further problems arise, revealing the political implications of this practice, when the donations are earmarked to a certain use. All these aspects will receive exploration in Chapter Five.

⁶⁵ UN Doc. E/CN.4/2003/53, annex (1996), para. 14. Cited in M.J. Dennis and D.T. Steward, ‘Justiciability of Economic, Social, and Cultural Rights: Should There Be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing, and Health?’, *The American Journal of International Law*, Vol. 98, No. 3 (July, 2004), p. 499.

CHAPTER FOUR: THE JUSTICIABILITY OF THE RIGHT TO FOOD

The doctrine has largely left behind the controversies on the “positive” nature of the right to food, which is now enshrined in international law, creating clear obligations for States to ensure its progressive realisation both by ratifying and enacting the relevant international treaties and by setting up domestic legislation. Nevertheless, in the practice, judicial recognition is largely absent, not just for the right to food, but for ESC rights in general, despite the essential role of accountability in ensuring the implementation of the related obligations.¹ However, even among ESC rights, the right to food is particularly controversial: its constitutional recognition around the world is lacking, and its satisfaction has been largely left to the market and States’ policy choices, rather than relying on a rights-based approach² — with all the consequences explored throughout the introduction to this thesis. Notwithstanding, the international doctrine has evolved in recent times towards the recognition of the justiciability of the right, fulfilling most of the necessary parameters.

In order to be justiciable, a right must 1) have a clear normative content engendering definite entitlements and obligations, 2) upon specific duty-holders and 3) to the benefit of clearly identifiable right-holders, 4) enshrined in binding law, with an efficient and independent judiciary to enforce said obligations. This Chapter will firstly review these requirements in this order, so as to ascertain that the premises for the justiciability of the human right to food exist. It will contextually present court cases where they may be instrumental to the development of the discussion. Jurisprudence on the right to food and water is thus far limited, albeit growing. Therefore, the cases touched upon will sometimes be tangent to it, or sometimes, when of interest (such as in order to ascertain the M.O. of a certain judicial body, as may be applied to the right to food as well), they will regard other ESC rights. The final paragraph of the present chapter will conclude by discussing the impact that judicial and quasi-judicial organs have had on the realisation of the right to food, through its justiciability.

¹ H. Elver, *Report to the General Assembly*, A/69/275 (7 August 2014).

² C. Courtis, ‘The Right to Food as a Justiciable Right - Challenges and Strategies’, A. von Bogdandy and R. Wolfrum, (eds.), *Max Planck Yearbook of United Nations Law*, Volume 11, 2007, pp. 322-323.

1. THE NORMATIVE CONTENT OF THE RIGHT TO FOOD: ENTITLEMENTS AND OBLIGATIONS

1.1. NORMATIVE CONTENT OF THE RIGHT

The normative content of the right to adequate food was already largely explored in the section dedicated to the General Comment No. 12. However, it is also necessary to account for the expansion provided by the subsequent evolution of the doctrine. A new formulation was offered in 2014 by De Schutter, synthesising this one: «The right to food is the right of every individual, alone or in community with others, to have physical and economic access at all times to sufficient, adequate and culturally acceptable food that is produced and consumed sustainably, preserving access to food for future generations.»³ Freedom from adverse substances, cultural acceptability and dietary appropriateness can all be understood as components of the requisite of adequacy, in such formulation, which therefore presents all the relevant elements: availability, physical and economic accessibility, adequacy, sustainability and the individual and collective dimension of the right.

Still, this definition could use some expansion in light of the CESCR's General Comment No. 15, in which the Committee had specified water to be included among the open-ended list of elements composing the “adequate standard of living” prescribed in Article 11.1 of the Covenant.⁴ The Committee highlighted the importance of water as concerns partaking the local cultural life, securing livelihoods, agricultural production, environmental hygiene and, above all, personal consumption.⁵ As concerns its normative content (including the limitations to the principle of progressive realisation explained above), right-holders, duty-holders and accountability mechanisms, they can all be understood as largely following the same lines as will be clarified over the course of this paragraph as concerns the right to food.

In light of this, the right to food could be understood as the “individual and collective right to have at all times physical and economic access to sustainably produced, qualitatively and quantitatively adequate food and water”. As stated in the previous chapter, the realisation of a human right

³ O. De Schutter, General Assembly, *Report to the Human Rights Council*, A/HRC/25/57 (24 January 2014).

⁴ UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant)*, 20 January 2003, E/C.12/2002/11, Para. 3.

⁵ *Ibidem*, Para. 6.

to food necessarily hinges on a rights-based approach, lest the very essence of human rights, as shaped through the various conventions and instruments that have been ratified since the Second World War, be subverted and corrupted.

Recalling what was said earlier, it must however be kept in mind that results cannot be achieved instantaneously everywhere, especially as concerns this long-term dimension of facilitating the right. The immediate justiciability of such right can only uncontroversially be conceived referring to the obligations to respect, to take action to the maximum of available resources, to provide a minimum basic level of satisfaction of the right, the principle of non-regression, the prohibition of discrimination and other criteria as may arise in national articulations. This is indeed the bedrock; over the course of the present chapter, many evolutions that have arisen in national, regional and international practice as concerns the justiciability of the right to food will be accounted for and explored; starting immediately, with the expansion of obligations beyond the traditional national borders.

1.2. ENTITLEMENTS AND OBLIGATIONS: THE EXTRATERRITORIAL DIMENSION

As was the case for the normative content, the obligations arising from the right to food were also quite clearly analysed by General Comment No. 12. The doctrine has evolved towards a framework distinguishing between more stringent “core obligations”, like guaranteeing a minimum content of the right at all times, and the obligations that articulate on the long period, concerning the building of an enabling environment allowing everyone to enjoy unrestricted access to sufficient and adequate food. In the formulation of the right to adequate food contained in the 2009 Five Rome Principles for Sustainable Global Food Security, countries have accepted a twofold approach: 1) direct action to immediately provide food to the hungry, and 2) “medium- and long-term sustainable agricultural, food security, nutrition and rural development programmes (...) including through the progressive realisation of the right to adequate food.”⁶

Aside from that, however, it is necessary to take into account that, In a globalised, interconnected world in which food production is largely absorbed by world-scale supply chains, the actions

⁶ O. De Schutter, *Report to the Human Rights Council*, A/HRC/25/57 (24 January 2014).

of States have effects well beyond their territorial boundaries. A strictly territorial application of human rights obligations is outdated in such a scenario.⁷ Certainly, it has been established that governments are the primary duty-holders and thus have a duty to protect the rights of their citizens from the actions of third parties, including other States. This entails paying special attention to the terms and conditions of new international treaties that might be stipulated, such as by paying mind that they do not unfairly displace internal production and/or deprive of access to land producers who previously relied on it for their own sustenance without offering them adequate compensation. However, States oftentimes do not have the freedom of manoeuvre necessary to adequately avoid such situations, or, where they might already have happened, remedy them, their power being increasingly restricted by international trade rules sponsored by multilateral institutions, or by the scarcely regulated rise of TNCs. As such, the doctrine is currently undergoing an evolution towards the recognition of the extraterritorial obligations of States, that must take care not to create such situations abroad.

A sort of “schizophrenia” of the UN system has already been mentioned in the introduction. Citing a 2004 report from the ILO, Ziegler finds a second kind of “schizophrenia” in the actions of States. That is, while they may abide their human rights obligations in their domestic policies, at the same time they often violate those same human rights, especially the right to food, in their foreign policies — as in the case of agricultural subsidies.⁸ The following Rapporteur, De Schutter, reinforced this notion by stressing that the efficacy of national efforts largely depends on the existence of an international environment facilitating them through adequate ODA, sustainable investment regimes and concerted effort against climate change. Thus, it must be understood that States have an international obligation to strive to create such environment.⁹ The third Rapporteur Elver most recently argued on the same lines that States must, individually, through international cooperation and through international trade and investment policies and practices, act in a way that satisfies the essential food needs of their people. “It is, therefore, important to recognise the interdependency of food aid, trade liberalisation in agriculture, intellectual property rights and agribusiness”,¹⁰ in order to understand how far the decisions of States ripple beyond their own borders and act accordingly.

⁷ J. Ziegler, *Report to the Commission on Human Rights*, E/CN.4/2006/44 (16 March 2006).

⁸ J. Ziegler, *Report to the Commission on Human Rights*, E/CN.4/2005/47 (24 January 2005).

⁹ O. De Schutter, *Report to the General Assembly*, A/63/278 (21 October 2008).

¹⁰ H. Elver, *Report to the General Assembly*, A/69/275 (7 August 2014).

In general terms, the international human rights obligations of States find their juridical basis in a number of documents. Firstly, in the Charter of the United Nations, Articles 55 and 56;¹¹ notably, Article 55 places the “universal respect for, and observance of, human rights” without discrimination among the objectives of the UN. Moreover, Articles 22 and 28 of the UDHR also form a basis for such duties, as presented in the first chapter. Further formulations are displayed in the ICESCR, under Articles 2.1, 11.2, 22 and 23 (displayed in the previous chapter) and the essential role of international cooperation to the achievement of ESC rights is further reinforced in the CESCR’s General Comment No. 3, under paragraphs 13 and 14. Resolution 7/14 of the Human Rights Council reinforced this, saying that States must take care that their international actions do not harm the right to food in other countries.¹² It is therefore safe to say today that the extraterritorial obligations of States are a well-established principle in the doctrine.

As concerns the structure of such obligations, they follow the familiar tripartite scheme of respect, protect and fulfil. For instance, the usage of food as an instrument for political pressure, like in food embargoes, is a glaring violation of the extraterritorial obligation to respect (as per General Comment No. 12). The same goes for measures that do not have the aim of compromising food security abroad, but have the foreseeable effect of doing so, like food aid or export subsidies to agricultural production in a global scenario where the importer can protect their national production neither through tariffs nor through parallel subsidies. As such, States must internationally respect the right to food by not sponsoring (and indeed, opposing) such manner of behaviour in negotiations within multilateral institutions (MLIs) like the WTO, IMF and World Bank. As concerns the extraterritorial obligation to protect, States have a duty to ensure that third parties under their jurisdiction do not cause harm abroad, and to punish them whenever they do. This is especially important in view of the rise of TNCs and indeed, the OECD countries have already subscribed to this idea in their “Guidelines for Multinational Enterprises of the Organisation for Economic Cooperation and Development”. As reviewed in multiple reports from the Rapporteurs, there are already

¹¹ Article 55: «With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote: a. higher standards of living, full employment, and conditions of economic and social progress and development; b. solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.»

Article 56: «All Members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55.»

¹² UN Human Rights Council, *Resolution adopted by the Human Rights Council - The right to food*, 27 March 2008, A/HRC/RES/7/14, para. 17.

cases of national or regional legislation that provide for such accountability: Australia, Canada and the UK all have tort laws allowing to hold TNCs accountable for foreign violations pursuant to the principle of “foreign direct liability”,¹³ and the US’ Alien Tort Claim Act also provides a legal basis.¹⁴ Finally, there is the extraterritorial duty to support the fulfilment of the right to food abroad. As concerns the “facilitate” dimension, States have a duty to provide an enabling global environment (as established above), for example by passing fair and equitable trade rules within the dedicated MLIs and enforcing effective development cooperation. The duty to “provide”, which is of course conditional on available resources, is the duty to give assistance to States that rightfully request it.¹⁵

2. DUTY-HOLDERS

Human rights law is based on conventions, which are for all intents and purposes international treaties. As such, it is the State that undertakes the relative obligations, and constitutes the primary duty-holder responding to the relative entitlements. However, as established in multiple points, the States are far from being the only actors whose actions have an impact on the enjoyment of the right to food. Connected to the evolution presented in the previous sub-paragraph is another one: the expansion of the notion of duty-holder to MLIs and TNCs, as actors with a relevant impact on the enjoyment of the right to food. An exhaustive rendition of such developments would deserve a dedicated work in itself; what follows is a general overview, useful to provide a picture of the pertinent evolutions.

2.1. EXPANDING ACCOUNTABILITY: MULTILATERAL INSTITUTIONS

The impact that MLIs have on the realisation of the right to food of individuals and communities has already been explored sufficiently in various points during the present thesis.¹⁶ Other than

¹³ See for example J. Ziegler, *Report to the General Assembly*, A/58/330 (28 August 2003).

¹⁴ J. Ziegler, *Report to the Commission on Human Rights*, E/CN.4/2005/47 (24 January 2005).

¹⁵ Ibidem.

¹⁶ For examples of the concrete impact that their policies have had in some cases in the past, see J. Ziegler, *Report to the General Assembly*, A/60/350 (12 September 2005), paras. 40-43.

recognising the individual States' responsibility toward their human rights obligations in their action within such institutions, voices have risen advocating for the recognition of the direct accountability of MLIs themselves. Calls for such evolution came in multiple occasion from the UN system itself. A Resolution by the UNGA in 2006 requested these MLIs to mainstream the right to food in their activities, inviting them (with explicit mention of IMF and World Bank) to not only respect, but also facilitate the right to food by promoting «policies and projects that have a positive impact on [it].»¹⁷ The obligation to respect is just as easily understood: it entails running preliminary assessments of the possible impact of projects, and not sponsoring the ones that foreseeably cause the likes of forced displacement or destruction of sources of livelihood, especially not in the absence of adequate compensation.¹⁸ The obligation to protect on the other hand entails ensuring that the chosen partners do not harm the right to food in their operations, and for decision-making bodies, like the WTO's Dispute-Settlement Body, to judicially protect the right to food.¹⁹

Ziegler's reports have reviewed the existing doctrine at length, in order to establish a juridical basis for such obligations. In the view he seconds, MLIs do have legal personality under international law, as they have decision-making bodies that prevent them from being understood as mere fora of discussion in which the ultimate decision-making is performed by States. As such, they are bound to the obligations stemming from their constitutive documents as well as from international agreements to which they are parties.²⁰ A further consideration arises, as it is the States who are parties to the human rights conventions, not the MLIs. Ziegler's reply to this point was threefold.²¹ Firstly, it is widely held that human rights stem not only from treaties, but also from customary international law, of which the right to food can be considered part because of the wide status of ratification of the relevant instruments. Secondly, international organisations are bound to laws that are generally recognised in the constitutions of their members, and a majority of States today recognises either the right to food, or provide for the text to be interpreted in accordance with international human rights law. Thirdly, most States have ratified one or more of the pertinent instruments, and organisations «cannot be free to do what their constituents are not permitted to do.» This met however the disagreement of the second Rapporteur, who argued that the only practically feasible way of envisaging obligations for international organisations was ultimately the first one to be proposed,

¹⁷ UN General Assembly, *Resolution adopted by the General Assembly - The right to food*, 2 March 2006, A/RES/60/165, para. 16.

¹⁸ J. Ziegler, *Report to the Commission on Human Rights*, E/CN.4/2006/44 (16 March 2006), para. 43.

¹⁹ Ibidem, para. 44.

²⁰ J. Ziegler, *Report to the General Assembly*, A/60/350 (12 September 2005).

²¹ Ibidem, para. 48.

regardless of the State parties' adherence to international instruments.²² Their being grounded in general international law rather than human rights treaties makes the obligations falling upon international organisations less wide than those falling upon States.²³

2.2. EXPANDING ACCOUNTABILITY: TRANSNATIONAL CORPORATIONS

There are multiple cases of TNCs harming the human right to food of people in host countries (i.e. countries other than the one they are based in). One such example was *SERAC and CESR v. Nigeria* (2001), in which a petition was brought to the African Commission on Human and Peoples' Rights for the behaviour of both the Nigerian National Petroleum Company and Shell Petroleum Development Corporation. This was three years prior to the entrance into force of the protocol establishing a proper judicial organ, the African Court on Human and Peoples' Rights; therefore, reparations came at the hand of the Commission, a quasi-judicial one. The Commission found the two to be in violation of several rights of the Ogoni People. Two of these are of topical importance here: the recognition of a positive duty of governments to protect their citizens from the disruptive acts of private entities; and the recognition in the text of the Charter of an implicit right to food.²⁴ Consequently, it called for the cessation of the illegal behaviour and for the issuance of reparations as appropriate. Focusing on the violation of the obligation to protect, such case therefore saw the State responsible for failing to prevent a TNC from harming the right to food of the locals. Indeed, this is a well-established principle in most parts of the world.²⁵ However, the doctrine is undergoing an evolution towards the acknowledgement that right to food obligations fall upon both the home State of the corporations (through the extraterritorial obligations of States), and upon the corporations themselves. As for the normative basis for this latter avenue, the UDHR states in its preamble

²² O. De Schutter, *Human Rights and International Organisations: the Logic of Sliding Scales in the Law of International Responsibility*, CRIDHO Working Papers, Université Catholique de Louvain (February 2009), Part I.

²³ Ibidem, Part II.

²⁴ *Communication 155/96, The Social and Economic Rights Action Center and the Center for Economic, and Social Rights / Nigeria (African Commission of Human and Peoples' Rights, October 2001)*. Text available at: <https://www.escri-net.org/caselaw/2006/social-and-economic-rights-action-center-center-economic-and-social-rights-v-nigeria>

²⁵ While not a judicial case, the events of Cochabamba in Bolivia of 1999 are also telling: the Government of Bolivia had guaranteed administration of local water to a private company, which subsequently raised the price of water, making it unaffordable for most. Following public unrest, the Government eventually unilaterally revoked the contract. The public outcry coming from all over the world eventually caused the company Bechtel to drop the lawsuit it had brought against the State of Bolivia by the ICSID.

that obligations to promote and respect human rights falls upon every organ of society; this has been interpreted as including TNCs.²⁶ Additionally, the CESCR's General Comment No. 12 reinforced that all members of society (including NGOs, CSOs and private businesses) «have responsibilities in the realisation of the right to adequate food».²⁷ Further clarification on the standards for TNC accountability are provided in the Committee on the Rights of the Child's General Comment No. 16 (2013) and the CESCR's General Comment No. 24 (2017).

There is a wealth of non-binding (voluntary) initiatives establishing the same principles. The OECD Guidelines for Multinational Enterprises, for instance, commit the adhering States to establishing national contact points for complaints on violations by TNCs. Other instruments include the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy; the International Code of Marketing of Breastmilk Subsidies (by UNICEF and WHO); the Code of Ethics for International Trade in Food (by the Codex Alimentarius Commission) and the Global Compact initiatives (by the then-Secretary General Kofi Annan).²⁸ Moreover, the UN Guiding Principles on Business and Human Rights approved in 2011 constitute an important document, as they explicitly state that States have a duty to protect human rights, corporations have a duty to respect them (acting in due diligence), and victims of abuses must have access to remedy (provided by the State). Most notably as concerns the extraterritorial obligation to protect of States, they are required (under Section I.A.2) to explicitly express their expectation that TNCs under their jurisdiction will respect human rights throughout their operations. Lastly, many TNCs have autonomously chosen to subject themselves to codes of conduct (CoCs) which binds them to certain behaviours. While for some of them this has translated in an improvement of their human rights record, as reported through external observation, for others it amounts to nothing more than a PR stunt.²⁹ Indeed, the problem with all these initiatives, aside from the great fragmentation among the regulatory frameworks, is their voluntary nature, as well as the lack of appropriate monitoring and enforcement mechanisms of a judicial nature. A consistent step forward in those regards would be the approval of the “Norms on the responsibilities of trans-national corporations and other business enterprises with regards to human rights”, elaborated by the Sub-Commission on the Promotion and Protection

²⁶ UN General Assembly, *The impact of property on the enjoyment of human rights and fundamental freedoms*, 7 December 1987, A/RES/42/115, para. 4 contains a ‘vigorous condemnation’ of TNCs cooperating with the then racist government of South Africa in perpetuating human rights violations.

²⁷ UN CESCR, *General Comment No. 12*, Para. 20.

²⁸ As appraised in J. Ziegler, *Report to the General Assembly*, A/58/330 (28 August 2003), paras. 47-48.

²⁹ Ibidem, para. 49. Similar appraisal in H. Elver, *Report to the General Assembly*, A/73/164 (16 July 2018), paras. 79-81 suggests that the situation has not known any relevant improvement.

of Human Rights. This document would expressly impose obligations upon TNCs to “promote, secure the fulfilment of, respect, ensure respect of and protect human rights recognised in international as well as national law”, thus even envisaging positive obligations, with express reference to the rights to food and water, and would constitute a landmark evolution as the first binding document explicitly laying out the above obligations upon TNCs. However, the project remains to date at the status of draft. Despite the looseness of the framework at the international levels, there are some relevant developments at the national level. For example, concerning direct accountability of TNCs, the South African Constitution considers TNCs as juridical persons directly accountable for their actions. As concerns instead the home State’s responsibility to protect the right to food abroad against damaging actions performed by TNCs under their jurisdiction, a particularly illuminating case can be found in *Recherches Internationales Quebec v. Cambior Inc. L. and Home Insurance and Golder Associates LTEE*. In such case, individuals in Guyana had filed a lawsuit against a Canadian TNC held responsible for environmental damage as a major shareholder of a Guyanese firm (directly responsible for the disaster). Through the assistance of *Recherches Internationales Quebec*, the lawsuit was brought before the Quebec Superior Court. Although the Court ultimately dismissed the case (arguing that the plaintiffs would enjoy appropriate protection of their rights by a Guyanese court as well), it did argue that both the Guyanese and Quebecois courts had jurisdiction over the matter.³⁰ Similarly, one can recall what was said above about States with tort laws allowing such litigation.

3. RIGHT-HOLDERS

Under human rights law, the entitlements fall upon every individual, without discrimination of any sort; States are responsible not only for the realisation of the rights of their citizens, but also Stateless individuals. While this is a universally accepted principle, there are still some controversies on this general level. Many States afford different levels of protection to different categories of peoples: one such example is notably that of the Arab States, which tend to make extensive reservations to human rights conventions to which they are parties so as to justify a discriminatory treat-

³⁰ *Recherches Internationales Quebec v. Cambior Inc. L. and Home Insurance and Golder Associates LTEE* (Quebec Superior Court, August 1998).

ment of women, in line with their religious and cultural tradition. Indeed, the former High Commissioner for Human Rights Louise Arbour declared in 2008 that the understanding of human rights enshrined in the Arab Charter of Human Rights was incompatible with the UN one, due to this reason (among others).³¹ Indeed, women and children are increasingly recognised as deserving the most attention, especially as concerns the right to food.³² Gaps in the protection of human rights also exist in a number of other cases, like the lacking protection often afforded to indigenous communities, or to the land rights of smallholder farmers, which is why so much emphasis is placed in the UN discourse on the needs of the most vulnerable: such condition is not only due to external circumstances, but often also to their being left behind. Another controversy arises when trying to establish which duty-holder has obligations towards which right-holders. Once again the reality of things is that, due to the fact that all human rights entail positive obligations, establishing which State has to spend resources for the satisfaction of the rights becomes a political issue. This is intuitively relevant to the discussion faced above, as concerns the extraterritorial obligations of States. However, the core of the controversy seems to arise in relation to economic refugees (i.e. people fleeing from hunger), whom, partly due to them erroneously being categorised as ‘migrants’, often happen to be rejected by receiving States, and sent back to situations in which their right to food — among others — is heavily compromised.³³ Such behaviour is often carried on even in the face of crystalline evidence that their human rights will not receive appropriate satisfaction in their home State. There are however cases in which States have agreed to guarantee the right to food of non-nationals: in 1996, the Swiss Federal Court recognised the right of the plaintiffs (Czech refugees in a condition of impossibility to provide for themselves) to see satisfied all their basic human needs (among which food) in order to safeguard their human dignity.³⁴ The principle was indeed enshrined in the Constitution (Article 12) through a reform in 1999.

³¹ ‘Arab rights charter deviates from international standards, says UN official’, *UN News*, 30 January 2008, <https://news.un.org/en/story/2008/01/247292-arab-rights-charter-deviates-international-standards-says-un-official> (accessed on 30 December 2018).

³² See for example: H. Elver, *Report to the General Assembly*, A/71/282 (3 August 2016).

³³ See for example: J. Ziegler, *Report to the General Assembly*, A/62/289 (22 August 2007), paras. 45-63; see also H. Elver, *Interim Report of the Special Rapporteur on the Right to Food*, A/72/188 (21 July 2017), paras. 39-44.

³⁴ *V. v. Einwohnergemeinde X und Regierungsrat des Kanton Bern*, BGE/ATF 121 I 367, 371, 373 V. JT 1996 (Swiss Federal Court (Tribunal fédéral suisse), 1995).

3.1. THE COLLECTIVE RIGHT TO FOOD: THE DRAFT DECLARATION ON THE RIGHTS OF PEASANTS

Another consideration that is worth noting is the fact that the right to food was specified in the CESCR's General Comment No. 12 to have both an individual and a collective dimension.³⁵ The individual dimension is most immediately apparent in light of what has been said thus far: the right to food is intrinsically bound to the individual right-holders, in line with an exquisite individual conception of human rights that is familiar when looking at most CP human rights. Indeed, human rights traditionally pertain exclusively to such dimension, as rights that are inherent to the human dignity of the individual. Nevertheless, the progressive development of the doctrine of various human rights, including the right to food, has seen the rise of a collective dimension, as well: that is, envisaging the possibility for the right holder to have a collective nature, such as can be the case for a rural community. This is most evident in the doctrine of the Inter-American Court of Human Rights, which, as explored in the following paragraph, has been extremely proactive in the defence of the human right to adequate food for many indigenous communities, especially in the Mesoamerican region. Moreover, a "Declaration on the Rights of Peasants and Other People Working in Rural Areas" is currently being negotiated within the UN;³⁶ the document could potentially significantly progress the defence of the interests of rural and indigenous communities, which desperately need addressing in a global scenario where these peoples are constantly marginalised and excluded from the benefits of development. This was partly the result of the lobbying activity of the farmers organisation "La Via Campesina", famous for advocating food sovereignty over the last three decades. A look into the current draft can help provide some insight as to what the collective dimension of the right to food entails.

«For the purposes of the present Declaration, a peasant is any person who engages or who seeks to engage alone, or in association with others or as a community, in small-scale agricultural production for subsistence and/or for the market, and who relies significantly, though not necessarily exclusively, on family or household labour and other non-monetized ways of organizing labour,

³⁵ See the dedicated section in Chapter 2 of the present thesis.

³⁶ Find the latest developments of the negotiation at United Nations Human Rights Council, 'Open-ended intergovernmental working group on a United Nations declaration on the rights of peasants and other people working in rural areas', <https://www.ohchr.org/EN/HRBodies/HRC/RuralAreas/Pages/WGRuralAreasIndex.aspx> (accessed 30 January 2019).

and who has a special dependency on and attachment to the land.»³⁷ A rather wide and comprehensive definition, that is further specified by the rest of the article to include all the known varieties of communities presenting such characteristics, from small-scale agricultural farmers, to fisherfolk, to nomadic and possibly landless communities. The requisite for entering such definition, as concerns agriculture, is therefore to engage (or seek to engage) in small-scale agricultural production for subsistence or trade, with a substantial reliance on household labour.³⁸ The draft calls upon States to respect, protect and fulfil their obligations corresponding to the entitlements of these communities as collective actors, echoing the familiar principle of ‘progressive realisation’ in establishing how these obligations are to be fulfilled – though emphasising the need for prompt action.³⁹ It is notable how the Declaration places considerable emphasis on the need for these communities to be involved in decision-making and consulted appropriately by the States before undertaking international commitments and obligations that may harm their interests.⁴⁰ It even contains a provision on the «right to seeds» of peasants, the importance of which is immediately apparent in light of its potential impact on the hoary issue of the relation between IPRs under the TRIPS agreement and the food security of farmers. The draft also pays attention to non-discrimination,⁴¹ sovereignty over local resources for sustenance,⁴² and a series of CP and ESC rights. Among these figure the right to safe working conditions (especially important as concerns the landless labourers, who often work under exploitative terms) the «right to adequate food and the fundamental right to be free from hunger», the right to an adequate standard of living, land and environment,⁴³ with an eye to the preservation of biodiversity.⁴⁴ The list continues with water, social security, the highest attainable standard of physical and mental health, safe and clean water for drinking and sanitation, adequate housing and professional training (with respect to agricultural activities in line with the principles of agroecology) and culture.⁴⁵ It is indeed a very wide and comprehensive collection of rights, and should the document maintain its salient features past the stage of drafting, it would provide a considerable contribution to the international framework of human rights instruments.

³⁷ Human Rights Council, *Draft United Nations declaration on the rights of peasants and other people working in rural areas*, A/HRC/WG.15/5/3, 10 September 2018, Article 1. [*Draft Declaration on the Rights of Peasants*, 2018 hereafter].

³⁸ H. A. Nuila, *Collective Rights in the United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas*, FIAN International, Briefing Note, March 2018, p.1.

³⁹ *Draft Declaration on the Rights of Peasants*, 2018, Art. 2.1.

⁴⁰ *Ibidem*, Art. 2.3.

⁴¹ *Ibidem*, Arts. 3 and 4 (posing special attention to gender discrimination).

⁴² *Ibidem*, Art. 5.

⁴³ *Ibidem*, Arts. 14-18.

⁴⁴ *Ibidem*, Art. 20.

⁴⁵ *Ibidem*, Arts. 21-26.

All throughout the draft, many explicit references are made to the individual and collective nature of the rights; for instance, article 17 recites: « Peasants and other people living in rural areas have the right to land, individually and/or collectively [...] ». Relatedly, the right to food sovereignty also has a collective dimension in its formulation. But what does it mean for a right to be collective? According to a recent Briefing Note from FIAN International, a collective right must present three characteristics: « 1. The holder of the right is collective; 2. The exercise of the right pertains to a legally protected collective good; and 3. The interest of the right is of a collective nature.»⁴⁶ Indeed, the shared conditions of the communities in terms of marginalisation, discrimination and scarce legal protection (often accompanied by other commonalities of ethnical, linguistic or other nature) make it so that often States, be it *de jure* or *de facto*, recognise rural and indigenous communities as collective rights-holders. Examples of these are, *inter alia*, the Constitution of the Democratic Republic of the Congo and the Bill of Rights of South Africa, which both recognise a collective right to property.⁴⁷ Even when there is no legal recognition of collective rights, States may recognise such communities as collective stakeholders with common interests, as in the cases of Ecuador and Bolivia.⁴⁸ On the other hand, the stance of international law on the matter is fragmentary, despite the recognition (or possible interpretative extrapolation) of collective human rights in a number of international instruments. Nevertheless, the jurisprudence of international bodies, especially the CESCR, has guaranteed the progress of the doctrine towards their recognition, by explicitly interpreting rights in their collective dimension (General Comments No. 14 and 21) and by inviting States to «adopt effective measures of a collective nature to safeguard indigenous groups' interests in terms of scientific production.»⁴⁹

A look into the arguments in favour and against a collective dimension of human rights can help achieve a rounded understanding of its implications. One of the reasons addressed against the proposal of collective rights is that the only such human right should be the right to self-determination, lest collective rights overshadow individual human rights in the international discourse. The Briefing Note by FIAN addresses such concern by noting that collective rights do not in any way relieve States of their obligations under existing individual human rights, and must be rather understood as an addition, necessary in light of the rising knowledge around the great connec-

⁴⁶ H. A. Nuila, *Collective Rights in the United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas*, FIAN International, Briefing Note, March 2018, p.2.

⁴⁷ *Idem*.

⁴⁸ *Ibidem*, p.3.

⁴⁹ *Ibidem*, pp. 4-5.

tion that individuals have, in their identity-building and knowledge-constructing activities, to the communities they belong to.⁵⁰ Indeed, it has been pointed out, with reference to rights relating to the environment, that an obstinate focus on individual entitlements may bring to a “stagnation” of international law, inadequate for tackling issues that generate consequences affecting communities at large.⁵¹ Another concern, that of collective rights not being enforceable, is instead addressed with reference to the existence of class action for litigation against activities that cause harm to the public welfare, which provide similar mechanisms. Finally, concerns that collective rights for communities other than indigenous peoples would be undue have been answered through a reflection on the process that led to the recognition of the rights of the latter in the UN Declaration on the Rights of Indigenous Peoples. Indeed, if the discriminant criteria were their special ties with the land they live on and derive sustenance from and them having discernible characteristics distinguishing them from the rest of the population, then it stands to reason that a similar evolution with regard to rural communities is not only possible, but also due.⁵² In light of the fact that phenomena like those addressed by the Draft Declaration affect communities collectively, there is no reason not to update the list of rights-holders to include a collective dimension. Especially considering how many issues that have been presented in the Introduction to this work (e.g. the matter of IPRs as concerns seeds) and many more issues that will become apparent through the study of the jurisprudence on the right to food presented in this Chapter often affect communities as a whole, such development would fill a hoary gap in international law.⁵³ There is some practice to such regard, especially in the jurisprudence of regional courts, like the aforementioned IACtHR, and the African Court of Human and Peoples’ Rights (which carries in its very name a reference to a collective dimension of human rights) but, despite the progress, the individual perspective remains dominant.⁵⁴

⁵⁰ Ibidem, p. 8

⁵¹ See: F. Francioni, ‘International Human Rights in an Environmental Horizon’, *The European Journal of International Law*, Vol. 21, No.1, 2010, pp. 41-55.

⁵² H. A. Nuila, *Collective Rights in the United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas*, FIAN International, Briefing Note, March 2018, p. 9.

⁵³ Ibidem, pp. 9-10.

⁵⁴ See, again: F. Francioni, ‘International Human Rights in an Environmental Horizon’, *The European Journal of International Law*, Vol. 21, No.1, 2010, pp. 41-55.

4. LEGAL FRAMEWORKS AND JURIDICAL SYSTEMS

What was analysed thus far (normative content, duty-holders, right-holders and the evolution of these notions) were all theoretical concepts making up the basic understanding of the right. The last two requirements (the legal frameworks and the judicial mechanisms protecting the right to food) instead constitute a step into the real world, a look into the practice and the actualisation that these concepts find in reality. This paragraph will be dedicated to an overview of the existence and scope of these two requirements of the right to food at the national, regional and international level.

4.1. NATIONAL LEVEL

The first part of this section will be an overview of the width of the existing national coverage of the right to food in terms of legal recognition. To this aim, it will borrow heavily from the work made by the FAO in reviewing and systematising such systems.⁵⁵ The second part of the section will instead account for non-constitutional legal recognition of the right. The third part will explore whether there is an obligation to incorporate the right to food in national legal systems and whether that, too, is subject to progressive realisation. Finally, the fourth and final part will briefly mention the other two avenues of national implementation of the right to food, of a non-legal character (policies and institutions).

Some States have enshrined the right to food in national Constitutions, either explicitly, i.e. directly recognising the right, or implicitly, i.e. recognising it in the context of another right. To date, 30 countries have constitutional articles explicitly protecting the right. In light of what the thesis has already said on the significance of a rights-based approach, the importance of a constitutional recognition of the right to food should be clear: not only is it the most stable level of recognition that a national legal system can afford, but also the highest, entailing a cascading effect on lower

⁵⁵ See: L. Knuth, M. Vidar, *Constitutional and Legal Protection of the Right to Food Around the World*, FAO, Right to Food Unit, Rome, 2011. The FAO website furthermore provides a comprehensive list of the States enshrining the right to food in their constitutions either implicitly or explicitly, of those which have constitutional provisions prescribing a direct application of international law and of those who have constitutionally enshrined directive principles of State policy on the realisation of the right. The data that follows on these topics is available at: <http://www.fao.org/right-to-food-around-the-globe/level-of-recognition/en/> (accessed on 30 December 2018).

legislation, strategies and policies.⁵⁶ Of these countries, some recognise the right to food in a general fashion, while others recognise it as only referring to a specific group of beneficiaries.⁵⁷ A total of 74 countries elected to recognise the right as implicit in another human right that is understood, as a normal interpretation in international law, to include the right to food, like the rights to an adequate standard of living, well-being, a dignified life or development.⁵⁸ Moreover, a total of 97 legal systems recognise direct applicability to international law in the domestic juridical system; in such cases, international law is generally held to be subordinate to the constitution, but superior to national law. Therefore, these must be accounted for, as well. Indeed, there are cases in Argentina of local courts applying the right to food even in the lack of a specific constitutional provision, ordering the local government to include a family and a cancer patient in a food plan. In both cases there was a direct application of international human rights instruments (ICESCR and CRC), which were guaranteed constitutional rank with the 1994 reform.⁵⁹ The High Court of Fiji also ruled against the punishing halving the food rations of an inmate, for incompatibility with the obligations under Article 11 of the ICESCR.⁶⁰ Accounting for all the overlaps between these, the number of countries that present at least one of such characteristics totals 119.⁶¹ In addition to this, Chile and the United States of America, albeit devoid of any of the above traits, are monist legal systems. This means that, unless they explicitly establish otherwise, e.g. through NSE declarations (i.e. declarations of non-self-execution — of which the USA have made extensive use in its ratification of human rights conventions),⁶² the content of treaties to which they are parties is held to be directly applicable by

⁵⁶ De Schutter, O., *Countries Tackling Hunger with a Right to Food Approach, Significant Progress in Implementing the Right to Food at the National Scale in Africa, East Asia and Latin America*, FAO, Briefing Note, 01, May 2010.

⁵⁷ E.g. Colombia (pregnant women, children, elderly), Costa Rica (children), or Panama (children, elderly, disabled).

⁵⁸ See: Knuth, L., Vidar, M., *Constitutional and Legal Protection of the Right to Food Around the World*, FAO, Right to Food Unit, Rome, 2011, p. 16.

⁵⁹ See: *C.M.D. y otros c. GCBA s/amparo* (Buenos Aires Administrative Trial Court No. 3, March 2003) and *González Rayco, Artidoro c. GCBA s/amparo* (Buenos Aires Administrative Court No. 4, May 2005). For similar cases, see also *Defensor del Superior Tribunal de Justicia c. Estado Provincial-Acción de amparo* (Paraná (Entre Ríos) Family and Juvenile Court No. 2, August 2002) and *Rodríguez, José Angel y otra c. Sistema Provincial de Salud y otro s/amparo s/medida cautelar* (Tucumán Administrative Court of Appeals, Chamber I, December 2003), as appraised in Curtis, C., 'The Right to Food as a Justiciable Right - Challenges and Strategies', A. von Bogdandy and R. Wolfrum, (eds.), *Max Planck Yearbook of United Nations Law*, Volume 11, 2007, p. 237.

⁶⁰ See: *Tito Rarasea v. State* (High Court of Fiji, May 2000), *ibidem*, p. 238.

⁶¹ From the total of 120, the Marshall Islands have been taken out, due to them having no explicit, nor implicit protection of the right to food, and the constitutional provision establishing the legal rank of international law says that "no treaty or other international agreement (...) shall, of itself, have the force of law in the Republic" (Art. V, Section 1 (4)). While the Zimbabwean Constitution also provides for the non-direct-application of international treaties in domestic courts (Art. 327.2(a, b)), the State still remains within the grand total due to its Constitution containing both explicit recognition of the right to food (Arts. 77(b) and 81.1(f)) and directive principles of State policy to that regard (Arts. 3.1(c), 11, 15(a, b, c), 19.2 (b) and 21.2 (b)).

⁶² See: D. Sloss, 'The Domestication of International Human Rights: Non-Self-Executing Declarations and Human Rights Treaties', *Yale Journal of International Law*, vol. 24, issue 1, 1999, pp. 129-221.

domestic courts. Yet, not all the countries that have only the latter of these three traits have ratified all the relevant treaties. Some are parties to the ICESCR, but not to one or more of the specific conventions (CEDAW, CRC and CRPD), thus recognising a human right to food, but missing the particular articulations.⁶³ Others have not ratified the ICESCR⁶⁴ (and, possibly, any combination of the other treaties).⁶⁵ The USA must to such regard be taken out of the list entirely, as they alone have ratified none of the relevant instruments. And yet, even in the USA there were two cases in which, despite the lack of a constitutionally recognised right to food (and of course, steering well clear of any mention to a human right to food in general), courts effectively realised the right to food of the plaintiffs in the context of food stamp programmes.⁶⁶ The other 10 States have a shakier legal ground for litigation, to be sure, but it is still theoretically conceivable; they will therefore be counted within the total. This means that there are 120 countries whereby the right to food is integrated in the national legal system, and can therefore be justiciable by national courts. Adding to this, a total of 102 countries (73 of which presenting at least one of the aforementioned elements, thus overlapping) have constitutional provisions committing States to pour effort towards the realisation of the right to food (or a group of rights wherein it can be understood to exist): in essence, they recognise the right to food as a matter of directive principles of State policy. While this addition brings the total number of States to a reassuring 151, this last group of provisions is very hardly object of justiciability: it does represent an overarching objective of the State, and its inclusion in the constitutional document bestows considerable solemnity upon it, but it is understood to be non-enforceable by a court.⁶⁷

Finally, countries may still provide legal protection to the right in sources other than the constitution: specifically, framework laws, i.e. wide-ranging and comprehensive legislation having the objective of the realisation of the right to adequate food, incorporating the provisions of the ICESCR, including the tripartite scheme of obligations, in the national legal system. These were explicitly encouraged by the CESC as a “major instrument in the implementation of the national strategy concerning the right to food.”⁶⁸ Indeed, framework laws are generally recognised to have

⁶³ Such is the case for Cameroon, Chad, Sudan and Tajikistan.

⁶⁴ Such is the case for Andorra, Mozambique, Oman and Qatar.

⁶⁵ Such is the case for Comoros, South Sudan and the United States of America.

⁶⁶ See: *U.S. Department of Agriculture v. Moreno*, 413 U.S. 528 (U.S. Supreme Court, 1973) and *Robidoux v. Kitchel*, 876 F. Supp. 575 (U.S. District Court, 2nd district, 1995).

⁶⁷ As clarified in the “Methodology” section of the FAO website which collects such data. Available at: <http://www.fao.org/right-to-food-around-the-globe/methodology/en/> (Accessed on 30 December 2018).

⁶⁸ CESC, General Comment No. 12, Para. 29.

multiple merits with regards to the realisation of the right to food, as they ensure compliance and accountability from governments, secure the central role of the right in national strategies and put consistent limits to the effects of international trade or financial agreements. Furthermore, they may include monitoring institutions and recognise the justiciability of the right. Framework laws must also include an international dimension, in order to encourage international cooperation to realise the right to food.⁶⁹

Commenting on the work of A. Sen, De Schutter appraised the most significant consequence of the ‘capability approach’ to be the understanding that “hunger stems from disempowerment, marginalisation and poverty.” The real reason of hunger is lack of economic access to adequate food: that is why recognising food as a human right, and therefore giving it the legal protection a right demands, is essential in order to tackle hunger. Another important aspect is to ensure participation and transparency, so that the laws and policies that are made for the poor include the poor in their elaboration.⁷⁰ The CESCR has likewise expressed the opinion that in many cases legislation may be appropriate, or even indispensable, to the aim of guaranteeing the enjoyment of human rights for the people within the States.⁷¹ For these reasons, FAO Guideline 7.2 (2004) recommends the inclusion of the right to food in national constitutions. Despite the flexibility afforded by the Covenant in the application of its content to the member States, and despite the non-exclusive formulation of the duty to undertake legislative measures under Article 2.1, some principles instead create what has at times even been understood as a veritable obligation to incorporate the terms of the treaty in the domestic legal system. The arguments to that regard have been summarised in an FAO document,⁷² reported as follows. Firstly, ‘good faith’, according to which failure to incorporate the Covenant’s provisions in national law can theoretically be held as a violation of international law. Secondly, ‘effectiveness’, whereby treaties must be read so as to give effect to their provisions; in this light, national courts are the most accessible and effective human rights enforcers in most cases, as international mechanisms like inter-State complaints or UN bodies are both less accessible by individuals and less likely to generate compliance from the State. As agents rooted in

⁶⁹ De Schutter, O., *Countries Tackling Hunger with a Right to Food Approach, Significant Progress in Implementing the Right to Food at the National Scale in Africa, East Asia and Latin America*, FAO, Briefing Note, 01, May 2010, pp. 5-7.

⁷⁰ De Schutter, O., *Countries Tackling Hunger with a Right to Food Approach, Significant Progress in Implementing the Right to Food at the National Scale in Africa, East Asia and Latin America*, FAO Briefing Note, 01, May 2010.

⁷¹ UN CESCR, *General Comment No. 3*, Para. 4.

⁷² L. Knuth, M. Vidar, *Constitutional and Legal Protection of the Right to Food Around the World*, FAO, Right to Food Unit, Rome, 2011, pp. 11-12.

the national context, their decisions tend to be more politically acceptable, more legitimate and are more easily implemented by the local executive. However, the content of the right claimable by domestic courts must be the same as recognised internationally, in order to be effective. Thirdly, people are recognised an ‘effective right to remedy’, which cannot be met in the absence of pertinent national legislation. A fourth element is the general support that the need to incorporate the right to food in the national legal system finds in the UN bodies, with an expressed preference for national constitutions. In fact, contrary to the ICESCR’s reference to ‘legislative measures’ in general, the Right to Food Guidelines of 2004 mention ‘State constitutions’ specifically. After all, violations of the right to food most often come as a consequence of incompatible law; it seems only appropriate for the right to enjoy a higher ranking in the hierarchy of national legal systems.⁷³ While these arguments hold consistent sway on the intuitive level, the CESCR’s doctrine has never been clear on the matter: in 1999, it has stated that «there is no provision [in the Covenant] obligating comprehensive incorporation or requiring it to be accorded to any specific type of status in national law»;⁷⁴ what matters is rather that the States take action to discharge their obligations concerning the right to food. This seems to suggest that incorporating the right in the national legal system is not stringently part of such set of obligations. Depending on the circumstances, administrative remedies may be as effective a remedy as judicial ones.⁷⁵ There is therefore no consistent ground to argue for a legal obligation to frame the right to food in national law. While it did not ever envisage it as an obligation, the Committee did however often stress the preferability of incorporation in domestic legal systems.⁷⁶

Whatever the nature of the legal framework, enshrining the right in law is not sufficient, *per se*: there is also the need for comprehensive national strategies,⁷⁷ designed in line with the PANTHER framework, and including multiple programmes for implementation. As per the FAO Guidelines, these must have appropriate monitoring in order to be able to identify emerging threats, improve horizontal and vertical coordination of the government, allocate clear responsibilities and timeframes, ensure participation and focus on the needs of the most vulnerable.⁷⁸ Moreover, the Guidelines also prescribe the setting up of appropriate institutions to ensure the realisation of the

⁷³ Ibidem.

⁷⁴ CESCR, General Comment No. 9, Para. 5.

⁷⁵ Ibidem, Para. 9.

⁷⁶ CESCR General Comment No. 3, Para. 4 (as mentioned above); General Comment No. 9, Para. 8; General Comment No. 12, Para. 33.

⁷⁷ CESCR General Comment No. 12, Para. 21.

⁷⁸ FAO Right to Food Guidelines (2004), Guideline 3.

right.⁷⁹ The ones displayed in this paragraph are the main ways in which a State can comply with its obligations concerning the right to food. The thesis focuses on the role of courts specifically, therefore these latter categories of non-legal efforts to realise the right to food will not receive extensive exploration, although their contribution in realising the right both within and outside of national borders is certainly to be reckoned with.⁸⁰ Their relevance will only be considered insofar as they relate to courts, and they can be understood to be claimable. As De Schutter wrote, commenting on the “Fome Zero” Strategy of Brazil, some of the programmes contained therein are enshrined in law, therefore constituting entitlements, and not mere policy option; while desirable, that is however far from being the norm.⁸¹ Likewise, the setting up of institutions can help ensure temporal consistency and technical expertise and in many ways facilitate communications between the government and the civil society;⁸² however, they will only marginally be considered herein, insofar as their setting-up has been commissioned by a court (like in the case of India).

4.2. REGIONAL LEVEL

As mentioned in the first chapter, there are a number of regional human rights instruments; as concerns the right to food, the most relevant are the ECHR and the European Social Charter in Europe, the IACHR in the Americas and the AfCHPR in Africa; no such mechanism is currently present in the Asian continent, save for the controversial Arab Charter of Human Rights. The contribution that these offer to justiciability can be assessed with reference to the degree of stringency of their accountability mechanisms, especially judicial ones.

A. EUROPE

The European Social Charter of 1961 envisages a set of ESC rights; however, the right to food is not among these, and the commitments it entails are rather weak, as they are based on an *à*

⁷⁹ Ibidem, Guideline 5.

⁸⁰ For an overview of their main feats and achievements, see De Schutter, O., FAO, *Countries Tackling Hunger with a Right to Food Approach, Significant Progress in Implementing the Right to Food at the National Scale in Africa, East Asia and Latin America*, Briefing Note, 01, May 2010.

⁸¹ Ibidem, p. 8.

⁸² Ibidem, pp. 12-13.

la carte approach.⁸³ An attempt to strengthen the monitoring mechanism through an amending protocol in 1991 has yet to meet sufficient ratification. The 1996 reform to the European Social Charter, introducing the right to an adequate standard of living in relation to wages (which is potentially a good basis for right to food litigation) has instead come into force in 1999, after three ratifications, and it has currently been ratified by 34 States out of the total of 47 members of the Council of Europe. Moreover, an Additional Protocol in 1995 (entered into force in 1998) introduced the possibility of collective complaints procedures for violations of the Charter, which adds to the standard procedure of national reporting. The body tasked with the oversight of compliance is the European Committee on Social Rights (ECSR), made up of fifteen independent experts; when consulted in its quasi-judicial vest, the ECSR has merely declaratory functions: that is, it provides a clear and motivated opinion acknowledging why the case at hand does or does not include a violation, but provides no remedy. The task is instead delegated to the intergovernmental Committee of Ministers of the Council of Europe, which may adopt a recommendation addressed at the concerned State party accordingly with the conclusions of the ECSR (as per Article 9 of the Protocol of 1995). This creates ample manoeuvre space for the States, leaving a large margin of discretion,⁸⁴ and has indeed even contested the conclusions of the experts.⁸⁵

B. THE AMERICAS

As concerns the American continent, Article 26 of the American Convention of Human Rights (ACHR) contains a loose provision on ESC rights, committing the States parties to their progressive realisation. The Convention was expanded in relation to ESC rights in 1999, with the so-called “Protocol of San Salvador”, which explicitly envisages and protects the right to food in Article 12, committing the States parties to “improve methods of production, supply and distribution of food, and [...] promote greater international cooperation in support of the relevant national policies.”. Acknowledging the principle of progressive realisation and resource limitations, and stressing the obligation (Article 1) of incorporating the rights set forth in the Protocol in national

⁸³ C. Tomuschat, *Human Rights: Between Idealism and Realism*, Oxford, New York, Oxford University Press, 2008, p. 32.

⁸⁴ As appraised in B. Cali, ‘Enforcement’, in M. Langford, B. Porter, R. Brown, and J. Rossi (eds.), *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, Pretoria University Press, 2016.

⁸⁵ See for example: *Resolution CM/ResChS(2014)1* *Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v. Sweden*, Complaint No. 85/2012 (Committee of Ministers, 2014), wherein, despite the ECSR finding a violation of the Charter, the Committee «2. [...] recognised] that the decision of the [ECSR] in this case raises complex issues in relation to the obligation of EU member States to respect EU law and the obligation to respect the Charter;» as appraised in [ibidem].

legislation (Article 2), the document moves much along the same lines as the ICESCR. Currently, 23 out of the 35 States parties to the OAS are parties to the ACHR; among the absents, Trinidad and Tobago and Venezuela are former parties, which exited by denunciation (1998 and 2012, respectively), while the United States of America have signed the Convention in 1977, but never proceeded to ratify it. The ACHR and the Protocol of San Salvador are binding documents, compliance with the terms of which is overseen by the Inter-American Commission on Human Rights (IACHR), which can also receive individual claims of human rights violations. While the Commission may issue recommendations with a view to try to favour a friendly settlement, it may also pass a case to the Inter-American Court of Human Rights (IACtHR), a proper judicial mechanism for the protection of the rights. The Court has been active in the protection of the rights of indigenous people. While not directly related to the right to food, this is significant in light of the fact that indigenous peoples are often among the most food-insecure: it is a commonly recurring problem that they may be evicted from their ancestral lands, from which they derive their livelihood, due to insufficient recognition of their legal tenure. A landmark case to this regard, which constituted a basis for the following jurisprudence on the rights of indigenous peoples, was ruled in 2001.⁸⁶ In such case, the IACtHR found the State to be violating the community's property rights as enshrined in the ACHR by unilaterally leasing their land to a third-party private company, as well as their right to judicial protection by not providing them with an effective mechanism for remedy. What is significant about this case is that the ACHR's formulation of the right to property (Article 21) was creatively interpreted to include property arising from indigenous tradition. This was done in light of two overarching principles⁸⁷ (which may therefore also be considered in regard to cases of different nature, including the right to food). On the one hand, the principle *pro homine*, frequently referred to in the jurisprudence of the IACtHR,⁸⁸ whereby interpretation must lead to the fullest satisfaction of the rights of the victim. On the other, the principle whereby treaties must be interpreted in light of their intended purpose, expressed in Article 31.1 of the Vienna Convention on the Law of Treaties (VCLT). More in general, the judgement was issued with reference to the general juridical system prevailing at the time of the ruling, a principle established by the International Court of Justice (ICJ) in 1971. To such regard, the Court borrowed from a wealth of existing instruments in establishing that the indigenous peoples' systems of legal tenure and property, rooted in the custom of their

⁸⁶ *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Ser. C. No. 79 (Inter-American Court of Human Rights, August 2001). Available at <https://www.escr-net.org/caselaw/2006/case-mayagna-sumo-awas-tingni-community-v-nicaragua-eng> (Accessed 25 December 2018).

⁸⁷ As per the concurring opinion of Judge Sergio García Ramírez, included in the document of the Court's ruling.

⁸⁸ *Ibidem*.

communities, must be respected by the law.⁸⁹ The widespread existence of indigenous peoples in the American continent is reinforcing to such effect, as the legal systems regulating these communities have continued to exist since the conquest of the continent, indeed obtaining legal recognition in multiple States. It is under these premises that the interpretation of Article 21 was given.

Following such case, however, the Court recently adjudicated two more cases on indigenous communities with specific regard to the right to food: *Indigenous Community Yakye Axa v. Paraguay*⁹⁰ and *Indigenous Community Xákmok Kásek v. Paraguay*.⁹¹ The content of both is essentially the same as the case brought against Nicaragua in 2001. In both cases, the Court found violations not only of the rights to property (following the same lines delineated above) and judicial remedy, but also to life (in the former) and to non-discrimination and cultural identity (in the latter). During the period in which they were deprived of access to their land, the claimants saw compromised, *inter alia*, their access to adequate food and water; this was interpreted as a violation of the rights set forth in the San Salvador Protocol. In general, the Court stressed that the States have positive obligations to ensure a dignified life to individuals, especially as concerns vulnerable groups. The Court ordered the State to provide basic goods and services to the claimants until their land was restored, thus enabling them once again to provide for themselves; to the latter regard, it ordered the land restituted, and their legal tenure secured. These cases solidified the jurisprudence of the Court as concerns indigenous communities, in identifying a strict relation between their ancestral land and their survival, due to the many social, economic, cultural and religious functions that the land covers for them.⁹² Yet another litigation on the rights of indigenous peoples is of particular import, as it reveals the possibility for litigation on the right to food based on another, more easily litigable right, due to it belonging to the pantheon of the less controversial CP rights: the right to life. As such, in *Sawhoyamaxa Indigenous Community v. Paraguay*, the Court ruled that, since the State knew or ought to have known of a situation endangering the life of determinate persons, it had failed to take

⁸⁹ The Judge mentioned Geneva Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries (1989), the Draft Declaration on Discrimination against Indigenous Peoples by the United Nations Economic and Social Council's Sub-Commission on Prevention of Discrimination and Protection of Minorities (1994) and even the American Declaration on the Rights of Indigenous Peoples, which at the time was still being drafted and would be approved only in 2016.

⁹⁰ *Indigenous Community Yakye Axa v. Paraguay* (Inter-American Court of Human Rights, 2005). Available at <https://www.escri-net.org/caselaw/2006/case-indigenous-community-yakye-axa-v-paraguay-eng> (accessed on 26 December 2018).

⁹¹ *Indigenous Community Xákmok Kásek v. Paraguay* (Inter-American Court of Human Rights, 2010). Available at <https://www.escri-net.org/caselaw/2014/case-indigenous-community-xakmok-kasek-v-paraguay> (accessed on 26 December 2018).

⁹² As assessed in the concurring opinion of Judge Eduardo Vio Grossi (included in the document) with reference to paras. 85 and 86 of the Court's judgement on the *Xákmok Kásek* case.

the necessary measures, within its capabilities, to ensure they had access to water and health.⁹³ Multiple elements are worth noticing here: first and foremost, the ACHR essentially performed a review of State action of the ‘*Grootboom*’ school, and deemed it insufficient. Secondly, the ruling signals (and indeed, forwards) the recognition of the interconnected nature of all human rights set forth in the Vienna Declaration. Thirdly, the human right to life was herein understood in a restrictive sense, as a human right to survival; this evokes the doubt whether an even more progressive interpretation could be given, ruling for the right to ‘adequate’ food, under an expansive understanding of the right to life, could be a possible future development.

C. AFRICA

Finally, the then Organisation of African Unity (now African Union) adopted in 1981 the African Charter of Human and Peoples’ Rights (AfCHPR), currently ratified by 53 out of 55 members of the African Union and overseen, as per Article 1 of the Charter, by the African Commission on Human and Peoples’ Rights (AfCoHPR). While it does not explicitly envisage the right to food, as mentioned, the Charter has been interpreted by the AfCoHPR as implicitly recognising it, with reference in particular to the rights to health and satisfactory environment of development, in the aforementioned case of *SERAC* case (2001). That decision was however issued by a quasi-judicial body, with a history of having its recommendations ignored by the States.⁹⁴ Another such decision that was however very important for the evolution of the African human rights system’s jurisprudence was the 2003 *Purohit and Another v The Gambia*. Rather than the substance of the case, what is important here are the contextual observations of the Commission; specifically, the fact that it sponsored a different reading of Article 16 of the Charter, recognising the importance of the availability of resources in the realisation of the rights. This substantially leans towards the ICESCR’s understanding of rights to be progressively realised (with all due limitations to the principle’s scope).⁹⁵ When the African Court of Human and Peoples’ Rights (AfCtHPR) was created, in 2004, a judicial organ was finally in place to enforce the contents of the Charter. However, only 30 States have subjected themselves to the authority of the Court thus far.⁹⁶ In 2008, a protocol was proposed for the creation of an African Court of Justice and Human Rights, merging the AfCtHPR and the

⁹³ *Sawhoyamaya Indigenous Community v. Paraguay* (Inter-American Court of Human Rights, 2006).

⁹⁴ C. Mbazira, ‘Enforcing the economic, social and cultural rights in the African Charter on Human and Peoples’ Rights: Twenty years of redundancy, progression and significant strides’, *AHRLJ*, vol. 6, no. 2, 2006, chapter 6.1.3.

⁹⁵ *Idem*.

⁹⁶ African Court of Human and Peoples’ Rights, ‘Welcome to the African Court’, <http://www.african-court.org/en/index.php/12-homepage/1-1-welcome-to-the-african-court>, 2019 (accessed on 2 January 2019).

(still-inexistent) African Court of Justice; however, only six States have ratified it thus far, of the fifteen needed for the protocol to enter into force. The Court receives complaints by the Commission, by the States parties to the protocol, or by African intergovernmental organisations (IGOs); conditional on a State having issued a Declaration to such terms, NGO and individual complaints from citizens of said States are also possible: currently, this is the case for eight countries. One dashing characteristic of the Court is that it can judge compliance not only with the Charter (as was the case for the Commission), but also with the obligations under other international human rights instruments ratified by the State concerned (Article 7 of the protocol). This is a unique element to the African human rights system, attempting to unify the international and the regional human rights regimes. This opens up problems, as well: the other human rights instruments have their own oversight bodies, and divergent or inconsistent interpretation may spell disaster for the Court; moreover, it risks compromising the regional identity of the local human rights system, necessary in order to address the challenges that are peculiar to the local context. Further yet, having to apply the contents of the Charter in line with international human rights law could be good in terms of the universality of human rights, but it could create difficulty with the “African Court’s enterprise of redeeming the poor”.⁹⁷ Once again, there is the hoary problem of State compliance with the Court’s sentences: although the States have pledged in the protocol to guarantee application, past trends of reticence to punish States in the AU Assembly and the aforementioned neglect of the Commission’s recommendations led some to pessimism. It has been suggested that the best course of action would be for the Court to focus its efforts on influencing domestic courts.⁹⁸

4.3. INTERNATIONAL LEVEL

The international sources of the right to food have already been discussed at length over the course of the present thesis, and will only briefly be recalled herein. The problem with international sources is the fragmentary nature of the ratification. Nevertheless, aside from the non-binding UDHR, the right to food is contained in a number of binding international instruments.⁹⁹ To date,

⁹⁷ C. Mbazira, ‘Enforcing the economic, social and cultural rights in the African Charter on Human and Peoples’ Rights: Twenty years of redundancy, progression and significant strides’, *AHRLJ*, vol. 6, no. 2, 2006, chapter 6.2.

⁹⁸ *Idem*.

⁹⁹ ICESCR (Art. 11), CEDAW (Art. 12.2), CRC (Arts. 24.2(c) and 27.3), CRPD (Arts. 25(f) and 28.1), as well as being recognised in the Preamble to the 2012 Food Assistance Convention.

169 States have ratified the ICESCR (1966), which recognises the right to adequate food in the context of the right to an adequate standard of living and, separately, the fundamental right to be free from hunger. 189 States have ratified the CEDAW (1974), which does not directly recognise the right to food, but it does recognise a right to special protection for adequate nutrition for pregnant and lactating women in Article 12, and establishes women's right to equal access to economic opportunities, agricultural credit and "equal treatment in land and agrarian reform", in Article 14. A total of 196 States are parties to the CRC (1989), which in Article 24 recognises the child's right to the highest attainable standard of health (including the State's commitment to provide adequate food and water) and in Article 27 commits the States to providing the parents with assistance in order to fully implement the child's right to an adequate standard of living (including nutrition). Similarly, the CRPD (2006), ratified by 177 States, recognises the right to an adequate standard of living, including adequate food, to persons with disabilities in Article 28.

These human rights conventions all have their monitoring bodies: the Committee on the Elimination of Discrimination against Women for the CEDAW, the Committee on the Rights of the Child for the CRC, the Committee on the Rights of Persons with Disabilities for the CRPD and, of course, the CESCR for the ICESCR. All of these committees regularly issue General Comments to clarify the contents of the pertinent instruments, and receive and analyse the States parties' reports, issuing recommendations as appropriate.¹⁰⁰ They all encourage the inclusion of their content in national law, and the revision of the latter where it may be in contrast with the achievement of the preposed objectives.¹⁰¹ With the exception, until most recent times, of the ICESCR and the CRC (which acquired one in 2011), all these conventions have optional complaints mechanisms.

Recently, with the entry into force of OP-ICESCR in 2013, the CESCR can now act as a judicial body enabled to receive individual complaints at the international level. As explored in the previous chapter, however, ratification of such protocol remains low. Thus far, no cases concerning the right to food have been brought before the CESCR in its quasi-judicial function; it is therefore early to evaluate the effectiveness of its judgements in generating compliance on behalf of the States. Some insight on the Protocol's procedural aspects, significance and potential exercise of functions has however been offered by an eminent group of scholars from the International Network for Economic, Social and Cultural Rights (ESCR-Net). Moving beyond legal commentary,

¹⁰⁰ ICESCR: Arts. 16-22; CEDAW: Arts. 18, 20-22; CRC: Arts. 44, 45; CRPD: Arts. 35, 36.

¹⁰¹ ICESCR: Art. 2.1; CEDAW: Arts. 2 (a, f), 15.1, 15.4; CRC: Arts. 7, 19, 32.2, 33; CRPD: Art. 4.

they draw on the existing practice of justiciability of human rights in general, and ESC rights in particular, to suggest how the Committee should move to best achieve balance between the reticence of States, the need to establish a coherent jurisprudence and that to remedy violations and thus build credibility.

A. STRIKING A DELICATE BALANCE

The authors argue¹⁰² that its significance is best appreciated with regard to its ability to attract more States into membership, and to reinforce the notion of ESC rights as justiciable in other systems (e.g. the regional ones explored above). What's more, to truly solidify in practice the principles of the Vienna Declaration, and to give a comprehensive and coherent jurisprudential articulation to the obligations under Article 2.1 of the Covenant, the principle of progressive realisation, the minimum core obligations and the content of the tripartite framework of obligations. This will largely depend on the stance that the CESCR will take during these first years of practice under the Optional Protocol: should it decide to accept too many cases which entail its intrusion on the States' sovereignty to decide on budget allocation (which remained the most contentious point during negotiation), sceptical States may be deterred. It must avoid, for example, adopting the 'judicial paradigm' that is typical of the IACtHR, the remedies offered by which are extremely detailed and must be followed to the letter. The Committee seems to be aware of this, as the first case it accepted, *I.D.G. v. Spain*, concerning forced evictions, was resolved with a recommendation for ensuring better availability of documents to the plaintiffs (and people in similar conditions). While cautious and relatively unburdening, such recommendation has nevertheless potential to significantly benefit the victims of forced evictions in the wake of the economic crisis. On the other hand, handpicking the cases in order to reassure the reticent States might potentially compromise the Protocol's potential to induce transformative change in the juridical doctrine. A delicate balance must be struck, and other factors in the success of the Committee will likely be the quality of the cases brought before it (thus, the quality of advocacy offered by the civil society in raising the claims), as well as that of its recommendations.

¹⁰² See: M. Langford, B. Porter, R. Brown and J. Rossi (eds.), 'Introduction', in *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: A Commentary*, Pretoria University Press, 2016, para. 4, pp. 11-15.

B. THE CRITERION OF REASONABLENESS (ARTICLE 8.4)

While the OP does include a number of elements of novelty, its most important part is arguably Article 8.4, tasking the Committee with assessing the “reasonableness” of the positive actions taken by the State in complying with its obligations. As seen thus far, the objections around the justiciability of ESC rights revolve around the possibility for a judicial (or quasi-judicial) entity to assess compliance with the loosely formulated Article 2.1 of the ICESCR: to take steps, to the maximum of available resources, to progressively realise the rights by all means available, especially legislative ones. One thing is to require a commitment to action, another thing is to make that an obligation. As previously explored, the South African Supreme Court’s judgement of the *Grootboom* case is an example, as progressive as it is rare, of a court carrying out such review activity. Porter commented this pivotal article in the dedicated section of the study.¹⁰³ After a long struggle to affirm the possibility to adjudicate and evaluate the positive efforts of States in complying with their obligations, the Optional Protocol now envisages that same function for the CESC. The fact that failure to act, as well as failure to do enough, has been made justiciable is the resulting achievement of years of negotiation, made difficult by the predominant conception of ‘referee-like’ adjudication of human rights: merely stating whether a right has been infringed upon by State action, which is typical of CP rights, but ill-suited to ESC rights. In fact, most of the violations of this latter category, which affect especially the most vulnerable, depend on the State’s failure to take action, including misguided budget allocation and missed incorporation of the rights in the national legal system. Opposition during negotiation was progressively forced to regress its trenches, from obstructing the draft of the OP itself, to limiting it to an à la carte approach enabling each State to select which articles of the Covenant to be claimable, to opposing the possibility to judge State effort under Art. 2.1. Among the main opponents, Porter found through the analysis of the reports, were Australia, Canada, China, Poland, the UK and the USA. The fact that their proposals, like that of substituting the requisite of ‘reasonableness’ with that of ‘not being unreasonable’, were overcome during negotiation sheds light onto the determination to take this step that the OP symbolises. Likewise, the proposal of including a ‘margin of discretion/appreciation’, entailing a complete deference to the States’ competence to elaborate and implement policy, was discarded. During the build-up to the approval of the Protocol, the CESC clarified that resource constraints are an important element to take into

¹⁰³ See: B. Porter, ‘Reasonableness and Article 8(4)’, in M. Langford, B. Porter, R. Brown and J. Rossi (eds.), *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: A Commentary*, Pretoria University Law Press, 2016, pp. 173-202.

account, but do not justify inaction. The obligation remains immediate, and even when resources are demonstrably insufficient, the State has to do all that is in its power to ensure the widest possible enjoyment of ESC rights under the given circumstances, especially through low-cost programmes benefiting the most vulnerable and marginalised. Among the criteria under which to assess reasonableness are the discernible intent of the action, the respect of non-discrimination and precedence to the most vulnerable, timeliness, whether a State has taken, among the options available, the one least restricting ESC rights and whether the State's reasons for possibly deciding *not* to allocate resources may be deemed reasonable. The concept of 'reasonableness' itself was on the rise during those years, having recently been incorporated in the CRPD, the first human rights instrument to declare that failure to take 'reasonable' action to satisfy its obligations constituted a violation of the Convention. In line with *Grootboom*, the way in which it was articulated in the OP-ICESCR was so as to recognise the existence of multiple viable adequate policies, among which the State could choose; the Committee's role was to be understood as complementing social and economic policy choices with the human rights-based assessment of the context, based on the perspective of the claimants. The CESCER would therefore avoid micromanaging policy choices but rather review the reasonableness of existing action, and in case of failure recommend for reparations to be taken, giving margin of discretion to the State as to how. The States remain sovereign to elaborate policies, stressing the involvement of stakeholders and focus on the most vulnerable, as well as a comprehensive perspective accounting for the interconnection of all rights, and the prohibition of deliberately retrogressive and/or discriminatory measures. As the Supreme Court of South Africa based its judgement of the *Grootboom* case on the principle of human dignity as the *raison d'être* of the new constitutional order, so will the CESCER refer to the objectives of ICESCR and OP-ICESCR: realising Covenant rights for the plaintiffs and ensuring their realisation in the future.

C. ENSURING THE ENFORCEMENT OF THE PROTOCOL

A number of interesting observations were likewise forwarded by Cali¹⁰⁴ concerning the follow-up to the Committee's Views (Article 9) and the opt-in inquiry procedure (Article 12) under the OP; in other words, their practical enforcement. Under Article 31 of the Vienna Convention on the Law of Treaties, whereby treaty provisions must be interpreted with a holistic approach aimed at realising the purpose of the treaty, the follow-up clauses must be interpreted so as to ensure effec-

¹⁰⁴ See: B. Cali, 'Enforcement', in M. Langford, B. Porter, R. Brown and J. Rossi (eds.), *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: A Commentary*, Pretoria University Law Press, 2016, pp. 359-380.

tive enforcement, with remedies appropriate for ESC rights, and in line with the enforcement practices of the rest of the UN Treaty System. The principle to be adopted is thus that of ‘effectiveness’, which is a deep-seated one in human rights treaties; this must substantiate in a ‘pro-active’ interpretation of the two articles. By that, the authors do not mean to endorse the aforementioned ‘judicial paradigm’ of the IACtHR, whereby adjudicatory bodies must prescribe remedies in as much detail as possible, in order to avoid the States watering down the judicial provisions in the implementation. Rather, because the law must be not only normative but also problem-solving, the key is not only to pressure unwilling States, but also to offer implementation assistance to States that lack the resources to comply. The practice of follow-up is in itself a step forward that all human rights treaty bodies are taking beyond the notion whereby, due to them not being courts, States parties are entirely sovereign as concerns implementation; it is therefore a shared and emerging treaty body practice. The nature of the remedy is also deserving of some reflection: for ESC rights, remedies can take a wide array of forms, depending on the nature of the claim; the Committee might have to decide for a twin-track approach, providing immediate relief to the victim(s) through short-term action and guaranteeing non-repetition through long-term strategies. The remedy could also require a dialogic action, whereby the State and other stakeholders engage in discussion in order to arrive to the best solution for all parties involved, under the supervision of the CESCR. It is essential that the Committee maintains flexibility and decides on a case-by-case basis, involving States in the choice of remedy but firmly limiting such choice to acceptable ones. Finally, another observation of great significance that has been made is on the role of Article 14, which sets duties of assistance upon intergovernmental organisations, like the UNDP or the World Bank. Firstly, through the provision of technical advice. Secondly, as per Art. 14.2, by acting directly to assist the States in achieving progress; this would be understood as entailing a duty for these institutions to withdraw support from the likes of investment projects harming the ESC rights of the plaintiffs; however, the duties of these entities must be understood as complementary to the duties of States.

D. THE JURISPRUDENCE UNDER THE OPTIONAL PROTOCOL

While no cases were thus far brought before the CESCR under the OP concerning the right to food, a comparative glance at the three cases adjudicated thus far can highlight a number of elements showing how the practice of the Committee is in line with the theorisation of the scholars explored thus far, as well as other relevant elements characterising it. A first commonality that is im-

mediately evident is the form of the recommendations. In the aforementioned *I.D.G. v. Spain*,¹⁰⁵ as well as in *Ben Djazia et al v. Spain*¹⁰⁶ and *Trujillo Calero v. Ecuador*,¹⁰⁷ the Committee has adopted a twin-track approach. On the one hand, focusing on the claimants, it prescribed the State to remedy the violation of their rights, offer compensation for the damage suffered and reimbursing the processual expenses of the Communication. On the other, focusing on guarantees of non-repetition, it prescribed legislative and/or administrative measures of a wider breadth, aiming to repair the structural deficiencies that it recognised to be at the origin of the violation.¹⁰⁸ In all three cases, it requested the States to provide reports on the implementation of such measures for follow-up.¹⁰⁹ Another element that the Views have in common is the stress on “context”. While in all cases the CESCR found national law to be lacking to some extent, giving rise to situations of violation of Covenant rights, what it really highlighted was the fact that domestic courts, in applying it, had paid

¹⁰⁵ *I.D.G. v. Spain E/C.12/55/D/2/2014 (Committee on Economic, Social and Cultural Rights, 2015)*. The plaintiff was unable to pay her mortgage, and the lending bank had a Court begin a mortgage enforcement procedure against her and, subsequently, auction her apartment. Several attempts to notify the claimant of the procedure failed, leaving her unable to arrange for her defence. She claimed that the Court’s announcement on the notice board was insufficient in light of her right to legal protection, and that it should have left notification with a neighbour or the building’s caretaker, thus sought the annulment of all procedures to prior to the first notification attempt. The Court rejected the motion. The plaintiff then proceeded to request protection under *amparo* to the Constitutional Court, claiming that the Court’s rejection violated her aforementioned rights. The Constitutional Court rejected the claim for manifest absence of violation of rights covered by *amparo*. The case was then brought before the CESCR for violation of her right to housing under Article 11.1 of the ICESCR.

¹⁰⁶ *Ben Djazia et al v. Spain E/C.12/61/D/5/2015 (Committee on Economic, Social and Cultural Rights, 2017)*. The plaintiffs were evicted by their lessor, after being given appropriate notice of the termination of the contract and refusing to leave nonetheless, by order of the Madrid Court of First Instance No. 37. They lacked access to alternative accommodation, and were unable to access social assistance on national grounds despite repeated applications. The Constitutional Court refused their request for *amparo*, as the right to housing is not included among those susceptible of such remedy. Even appealing to the ECtHR proved unsuccessful, as it rejected the application. In 2015, one year after the Constitutional Court’s refusal, the claimants issued a communication to the CESCR for violation of their right under Article 11.1 of the ICESCR (with reference to the CRC, for the protection of their two minor children) by the Court’s eviction order.

¹⁰⁷ *Trujillo Calero v. Ecuador E/C.12/63/D/10/2015 (Committee on Economic, Social and Cultural Rights, 2018)*. The claimant was an old woman with health problems and without official employment, who was denied access to pension. She had made multiple voluntary monthly contribution to the Ecuadorian Social Security Institute, missing eight consecutive payments which were then paid retroactively. While the law stated that missing six consecutive contributions would terminate her affiliation, she was repeatedly verbally assured by the officers of the Institute of her eligibility, causing her to leave her job, and apply for pension in 2001. However, the Institute rejected her application in 2002, voiding not only her eight months of missed contributions, but also of the following 65 until she obtained official employment in 1995. The decision was upheld by the Institution’s National Appeals Board in 2003, but communication was only delivered to the claimant in 2007. After a series of court appeals (Quito District Administrative Court No. 1, 2007; National Court of Justice, 2014; Constitutional Court, 2014), the claimant brought her case to the CESCR in 2015, claiming violation of her right to social security under Article 9 of the Covenant, due to violation of her right to information. Though not invoking it, she further referred to Article 2.2 of the Covenant (gender discrimination), claiming her condition to be exemplar of a generation of women relegated to unpaid domestic work who had to rely on security schemes for their livelihoods, although such schemes were meant for professionals. The absence of non-contributory schemes — and contextually, her being denied her pension — was therefore held to be discriminatory.

¹⁰⁸ See: *I.D.G. v. Spain*, paras. 16-17; *Ben Djazia et al v. Spain*, paras. 20-21; *Trujillo Calero v. Ecuador*, paras. 22-23.

¹⁰⁹ See: *I.D.G. v. Spain*, para. 18; *Ben Djazia et al v. Spain*, para. 22; *Trujillo Calero v. Ecuador*, para. 24.

insufficient attention to respecting the principle of “proportionality”: making sure not to create a situation whereby the rights of the affected person were violated.¹¹⁰ To this regard, it took the occasion to stress that, while the interpretation and application of domestic law on the case at hand is a duty of the national courts, the Committee’s duty was merely to assess whether the evidence provided revealed a violation of Covenant rights. The focus on context was in turn a primary element in the evaluation of State action based on the criterion of “reasonableness” under Article 8.4 of the OP. The reasoning of the Committee was indeed primarily based on the assessment of such principle in all three cases, finding the States’ action to be “unreasonable”, thus non-compliant with the obligations under Article 2.1 of the ICESCR.¹¹¹ Here, too, the Committee took the chance to repeatedly stress that States have an array of viable policy options, among which they are sovereign to choose using as guiding principle the guarantee of the enjoyment of Covenant rights; the task of the Committee is indeed limited to reviewing such action, and recommending alternative courses if it is found to be lacking in some respect.

5. OTHER RELEVANT CASES OF JUSTICIABILITY

This final paragraph will contain other relevant cases of justiciability that offer some insight on some aspect that in the above recollection was not touched upon, following the schematisation

¹¹⁰ See: *I.D.G. v. Spain*, para. 6 (the principle was only mentioned by CESCR-Net, which intervened as a Third Party); *Ben Djazia et al v. Spain*, para. 13.4 (proportionality in eviction, in respect of human dignity), para. 17.6 (proportionality in budgetary adjustments, especially in consideration of the “context” of widespread economic crisis); *Trujillo Calero v. Ecuador*, paras. 12.1 and 17.1 (proportionality of the penalty in eligibility for social assistance schemes).

¹¹¹ In *I.D.G.*, it deemed the State’s action unreasonable based on the Court’s lack of attempt to contact the claimant through alternative avenues: while not expressly required (though envisaged) by the law, the fact that under the existing conditions the suit would result in the claimant losing her only place of residence made the action taken unreasonable. In *Ben Djazia*, the State’s action was considered unreasonable under two aspects. Firstly, the decision to sell part of the public housing available to private investment companies in the middle of an economic crisis (the State party had justified that the plaintiff was not provided with public housing by invoking the limitedness of resources, i.e. the lack of available housing). Secondly, the Court had failed to consider the context, i.e. the concrete consequences of the eviction for the affected persons, rendering them homeless and infringing on their right to housing. Finally, in *Trujillo Calero*, the eligibility requirements for social security were deemed unreasonable in view of the lack of non-contributory schemes that could be accessed by individuals facing obstacles in accessing regular employment, such as women and the elderly.

proposed by Courtis.¹¹² A final section will give an in-depth look to the most far-reaching case of justiciability to date: the PUCL litigation by the Supreme Court of India.

A. JUSTICIABILITY OF THE RIGHT TO FOOD BASED ON A “RIGHT TO A VITAL MINIMUM”

This kind of litigation was already touched upon above, with reference to the court case of the Swiss Federal Court. Therein, the right to a vital minimum was stemmed from the concept of human dignity. In Germany, the same approach was followed, deducing the right from both the concept of human dignity and from the principles of a welfare State.¹¹³ Finally, in Bangladesh, a Supreme Court’s decision based on the right to life commanded the State to halt the distribution of food that was ascertained to be unhealthy, arguing the right to life to include the duty to preserve the health and longevity of the individual.¹¹⁴

B. JUSTICIABILITY OF THE RIGHT TO FOOD BASED ON THE MEANS TO PROCURE ONESELF FOOD

This has been done in a number of ways. First avenue has been to protect and judge the adequacy of income, as the means to economic access to food. Courtis reports that this is a common practice in the German Federal Constitutional Court, which has in multiple occasions issued decisions limiting the State’s power of taxation to protect a minimum income necessary for subsistence, including food. The author also points out that the Argentine Supreme Court has a florid jurisprudence to such effect. In a series of cases, the Court defended the minimum level of purchasing power represented by income for individuals as concerns pensions,¹¹⁵ wages,¹¹⁶ and even compensations offered by lower courts.¹¹⁷ Another way in which the means to procure food have been protected

¹¹² Courtis, C., ‘The Right to Food as a Justiciable Right - Challenges and Strategies’, A. von Bogdandy and R. Wolfrum, (eds.), *Max Planck Yearbook of United Nations Law*, Volume 11, 2007, pp. 326-337.

¹¹³ See: *German Federal Constitutional Court (BVerfG) and German Federal Administrative Court (BVerwG)*, *BVerfGE* 1, 97 (104 et seq.); *BVerwGE* 1, 159 (161); *BVerwGE* 25, 23 (27); *BVerfGE* 40, 121 (134); *BVerfGE* 45, 187 (229), as appraised in C. Courtis, ‘The Right to Food as a Justiciable Right - Challenges and Strategies’, A. von Bogdandy and R. Wolfrum, (eds.), *Max Planck Yearbook of United Nations Law*, Volume 11, 2007, p. 330.

¹¹⁴ *Dr. Mohiuddin Farooque v. Bangladesh and Others (No. 1) (Supreme Court of Bangladesh (High Court Division) 1996)*, *idem*.

¹¹⁵ *Rolón Zappa, Victor Francisco (Argentine Supreme Court, September 1986)*, *ibidem*, p.332

¹¹⁶ *Martinelli, Oscar Héctor Cirilo y otros c. Coplinco Compañía Platense de la Industria y Comercio S.A. (Argentine Supreme Court, April 1991)*, *Vega, Humberto Atilio c. Consorcio de Propietarios del Edificio Loma Verde y otros/ accidente-ley 9688 (Argentine Supreme Court, December 1993)* and *Sánchez, María del Carmen c. ANSeS (Argentine Supreme Court, May 2005)*, *idem*.

¹¹⁷ *Jáuregui, Manuela Yolanda c. Unión Obreros y Empleados del Plástico (Argentine Supreme Court, August 1984)*, *ibidem*, p. 331.

has been through the protection of land tenure; aside from the already-explored cases of the IAC-tHR, there is also a case from the Supreme Court of Canada, which struck down legal accusations against an indigenous population for fishing without permit in protection of their aboriginal right to fish for food.¹¹⁸ Among these methods of litigation can also be included those based on the right to housing, in the context of preventing or remedying forced eviction in rural households that depend on their land for sustenance. On the current of the *SERAC* case, there is increasing jurisprudence to such regard; the Colombian Constitutional Court, in particular, is developing a strong jurisprudence in protection of the rural poor displaced by armed conflict, often referring to the right to food in its appraisal of the violations.¹¹⁹

5.1. THE PUCL LITIGATION: A PARADIGMATIC EXAMPLE

The many court cases cited thus far certainly offer a wealth of insight as to the contribution that a court might provide in realising the right to food by enforcing the States' compliance with their obligations to respect, protect and fulfil the right. However, no approach has been quite as far-reaching as that adopted by the Indian Constitutional Court in the case of *People's Union for Civil Liberties v. Union of India*, in 2001.¹²⁰ An analysis of such case is ideal for the conclusion of this paragraph, as it presents both one of the most virtuous applications of the principles laid out thus far to characterise a rights-based approach, and the limitations that it finds in the practice.

A. THE CASE

After a famine brought to the death by starvation of numerous people in the State of Rajasthan, despite the availability within the State of food storage for distribution in cases of emergency according to the Famine Code of 1962, due to a malfunctioning of the local distribution system, the group of advocacy "People's Union for Civil Liberties" (PUCL) petitioned the court to remedy the situation. Tabling a public interest litigation, they requested to enforce the application of both existing

¹¹⁸ *R v. Cote*, (1996) 138 DLR (4th) 385 (Supreme Court of Canada, October 1996), ibidem, p. 333.

¹¹⁹ C. Courtis, 'The Right to Food as a Justiciable Right - Challenges and Strategies', A. von Bogdandy and R. Wolfrum, (eds.), *Max Planck Yearbook of United Nations Law*, Volume 11, 2007, p. 336.

¹²⁰ *People's Union For Civil Liberties v. Union of India and others Civil Original Jurisdiction, Writ Petition (Civil) No.196 of 2001* (Supreme Court of India, November 2001), available at <https://www.escri-net.org/caselaw/2006/peoples-union-civil-liberties-v-union-india-ors-supreme-court-india-civil-original>

food schemes, and the Famine Code. Because there was no specific constitutional provision on the right to food, they grounded the case on the right to life (enshrined in Article 21 of the Constitution), understood as including a right to food (like the aforementioned case of the IACtHR). Lamenting the inadequacy of measures adopted by the States for drought relief and the provision of subsidised food, they brought the case against the Food Corporation of India (FCI, an SOE under direct management of the Federal Government) and six States, including Rajasthan. Indeed, the failure was at both levels: the FCI had failed to release surplus stocks to States for emergency relief, and the governments had failed to purchase the quotas of grain allotted to them for emergency purposes due to an alleged lack of financial resources. While its early interim orders were limited to the issuance of grains to families below the poverty line, a landmark order in November radically changed the approach. The order redefined the existing government schemes making them constitutionally protected entitlements corresponding to the right to food, even outlining how they were to be implemented. In what bordered on legislative activity, the Court expanded upon existing plans (both on food and employment), and forbade their modification without its consent, adducing as justification the need to make them appropriate to the satisfaction of the right to food. Over the following two years, the Court issued a number of interim measures that found scarce implementation from both the national and the State governments. Seen how food was available, but not being distributed, the Court firmly rejected the State's argument on the non-availability of resources, and in its judgement of 2003 found the failure to implement the schemes to constitute a violation of the right to life. Consequently, the judgement issued remedy in an extremely far-reaching way: not only did it order the enforcement of the Code, but also expanded the existing schemes by a large amount, and even ordered for the creation of new ones, ordering to increase their financial backing. Since 2001, hearings have been periodically held by the Supreme Court to monitor the implementation of its judgements.

B. SIGNIFICANCE

If one should make up a hypothetical textbook example of how to correctly litigate and adjudicate the right to food, while illustrating the pitfalls that a judicial approach still meets in the practice, it would closely resemble the *PUCL* case. Faced with the hoary arguments against the justiciability of ESC rights, especially scarcity of resources, the Supreme Court elected to cut the Gordian knot and give absolute precedence to the existing violation of the right to life, and to the neces-

sity to protect individuals from starvation.¹²¹ In this way, it conferred to what was treated as a mere aspirational objective the validity of a legal entitlement. On the one hand, the case is a paradigmatic example of a right to food approach brought around through bottom-up agitation. The large-scale Right to Food Campaign led by PUCL did a terrific job in keeping the victims posted on the developments and maintaining a steady flow of communication between the civil society and the PUCL Commission created *ad hoc* by the Court and task with analysing policy data from both the federal and the State level. The Court paid great heed to its reports and often cited them *verbatim*. Indeed, the construction of such triangular relationship created a united front which could highlight any shortcoming in policy implementation and communicate it promptly to the Commission, which attempted to find a settlement with the government before turning the issue to the Court. On the other hand, the case is illustrative of the role of courts and justiciability in contrasting the effects of the international neoliberal paradigm on the right to food. Indeed, the Court's provisions were in many cases contrary to the liberalising aims of the World Bank- and IMF-sponsored New Economic Policy (NEP), as well as of the WTO regulations to which India is subject, deemed greatly harmful for internal food security in a country where 60% of the population rely on agriculture for their livelihoods, the majority being rural smallholder farmers. The Court stepped in and corrected many measures that had been taken under the structural adjustments; in particular, ordering the government to increase spending in order to ensure rural employment was essentially an agricultural subsidy, in contrast with the AoA. By acting as a "floor to Indian Capitalism", PUCL humanised it by refusing to allow people to starve as a short-term cost of adjustment of liberalisation for mere utilitarian calculation (the prize of a higher aggregate wealth later on). It did so by using human rights as rigid and unsurmountable barriers that must not be crossed by the action of the State, no matter the objective or competing interest. The usage of a right to food approach to economic policy is recognisable in the bottom-up movement caused and funnelled by PUCL, making the grievances of the victims heard, instead of merely receiving it in a top-down fashion, once again proving that it is through the existence of courts able to apply human rights that democracy is preserved and development can take a human visage.¹²²

It has been however argued that many elements render the case a rather *sui generis* one.¹²³ A first peculiarity is already apparent when considering the language that has been used: not an inter-

¹²¹ As appraised in L. Birchfield, J. Corsi, 'Between Starvation and Globalisation: Realising the Right to Food in India', in *Michigan Journal of International Law*, Vol. 31, Issue 4, 2010, pp. 692-764.

¹²² *Ibidem*.

¹²³ *Ibidem*.

national human right, but a ‘national’ fundamental right, based on the constitutional law’s commitment to ensure a baseline of nutrition for its constituents by activating the national institutions. Many other examples of such language reflect the Indian confidence in the country’s sovereignty vis a vis international bodies in realising human rights.¹²⁴ In general, the Indian Supreme Court has a unique role as the only Court in the world that has the final say over the constitutional text, due to its function as the “guardian of the social revolution”. It was partly this role, and the likewise unique constitutional doctrine it gave rise to, together with the progressive reform of public interest litigation that made it much more accessible, that created the *prima facie* conditions for the birth of the *PUCL* case.¹²⁵ Another trait of uniqueness has been argued to be the peculiar relationship between the Indian civil society and judiciary, owing to the strong advocacy and interconnection offered by the Campaign and *PUCL*.

C. OBSTACLES

Still, the case found some serious obstacles in implementation. It has already been mentioned how the States’ compliance with the decisions of the Court was often lacking. In 2013, sparked by the decade-long case, the Government promoted the landmark National Food Security Act (NFSA), which converted into legal entitlements the provisions of the food schemes issued by the 2003 sentence and progressively implemented over the years. The drafting of the NFSA was a delicate matter, especially in light of the need to ensure compliance with the provisions in the context of a PDS that had already shown problems in its efficiency due to corruption.¹²⁶ Just like *PUCL* was essential in building public agitation at the beginning of the whole litigation, so too did it prove pivotal when the central government lagged in the implementation, postponing it by a whole year. Once again, the Union petitioned the Court, deeming the postponement to be illegal. Today, the Act is in force, and still undergoing progressive implementation in the various States of India. However, the progress in the implementation seems to be slow, with many States keeping it on the “back-burner”, attracting the harsh criticism of the Supreme Court, which defined compliance as “pathetic, to say the least”.¹²⁷ It seems therefore like, even in the Indian case, which sees the presence of extremely favourable conditions for a wide-ranging and far-reaching expansionist court approach, the

¹²⁴ Ibidem, p. 703.

¹²⁵ Ibidem, pp. 705-718.

¹²⁶ Ibidem, p. 757.

¹²⁷ ‘National Security Act not implemented as it should be: Supreme Court’, *The Economic Times*, 21 July 2017. Available at <https://economictimes.indiatimes.com/news/politics-and-nation/national-food-security-act-not-implemented-as-it-should-be-supreme-court/articleshow/59702676.cms> (accessed 15 January 2018).

ultimate obstacle posed by the reticence of the States to comply with judicial decisions remains steadfast, and scarcely possible to overcome.

6. CONCLUDING REMARKS

The justiciability of the right to food has come a great distance, overcoming an immense number of obstacles and gradually expanding its reach and capabilities to contribute to the fight against world hunger. On the most general level, the thesis has explored the advancement engendered by the expansionist doctrine of the CESCR in shedding behind the hoary distinction between different ‘generations’ of rights. Another relevant evolution to such regard is certainly the doctrine of judicial review of the reasonableness of State action in fulfilling its obligations, which finds its epitomic representation in the *Grootboom* case. More specific advances related to the right to food are gradually evolving the doctrine of justiciability, endowing it with instruments appropriate for facing the rising challenges of the new millennium, which have become ever more apparent since the worldwide crisis of food prices in 2008. Among such ongoing evolutions, we can herein recall especially the progressive expansion of the notion of right-holders to include a collective dimension, which shows great promise in the current Draft UN Declaration on the Rights of Peasants. The reach of courts has likewise expanded with the progressive affirmation of extraterritorial obligations of States, which is especially relevant as concerns their obligation to ‘protect’ the right to food in light of the potential impact on the possibility of appealing to State authorities for keeping in check TNCs, currently subject to checks and balances of a merely voluntarist nature.

The thesis has also accounted for the fact that, as the normative content of the right to adequate food (including the deriving obligations) expanded thusly through the interpretive activity of the CESCR and the jurisprudence of courts at all levels, an increasing number of States has over time incorporated the right to food in national law. While this does not automatically and immediately translate into a faithful application of the right by domestic courts, it is certainly an expansion that signals an increased degree of acceptance compared to the past. This also reflects in the diplomatic success that was the approval of the Optional Protocol to the ICESCR, which came in 2008, on the backdrop of one of the deadliest food crises to date. The thesis expressed the opinion that the progressive strengthening of justiciability and the role of courts in upholding the entitlements of individuals by not only limiting the freedom of movement of States, but also compelling them to undertake positive action to progressively realise the right to adequate food for everyone, without dis-

crimination, to the maximum of their available resources, is highly desirable. Seen the meaning and benefit of a human rights-based approach to development, especially in the context of the proliferation of comprehensive development plans in the context of the 2030 Agenda for Sustainable Development, the role of courts as authoritative guardians of the right to adequate food can help provide the fight against world hunger the urgency that the moral stringency of the entitlements deriving from this human right command. Especially so, in light of the voluntarist nature of the SDGs, and the regrettable exclusion of the right to adequate food from ‘SDG2: Zero Hunger’.

Indeed, such exclusion reflects the fact that the hard-line opposition of many developed States, USA in primis, to the recognition of any entitlement-entailing conception of food as anything else than a tradable commodity still stands strong. For all this progress, challenges to justiciability abound. The final paragraph of Chapter Three in the present thesis has accounted for the fact that a justiciable approach meets many limitations. For instance, the difficulties of courts in generating compliance with their sentences, related to the lingering objections around their legitimacy in adjudicating ESC rights. This is problematic especially as concerns the quasi-judicial function covered by the CESC under the OP-ICESCR, which has thus far kept a low profile so as not to discourage further accessions. There is also the problem of the cases where the reach of justiciability may be legitimately constrained due to conflicting interests and rights, or where it may be hindered by lack of information of the right-holders over their entitlements, or further still by their lack of physical or economic access to judicial remedy. Last, but not by any stretch least, is the fundamental problem that courts can only mandate States to take proactive measures for the realisation of the right to food insofar as the States have the necessary resources at their disposal. This immediately evokes the hoary problem mentioned multiple times throughout the thesis, especially in the section dedicated to the Special Rapporteurs on the Right to Food in the Introduction and in Chapter Three: the fact that the permanence (and indeed, rise) of world hunger is essentially a political problem. In Chapter Three, the thesis has striven to elaborate a theory of human rights, and established that the stringency of the moral obligations deriving therefrom makes it so that reforming the current international regulatory system, many elements of which systematically hinder the efforts of countries in the global South to realise the right to food, is highly desirable. This is even more so, in light of what Pogge said on the relatively infinitesimal cost that developed States would have to sustain in order to stop most foreseeable and avoidable deaths by manmade causes. Nevertheless, the inescapable reality is that making a discussion on the reform of the international system revolve around human rights obligations calls into question their fundamental neutrality, and may in turn increase the current disillusionment that surrounds and hampers them. Moreover, there seems to be simply no way for the avenue of justiciability to engender such reform, considering how the only reason-

ble way to table such discussion appealing to international obligations of States stemming from the right to adequate food would appear to be through the mechanism for inter-State litigation under the Optional Protocol to the Covenant. Aside from the fact that only five States have opted into such procedure (and a low amount of States have become parties to the Protocol in general), the aforementioned need for a low-profile jurisprudence of the Committee suggests that the chances for such an evolution are null in the foreseeable future.

It is therefore evident that courts cannot shoulder all the weight of the fight against world hunger – nor is it desirable that they would do so. Especially insofar as the problem of States, in the current international system, may very well pertain to an objective lack of resources, top-down avenues of redistribution of resources such as the one performed by ODA seem to offer a valuable, if palliative, contribution. The role of human rights indicators with regard to ODA will be explored in the following Chapter.

CHAPTER FIVE: INDICATORS AND THE RIGHT TO FOOD

As the avenue of justiciability meets the challenges above and gradually spreads to an increasing number of States, the fight against world hunger recently availed itself of another tool: the use of the statistical instruments known as human rights indicators (HRIs).

Development indicators, such as the ones provided by the World Bank and the United Nations Development Programme (UNDP) were already widely used in development monitoring. The FAO also utilises its own set of indicators to assess the likes of the incidence of undernutrition, or of stunting. However, an exploration of their possible application in the field of human rights eventually deemed them inadequate, and led to the creation of appropriate, dedicated indicators in a process that spanned roughly two decades. HRIs were designed with a well-defined objective in mind: to harness the power of indicators, deriving from their descriptive simplicity, apparent numerical impartiality and capacity to direct decision-making and inform governance, to the monitoring and realisation of human rights. As such, they were progressively refined, in both their content and methodologies, in order to adequately capture the States' compliance with their human rights obligations and to bring to light otherwise unreported and concealed phenomena of discrimination and marginalisation.

The push towards the adoption of indicators assumes particular importance in the context of the 2030 Agenda for Sustainable Development, as its SDGs have a stronger focus on human rights than the MDGs of the previous framework did. In the context of achieving sustainable development plans that accurately capture, in their design and implementation, the need for inclusiveness, participation and holistic interconnection that are at the basis of human rights, the capacity of HRIs to contribute to such design and to subsequently monitor the implementation of the programmes accordingly conferred new impetus upon their diffusion. Despite the outstanding omission of the human right to adequate food from the framework, leaving 'SDG2: Zero Hunger' orphan of its guiding human right, human rights indicators have the potential to still lead development on the proper and necessary track, towards a dimension centred on human dignity.

In exploring these issues, the chapter will proceed as follows. The first paragraph will address the theoretical aspects of indicators; firstly, it will assess their strengths and weaknesses, and the potential pitfalls of their utilisation; secondly, it will explore the nature of human rights indicators, by reviewing the process that led to their birth, the OHCHR's Framework that constitutes the

current state of the art and the HRIs proposed by the Framework for monitoring the right to adequate food. The following analysis will keep the Framework as a reference point for HRIs; while the thesis does acknowledge the existence of other proposed set of human rights indicators such as the IBSA set, the OHCHR was closely involved of the development of the latter, which therefore carries significant similarities to the Framework. The second paragraph will turn to analyse the utilisation of HRIs in practice. A first sub-paragraph will address their diffusion, and the fact that it is still at the very onset; a second one will instead address the evolution of the role of the CESCR towards an additional dimension of auditing, providing practical examples of how the Committee's Concluding Observations have reflected such role, and finally turn to an analysis of the role of non-State stakeholders in HRI-based monitoring, bringing the example of FIAN International. The third paragraph will on the other hand turn to an estimation of the potential impact that the incorporation of HRIs in national monitoring can have on the developing States' inflows of ODA, building a model to such end. Finally, the chapter will conclude with a summary of the salient elements of the analysis, contextualising the role of HRIs in the 2030 Agenda for Sustainable Development and advancing a reflection on the consequences and implications of the voluntarist nature of the SDG system, with reference to the chronic shortfalls in levels of ODA.

1. INDICATORS IN THEORY: DEFINITIONS, PITFALLS AND STATE OF THE ART

One general and uncontroversial definition of “indicator” is to say that they are statistical measurements. Data is gathered in an attempt to measure a certain issue or phenomenon, from a variety of sources: statistically representative household surveys, official statistical offices, administrative acts and so on. After the gathering, such data is systematised and interpreted, and rendered easily understandable under the form of an indicator. However, despite the alluring apparent neutrality and objectivity of numbers, the ‘scientific nature’ of indicators conceals a degree of evaluation: the choice of what to measure (and what to omit), the choice of how to measure it (based on which data) and the choice of how to interpret the data are all decisions that have an impact on the message that the indicator will convey. These messages are not devoid of consequences, considering how they impact global policy-making. However, the aforementioned merits of indicators invite their usage in other fields, such as human rights; an ongoing exploration began in the 1990s on how to construct a specific set of universal human rights indicators. The present paragraph will explore

these two topics: the nature of indicators beyond their alleged neutrality, and the efforts to harness the potential of such scientific measurements in the field of human rights.

1.1. THE TRUTH BENEATH THE NUMBERS:

A PRELIMINARY REFLECTION ON INDICATORS

Indicators have been produced in a number of fields: the World Bank and the UNDP have designed a plethora of development indicators, and the FAO's State of Food Insecurity in the World (SOFI) reports also rely on indicators for measurements like number of undernourished people, number of food-insecure people, incidence of stunting and so on. These instruments have since the mid-1990s transitioned into other fields, like CSR and, notably, human rights. The allure of statistical instruments for monitoring and accountability is easily understood: a number is impartial, and objective — at least apparently. Indeed, Merry defined indicators as “statistical measures that are used to consolidate complex data into a simple number or rank that is meaningful to policy makers and the public.”¹ Exploring their benefits and pitfalls, Merry provided a useful distinction between two functions of indicators. Firstly, a ‘knowledge’ effect, whereby they produce a reality knowable through numbers, extrapolating a phenomenon from the context in which it is born and presenting it in the form of easily comprehensible, apparently objective data. They produce knowledge, *in primis*, by labelling: deciding what to measure gives an identity to the object of measurement that it might not have had otherwise. This is a veritably creative activity, which already calls into question the alleged neutrality of indicators and statistics. Secondly, a ‘governance’ effect, whereby governments and decision makers can rely on indicators to understand where and how to act to best reach their objectives.² On a global scale, it will be immediately apparent how impactful for determining the movements of global resources the World Bank's “Ease of Doing Business Index” can be, especially considering how this authoritative index naturally ranks at the first places countries like New

¹ S. E. Merry, 'Measuring the World: Indicators, Human Rights and Global Governance', *Current Anthropology*, Vol. 52, Supplement 3, April 2011, p. S86.

² Ibidem, pp. S84-S85.

Zealand, Singapore or the US, while reserving the bottom places for the likes of Somalia and Eritrea.³ So too are indicators influential in determining the recipients of ODA.

Porter also observed how indicators are particularly attractive as instruments for decision-making in a world in which the elimination of corruption is very high on the global public agenda. The suggestion is that if decisions are taken based on impartial and universally accessible data, everything happens under the eyes of citizens, and the arbitrary power of elites is therefore reduced. The manifest problem is, once again, that indicators are inherently not impartial: there are theories and interests underlying the decision of which data to gather, which to omit (and why), and what methodology to use for systematising and interpreting it.⁴ A different underlying theory will determine different criteria and methodologies for data selection and systematisation, and these may in turn lead to even radically different data-sets; finally, and most importantly, these determine different decisions being made. It is therefore possible that indicators may be used with the final decision already well in mind, in order to justify it by an ad-hoc collection of data. This is the inherent risk of the alluring simplification and objectivity of indicators: that they do conceal visions and objectives, whether we may find them ‘good’ or ‘evil’ — although by an appropriate use of metadata sheets, these processes may be carried out with a higher degree of transparency. On the backdrop of the increasing reliance on indicators in global governance and development, Porter also cautions against the fact that indicators are primarily produced in the Global North — intuitively so, as these are the countries with the highest technical expertise and amount of expert knowledge. This concentrates into their hands a considerable amount of (already abundant) decision-making power.⁵

Concerns are likewise raised in the “governmentality” discourse about the use of indicators in global governance, over the possibility that the spread of regulatory regimes based on expert knowledge will close the “healthy gap” that exists in democratic societies between international human rights law and the national democratic process of priority-setting.⁶ Indeed, Rosga and Satterthwaie assessed a tendency to do so by two means. Firstly, by “Goodhart’s law”: if an indicator encourages a policy due to its formulation, the monitored party will tend to undertake such policy over alternatives that the beneficiaries would have actually preferred in order to obtain a better

³ As appraised in [ibidem], p. S87. The States mentioned by the article were updated in light of the World Bank, *Ease of Doing Business Index*, 2018.

⁴ See Porter, Theodore M. 1995. *Trust in numbers: the pursuit of objectivity in science and public life*. Princeton, NJ: Princeton University Press, cited in [see footnote 1 above].

⁵ Ibidem.

⁶ As reported in A.J. Rosga, M. L. Satterthwaie, ‘The Trust in Indicators: Measuring Human Rights’, *Berkeley Journal of International Law*, Vol. 27, Issue 2, 2009, pp. 304-311.

score on the indicator: the “measure” becomes the “target”.⁷ Secondly, by the tendency to select outcome indicators based on their ease of measurement, which can easily lead governments to increase effort in the field measured by the indicator and forego likewise important dimensions that were left out due to difficulty of measurement.⁸ To foreshadow the content of the next paragraph, the answer to such problem lies in ensuring a participatory approach, which is a fundamental requisite of human rights indicators.

It is therefore important to take as a starting point the notion that, despite their numerical nature, indicators are inherently far from absolute objectivity: a too strict reliance on them as ‘scientific’ bases for decision-making risks compromising democratic participation, and forgetting that in creating knowledge and setting priorities they inevitably entail an underlying objective or vision. That is not to say that their contribution is null: exactly because of their power to raise issues on the agenda, when their underlying objective or vision is made to be human rights, their potential for introducing human rights within a reluctant development discourse will be immediately evident. Moreover, as statistical instruments, they greatly contributed, over the last two decades, to the monitoring of States’ compliance with their human rights obligations by human rights bodies. In light of their ‘knowledge’ and ‘governance’ effects, indicators do not only function as a descriptive instrument, but also as a prescriptive one: by highlighting an issue, they place it on the agenda; by measuring it with different methodologies, they can overestimate or underestimate the pace of progress. By being used together with benchmarks, which establish quantified objectives, and deadlines by which to achieve them, they go well beyond a merely descriptive function, and instead become an instrument for accountability and compliance.

1.2. INDICATORS FOR HUMAN RIGHTS

Indicators have been used historically in a wide range of fields; tackling all of them is beyond the scope of this thesis, which will focus on human rights indicators (HRIs), and the way in which they relate to development indicators.

⁷ Ibidem, pp. 265-288.

⁸ Ibidem, pp. 304-311.

A. THE NEED FOR HUMAN RIGHTS INDICATORS

The attempt to develop human rights indicators for ESC rights began in the 1990s, with the realisation that development indicators were not appropriate for monitoring human rights. In 1990, the then-UN Special Rapporteur on the Realisation of ESC Rights, Danilo Türk, highlighted the benefits of ‘quantitative’ development indicators in covering such function, and proposed their utilisation in the monitoring activities of human rights bodies.⁹ However, the UN seminar on “appropriate indicators to measure achievement in the progressive realisation of ESC rights”, held in 1993 in order to attempt to create a set of indicators for each ESC right, borrowing from the existing development ones, declared the purpose unachievable. This was due to a lack of consensus over whether the indicators should be used to judge the process (the States’ effort) or the results (the actual realisation of the rights), as well as whether merely quantitative measurements, such as those offered by development indicators, were suitable for monitoring human rights.¹⁰ Indeed, writing in response to the UNDP’s request for clarification on the state of the art of HRIs for its incoming “Human Development Report 2000”, Green assessed that, as of 2001, the distinction between HRIs and development indicators had yet to take shape, and bodies overseeing the compliance with ESC rights, like the CESCR, widely relied on the existing development indicators.¹¹

The reason why development indicators are unsuitable for monitoring human rights will be evident in the following segment, describing the state of the art of human rights indicators. The quest for appropriate HRIs found new impetus at the turn of the millennium, with the High Commissioner on Human Rights, Mary Robinson, saying in 2000 that “[w]hen the target is human suffering, and the cause human rights, mere rhetoric is not adequate to the task at hand.”¹² There was a discernible need for instruments that were specifically envisaged for monitoring human rights in a scientific fashion, thus harnessing the power of statistical instruments for the aims of a human

⁹ Special Rapporteur Danilo Türk, *The New International Economic Order and the Promotion of Human Rights, Realization of Economic, Social and Cultural Rights, Progress Report Prepared by Mr. Danilo Türk, Special Rapporteur*, U.N. Doc. E/CN.4/Sub.2/1990/19 (July 6, 1990), cited in A.J. Rosga, M. L. Satterthwaite, ‘The Trust in Indicators: Measuring Human Rights’, *Berkeley Journal of International Law*, Vol. 27, Issue 2, 2009, p. 270.

¹⁰ World Conference on Human Rights, Apr. 19-30, 1993, *Report on the Seminar on Appropriate Indicators to Measure Achievements in the Progressive Realization of Economic, Social and Cultural Rights*, 3, U.N. Doc. A/CONF.157/PC/73 (Apr. 20, 1993), cited in [ibidem], p. 273.

¹¹ M. Green, ‘What We Talk about When We Talk about Indicators: Current Approaches to Human Rights Measurement’, *Human Rights Quarterly*, Vol. 23, Issue 4, 2001, pp. 1089-1091.

¹² United Nations High Commissioner for Human Rights (1997–2002) in her address at the Conference of the International Association for Official Statistics on “Statistics, Development and Human Rights”, Montreaux, Switzerland, September 2000. Cited in OHCHR, *Human Rights Indicators - A Guide to Measurement and Implementation*, HR/PUB/12/5, 2012, p. 1.

rights-based approach. Indeed, the rationale is clear when considering the hoary problem of the authority of human rights monitoring bodies like the CESCR: by relying on expert opinion and statistical instruments that have an aura of impartiality, the human component of the judgement would be concealed, thus avoiding many allegations of politicisation.

HRIs could also make the monitoring activity of the relevant bodies more precise, providing a clear picture of the commitment, effort and outcome of the States in realising human rights in compliance with their treaty obligations. Indeed, HRIs can capture many aspects of reality that a mere development assessment could not. In the words of the former High Commissioner for Human Rights, Navi Pillay: “Devising a policy or statistical indicator is not a norm or value-neutral exercise. Yet, integrating human rights in these processes [by ensuring participation in development, partaking in its benefits, empowerment, accountability, and non-discrimination] is not only a normative imperative, it also makes good practical sense”. And indeed, a development that does not integrate human rights by placing the individual at its core inevitably increases inequality, which can lead to social unrest and, as in the case of the Arab Spring, revolt.¹³

Still one more benefit of using indicators for human rights monitoring, aside from issues of authority and preciseness of the monitoring, relates to the ‘knowledge’ and ‘governance effects of above. Monitoring (and especially counting) an issue brings that issue to attention. The fact itself that something is being monitored and measured bestows importance upon it and brings it under the eye of otherwise unaware observers. The benefits for issues like discrimination and inequalities, which oftentimes go ignored and underreported due to the isolation of the marginalised groups, will be immediately evident, especially when indicators are coupled with benchmarks and timeframes. Indeed, their development has been repeatedly encouraged by the CESCR as a means to accelerate the progress; however, the choice of acceptable and adequate indicators is naturally a precondition for the creation of benchmarks.¹⁴

But the most fundamental benefit of developing HRIs is only properly understood in relation to the other existing avenues of advancing human rights, like that of justiciability. Such benefit is to bring the complex and often inaccessible legal language of human rights treaties “into a message that is more tangible and operational”, thus allowing human rights advocates to communicate more

¹³ Navi Pillay, ‘Foreword’, in OHCHR, *Human Rights Indicators - A Guide to Measurement and Implementation*, HR/PUB/12/5, 2012, p. III.

¹⁴ As noted in OHCHR, *Human Rights Indicators - A Guide to Measurement and Implementation*, HR/PUB/12/5, 2012 [*Human Rights Indicators Guide*, 2012 hereafter], p.20.

effectively with stakeholders that may not be savvy to such language, thus finally providing a powerful instrument for bridging the gap between theory and practice. Naturally, the adherence of the indicators to the normative content of the rights they monitor is to be strictly checked.¹⁵

For these reasons, since the 1990s, the General Comments and the Concluding Observations of the CESCR have gradually evolved from stating the desirability of national monitoring systems providing clear data for human rights, to envisaging their development as a matter of Covenant obligation, not subject to resource constraints — and, therefore, to progressive realisation.¹⁶

B. THE STATE OF THE ART OF HUMAN RIGHTS INDICATORS: THE OHCHR'S FRAMEWORK

The OHCHR's "Report on Indicators for Monitoring Compliance with International Human Rights Instruments" of 2006 provided a decisive push towards the development of a comprehensive framework that is still in use to date. This paragraph will look at such report, together with the elements that were progressively added by its follow-up in 2008¹⁷ and by the final crystallisation of this progress in the 2012 "Human Rights Indicators - A Guide to Measurement and Implementation". These documents were produced on request of the human rights treaty bodies with the cooperation of multiple experts in the fields of statistics and human rights and subsequently refined through participatory consultations with human rights stakeholders. The definition of 'human rights indicator' offered in the latter document is: "a human rights indicator is specific information on the state or condition of an object, event, activity or outcome that can be related to human rights norms and standards; that addresses and reflects human rights principles and concerns; and that can be used to assess and monitor the promotion and implementation of human rights."¹⁸ The meaning of such fairly broad and encompassing definition will be clarified over the course of this paragraph.

A first fundamental element is that the essentially numerical and quantitative nature of development indicators is ill-suited for human rights-monitoring, which inevitably requires the use of qualitative indicators as well.¹⁹ An indicator is 'quantitative' insofar as it measures something that

¹⁵ Ibidem, pp.1 and 43.

¹⁶ As appraised in A.J. Rosga, M. L. Satterthwaite, 'The Trust in Indicators: Measuring Human Rights', *Berkeley Journal of International Law*, Vol. 27, Issue 2, 2009, pp. 278-279.

¹⁷ OHCHR, *Report on Indicators for Promoting and Monitoring the Implementation of Human Rights*, HRI/MC/2008/3 (June 6, 2008) [*Report on Indicators*, 2008 hereafter].

¹⁸ Ibidem, p. 16.

¹⁹ OHCHR, *Report on Indicators for Monitoring Compliance with International Human Rights Instruments*, HRI/MC/2006/7 (May 11, 2006), paras. 2 and 8-11. [*Report on Indicators*, 2006 hereafter] In defining the two catego-

is countable and numeric in nature, making it possible to express it as a percentage; for instance, the number of households targeted by a certain policy, or the number of infant deaths in a given country. A ‘qualitative’ indicator, on the other hand, is a narrative-based description that may take the form of questionnaires, or other measures that do not lend themselves to such presentation. Both quantitative and qualitative indicators can in turn be objective or subjective: the latter are based on personal opinions and perceptions of individuals, whereas the former are based on facts, thus lending more easily to diachronic and synchronic comparison within a country.²⁰ As such, an example of quantitative-objective indicator (pure hard facts) would be “prevalence of underweight children under five years of age”, whereas a quantitative-subjective one (opinions in quantitative form) could be “percentage of individuals who feel safe walking alone at night”. On the other hand, a qualitative-objective indicator (hard facts presenting a narrative) could be “the status of ratification of human rights treaties for a given country”, whereas a qualitative-subjective one (opinions presenting a narrative) could be “is the right to food fully guaranteed in law and practice in a given country?”. The OHCHR specified that all four kinds of indicators are necessary, but explicitly stated that objective indicators should be prioritised over subjective ones, and quantitative over qualitative; therefore, the indicators proposed by the Office tend to mostly be quantitative-objective and qualitative-objective, and sometimes also quantitative-subjective.²¹

Moreover, the conceptual framework for HRIs presents a number of salient features that are specific to human rights indicators.²² Firstly, their being anchored to the normative content of the right, instead of being tangent to it and thus merely ‘adaptable’ to a monitoring function. Indeed, each HRI is divided into attributes (averagely four of them) based specifically on the normative content of the right they measure, as derived from the text of the relevant legal instruments in which it is enshrined and expanded upon by the activity of the monitoring bodies.²³ For instance, in the list proposed by the OHCHR, the right to life had among its attributes the right to adequate food — which was in turn treated as a right in its own standing, giving rise to a subset of attributes. This also reveals the second feature of HRIs: their reflection of the ‘Vienna principles’ of universality, inalienability, interconnectedness, interrelatedness and interdependence. Thirdly, they integrate the overarching requirements of human rights such as non-discrimination, equality, and participation.

ries, the Report seems to utilise the distinction provided by Green in 2001 (see point 7 above, pp. 1076-1084) between “statistic” and “thematic” indicators.

²⁰ *Human Rights Indicators Guide*, 2012, p. 17.

²¹ *Ibidem*, p. 18.

²² *Report on Indicators*, 2006, para. 13. See also *Human Rights Indicators Guide*, 2012, p. 33.

²³ *Human Rights Indicators Guide*, 2012,

Fourthly, and most importantly, their capacity to capture the effort of the States in complying with their obligations under human rights instruments, both as concerns monitoring and protection. Finally, HRIs are also able to capture the obligations of States to ‘respect, protect and fulfil’ human rights, by focusing on the entitlements of individuals, the action and inaction of governments and the existence of efficient remedial mechanisms.

Based on the individuated attributes, indicators of three kinds were built for each right, following a tripartite framework.²⁴ Firstly, ‘structural’ indicators are meant to capture the States’ commitment to human rights treaties (their rate of ratification) and their actuation of them in terms of providing individuals with remedial mechanisms against violations. These are to be articulated on a State-by-State basis, monitoring for instance the rate of ratification of the relevant international instruments, the degree of legal incorporation of the rights contained therein, the institutional mechanisms in place to secure and promote the entitlements, and the existence of policies and strategies to realise the right. Policy statements are particularly important, as they capture a government’s commitment and plan of action, and possibly even come with benchmarks to keep governments accountable for failure to reach the preposed objectives. Secondly, ‘process’ indicators, able to capture the efforts of States by measuring the extent, reach and financing of their policies, in line with their available resources, aimed at the realisation of the rights. This is self-evidently immediately connected with assessing compliance with the obligation to progressively realise the ESC rights. This category is the most dynamic of the three, and continuously assesses the likes of budget allocations and “coverage of targeted population groups under public programmes”. Whereas the structural indicators take stock of the presence of institutions and programmes tasked with remedying human rights violations, process indicators measure the ratio and extent of redress provided (against the number of complaints received) by such institutions and the tangible results of programmes, thus establishing a (preferably empirical) causal nexus between structural and outcome indicators. Thirdly, ‘outcome’ indicators, aimed at assessing the concrete enjoyment of individuals of their rights in the national context. These most closely overlap with the existing socio-economic indicators. Where process indicators can be seen as ‘flow’ measures, outcome indicators would best be described as ‘stock’ measures; the former evolves faster, is more dynamic, and captures the effort; the latter evolves more slowly, cumulating on the results of the policies described in the former. The expansion that this HRI framework provides *vis a vis* the development indicators is herein evi-

²⁴ *Report on Indicators*, 2006, paras. 17-19. See also *Report on Indicators*, 2008, paras. 18-22. See, finally, *Human Rights Indicators Guide*, 2012, pp. 33-38.

dent: by using this tripartite structure, they can capture both the dimension of the State's compliance with obligations, and the actual degree of realisation of the rights. In summary, structural, process and outcome indicators respectively capture commitment, effort and realisation; the first two capture 'intent', the latter captures 'outcome'. This tripartite structure was deemed more appropriate than the 'respect-protect-fulfil' one that this thesis has highlighted to be so central in the discourse of justiciability. It is likewise adequate in capturing the States' compliance with these three dimensions of their human rights obligations, with the added benefit of being more easily communicated, as it avoids the difficult legal language of human rights, though maintaining their essential character and requirements.

The set of proposed indicators is built based on a matrix that sees attributes on the horizontal axis, and the three types of indicators on the vertical one; like so, the OHCHR developed a framework of illustrative HRIs. While this practice, *per se*, would yield a large number of indicators, a selection is carried out among such indicators based on their compliance with certain specific methodological criteria, which are indispensable requisites for a human rights indicator. Firstly, they have to be designed in a holistic fashion — in line with the interconnected, interrelated and interdependent nature of human rights, whereby a process indicator for one right can be an outcome indicator for another. This has an evident potential to contribute to overcoming the artificial gap between civil and political rights, on the one hand, and economic, social and cultural rights, on the other, explored in the second chapter of the present thesis. Secondly, they have to be designed with the democratic participation of all the population, to the widest possible extent, so as to provide an accurate picture of the way ahead based on the perceived needs of the rights-holders and especially give a voice to marginalised groups to such regard. Thirdly (and connectedly), it is essential for human rights indicators to be “disaggregated based on the prohibited grounds of discrimination”: ethnicity, race, religion, language, sex and all the other bases for discrimination prohibited by human rights law must act as stratifiers along which to disaggregate data. This can be applied at both the household and the aggregate levels, in order to highlight the existence of discriminatory practices and pursue equality.²⁵ To this regard, the OHCHR acknowledges the inevitable obstacle posed by the heavy cost of disaggregating data, in a context in which national governments, especially in developing States, often struggle even for the basic collection of aggregate data.²⁶ There is moreover a caveat in attempting to identify discriminated minorities: the act itself of identifying them may rein-

²⁵ *Report on Indicators*, 2006, paras. 21-22.

²⁶ *Ibidem*, para. 27. See also *Human Rights Indicators Guide*, pp. 21-22.

force their marginalisation;²⁷ to this regard, it is useful to allow for the self-identification of the individual.²⁸ Disaggregation to highlight discrimination and inequality is however extremely important, especially considering that the discriminated and marginalised are overrepresented in the bottom quintile of global wealth and income distribution. Fourthly, the methodologies of data-gathering and data-usage are worthy of attention in other respects as well, especially in light of the risks that are connected with abusing such data. Especially insofar as the data identifies marginalised minorities through proper disaggregation, there is the danger that they will instead become useful resources for those seeking to oppress them. This can be addressed through safeguards like strict laws on data confidentiality and decentralisation of data.²⁹ In general, following the RIGHTS framework, data must be relevant and reliable, gathered with methods independent from the monitored party, of global interest but amenable to contextual adaptation, anchored to human rights, gathered with transparent methodologies (which may for instance be made explicit through metadata sheets), simple and specific.³⁰ Data sources should vary according to availability and the nature of the object of monitoring. As concerns “event-based data” (data related to events like harassment, mistreatment or killing), the sources should be NGOs, testimonies of the event, official reports of the States and information provided by the international monitoring mechanisms like the Special Procedures of the UN. As concerns on the other hand “socio-economic and administrative statistics” (data sets of a quantitative nature reporting on various aspects of living), they are available by most governmental statistical offices, which have the merit of gathering data according to a unified methodology. These datasets are compiled and distributed by the national government, often in cooperation with national statistical offices and international organisations. They have multiple functions that confer them paramount importance as sources for HRIs: they constitute the basis for the State’s decision-making as concerns its programmes and policies for human rights; they are object of much work from many UN Agencies (notably, the FAO), which use them to keep track of the countries’ human rights performance; similarly, NGOs frequently use them for monitoring human rights. Socioeconomic statistics are compiled based on administrative data, statistical surveys and

²⁷ Randeria for example reports how the Indian caste system became separated by a much more rigid set of divisions when the British colonisers started disaggregating the census by castes, for legibility, thus lending legitimacy and credibility to what was previously a rather loose and informal hierarchy. See Randeria, Shalini, ‘Entangled histories of uneven modernities: civil society, caste solidarities and legal pluralism in post-colonial India’, in John Keane (ed.), *Civil society: Berlin perspectives*, New York, Berghahn, 2006 pp. 213– 242. Cited in S. E. Merry, ‘Measuring the World/ Indicators, Human Rights and Global Governance’, *Current Anthropology*, Vol. 52, Supplement 3, April 2011, pp. S83–S95.

²⁸ *Human Rights Indicators Guide*, 2012, p. 48.

²⁹ *Ibidem*, p. 46.

³⁰ *Ibidem*, p. 50.

censuses (in rising order of cost, and descending order of frequency). All three methods are at risk of biases and distortions if they are carried out (willingly or unwittingly) in a non-inclusive fashion. For instance, statistical household surveys, one of the main sources of data for the MDGs, are particularly at risk of biases due to their restricted sample scope, which needs to be accurately selected so as to make it as representative as possible.³¹

The distinguishing traits of HRIs therefore pertain to both substantive and, consequently, methodological issues. A fundamental consequence of all the aforementioned observations is that HRIs cannot have a universal scope. Indeed, much to the mandators' disappointment, the experts assembled by the Office eventually dropped any ambition of universality and comparability, and presented instead a list of "illustrative" indicators — i.e. templates, which should be adapted to the national context. The 2006 Report acknowledged that the differences between States command different development priorities; from this, albeit using a rather open wording ('may' and 'may not's), it inferred that especially ESC rights can scarcely rely on a universal framework, and need instead to be adapted to the national context.³² Indeed, the adaptation to the national context was deemed essential both for the indicators to accurately reflect the national challenges and efforts, and for them to be acceptable by the countries that will be monitored against them.³³ Such adaptation substantiates in detecting which elements are most relevant, of the ones proposed by the Framework, to accurately capture the reality of both the State's challenges in the realisation of, for example, the right to adequate food, and the State's effort, depending on which avenue of implementation it has chosen to realise the rights. For instance, a State that has not to incorporate the human right to food in national legislation will be more appropriately measured through structural indicators like "Date of entry into force and coverage of the right to adequate food in the constitution or other forms of superior law", or "Date of entry into force and coverage of domestic laws for implementing the right to adequate food". Then, appropriate process indicators would assess the efficiency of the judiciary in terms of rate of cases received, remedies issued, times of process and capacity to generate compliance. On the other hand, a State that has chosen to rely on alternative methods, such as possibly an expansion of the national ombudsman's office, would be more appropriately measured by assessing these characteristics with reference to the ombudsman, instead. Likewise, a process indicator like "Proportion of targeted population covered under public nutrition supplement pro-

³¹ Ibidem, pp. 51-68.

³² Ibidem, para. 28.

³³ *Human Rights Indicators Guide*, 2012, p. 44.

grammes” would be appropriate for monitoring the behaviour of a State that has adopted such measures to address the problem of national hunger, as well as for a State that has failed to do anything relevant. However, a State may also be pursuing the same means, rather than through top-down distribution, through the empowerment of local producers and the strengthening of their access to markets, deeming such policy to be more fit to the national needs. Adopting an indicator that is not properly tailored on the national context can also have perverse consequences in terms of misleading national policymaking towards compliance with the indicator, rather than towards the policies that are actually necessary and adequate to the local needs (see Goodhart’s Law above). Consequently, HRIs must be anchored to goals and concerns of human rights, adapted to country context and based on acceptable methodologies.³⁴ Dropping the ambition of universality of HRIs also came with an expression of scepticism not only on the feasibility, but also on the desirability of cross-country comparison for ranking purposes: the interrelated and multifaceted nature of human rights largely dodges such intentions. Comparison is most useful in a diachronic fashion, to assess the progress of one country over time, and can only be made in a cross-country fashion with reference to limited aspects of human rights.³⁵ Nevertheless, the OHCHR still seemingly left a window open on the possibility of “a core set of human rights indicators that may be universally relevant, hinting that the rationale should be the minimum core content of the rights³⁶ — which will be reminiscent of the doctrine of the CESCER studied in the previous chapters.

As concerns the practice of establishing rights-based monitoring (RBM) at the country level, the follow-up Report of 2008 gave some directions on how properly to draft a national set of HRIs following the guidelines offered therein implement the Report’s provisions. It specified that the fundamental difference with the monitoring already carried out by other mechanisms (e.g. administrative ones) at national level revolves around a shift from aggregate measures and national averages to more specific measurements, centred on target groups or, ideally, individuals.³⁷ The guidelines touched sequentially a number of specific issues. Firstly, it recommended identifying the regular monitoring stakeholders, from national human rights institutions (NHRIs) to administrative agencies relevant for the object of monitoring, to pertinent NGOs and generally claim-holders, and bringing together their expertise, ideally identifying an independent one to act as a leader — though

³⁴ *Report on Indicators*, 2006, para. 4.

³⁵ See *Human Rights Indicators Guide*, 2012, p. 30.

³⁶ *Ibidem*, p. 44.

³⁷ *Report on Indicators*, 2008, para. 35.

not specifying more than that as concerns whom.³⁸ Secondly, it recommended the identification of the targets of monitoring: vulnerable groups, also discerning which attribute of the right best describes their vulnerability. Regarding the right to adequate food, the Report exemplifies that “children could be more likely to suffer from dietary inadequacy or malnutrition, whereas a working or migrant population may be more vulnerable to food safety and consumer protection issues.”³⁹ This activity, to be carried out country by country, helps both with the identification of targets and disaggregation. Thirdly, with reference to the difference between ‘accessibility’ and ‘availability’, it encouraged paying special attention to develop indicators that would be able to detect appropriately existing discrimination that could compromise the access of discriminated segments of the population to the object of their rights.⁴⁰ Finally, because human rights monitoring depends on continuous monitoring and effort, data should be available on a periodic and regular basis, and also made public and disseminated through an appropriate framework.⁴¹

C. HUMAN RIGHTS INDICATORS FOR THE RIGHT TO ADEQUATE FOOD

In line with the considerations examined above, the OHCHR proposed the following illustrative indicators for monitoring the human right to adequate food, in its 2012 document. The right was firstly distinguished among the attributes of ‘nutrition’, ‘food safety and consumer protection’, ‘food availability’ and ‘food accessibility’.⁴² A look at some of the indicators is telling of how the principles above were applied in the design of the framework. Firstly, it can be noticed how the interconnection between the rights and the holistic approach it requires is reflected in the fact that some of the same indicators are present in multiple rights. An example of relevance to the right to adequate food is the outcome indicator monitoring infant mortality rates, which is also present as an outcome indicators for the right to life (for which “health and nutrition” is one of the attributes) and the right to the highest attainable standard of health. As a socioeconomic outcome indicator that was already present in the MDGs, the metadata sheets suggested as data sources for compiling it national statistical offices and data series from UNICEF and the WHO, which rely on administrative (available every year) and survey data (available every 3-5 years).⁴³ The metadata sheet for the indicator “proportion of the targeted population covered under public nutrition supplement pro-

³⁸ Ibidem, para. 37.

³⁹ Ibidem, para. 38.

⁴⁰ Ibidem, para. 39.

⁴¹ Ibidem, para. 40.

⁴² See *Human Rights Indicators Guide*, 2012, p. 89.

⁴³ *Human Rights Indicators Guide*, 2012, p. 163.

grammes” also calls upon the close connection of nutrition with health and education.⁴⁴ Likewise, the table of indicators for the right to adequate food reveals a connection with poverty (“proportion of targeted population that was brought above the poverty line in the reporting period”), work (“unemployment rate and average wage rate of targeted segments of labour force”) and gender (“work participation rates by sex” and “estimated access of women and girls to adequate food within household”) in the context of assessing food accessibility. Indeed, these are all elements that may compromise the individuals’ economic access (and possibly even physical access, especially as concerns the in-household distribution of resources) to adequate food. Reference to gender is also found in the process indicator for food availability “proportion of female-headed households or targeted population with legal title to agricultural land”; this indicator is vital, as women are pivotal food producers in many countries, in which the food production modalities still largely rely on small scale rural farming. Secondly, all tables of indicators reinforce the disaggregation that is already necessarily carried out by the ones just mentioned by specifying that all the indicators are to be properly “disaggregated by prohibited grounds of discrimination, as applicable”. Thirdly, a noteworthy element is the absence of subjective indicators, built on the perceived reality of the rights holders, for the right to adequate food (with the possible exception of “estimated access of women and girls to adequate food within households”). Fourthly, the indicators on ‘availability’ also pay mind to the effects of food aid, assessing both the proportion of available food obtained through such means and the effects of import-dependency. Finally, the indicators effectively capture the causal nexus between commitment, effort and results. With reference for instance to the attribute of accessibility, structural indicators capture the degree of ratification of relevant international treaties and legal incorporation of the right, and more specifically the existence of policies for agricultural production and “drought, crop failure and disaster management”. Then, the effort is likewise measured in terms of the ratio of complaints received (*vis a vis* complaints submitted) by national remedial mechanisms, and the rate of compliance of the State with their decisions, on the one hand, and the concrete impact of policies in reaching targeted families, on the other. And lastly, the results of the States are taken stock of in the outcome indicators, assessing the death rates for malnutrition and the “proportion of the population below minimum levels of dietary energy consumption”, paying attention to the victims of inequalities by measuring “average household expenditure on food for the bottom three deciles of population or targeted population”. Notably, no reference is made in the proposed set of indicators to the dimension of cultural acceptability of food,

⁴⁴ Ibidem, pp. 155-156.

which could easily have been inserted as a process or outcome indicator under the attribute of ‘availability’. Such omission notwithstanding, the proposed framework seems to largely reflect the characteristics of the PANTHER framework for a human rights-based approach to food and nutrition: participation is both treated as an overarching principle, and has its own set of indicators (though the latter does not include indicators on public participation in drafting the indicators). Accountability is also reflected in the careful planning of indicators in accurately reflecting the action of the State and the functioning of remedial systems. Non-discrimination is guaranteed through data disaggregation, according to the methodological premises explored above. Transparency is once again assessed as a methodological premise, calling for participation in policy-making, and lies in the transparency of the process of individuating the needs to be addressed by programmes and of designing the indicators accordingly. Human dignity is reflected by the very nature of HRIs, the design of which is firmly anchored to the normative content of human rights. Empowerment is ensured through extensive monitoring of discriminated minorities. Rule of law is finally reflected in the structural indicators detecting the degree of incorporation of the right in legal provisions, and the ratification of the relevant international instruments. Human rights-based monitoring of food-related issues differs therefore from the mainly quantitative statistical measurements adopted for example by the FAO in its SOFI reports (which not by chance do not refer to the human right to food in their text). The difference lies, fundamentally, in understanding the individual not just as a parameter or an object of monitoring, but as the holder of entitlements relating to its essential human dignity. Such entitlements need to be treated in a holistic fashion, and individuals must be involved in the process of elaborating indicators, benchmarks and timeframes, as the design of these instruments has very real consequences on the setting of priorities and boundaries in policy-making that need to be respected if development is to be inclusive and non-discriminatory. Finally, human rights indicators have evident advantages vis a vis the merely quantitative development ones both in terms of providing a more realistic picture of the quality of life of individuals and communities, due to their strict adherence to their point of view, and in terms of being able to appropriately capture the States’ compliance with their obligations through their tripartite structure (structural, process and outcome).

2. HUMAN RIGHTS INDICATORS IN PRACTICE

After laying the theoretical premises of the Framework in the previous paragraph, the thesis will now proceed with an analysis of the practical use of HRIs. A first part will address the still ongoing state of the process of their diffusion among the relevant stakeholders. Then, the paragraph will illustrate the meaning and value added of human rights indicators in the monitoring activity of the CESCR, by providing examples of its ‘auditing’ functions through a review of its recent Concluding Observations, then moving on to an analysis of how indicators can be harnessed by alternative stakeholders, like NGOs, to fill the “monitoring gap” in the right to food.

2.1. THE CURRENT STATE OF PRACTICE: AN ONGOING PROCESS

The practical use of human rights indicators is still very much a process *in fieri*. The OHCHR is carrying out, through its regional and country offices, an extensive work of diffusion of the Framework studied in the theoretical paragraph of this chapter. Especially under the global impetus of the Sustainable Development Goals of the 2030 Agenda, which heavily incorporate human rights and requires extensive monitoring for the achievement of its Goals, the number of States that are adopting HRIs is on the rise. Just recently, the Human Rights Report of 2017 highlights multiple achievements in this respect. In Madagascar, for instance, the OHCHR contributed to the drafting of a National Development Plan for the period 2015-2019, which is now complete with Human Rights Indicators for monitoring.⁴⁵ The Office also assisted the drafting of the National Human Rights Action Plan for Ukraine, in order to properly integrate within it the recommendations of the treaty bodies and to develop a set indicators for progress-monitoring.⁴⁶ Similar progress was also made in Serbia, where the OHCHR’s work contributed to strengthening monitoring and reporting to treaty bodies and the Universal Periodic Review (UPR) of the Human Rights Council of both government and CSOs, through the development of HRIs.⁴⁷ But the largest amount of progress has been made in Latin America and the Caribbean, a region that has a historically good track record of developing

⁴⁵ OHCHR, *UN Human Rights Report 2017*, 2017, pp. 205-206.

⁴⁶ *Ibidem*, p. 274.

⁴⁷ *Ibidem*, p. 285.

human rights-based programmes and policies, especially as concerns the right to adequate food. Indeed, Guatemala was already praised in the 2012 ‘Human Rights Indicators Guide’ as an early adopter of the OHCHR’s Framework for its periodic reports to the CESCR, as concerns the right to food, health and education.⁴⁸ Recently, Paraguay has also made consistent strides in developing its own sets of HRIs for CP, ESC and environmental rights, virtuously creating an ad-hoc set of indicators for persons with disabilities, with the assistance and guidance of the Office. Paraguay was also reported to have increasingly rooted in human rights its policies for poverty-reduction, especially as concerns land, education, non-discrimination and gender-equality.⁴⁹ Finally, Mexico also increased its use of HRIs in policy impact-assessment and in the implementation of the recommendations of human rights bodies; here, too, the OHCHR contributed to the drafting of indicators for the SDG framework that sponsored a human rights-centred development.⁵⁰ Yet, for all this progress, many countries have yet to adopt such instruments. As the next section will illustrate, the Committee still periodically laments the lack of appropriate indicators for monitoring human rights, for developed and developing States alike. As such, the possibility to assess the practical impact of human rights indicators for monitoring the States’ compliance with their obligations is greatly limited at the present time. Future research may provide deeper insight on the matter. The analysis presented herein will therefore be limited to an assessment of the potential of such instruments, based on the data available.

2.2. THE IMPACT OF HUMAN RIGHTS INDICATORS ON MONITORING

Human rights indicators are increasingly utilised in monitoring the States’ compliance with their human rights obligations by the competent bodies (the treaty bodies, the Special Procedures and the Universal Periodic Review of the Human Rights Council), and in many other fields, like measuring development in terms of human rights and elaborating national plans and deciding budget allocation at country level. The former will be addressed in this paragraph, focusing on the monitoring activity performed by the CESCR for the human right to adequate food. The other fields are beyond the scope of this thesis, and will not be analysed herein. The criterion for the choice of hu-

⁴⁸ *Human Rights Indicators Guide*, 2012, p. 105.

⁴⁹ OHCHR, *UN Human Rights Report 2017*, 2017, p. 245.

⁵⁰ *Ibidem*, p. 230.

man rights monitoring over the other uses of indicators is its similarity with the avenue of justiciability in upholding and forwarding the right to adequate food, in line with the objective of this thesis. Indeed, as a Court may review the behaviour of a State while investigating a specific case of alleged violation of the right, so can the CESCR assess under a general scope the activity of the State with regard to the right. The difference is primarily one of perspective: a court may address a single case, verifying the action of the State and its compliance with the guidelines and limitations imposed by the human right, whereas the Committee addresses the general state of the right to food within the State and suggests ways to improve it. It does so based on the State's self-reporting and on the information provided by NGOs, CSOs and relevant specialised agencies of the UN. All these entities increasingly rely on HRIs for their monitoring: UN agencies, NGOs and CSOs do so on the recognition of the validity of the Framework proposed by the OHCHR, while States are generally encouraged by the CESCR to do so.

Rights-based monitoring has indeed provided a new set of instruments for highlighting the critical areas on which States need to take action in order to guarantee the universal realisation of human rights to people under their jurisdiction. Consequently, the same HRIs have a great capability to highlight where the State may not be taking action as appropriate, which creates a very powerful instrument in the hands of monitoring mechanisms like the Committee on Economic, Social and Cultural Rights. The ability of human rights bodies to hold governments accountable is particularly reinforced when indicators are coupled with benchmarks, which establish desired values for the indicator to reach, and possibly even reasonably established timeframes within which to reach the objective. The CESCR has indeed encouraged States to adopt benchmarks and timeframes, as well, for national policies under framework laws to respect.⁵¹ Indeed, benchmarks can be rooted in the normative content of the right, as contained in international treaties, but also on past values of the indicator (so as to ensure non-regression), comparison between different segments of the population (so as to ensure equality and non-discrimination), or on targets set by individual or collective commitments of the States (like the SDGs), possibly even set by participatory processes.⁵²

In General Comment No. 14, the CESCR encouraged a reporting and monitoring process in four steps. Firstly, the selection of indicators; secondly, the setting of appropriate benchmarks;

⁵¹ See e.g., with reference to the right to adequate food, General Comment No. 12 (1999), paras. 29 (benchmarks) and 24 (timeframes). The need for benchmarks to accompany quantitative indicators was however already set in general terms in General Comment No. 1 (1989).

⁵² *Human Rights Indicators Guide*, 2012, pp. 105-106.

thirdly, during the reporting period, the Committee “will engage in a process of scoping with the State party”, i.e. analysing the progress in order to set the indicators and benchmarks for the targets of the following reporting period; finally, the State will use such indicators and benchmarks to monitor its implementation over the next period.⁵³ A cyclical monitoring process is therefore established, where the indicators and benchmarks are constantly updated in light of the successes and shortcomings of the States in meeting them.

Indeed, it has been argued that the activity of reviewing States based on their own self-monitoring inserts a new dimension in the monitoring activities of human rights bodies: that of ‘auditing’. The rationale is to circumvent the pitfalls of human judgement: human rights treaty bodies systematically face great difficulties in generating compliance in their quasi-judicial function with their recommendations, Concluding Observations and General Comments. They have a problem of authority, which harkens to the uncertain attribution of such authority in the human rights system and stems from the fact that, in their monitoring, they exercise a human activity of judgement.⁵⁴ The latter is easily subject of allegations of politicisation, aimed at undermining its legitimacy, and it is also a manifestation of an adversarial relation between the Committee, a guardian of human rights, and the State, found in violation of them, be it for omission, negligence or ill-intended action. Indicators, on the other hand, allow largely circumventing such obstacle. As explored in the previous paragraph, HRIs are selected by each State, with the supervision of the Committee, the function of which therefore fundamentally shifts from merely observing the action of the States in complying with their human rights obligations to also overseeing the States’ self-monitoring. The latter modality goes under the name of ‘auditing’: the auditee develops its own indicators, and the auditor reviews their adequacy in capturing their compliance and then assesses their progress based on such indicators. The passage from monitoring to auditing entails a basic shift of responsibility: from the overseer, which becomes an auditor, to the overseen, which becomes responsible for monitoring its own compliance with the indicator, in what has been defined “government at a distance”.⁵⁵ The activity of ‘judgement’ is no longer done by the body, but by the indicator itself. Like so, political discussion on what the meaning and interpretation of human rights should be is swept under the rug of numerical data, and the debate is diverged instead on which indicators to design, how to design

⁵³ UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)*, 11 August 2000, E/C.12/2000/4, paras. 57-58.

⁵⁴ See A.J. Rosga, M. L. Satterthwaite, ‘The Trust in Indicators: Measuring Human Rights’, *Berkeley Journal of International Law*, Vol. 27, Issue 2, 2009.

⁵⁵ S. E. Merry, ‘Measuring the World: Indicators, Human Rights and Global Governance’, *Current Anthropology*, Vol. 52, Supplement 3, April 2011, p. S90.

them and which data to rely on in the exercise of the monitoring function.⁵⁶ Nonetheless, it is important to notice that the monitoring activity of human rights bodies will never be completely apolitical and devoid of judgement. Despite the overreliance of the Framework on quantitative and objective indicators, human rights retain a “pesky, irreducible core of human judgement.”⁵⁷ It is necessary to account that this assessment of the mutating role of, *inter alia*, the CESCR does not imply a complete transition into a role of auditing: rather, the function accompanies and adds a new dimension, with the implications of above, to their role of monitoring. Moreover, this process is very much still *in fieri*, considering how the adoption of HRIs for monitoring by national governments and other actors like CSOs and NGOs is still quite sparse.

A. “MONITORING OF MONITORING”: THE CESCR’S AUDITING IN PRACTICE

In light of the practical and, one could say, ‘political’ benefits of HRIs, it is unsurprising that the CESCR would strongly encourage the States that have yet to do so to reform their national monitoring systems in conformity with the Framework. For instance, in a most recent Concluding Observation, it has recommended the State of South Africa to “take steps to progressively develop and apply appropriate indicators on the implementation of economic, social and cultural rights in order to facilitate the assessment of progress achieved by the State party in complying with its obligations under the Covenant for various segments of the population”, then directing specifically to the OHCHR’s Framework.⁵⁸ The same exact formula was replicated for recent recommendations for any other country that the Committee deemed to have insufficiently incorporated the methods for data-collection and systematisation suggested by the Framework. In recent Concluding Observations, such formulation can be found for instance addressed to Niger,⁵⁹ Turkmenistan,⁶⁰ Argentina,⁶¹ Mali,⁶² Germany⁶³, Cabo Verde⁶⁴ and others.⁶⁵ Moreover, some more elements of the Com-

⁵⁶ Ibidem, p. S88.

⁵⁷ A.J. Rosga, M. L. Satterthwaite, ‘The Trust in Indicators: Measuring Human Rights’, *Berkeley Journal of International Law*, Vol. 27, Issue 2, 2009, p. 304.

⁵⁸ Committee on Economic, Social and Cultural Rights, *Concluding observations on the initial report of South Africa*, E/C.12/ZAF/CO/1, 29 November 2018, para. 81.

⁵⁹ Committee on Economic, Social and Cultural Rights, *Concluding observations on the initial report of the Niger*, E/C.12/NER/CO/1, 4 June 2018, Para. 64.

⁶⁰ Committee on Economic, Social and Cultural Rights, *Concluding observations on the second periodic report of Turkmenistan*, E/C.12/TKM/CO/2, 31 October 2018, para. 49.

⁶¹ Committee on Economic, Social and Cultural Rights, *Concluding observations on the fourth periodic report of Argentina*, E/C.12/ARG/CO/4, 1 November 2018, para. 66.

⁶² Committee on Economic, Social and Cultural Rights, *Concluding observations on the initial report of Mali*, E/C.12/MLI/CO/1, 6 November 2018, para. 57.

⁶³ Committee on Economic, Social and Cultural Rights, *Concluding observations on the sixth periodic report of Germany*, E/C.12/DEU/CO/6, 27 November 2018, para. 64.

mittee's Concluding Observations are worth noting, as concerns its "monitoring of monitoring". At times, the data was in itself deemed insufficient, and the Committee therefore encouraged the expansion of data-collecting activities.⁶⁶ In general, numerous concluding observations encouraged further disaggregation of data along the prohibited lines of discrimination.⁶⁷ Sometimes, the focus was on the need to favour the inclusion of relevant stakeholders in the participatory data-gathering and decision-making activities.⁶⁸ Recommendations have also often concerned the need to improve the monitoring of working conditions.⁶⁹ The Committee likewise addressed the need to ensure that national human rights-related plans, programmes and policies are equipped with proper monitoring mechanisms.⁷⁰ Relatedly, another recurring leitmotif in the CESCR's recommendations is the creation of appropriate indicators against which to monitor the progress of national programmes for development;⁷¹ this is especially expressed with a view to monitoring SDG achievements, "treating beneficiaries of public programmes as rights-holders who can claim entitlements."⁷² The States taken into account in this analysis of the 'auditing' activity of the Committee come from all regions of the world and have different wealth and development levels. While some themes, such as an overall lack of data, are more commonly present in less-developed States, the invitation to adopt human rights-specific indicators for monitoring the compliance with Covenant obligations is overarching, and so is the demand for disaggregated data. Indeed, a vast majority of the concluding observations submitted over the last six years (a time deemed appropriate to garner a general idea, due to the

⁶⁴ Committee on Economic, Social and Cultural Rights, *Concluding observations on the initial report of Cabo Verde*, E/C.12/CPV/CO/1, 27 November 2018, para. 71.

⁶⁵ See e.g.: Committee on Economic, Social and Cultural Rights, *Concluding observations concerning the initial report of the Central African Republic*, E/C.12/CAF/CO/1, 4 May 2018, para. 45; *Concluding observations on the fourth periodic report of New Zealand*, E/C.12/NZL/CO/4, 1 May 2018, para. 54; *Concluding observations on the sixth periodic report of Spain*, E/C.12/ESP/CO/6, 25 April 2018, para. 53; *Concluding observations on the initial report of Bangladesh*, E/C.12/BGD/CO/1, 18 April 2018, para. 75; *Concluding observations on the combined fifth and sixth periodic reports of Mexico*, E/C.12/MEX/CO/5-6, 17 April 2018, para. 74; *Concluding observations on the sixth periodic report of Colombia*, E/C.12/COL/CO/6, 19 October 2017, para. 72; *Concluding observations on the fourth periodic report of the Republic of Korea*, E/C.12/KOR/CO/4, 19 October 2017 para. 72.

⁶⁶ See e.g. the Observations for the Niger, para. 13; Turkmenistan, paras. 6, 7 and 30.

⁶⁷ See e.g. the Observations for Argentina, paras. 11 and 12 (b); Cabo Verde, paras. 10 and 11); Germany, para. 55(e); the Niger, paras. 13 and 48 (the latter with reference to the right to food); South Africa, para. 11; Turkmenistan, paras. 7, 19 and 30.

⁶⁸ See e.g. the Observations for Argentina, para. 12 (c); Bangladesh, paras 14 and 16 (b); Colombia, para. 54; Mexico, para. 10.

⁶⁹ See e.g. the Observations for Germany, para. 43; New Zealand, para. 28 (c); Republic of Korea, paras. 15 and 29; Spain, para. 26 (c).

⁷⁰ See e.g. the Observations for Mexico, para. 51 (d); New Zealand, paras. 9(c) and 11; Republic of Korea, para. 12 (c); Spain, para. 20.

⁷¹ See e.g. the Observations for Cabo Verde, para. 43.

⁷² See e.g. the Observations for Bangladesh, para. 74; Cabo Verde, para. 70; Central African Republic, para. 44; Colombia, para. 71; Mali, para. 56; Mexico, para. 73; New Zealand, para. 53; Republic of Korea, para. 71; South Africa, para. 80.

quinquennial occurrence of State periodic reporting) contains expressions of regret and concern from the Committee for the lack of use of HRIs — when not of adequate or adequately disaggregated data altogether. The only notable exception to this trend is Portugal, which stands out as the only State report over the last six years to contain the praise and encouragement of the Committee for the adoption and use of human rights indicators.⁷³

B. FILLING THE VOID: BOTTOM-UP MONITORING FOR THE RIGHT TO ADE- QUATE FOOD

Despite the inadequacy of most national statistical offices in monitoring human rights and compliance with related obligations, the Committee was still able in its reports to provide insight on the State of ESC rights within the countries, highlighting critical aspects and suggesting ways forward.⁷⁴ The reason why it was able to do this, even in situations where the report of the State was altogether not submitted,⁷⁵ is because information is submitted to human rights monitoring bodies through a number of sources other than the State: national human rights institutions (NHRIs), where present, but also NGOs, CSOs and other stakeholders. The role of these non-State stakeholders in monitoring human rights goes beyond merely reaching where the States' statistical systems cannot. As the reports of the Special Rapporteurs on the Right to Food explored in the introduction often highlighted, threats to the food security of individuals come from acts of commission and acts of omission both. Cases of omission might for instance be linked to monitoring deficiencies that may lead to not taking into account the needs of affected populations in the drafting and implementation of otherwise well-meaning policies in compliance with their obligation to 'fulfil'. There may also be cases of neglect, as in the instances where States fail to 'protect' the right to food from the harmful actions of TNCs, for example as concerns invasive marketing of unhealthy food products, or excessive use of biochemical products and pesticides in large-scale cultivations. Acts of commission more directly relate to the failure to 'respect' the right to food, as in the case of LSLAs and forced evictions, carried out for economic interest with little regard to the consequences on the food securi-

⁷³ Committee on Economic, Social and Cultural Rights, *Concluding observations on the fourth periodic report of Portugal*, E/C.12/PRT/CO/4, 8 December 2014, para. 21.

⁷⁴ For the rules of periodic review in cases of missed production of report, consult: Office of the High commissioner for Human Rights, *Committee on Economic, Social and Cultural Rights, Working Methods — Excerpt from the Report on the Forty-Fourth and Forty-Fifth Sessions (E/2011/22 - E/C.12/2010/3)*, paras. 19-59. <https://www.ohchr.org/EN/HRBodies/CESCR/Pages/WorkingMethods.aspx#ftn1> (accessed 28 January 2019).

⁷⁵ See e.g. Committee on Economic, Social and Cultural Rights, *Concluding observations of the Committee in the absence of an initial report from Equatorial Guinea as approved by the Committee at its forty-ninth session (14–30 November 2012)*, E/C.12/GNQ/CO/1, 13 December 2012.

ty status of the previous tenants of the expropriated lands, which oftentimes have a tenuous or inconsistent legal entitlement to the land they rely on for sustenance. In cases of omission, naturally, it is the inability of the State to properly detect the needs of the affected population that *prima facie* creates the need for alternative monitoring systems that may fill the gap. In these cases, the activity of monitoring carried out by alternative stakeholders through the use of HRIs (with the annexed methodological caveats, such as the need for participatory data-gathering, a holistic approach etc.) will contribute to direct the eyes of governments on otherwise invisible issues. Moreover, even what is deemed to be oversight may be responding to a wilful omission of data-gathering on the targeted segments of the populations, aimed at increasing their marginalisation and discrimination, thus bringing the fault of the State into the field of commission. Even more so, in such cases, the activity of data-gathering and advocacy of alternative stakeholders provides an instrument for the down-trodden to hold governments accountable for their actions in front of the monitoring bodies of above. Where the State cannot, or will not, reach, the ‘knowledge’ and ‘governance’ effects of indicators can be harnessed by non-State stakeholders to fill the monitoring gap.

One of the most active NGOs in filling this monitoring gap as concerns the human right to food is the ‘Food First Information and Action Network (FIAN International)’, which has launched in 2013 a ‘Global Network for the Right to Food and Nutrition’ exactly with the aim of coordinating such advocacy efforts by various grassroots and civil society organisations from around the world. The NGO’s ‘People’s Monitoring Project’ uses human rights indicators that were inspired by the 2004 ‘Right to Food Guidelines’ from the FAO.⁷⁶ The methodologies, on the other hand, are closely resembling the guidelines for HRIs provided by the OHCHR’s Framework, highlighting for instance the need to ensure participation and inclusion. However, from the methodological clarifications advanced by FIAN, other elements of interest emerge. Foremost, the added benefit of complementing the top-down approach of international entities such as the human rights treaty bodies of the development agencies of the UN with the bottom-up perspective of grassroots organisations and social movements, able to present a clearer picture of the obstacles that the implementation of an inclusive development strategy might face in the national context. The aim of the NGO in developing its indicators is precisely to guarantee the inclusion of what they call a “peoples-based narrative” in the top-down efforts to sponsor development, so as to eschew an overreliance on hard data that

⁷⁶ See Global Network for the Right to Food and Nutrition, ‘People’s monitoring for the Right to Food and Nutrition: Political Manifesto’, <https://www.righttofoodandnutrition.org/peoples-monitoring-right-food-and-nutrition>, 07 March 2017, (accessed 28 January 2019).

could overshadow the real causes of hunger and malnutrition, which could for instance be rooted in inequality, marginalisation and discrimination. In line with a people-centred approach to development, the monitoring activity by FIAN also pays great attention to people's sovereignty over national resources, and other elements of 'food sovereignty' in general. Moreover, the Network acknowledges that the currently proposed list of HRIs is still quantitative-oriented, using proxy indicators for issues that would require a more qualitative assessment, the development of which is in the NGO's plans for the next future. Likewise, it specifies that the list is once again tentative, as the correct way to generate and systematise data for human rights is still uncertain, and more work will be needed across the board to strike a balance between reliance on expert opinion and hard measurements, on the one hand, and reliance on bottom-up narratives and perceptions and more qualitative forms of data, on the other.⁷⁷ Indeed, in the proposed indicators' metadata, one can see how it is still a work in progress, at the present time: many indicators lack metadata altogether, and the ones that do have it often also contain a clause specifying that the "data analysis is still under construction". The list of HRIs itself is still under construction, but a preliminary observation reveals a close resemblance to the work of the Framework. At the present time, it would seem that the value added that the bottom-up approach sponsored by the network brings to the table substantiates mostly in a heavy focus on monitoring political participation, with a dedicated outcome indicator (which is however presently based on a methodology that does not allow for the detection of in-country inequalities). There is moreover an indicator assessing specifically the "existence of multiactor governing or decision making bodies for food policy at national, subnational and/or local level with diverse participation of civil society organizations", for which however there is presently still no metadata. There is also notably a structural indicator oriented to monitoring food sovereignty, on the existence of intellectual property rights on seeds. More closely in line with the ones already elaborated in the Framework are indicators on the general prevalence of stunting, the "degree of land concentration", the legal incorporation of the right to food, the functioning of judicial mechanisms to provide redress for violations and the existence of a national food security policy.⁷⁸

⁷⁷ Global Network for the Right to Food and Nutrition, 'Methodology: Method behind the Peoples' Monitoring Project', <https://www.righttofoodandnutrition.org/methodology>, 24 May 2017, (accessed 28 January 2019).

⁷⁸ See Global Network for the Right to Food and Nutrition, 'Indicators', <https://www.righttofoodandnutrition.org/indicators> (accessed 29 January 2019).

3. WHY HUMAN RIGHTS INDICATORS? INCENTIVES AND DISINCENTIVES

As premised in the previous section, the use of HRIs is still in the beginning phases, and there is currently very little to go by in attempting to assess their impact on both rights-based policymaking and monitoring. Indeed, while the adoption of human rights indicators is not *per se* a costly transition, entailing more a methodological shift than anything else, the limited capacities of statistical offices in many developing States remain an obstacle. More resources are needed in order to expand their data-gathering and systematisation capabilities, in the cases in which the CESCR has lamented an overall insufficient production of data; even more resources are required, in an even larger amount of cases in which the Committee encouraged further disaggregation of data, which can be very costly to produce. However, while these financial obstacles may shed some light on the reticence of most States to adopt human rights indicators, it is also necessary to probe other possible incentives and disincentives that may affect their spread. The articulations of HRIs in practice might still have a ways to go, but their conceptual premises are sufficiently clear to invite such reflection. Specifically, this paragraph forwards a theoretical reflection on the relation between human rights indicators and official development assistance, building a simple model of limited scope for understanding the potential impact of the incorporation of HRIs on the inflow of ODA, based on some simplifying assumptions that will be clarified at the end of the analysis.

A preliminary observation to such regard is that there is a link in the current globalised world between human rights performance (as perceived by the population of donor countries) and amount of ODA that the donor will afford the recipient. Specifically, it has been argued that global public opinion pressures donor governments of the OECD to pay attention to the human rights record of the recipient country.⁷⁹ On the converse, this correlation means that there is an incentive for recipient countries to improve their human rights record in order to receive more development assistance. This naturally opens to a number of considerations concerning HRIs. One can safely infer,

⁷⁹ Y. Kim, T. Whang and C. Soh, 'Human Rights, Official Development Assistance (ODA), and Globalization: Quantitative Studies and the Case of South Korea', *Korea Observer*, Vol. 46, No. 1, Spring 2015, pp. 27-51. See also M. Schmaljohann, 'Pretending to be the Good Guy. How to Increase ODA Inflows While Abusing Human Rights', University of Heidelberg, Discussion Paper Series, No. 549, September 2013 (the author analyses how the ratification of human rights treaties, even in the absence of a factual improvement of the situation of human rights in the country, increases the inflow of ODA from donor countries; this is particularly relevant to the case at hand, as the ratification of human rights treaties is one of the structural indicators proposed in the Framework).

from the analysis of the first paragraph, that human rights indicators can be expected, upon their implementation, to bring to light phenomena of marginalisation and other situations giving rise to a failure to realise human rights that were previously unreported, and therefore concealed. For States to expose their ‘ugly sides’ and report on long-since invisible discriminations is a necessary sacrifice on the road to a more inclusive development tailored on human rights. However, elaborating on the research mentioned above, for a recipient State to do so would likely entail accepting a downsizing of the inflow of ODA in the short term. By converse, the cost of inaction in the short term is fairly low, limited to the rather universal denunciation by the Committee to all the States for having failed to incorporate the Framework of HRIs in their domestic monitoring systems. As such denunciation is directed at the vast majority of States, this has little to no bearing on the direction of ODA. Therefore, the consequences of inaction on ODA in the short term are inexistent, while action (i.e. incorporating and implementing the Framework) is likely to bring about a decrease in ODA inflow. This must on the other hand be weighed against the consequences in the long run.

The fundamental difference in the long run is the intervening variable of alternative stakeholder-reporting: the completion of the currently ongoing process of development of human rights indicators by NGOs, CSOs and other, which will then use them to monitor the conduct of the States in which they operate. Especially seen as these indicators are able to capture the compliance of States with their human rights obligations, the long run sees action and inaction causing different degrees of consequences depending on whether a State is virtuous or vicious. In the former case, the State will earnestly use the highlighting of human rights failures to address them with a view to ending and remedying them. In the latter case, the violations usually came as a consequence not of oversight or ignorance, but malfeasance and wilful neglect.⁸⁰ In the case of non-compliance with the Framework (inaction), the State will face condemnation: as CSOs and NGOs increasingly avail themselves of HRIs, the concealed discriminations and inequalities will inevitably be brought to light, notwithstanding the action or inaction of the State *vis a vis* the Framework. The public image of the State in such cases is arguably even worse off than it would be if the State autonomously self-reported on the missed realisation of human rights, considering how the monitoring of human rights violations assumes the visage of an external denunciation. The effect is further aggravated in the

⁸⁰ As Thomas Pogge caustically points out, many corrupt governments in developing countries today hold their power due to the “resource privilege” and “borrowing privilege” afforded to them by the international community, which allow them to purchase means of coercion to maintain power instead of using the borrowed funds to finance policies addressed at ensuring a comprehensive development. See: T. Pogge, *Politics as Usual: What lies behind the pro-poor rhetoric*, Cambridge, Polity Press, 2010.

case of a vicious State, as is intuitive, while it will be somewhat mitigated if the State, despite not incorporating HRIs in its monitoring for fear of the short-term impact on ODA, will have employed resources to finance development programmes to the best of its ability. On the other hand, the effects of incorporating HRIs in national monitoring can range from a reduction in the levels of ODA for States that poured no effort into the realisation of human rights according to the critical areas highlighted by the indicators, to a potential increase, even beyond the pre-HRI level, for the more virtuous States.

	Consequences of Inaction	Consequences of Action
Short Term	Stable ODA (0)	ODA Reduction (-)
Long Term	ODA Reduction (---/--)	ODA Reduction/ ODA Increase (-/+)

Table: Estimated impact of the adoption of HRIs in national monitoring on the influx of ODA.

There is of course the possibility that a State would adopt HRIs and then attempt to ‘cheat’ the system. Indeed, a reiteration of the same measurement on a subject over time (such as what HRIs would perform) engenders a tendency of the measured party to understand the ins and outs of the monitoring system and adapt the data provided accordingly, in order to paint a more flattering picture of themselves without a corresponding real improvement in the object of measurement.⁸¹ This possibility is largely counterbalanced, of course, in the cases in which NGOs and CSOs would be active in the national territory in highlighting human rights violations and reporting through hu-

⁸¹ See A.J. Rosga, M. L. Satterthwaite, 'The Trust in Indicators/ Measuring Human Rights', *Berkeley Journal of International Law*, Vol. 27, Issue 2, 2009, p. 288.

man rights indicators that are appropriately designed for a qualitative detection of the perception of violations among the civil society, especially the most marginalised fringes, at the grassroots level. As their voice has great resonance both in the global public opinion and in the monitoring activity of the treaty bodies, Special Procedures and UPR, they have the ability to counterbalance a misleading narrative proposed by the State in its self-reporting. Since alternative stakeholders engaged in activities of monitoring and advocacy for human rights are nowadays present in the vast majority of States, it can be safely concluded that, between their counter-narrative and the treaty bodies' auditing, the possibilities to cheat the system are fairly low. The possibility is therefore of no impact to the present model.

According to the model, the logical choice seems to be to incorporate HRIs in national monitoring, as it both exposes to less potential losses in public image and possibly entails an improvement. It seems therefore that between the promotion and assistance activity of the Office of the High Commissioner' country and regional offices and the inexorable diffusion of these instruments among alternative stakeholders able to keep the States accountable, States will have consistent incentives to avail themselves of the same means of monitoring in the long run. Indeed, the cost of inaction is equal or superior to the cost of action, which, if accompanied by a consistent effort to improve the score of the indicators by ameliorating the living conditions within the country and facilitating the full realisation of the rights, will positively impact the public image of the State and, therefore, the inflow of development assistance. This incentive would even be positively reinforced if the amount of ODA in terms of percentage of the GNP of the donor States met at least the 0.7 threshold set in SDG 17 (Target 17.2). However, as of 2019, the levels of ODA offered by most countries in the OECD have for long dangled well below such threshold.

Is merely waiting for progress in the long run enough? In the short term, when the power of non-State stakeholders to bring to light patterns of discrimination and exclusion is limited by the fact that HRIs are still in the process of development and refinement, the cost of inaction is not as high, and may indeed outweigh the possible and costly benefits for action. Recognising the essential nature of human rights as due entitlements of the individuals compels to find ways to accelerate the progress, instead of merely waiting for it. To such regard, a possible solution could be the creation of an indicator, drafted and monitored independently for example by the OHCHR, to assess the adequacy of domestic monitoring systems based on how closely they are built upon the Framework. By such means, one could harness the communicative power and governance impact of indicators to raise the cost of inaction, by making non-adherence to the Framework liable to negatively impact the inflow of ODA. It is however necessary to take into account the contraindications of such a pro-

positional. It would certainly be desirable to drag into the spotlight a corrupt State which shows no regard for the human rights of its population and uses the resources of the State to purchase means of coercion with which to maintain power. However, a poor developing State that desperately needs ODA for its development programmes because it lacks the necessary financial resources, even when virtuous and well-meaning, could receive an undesirable downfall from the exposure of the scarce realisation of human rights within its territory.

It is necessary to keep into account that this simple model is, first and foremost, a mental experiment not supported by (currently unavailable) data. It aims to explore upon the possible consequences of the adoption of HRI based solely on logical deductions, and on the positive correlation found by fairly recent studies between human rights performance and inflow of ODA. Secondly, the model is limited in scope: it only considers ODA as an exemplar type of development assistance, but that is not the only one, and the existence of the same correlation between human rights performance and, say, private investment remains unexplored. On the same note, it is also necessary to take into account that exploring the incentives and disincentives of adopting the HRI Framework solely with reference to its impact on ODA fluxes is hardly enough to infer that the existence of incentives will inevitably cause a progressive assimilation of the framework in national statistical systems. It does however highlight that, with respect to the limited scope of the analysis, there is one such incentive in the long run, which is weaker in the short term, though it could be accentuated through the design of an indicator monitoring the compliance of the domestic monitoring systems with the Framework. Lastly, the model is based on a series of simplifying assumptions; first and foremost, the expectation that NGOs will progressively manage to develop and find the resources to implement HRIs in their grassroots monitoring, and that their diffusion in nations will continue increasing the range of their advocacy efforts. Relatedly, it assumes non-State stakeholders to be all-powerful, all-seeing observers with the capacity to monitor violations wherever and whenever they happen. Bringing the model closer to reality would require accounting for the limitations that these entities have to face, for example, in areas in which it would be dangerous for the surveyors to venture, or even more evidently, in countries that will actively hinder their activity by limiting their movement or not making available their public records.

4. CONCLUDING REMARKS

This chapter has addressed the second avenue to the realisation of the right to food object of this thesis: the use of statistical indicators tailored on the normative content and inherent characteristics of human rights. It has addressed the way these have come into existence, guided by the notion that understanding the perceived need of a new instrument that led to their creation is the best way to understanding the function that they cover. It has then illustrated the state of the art of HRIs with a specific focus on the right to adequate food, illustrating how the specific qualities and potential offered by statistical instruments can combine harmoniously with the nature and content of human rights. Like so, HRIs offer the communicative capabilities and apparent neutrality of indicators to convey a strong message that paints an accurate picture of the object of analysis, which is made even more precise through the participation of the rights-holders in the process of design and monitoring of the indicator. Their scientific aura, together with the preciseness of the picture, bestows upon them a great potential to inform policymaking in the direction of ensuring the inclusiveness of economic and social development, in line with the requisites of human rights. Exactly their governance potential and their non-inherently descriptive nature is what renders HRIs able to make a difference: to name something, and even more so to measure it, confers it importance and brings it under the public eye – which is immediately desirable for the aim of holding corrupt governments accountable for violations of human rights. It also allows a more profound understanding of the nature of a problem for well-meaning policymakers to effectively address it. For the exact same reason, one must be wary of the need, for HRIs to truly direct progress on the correct track, to closely follow the methodological requirements laid out in paragraph 1 of the present chapter in the process of their adaptation to the domestic context.

Compared with the avenue of justiciability, there is an immediately apparent difference in scope in the avenue of indicators. Indeed, whereas courts will analyse a past situation of violation in hindsight, establish responsibilities and mandate remedy as appropriate, indicators are a concept that more closely pertains to policymaking, and ensuring a future evolution of the systemic context in a direction that facilitates the realisation of human rights. Certainly, in light of the auditing function of the CESCR explored above, it may be argued that HRIs may follow a somewhat similar logic, in some instances: picture for instance the case in which a State adopts a set of indicators for monitoring human rights that is inadequate or wilfully exclusive of a certain discriminated segment of society. An official condemnation of such set of indicators will only come from the CESCR in the following cycle of periodic reporting, which may be as far as five years in the future. However,

that does not pertain to the function of indicators, per se, as much as it does the function of the Committee as their guardian. In their epistemological assessment, where the court's judgement is backwards-oriented, the role of indicators is rather that of setting a message for the future: especially in their function as guiding principles of development programmes and policies, they are an instrument to the creation of an environment in which human rights can be continuously and stably enjoyed by all.

Indicators still have a long way ahead. The status of their implementation and adoption, despite some cases in which the advocacy and technical assistance of the OHCHR has successfully led to their inclusion in some national development plans, is still in the early stages. The instrument is young and yet to prove its efficacy, although the conceptual and theoretical premises explored in this chapter promise well for its potential impact – duly considering all the pitfalls and possible statistical biases explored. The third paragraph has likewise explored, in the limited scope of a theoretical model, the potential influence of ODA in encouraging the diffusion of these instruments. Albeit concluding that ODA will likely have a positive impact on the likelihood of adoption, both the fact that it is an analysis based on simplifying assumptions and the fact that the levels of ODA are constantly dwindling are cause for some caution in drawing such conclusion. Once again, one can see the resurfacing problem of the political nature of the problem of world hunger: for all the observations on the compelling moral obligation to aid other States advanced in Chapter Three, the political will seems to be absent. Especially as concerns the right to adequate food, the shirking of the all-important international commitments of the SDGs from including a compelling right to food as the guiding principle of Goal 2 is exactly responding to the same underlying logic as the insufficient levels of ODA are: the States that have the most power to do something do not see an obligation to do so. Nevertheless, while the collective commitment to fight world hunger will not rally under the flag of human rights, the States that do want to place such concerns at the fundament of their policymaking will find in HRIs a powerful instrument to such regard.

CHAPTER SIX: CONCLUSION

The thesis has begun with a citation from Ziegler, arguing the fundamental cause of world hunger to be a lack of political commitment, and that “free trade will never feed the world”. Regrettably, the thesis also ends on the same note.

The evolution of justiciability and of the normative content and obligations related to the right to food explored in Chapter Four, and the recent development in the use of statistical instruments for monitoring human rights and informing the development discourse both represent the latest stages to date of a struggle for progressive affirmation that has now spanned almost eight decades. Both fields represent the strife to keep up with the rising challenges of the globalised world like the increase in the roster of relevant actors and their complex mutual relations, poorly described by traditional international human rights law that pertains exquisitely to the relation between States (as sole duty-holders) and individuals (as sole right-holders). Neither of these is true anymore: States, while maintaining a predominance in official diplomacy, are not the only ones whose actions cause ripples in the enjoyment of the right to food both within and beyond their borders, especially when some TNCs have a net annual revenue that far surpasses the GNP of many of the countries they operate in. Likewise, recent developments in the doctrine have had to come to terms with the fact that individuals may not be the sole entities that should be considered as right-holders, in light of the great interrelation that exists between the individuals and the community in which they are embedded, especially in the rural countryside of developing States, which may make it so that communities should be considered as a collective right-holder. One could go further and argue that the rise of a collective dimension of human rights is the symptom of the declining cultural dominance of Western civilizations, with their liberal societies valuing individual freedoms and individualism and traditionally underestimating the benefits and impact that a more embedded, communitarian view can offer. The rise of the traditionally discriminated-upon economic, social and cultural rights, separated as a “second generation” of rights inarguably due, to some extent, to the ideological divide that split the world during the Cold War, would seem to respond positively to the same narrative.

Be it an end of the cultural domination of the West, or a natural evolution dictated by the coming to light of the inherent contradiction of arbitrarily treating the two categories of rights differently, especially considering the principles of the Vienna Declaration of 1993, it can be certainly

said that the way of perceiving the world has changed. As the multifaceted and interconnected challenges of globalisation are met by an international society still largely unprepared for the task at hand, the world goes on changing at increasing speed. It is natural for the jurisprudence to play catch-up to such rapid and complex evolutions, and indeed, this is what this thesis has accounted for in its narration of the evolution of the doctrine. It is however also true that the jurisprudence has in turn the ability, through its evolution, to engender transformative change, by not only negatively holding governments accountable for their actions and violations, but also positively compelling them to act in a certain way in compliance with their obligations to fulfil human rights.

Courts can be wondrous and powerful guardians of the right to food and of the needs of a rights-based approach to development. The same can be said for HRIs, which unite the unique potential of statistical instruments for both monitoring and informing policymaking together with the procedural requirements of a rights-based approach and the substantive content of the human rights on which they are tailored. Though their lack of universality does not allow for cross-country comparison, their forward-oriented perspective is somewhat complementary to the backward-oriented one of judicial processes, which look at the past in search of a violation that has already happened. Correcting a violation surely upholds the rule of law by creating the certainty of punishment and remedy, but that is about the extent to which a court is able ensure non-repetition and transformative change. On the other hand, HRIs, especially when used as guiding principles for development programmes, rather constitute a promise for the future, facilitating the construction of an enabling environment in which the rights can be continuously and stably enjoyed by all. To this regard, they effectively contribute to the most controversial field of justiciability, that of judging positive State action in compliance with the obligation to fulfil, the States autonomously setting their own indicators, which entails a stronger persuasive power. Certainly, from *Grootboom* to the doctrine of the CESCR under the Optional Protocol, justiciability has progressed far in such regard; however, it is still a field that is rife with controversy, and can well benefit from the contribution of HRIs. The latter do however lack the cogency and immediateness of a court's decision, which is to some extent better suited for the compelling obligation for expeditious remedy of violations of human rights, and they are subject to the many pitfalls explored in the last chapter. Together, the two avenues create a framework whereby indicators direct development on a desirable path, complementing justiciability in its most controversial field, whereas courts correct the course of development by providing punishment and remedy wherever it may find violations. The former act on a systemic level, in a top-down fashion, striving to anchor development to an individual dimension of human dignity; the latter act on an individual (and community) level, in a bottom-up fashion, protecting entitlements in order to ensure that development is inclusive. It is therefore apparent how these two ave-

nues constitute two faces of the same coin, creating a comprehensive framework that will likely show unprecedented ability to favour an inclusive development and protect the entitlements of individuals and communities around the world.

However, both instruments together still suffer from some fundamental shortcomings. Firstly, despite some progress, accountability of TNCs and other non-State actors is still sorely lacking. Moreover, and connectedly, another obstacle lingers in the fundamental voluntarist nature of the commitments that constitute the basis for both justiciability and indicators. Indeed, the inescapable reality of the matter is that, if a State does not wish to recognise the right to adequate food, it cannot be compelled to do so. This cannot be addressed, at the present State of things, in a compelling fashion; the only possible way to do so is, as explored in Chapter Five, through incentives and disincentives. On the same note, neither of the two avenues, the former working on sanctions and obligations, the latter on incentives, has any credible way to engender the necessary transformative change in the international regulatory framework, which will continue to hamper the global effort to the universal realisation of the right to food until political will, established since the introduction to be the root cause of world hunger, will manifest. There is to date a fundamental lack of political commitment, as foreshadowed in Chapter One, in fighting against world hunger. This reflects into the chronic shortfalls of ODA, the exclusion of the human right to food from SDG 2, and most importantly, resilience to change and reform of an international regulatory that is evidently tilted to serve the interest of the more affluent States. Chapter Three has constructed a theory of human rights and explored the moral side of the obligation to reform an international system that is evidently in contradiction with the obligations laid out in Articles 22 and 28 of the UDHR, in that it foreseeably and avoidably causes a great number of poverty-related deaths. On the backdrop of increasing global inequality, SOFI reports disarmingly testify to the worsening status of food security worldwide, and the increasing number of global hungry. As strong and convincing as a moral analysis of the obligation to reform such system can be, the reality testified by this data, by the systematic (though not always successful) obstruction of the inclusion of any entitlement-entailing understanding of food from important global commitments and by the low levels of ODA is that, for a number of reasons beyond those touched upon in this thesis, the political will to fight world hunger is quite simply insufficient. The problem is still internationally treated in a voluntarist and charity-oriented fashion that shirks any stringent obligation. Both justiciability and indicators can be great instruments for remedying malfeasance and neglect, but neither has the ability to create resources where they do not exist. Legal litigation for the right to adequate food will not remedy a situation in which the right was not realised due to an objective scarcity of resources. Likewise, the ability of HRIs to direct development on a human rights-based track is well and good, but even considering

their potential to attract ODA through a virtuous conduct they can do nothing about the chronic shortfall of ODA from most OECD States. For so long as the effort to realise the right to food will take place on the backdrop of a neoliberal, Washington Consensus-based international order that systematically hinders such effort, the right to food will keep proceeding slowly – or, as is the present state of affairs, regress.

As far as the present thesis can discern based on the research conducted, human rights indicators do not offer any consistent way whatsoever to engender a reform of such system. The only plausible forum to adjudicate such discussion would be the CESCR under the opt-in inter-state procedure; for example, a State accusing another of having failed its international obligation to respect the right to food by sponsoring trade regulations with foreseeably negative effects in the WTO, or relatedly to fulfil, on the same grounds, or denouncing the insufficient level of ODA. However, the low number of States that have opted in and the current need for the Committee to adopt a conservative jurisprudence, along with a number of juridical considerations that further complicate such hypothetical claims makes it an unlikely development in the foreseeable future. The juridical doctrine is on the other hand striving to develop appropriate instruments, going for instance towards methods for ensuring the accountability of MLIs, or more stringent ways to evaluate the conduct of States within them. These are however still in the early stages, and in the opinion of this thesis, the extreme unbalance in political power of the States that dominate such institutions can reasonably lead to inferring that they will remain out of the reach of justice *ad aeternum*.

A final consideration to such regard is the possibility of an exogenous shock modifying the rules of the game. Especially insofar as one assumes the rise of ESC rights and of a communitarian dimension to human rights to signify a gradual weakening of the Western grip on the global order, the development achieved by many Asian States invites pause for reflection. Most importantly, the skyrocketing rise of the People's Republic of China. Two elements are worth noticing to such regard. Firstly, the fact that said rise has happened largely in defiance of the rules of international trade that have been discerned to be a systematic oppressing factor for so many developing States. Among an astounding number of accusations for infringement of intellectual property rights, unfair business practices and an extremely illiberal and State-centric model of economy, China has achieved its development while being continuously painted as the antagonist of everything that the liberal West holds sacred. The important thing here being, that many of the same elements the sacredness of which is traditionally celebrated by Western advocates have shown their ugliest side in their current perversion – despite such side being still far from the global collective eye, partly due to the great media firepower of the countries that benefit from it. To such regard, the rise of the

PRC to the status of East Asian local hegemon and global great power (with a seat in the UN Security Council) might bring an interesting alternative point of view, closely associated with the Group of 77, in the global debate. It is also worth noticing, to such regard, that East Asia has largely vanquished hunger and malnutrition via an approach that is mostly devoid of a right to food, which finds a difficult matrimony with the cultural aversion to legal litigation that characterises most of the countries therein. Indeed, it has done so by focusing on economic development, and in many cases, on the coattails of the rise of the PRC.

Keeping all these elements in mind, one can move to the second (and central) reflection of this last segment: the PRC is not merely sitting on its power, nor are the fallouts of its development limited to its immediate surroundings. Indeed, since 2013, China has embarked in the most ambitious international infrastructural development programme that the world has ever seen, under the name of “Belt and Road Initiative” (BRI). The plan is as far-reaching and potentially game-changing as it is oddly underreported by most Western media. It is not the objective of this final reflection to get into the details of what is an extremely complicated and multifaceted phenomenon; it is sufficient, in order to appreciate its potential for the aims of this thesis, to consider that the BRI extends all throughout the Eurasian continent. The Initiative has most notably extended its reach to many developing States, especially in Southern Asia (e.g. the port of Gwadar, in Pakistan) and in Africa (including substantial investment in the “Silicon Savannah”), aiming to meet the market demand for countries that have hoary and chronic infrastructural deficiencies. These countries have been largely excluded from investment due to the high risk of insolvency, or due to the traditional aversion of private investors to long-term returns on investment. On the other hand, China is building such infrastructure availing itself of its infrastructural overcapacity, and is using questionable means of insurance against insolvency: the assurance of maintaining a majority shareholding of all infrastructural projects for a hundred years to come.

The BRI could be the external shock bringing many States out of the abject poverty into which they were systematically confined by the neoliberal international system; it could tap into the unexpressed potential of populations oppressed first by arms, and then by rhetoric and rules. It has the potential to exert the pressure necessary to change the global equilibria and force that transformative change in an international system that is growing stale on its own dogmas. Just as easily, it could replicate familiar patterns of colonial oppression and merely use its newfound influence to perpetuate the same mechanics, while entering the restricted pantheon of States privileged by the global order. At this point in time, history has yet to be written. This concluding reflection is to be meant as an invitation for further analysis on the matter.

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SUMMARY

The thesis explores the hoary problem of world hunger based on a human rights perspective. Compared to the main body, this summary will follow a slightly different order of presentation of the arguments, of a less thematic and of a more discursive nature, so as to better convey the findings. Instead of respecting the separation between chapters 3 (generally concerning human rights) and 4 (analysing the justiciability of the right to food), it will rearrange the topics of the two. While the systematisation offered by the thesis is better-suited for a comprehensive and rounded understanding, this summary will address the topics in an order that focuses on synthetically building up to the limits of justiciability, as the link to the HRIs in chapter 5.

The Obstacles of the International System

The problem of world hunger was appraised multiple times to have an essentially political nature; paraphrasing the words of the former UN Special Rapporteur on the Right to Food Jean Ziegler, in a world overflowing with riches, those who have money eat, and those who do not often starve. The current global food production was estimated by the FAO to potentially satisfy the daily caloric requirements of 12 billion people; nevertheless, a productivist paradigm that holds the solution to world hunger to lie in further increasing the production of food, evident since the Green Revolution of the 1980s, still echoes to date. Some 821 million people worldwide suffer from chronic undernourishment. About 50% of them are household farmers, and another 20% are landless labourers — with an overrepresentation of women and children among them. Their problems pertain to a number of fields, from feeble legal tenure of land to a recurring exclusion from the benefits of development, among others. The reports of the three Rapporteurs have highlighted a number of features of the international system that contribute negatively to the food insecurity of many in the developing States. The Green Revolution eventually did little for global hunger, instead causing concentration and mechanisation of production and environmental degradation. Deforestation in the quest for more arable land ultimately for no aim other than economic profit often deprived indigenous peoples of their ancestral lands, and many smallholder farmers were evicted from the land on which they relied for livelihood in the context of LSLAs for biofuel production. The latter process was entrusted to free market mechanisms, sending many governments in developing countries on a mad rush to the bottom in an attempt to create more alluring conditions for production in order to secure the FDI that comes with TNCs, based in developed States of the global North, producing in their territory, to the detriment of rural farmers and indigenous communities. TNCs are indeed reportedly responsible both for often hiring poor farmers in slavery-like conditions, and for keeping

nominal food prices on the rise despite the continuous decline in real production costs since 1974, through unfair business practices. In general, it was the entire neoliberal, Washington Consensus-based international paradigm of commercial regulations that came under accusation in recent times, under the realisation that “free trade will never feed the world”. And yet, the system seems impervious to reform efforts due to the predominance of affluent States within the institutions that create and inform it, leading to the ongoing stall in the Doha Round of negotiations. The Rapporteurs (among others) strongly condemned the WTO for creating and protecting a system of rules that foreseeably hampers efforts to achieve food security and realise the right to food. The Ricardian assumption of mutually beneficial comparative advantages is what led the Bretton-Woods institutions to forcefully liberalise the agricultural markets of developing States, encouraging them to specialise on the production of tropical goods (instead of the staple crops necessary for alimentary self-sufficiency, in turn necessary for food security). Food crises in the 1970s and, most recently, in 2008 exposed their import-dependency, leaving them at the mercy of the exporting counterparts. The promised rise of a vibrant private sector attracting investment failed to manifest; meanwhile, developed States lag in the implementation of the AoA, flooding the market of developing States deprived of their trade barriers by WTO regulations through dumping, relying on green-boxed agricultural subsidies that are too expensive for poor States. This displaces their internal production, unable to compete and often reduced to subsistence farming. The blind application of patents on genetic resources under the WTO’s TRIPS Agreement worsens things still, by depriving rural farmers of the possibility to replant seeds as they had traditionally done, for the profit of patent-owners.

As the ‘rural exodus’ continues, causing conflict — exacerbated also by the increased incidence of extreme weather events such as droughts as a consequence of manmade environmental degradation that is mostly on the hands of the global North — the system stands strong against any effort of reform. Many affluent (and influential) States keep rejecting any entitlement-engendering understanding of food, which would allow to subtract such a vital component of everyone’s life from the marketable logic that pertains to it as a mere tradable commodity. The Rapporteurs have issued calls for a reform of the system towards the empowerment of agricultural workers, both the most vulnerable and the key to transformative change. However, a top-down lack of political will to understand the fight against world hunger as a compelling obligation, insofar the developed world is causing most of it, will keep hampering the efforts to set globalisation on a more desirable course. Countries like the USA, Australia, Canada and many EU States keep maintaining that the current regulatory framework is not inherently wrong, which entails that the responsibility for failing to achieve development under such system falls primarily on the State’s own shortcomings - naturally engendering a voluntarist approach to assistance as a consequence. These countries therefore pro-

pose to pursue food security, which is a policy concept, in a voluntarist fashion, without a rights-based approach anchored in the human right to food – which they altogether do not recognise.

Such is the background against which the thesis analyses the two principal avenues to the realisation of the right to food, both revolving around a rights-based approach that goes beyond merely aiming for the realisation of food security (a policy concept with an aggregate focus and a low degree of stringency), aiming instead for the universal realisation of the right to food (entailing stringent entitlements of individuals and, recently, communities). One, the approach of justiciability, is based on individuals claiming their right by judicial or quasi-judicial mechanisms to obtain redress against a violation of their entitlements in an adversarial and ex-post fashion. The other one, the approach of indicators, uses human rights-monitoring through statistical instruments of both a quantitative and qualitative nature to highlight critical issues like discrimination and inequality in order to clearly highlight objectives in a way that is tailored upon the national context, and then, through benchmarks and deadlines, sets the path forward for national plans and programmes to realise the right to food in a comprehensive fashion. The former has undergone a process of development over the last some seventy years, whereas the latter is a more recent development that found a somewhat stable formulation only between 2008 and 2012. Both these fronts struggle to forward the realisation of the right to food against the obstacles of lacking political will, which reflects not only in acts of commission and omission of States at the domestic level, but also into their international behaviour: specifically, the lack of reform of the international regulatory system, shortfalls of ODA and the underlying strong and continued opposition against the recognition of the human right to adequate food. The analysis will first provide a brief historical perspective of the recognition of the right, then analyse the advancement of the doctrine and of the jurisprudence, understanding the stringency of the obligations arising from the right and acknowledging the limited reach of justiciability, and finally analyse the avenue of HRIs and how, together with justiciability, it creates an instrument with consistent potential to address the challenges, but some fundamental shortcomings.

Historical Evolution of the Human Right to Adequate Food

The opposition of the above States goes opposite to the long and troubled evolution that the right to food has undergone over the last century. The UDHR (1948) enshrined the right to food in the context of an adequate standard of living, and not as a self-standing right; it also committed States to creating an international environment in which the realisation of ESC rights is facilitated for everyone. Yet, while influential, the UDHR was interpreted as a ‘common standard of achievements’, rather than a document creating obligations. The binding formulation would only come in 1966, with the right to food being enshrined in the ICESCR. Yet, the hoary separation between CP

and ESC rights reflected in the dual nature of the covenants, and ESC rights were afforded a much laxer regime of protection, through formulations in the Covenant like ‘progressive realisation’ and ‘maximum of available resources’ that were for long interpreted as remitting the realisation of the rights to the goodwill of States. This was also reflected in the fact that, contrary to the ICCPR, the ICESCR did not envisage a stringent obligation to provide judicial remedy against violations, nor did it create a dedicated independent body of experts with a quasi-judicial function tasked with monitoring compliance; the task was initially deferred to the intergovernmental ECOSOC. The Covenant did nevertheless envisage the self-standing “right of everyone to be free from hunger” in article 11.2, reiterated the obligation to cooperate internationally to achieve its realisation, and envisaged an obligation to reform domestic systems of food production and distribution as appropriate. The international system increased its awareness of the importance of food security in the wake of the food crisis of the 1970s, sparked by the oil crisis and by the opening of an enormous new market through the lifting of a trade embargo on the USSR, reducing the amount of in-kind food aid sold to import-dependent developing States and raising its cost. The 1974 World Food Conference, formulating for the first time a concept of food security in its Universal Declaration on the Eradication of Hunger and Malnutrition, still however reflected the focus on increasing food production that would characterise the ‘Green Revolution’ in the 1980s. Change began in 1981, when Amartya Sen shifted the focus from availability to access to food, through his famous “capabilities approach”. A further development came from the World Bank, highlighting the diachronic dimension of food security and introducing the concept of ‘stability’. The 1980s also saw the creation of the CESCR, and of the tripartite framework of obligations for the human right to adequate food (to respect, protect and fulfil) that now underpins the doctrine for all human rights. The evolution in the concept of food security found a comprehensive formulation in the Rome Declaration on World Food Security and Plan of Action of the World Food Summit of 1996, revolving around the four concepts of availability, accessibility, utilisation and stability. Despite opposition from the USA, the two documents also included reference to the right to food, and a commitment to halving the number of global hungry by 2015 that was thus somewhat covertly tinged of an obligational colour. Commitment 7.4 however requested further clarification on the normative content of the right to adequate food, which the CESCR provided in its General Comment No. 12 in 1999. The Comment clarified the normative content as: «the availability of food in a quantity and quality sufficient to satisfy the dietary needs of individuals, free from adverse substances, and acceptable within a given culture; the accessibility of such food in ways that are sustainable and do not interfere with the enjoyment of other human rights.» This definition, still in use today, presents the “three A’s” of availability, accessibility and adequacy, and also a formulation of the right in a collective dimension. Most im-

portantly, the document clearly established how to interpret the obligations of States, following the tripartite framework. Respecting the right, therefore not taking action that harms it; protecting it against the action of third parties; fulfilling it in both its dimensions of facilitating it (creating an enabling environment allowing everyone to enjoy the right self-sufficiently) and providing (food supplies to those whom, for reasons beyond their control, are unable to provide for themselves). Violation can both come from actions of commission and of omission, and in the latter case it is up to the State to demonstrate having done all that was in their power to comply with their obligations, including appealing for international assistance. These three obligations were also declined in an international fashion: respect (in drafting agreements), protect (citizens of other States from the possible harmful action from privates under the State's jurisdiction), facilitate (cooperate to create an enabling international environment) and provide (aid States facing crises beyond their capabilities). More provisions clarify implementation: national plans must be drafted for the progressive realisation of the right, including appropriate monitoring, benchmarks and frameworks, in a participatory fashion, and providing judicial remedy for infraction. The new millennium saw a flurry of new developments. The non-binding FAO's Right to Food Guidelines were drafted in 2004, supplementing the PoA of 1996 by guiding the implementation of domestic programmes for the realisation of the right to food in a way that accounted for the principles of the Vienna Declaration of 1993 (interconnectedness, interrelatedness, indivisibility, inalienability and universality of all human rights). The Millennium Declaration and its MDGs, in 2000, and its sequitur, the 2030 Agenda for Sustainable Development, represented a global commitment of unprecedented scale to, among others, fight world hunger. The commitment was initially watered down from the WFS formulation, but then became a universal commitment to "end hunger" by 2030 in SDG 2. While this is an extremely laudable step forward from the laxer formulation of its predecessor, the lack of a clear allocation of labour and the fundamentally voluntarist nature of the commitment (most notably reflected in the still ongoing chronic shortfalls of ODA) still invite caution before celebration. Most importantly, despite the inclusion of human rights as guiding principles in most SDGs, diplomatic opposition left Goal 2 orphan of its guiding human right to adequate food. The right still reached an important milestone with the approval in 2008 of the OP-ICESCR, which endowed the CESCR with a quasi-judicial function and enabled it to receive individual complaints, as well. Two opt-in procedures, which to date only registered five accessions, also enable interstate complaints and inquiry procedures.

Comprehensive Overview of the Justiciability of the Right to Food, and its Limitations

This process of progressive affirmation was accompanied by an evolution of the juridical doctrine of the right to adequate food under the CESCR (through General Comments and Conclud-

ing Observations) and the jurisprudence of various courts. The Committee gradually removed the hoary obstacles of positive obligations, which were argued to be an insufficient basis for a discriminatory treatment of ESC rights since CP rights create them as well, and of progressive realisation, which was appraised to find limitations in the immediately justiciable “minimum core content of the right”. Specifically, non-discrimination, non-regression, the obligation to respect, the minimum level of satisfaction of the rights, and the obligation to ‘take steps’. The latter is arguably the most controversial, as it entails a court’s judgement on the ‘reasonableness’ of the positive action of the States in complying with their human rights obligations. The principle does however already find jurisprudence at all levels: in the landmark *Grootboom* case in South Africa, in the recent Views of the CESCR under the Optional Protocol, and in a number of sentences of the IACtHR. Other objections against the justiciability of the right to food were the scarce clarity of its normative content and the lack of appropriate legislation to enforce in a court. As concerns the former, the General Comment 12 cited above, together with the doctrine of the “minimum core content”, already provides clarification enough to void such concern. However, another very important evolution is that of the extraterritorial (international) obligations of States, which is the result of the strife of the doctrine to adapt to the complex and interconnected reality of the globalised world. The extraterritorial obligation to respect the right means for instance refraining from food embargoes and from actions that have a foreseeable negative impact on food security abroad; protecting it means ensuring that third parties under the State’s jurisdiction do not cause harm abroad, and punish them when they do. The extraterritorial obligation to fulfil is controversial and will be tackled at a later point. As concerns legal incorporation, national recognition of the right to food has made enormous strides; many countries incorporate the right to food at the constitutional level, either explicitly or implicitly, within another right, or even by constitutional provisions giving direct application to the terms of the relevant international instruments (or to international treaties in general, as for monist States). Direct applicability usually puts international treaties at a rank inferior to constitutional, but superior to national law. Accounting for even the countries that have not ratified all the relevant international instruments (thereby making litigation under the right to food still theoretically possible, albeit more difficult), the grand total of countries incorporating the right to food in their domestic legal systems is currently 120. Furthermore, the USA are included in the number, though they have ratified none of the relevant human rights instruments, because there are precedents of domestic courts effectively realising the right to food of plaintiffs in the context of food stamps, albeit obviously steering well clear of any reference to a right to food. While the doctrine sponsored by the CESCR is still not universally shared, the number of States in which domestic courts can potentially apply the right to food during litigation has therefore risen consistently. Further, 31 States, though

lacking any of the above, have incorporated the right to food in the looser form of a directive principle of State policy; the latter type of incorporation however offers little basis for litigation. The CESCR has repeatedly stressed the preferability of incorporation of the right to food in national legal systems, but never pushed it as far as to envisage it as an obligation. Lastly, incorporation in national legal systems should be complemented with the drafting of comprehensive and far-reaching plans for implementation, in line with national resources and necessities, following a rights-based approach to development. The latter has some distinguishing features. Firstly, it is based on justiciable entitlements; secondly, it requires respecting the principles of the PANTHER framework (participation, accountability, non-discrimination, transparency, human dignity, empowerment and rule of law). These elements are a *conditio sine qua non* for ensuring that the inclusion of the neediest, traditionally left out, is made the central concern of development. An analysis of the Indian *PUCL* case provides great insight as to the power of a court to forcefully push a reluctant State not only to remedy a violation, but also to undertake extensive proactive engagement through law and policy-making in order to humanise development under a such an approach. However, despite the laudable activity of the Supreme Court, implementation remains problematic, once again, due to the lack of political will of the States (at the federate and at the federal level); moreover, replicability seems dubious, as it was argued that such extremely far-reaching judicial action pertains to exclusive characteristics of the Indian Supreme Court and its relation with the Indian civil society.

At the regional level, the jurisprudence of regional courts also offers some insight. There is unfortunately little to say about Europe: the European Social Charter of 1961, reformed in 1999 (and still not universally ratified) is overseen by the ECSR, an independent body of experts. However, such body has merely declaratory functions, and the issuance of recommendations is delegated to the intergovernmental Committee of Ministers of the Council of Europe, thus offering ESC rights a rather loose protection, leaving ample margin of discretion to States. In the Americas, the ACHR, amended by the Protocol of San Salvador, explicitly envisages the right to food in article 12. Compliance is overseen by the IACtHR, a proper judicial mechanism. The Court has been very active in the defence of indigenous communities, sometimes relying on creative interpretations in order to protect their rights to judicial remedy, property (as concerns land), food and others, often sponsoring a *pro homine* approach. In some cases, it also performed judicial review of State action, and it has shown great attention to ensuring the coherence of its sentences with the Vienna Principles, ruling on the right to food also based on the right to life. In Africa, the African Charter does not contain an explicit reference to the right to food, but has been interpreted by the AfCHPR to include it with particular reference to the rights to health and satisfactory environment of development in the *SERAC* case. The latter is also a precedent of striving to hold TNCs accountable through the (also

extraterritorial) obligation to protect of the States. In general, the doctrine is evolving towards a sharing of the responsibility between the State, and the TNCs, possibly even towards the recognition of direct responsibility for human rights upon the latter themselves – although at the present time, these are mostly supervised through voluntarist mechanisms. In a 2003 sentence, the AfCtHPR adopted an approach to assessing reasonableness of State action with regard to progressive realisation that was remarkably close to the CESCER's doctrine. The jurisprudence of both AfCtHPR and IACtHR also offers some reflection on the recent evolution of the notion of rights-holders to include a collective dimension; aside from the existing UN Declaration on the Rights of Indigenous Peoples, frequently referred to in the jurisprudence of the IACtHR, a UN Declaration on the Rights of Peasants and Other People Working in Rural Areas is currently being drafted, showing great promise and tackling a number of hoary issues like IPRs. Save for the European case, which is a lax regime of protection on its own, even the other two courts do however face issues in generating compliance with their decisions.

Finally, on the international level, the CESCER in its quasi-judicial function has to strike a delicate balance between the necessity of attracting more States into ratification (thus forbidding excessively creative and extensive recommendations) and ensuring the credibility and certainty of ESC rights, maintaining an ability to engender transformative change in the juridical doctrine. One dashing element of the OP is its article 8.4, which enshrines the criterion of reasonableness for judging the positive action of States in compliance with their obligations. This espouses the considerations above in that the CESCER has to use such criterion not to micromanage State policy, but to generally direct it into a desirable direction, offering a range of possible options. Connected to the concerns on the stringency of the practice of the Committee is the matter of ensuring the enforcement of its decisions, through the follow-up procedure under article 9. The principle to be adopted is that of 'effectiveness', which must substantiate in a proactive interpretation of the article, with an eye to not only pressuring unwilling States, but also providing the unable ones with implementation assistance. The practice of follow-up is another particularly innovative element in quasi-judicial practice, and a powerful instrument for compliance, if adequately used. Finally, article 14 allows the CESCER to call upon intergovernmental organisations like the World Bank, both for technical advice and for direct assistance — the latter of which is particularly relevant, as it potentially entails calling upon them, for instance, to suspend financing for programmes and policies that are harmful to the realisation of the rights in the concerned State. An analysis of the (thus far limited) jurisprudence of the Committee confirms these considerations.

A final consideration is now necessary on the extraterritorial obligation to fulfil, which entails cooperating to the creation of an enabling international environment (facilitate) and providing assistance (e.g. ODA) to States that rightfully request it (provide). This brings us back to the separation between the CESCER and the States that chose to follow its doctrine and adopt rights-based approaches to development, and the States that oppose the right to food and promote food as a tradable commodity not object to any entitlement, seemingly under the conviction that market mechanisms will suffice to ensure an efficient and equitable distribution of such a vital resource. The thesis explores the stringency of the obligations confronting the voluntarist approach with the moral compulsion of a theory of human rights, constructed borrowing from existing literature. It argues that there are no consistent cultural barriers to human rights, and that incorporation in law (and therefore justiciability), at least as concerns the immediately justiciable dimensions recognised by the CESCER, is essential for them to have meaning. An altogether denial of justiciability for human rights renders them risible, little more than a means for States to obtain a reputational boost by joining the relevant international instruments. To this regard, especially in light of the Vienna Principles, the behaviour of influential States arbitrarily ignoring the right to food (an inarguably indispensable component of the rights to life and health) compromises the *raison d'être* of the entire human rights system. Alston was correct in arguing that failure to guarantee a minimum content irrespective of the circumstances defeats the whole purpose of elevating these claims to the rank of 'rights' in the Covenant. The matter becomes more controversial when considering the international obligation to fulfil. Especially when adopting a cosmopolitan approach to global justice, there are very good reasons to argue that there is a moral obligation to reform such system, considering that, as Pogge assessed, it could be done with relatively little effort, even in a restrictive manner aimed only at ending life-endangering deprivations. The disproportionate responsibility of affluent States in creating and defending an international system that foreseeably and avoidably causes a great number of deaths also creates a compelling moral obligation to provide assistance. And yet, neither of these 'moral' obligations is being met by many affluent States. ODA dangles low, SDG 2 remains underpinned by a voluntarist streak and reform of the regulatory framework is nowhere to be seen. Should these 'moral' obligations be made justiciable? An immediate contraindication is that this would make human rights into political instruments in a debate on 'who is at fault for world hunger', which would likely worsen the disenchantment that already presently afflicts them. Secondly, the only plausible forum to adjudicate such discussion would be the CESCER under the opt-in inter-state procedure, for example a State accusing another of having failed its international obligation to respect the right to food by sponsoring trade regulations with foreseeably negative effects in the WTO, or relatedly to fulfil, on the same grounds, or denouncing the insufficient level of ODA. However,

the low number of States that have opted in and the current need for the Committee to adopt a conservative jurisprudence makes it an unlikely development in the foreseeable future. Another possible avenue would be an expansion of the notion of duty-holders to include MLIs, but that is a road rife with pitfalls, and still in its early stages. Thus, the thesis highlights a number of obstacles that limit the reach of courts: the non-universal incorporation of the right to food in domestic legal systems, the lack of information over one's own rights, lack of access to justice and the difficulty of courts to engender compliance, to name a few. Most importantly, justiciability can do nothing when the State has done all that it could, but failed due to lack of available resources; such cases require instead compelling States to take action in compliance with their international obligation to fulfil, but that seems to be currently out of the range of justiciability.

Human Rights Indicators: Statistical Monitoring for the Right to Adequate Food

The thesis therefore turns to the analysis of the other instrument that is currently used to advance the right to food: human rights indicators (HRIs). Indicators are statistical instruments allowing to communicate effectively complex realities in a form of easy understanding, extrapolated from context. They have a 'knowledge' effect, whereby they produce a reality knowable through numbers, and a 'governance' effect, whereby they highlight issues that deserve attention and direct policymaking. By labelling, they confer importance to the object of measurement: deciding what is worth measuring (and therefore rendering it visible for observers), what data to measure that on (including or excluding data sources can have a great impact on the final measurement) and what interpretation to give to the data are all activities that entail a degree of judgement and underlie the apparent neutrality of numbers. However, such neutrality is what makes them attractive for policymaking, as they bring data under the scrutiny of the public and reduce the arbitrary power of elites — especially so, in a world in which the elimination of corruption is so high on the global public agenda. In light of their governance power, however, it is essential that indicators be used for good, and not to misdirect; it is entirely within the realm of possibilities that they be used to justify policy decisions through an *ad hoc* collection of data, instead of the other way around. Pitfalls line the road of indicators even when they are used with the best intentions; for example, Goodhart's law, whereby an indicator that is not carefully formulated might end up encouraging policy choices disregarding the actual needs of the population, merely to score higher on the indicator. Likewise, indicators selected for their ease of measurement may cause similar distortions. Especially in light of their governance effects, it is necessary to account with due caution for the fact that these instruments are primarily devised in the global North (due to obvious reasons of technical expertise) thus potentially further polarise decision-making power.

The need to take into account the risks connected to indicators should not obfuscate their potential to introduce human rights in a reluctant development discourse, especially in light of their ability to raise issues on the agenda and, when used together with benchmarks and deadlines, to become a powerful instrument to direct action. They are furthermore strong bases for human rights monitoring. Indeed, monitoring bodies like the CESCR saw this potential, and probed the possible utilisation of the quantitative indicators already widely in use in the UN development agencies and in the World Bank for human rights monitoring. In additions to the reasons of above (higher precision of monitoring and governance effects), statistical measurements could sweep the hoary problem of authority of quasi-judicial bodies under the rug of impartial expert opinion. Perhaps most importantly, their allure lied in their communicative power, translating the sometimes inaccessible legal language of human rights into a form of easier understanding — with the caveat that their adherence to the normative content of the rights they monitor be strictly checked by a competent body. This is why the CESCR transitioned over time from holding the development of appropriate national monitoring systems to be desirable, to envisaging it as a matter of obligation under the Covenant in its General Comments and concluding observations.

After concluding development indicators to be inadequate, a set of dedicated HRIs was developed by the OHCHR between 2006 and 2008, reaching a final formulation in a Guide that was published in 2012. Abandoning ambitions of universal HRIs allowing for cross-country comparisons and rankings, the participatory process that led to such documents compiled instead an “illustrative” Framework of indicators that were to be adapted to the national context for self-monitoring following very specific procedural requirements. First element of difference from quantitative development indicators, the Framework states the importance of qualitative indicators for human rights monitoring, as well; both kinds can in turn be subjective (based on perceptions and opinions) and objective (based on facts). The Framework still expresses a preference for quantitative over qualitative, and objective over subjective. Moreover, rather than being tangent to the normative content of the rights they monitor, HRIs are tailored upon it (including the interpretation expanded in General Comments), each giving rise to a set of “attributes”. In line with the ‘Vienna principles’, such attributes reveal the interconnection of human rights (e.g. the right to food is both an attribute of the right to life, and a right in its own standing). Further, they integrate the overarching requirements of human rights, like non-discrimination, equality and participation. Finally, they are envisaged in a way that makes them appropriate for capturing the compliance of States with their obligations to ‘respect, protect and fulfil’ under human rights instruments. They do so by creating indicators of three kinds. Firstly, structural indicators, which capture the commitment of the State by monitoring the likes of the State’s rate of ratification of the international instruments in which the

right is enshrined, or the rate of acceptance of complaints from the preposed remedial mechanisms (and connectedly, the rate of remedy awarded to the victims). Secondly, process indicators, ‘flow’ measures that capture the effort of the State by monitoring the existence of programmes and policies to realise the right, their coverage and their impact. Thirdly, outcome indicators (often overlapping with the existing development ones) ‘stock’ measures capturing the results of the State by monitoring for instance the prevalence of undernourished people. The latter two categories of indicators must be designed carefully, in order to establish an effective causal nexus between them, for this tripartite framework to adequately capture the State’s compliance with its obligations. All three categories must furthermore be tailored upon the national context, lest they generate undesirable effects. In line with the methodological premises above, the indicators have to be designed in a holistic fashion and through a participatory process (so as to ensure that they adequately capture the needs of the rights-holders and are not perverted in a top-down fashion). Participation must also reflect in establishing rights-based monitoring (RBM) at country level, for the same reasons. It is only through taking stock of the lived reality through the participation of relevant stakeholders that HRIs can adequately cover their monitoring function. Moreover, data must be disaggregated, as far as possible, along the “prohibited grounds of discrimination”, so as to highlight otherwise concealed and overlooked patterns of systemic marginalisation. There are however some caveats, like the fact that disaggregation might just as likely solidify otherwise fluid separations (through the ‘knowledge’ effect), or contribute to the discriminatory activity of an oppressive government by highlighting the targets. “Socio-economic and administrative statistics” should be taken from official statistical offices, whereas “event-based data” should be gathered by NGOs, testimonies of the events and such, as States cannot be trusted with self-reporting in cases of violation. The thesis then proceeds to review the proposed attributes and indicators for the right to adequate food, verifying how they meet the requirements above and in general reflect the necessary characteristics of the PANTHER framework for a rights-based approach. Moreover, this tentative list covers a number of dimensions, leaving to the State the choice of which indicators to adopt for domestic monitoring in line with the contextual necessities. The individual is not only the object of monitoring, but the holder of entitlements relating to their inherent human dignity, to be involved in the process of drafting of indicators. It appears therefore that, despite relying on a different tripartite structure *vis a vis* justiciability (the obligations to ‘respect, protect and fulfil’ versus the monitoring of ‘commitment, effort and results’), HRIs found their own path to contributing to the right to food. At least under the lens of a theoretical analysis, they seem convincingly adherent to the necessities of a rights-based approach and therefore able to effectively monitor State conduct (and to direct it when coupled with benchmarks and deadlines), although always inviting caution as to their possible misuse.

Yet, at the present time, it is impossible to couple such theoretical consideration with an assessment of their practical impact, as their diffusion is still at an early stage, even in the few countries in which the advocacy of the OHCHR managed to cause the inclusion of HRIs in the monitoring of national development plans. This limited progress is the counterpart to the less rosy picture painted by the concluding observations of the CESCR over the last five years, almost all of which invite the States to “take steps to progressively develop and apply appropriate indicators on the implementation of economic, social and cultural rights”, then directing specifically to the Framework. While practice may be limited, a review of such observations provides some insight as to a new dimension in the activity the Committee. By undertaking a function of auditing (essentially, monitoring of monitoring), it circumvents the pitfalls of human judgement, like allegations of politicisation, potentially strengthening the ability to engender compliance by shifting the responsibility of monitoring to the monitored party itself, and limiting the review to an expert judgement of the appropriateness of the indicators that the State has selected. This ‘government at a distance’ however merely conceals the “pesky, irreducible core of human judgement” that human rights treaty bodies inevitably carry out. The observations of the Committee indeed encouraged countries to different extents, depending on their shortcomings: from an expansion of data collection, to further disaggregation, to more inclusive processes. On the other hand, the monitoring activities of other organisations, like CSOs and NGOs, may help fill the gap when the data collected by the State is insufficient or inadequate, through grassroots data-gathering that may more closely reflect the lived reality of the realisation of the rights and highlight discrimination and inequalities by ensuring the participation of the right-holders. FIAN International provides an example of one such entity developing a set of indicators that is closely resembling the one proposed by the OHCHR — although, again, it is still under development and currently in an incomplete and tentative state.

A final reflection on indicators assesses the impact of integrating the HRI Framework into national monitoring on the received levels of international assistance. Recent research has highlighted a positive correlation between human rights performance and received levels of ODA. Assuming based on the theoretical analysis of the Framework that its adoption would highlight previously invisible shortcomings in the realisation of human rights, the thesis constructs a simple model that makes a division between the short and the long term. In the short run, inaction (non-adoption) would have no impact on the level of ODA, whereas action would cause a reduction, for the reasons above. In the long run, a further distinction is to be made between a virtuous State, earnestly committed to the realisation of human rights, and a vicious State, which has no such interest in mind. A virtuous State choosing inaction (for instance out of fear for the effects on ODA) will still be called out on its violations because of the parallel development of HRI-based monitoring systems by

NGOs and CSOs, able to detect violations, with the larger negative effect that comes through external denunciation; such effect is of course exacerbated for a vicious State. On the other hand, action would in the long run yield a continuous moderate negative effect for vicious States, but a potential rise in the levels of ODA for States that have used the more accurate detection of situations of missed realisation of human rights to address them more effectively. There seems therefore to be an incentive in the long run to adopt the Framework, which gives some reason for hope as to its future diffusion. Nevertheless, human rights require immediate satisfaction. The process could be accelerated by devising an indicator on the appropriateness of domestic monitoring, designed and monitored independently (possibly by the OHCHR), channelling the communicative power of indicators to increase the negative effects in the short run. However, while dragging a corrupt State in the spotlight would be desirable, a State that chooses not to adopt the Framework because it desperately needs ODA for its development and cannot afford the short-term loss could be an undesirable victim. A raise in the constantly low-hanging level of ODA would also accelerate such process by increasing the stakes. The model is merely a mental experiment not supported by (currently unavailable data), and it relies on some simplifying assumptions. It only considers ODA among the various types of assistance, as it is the primary one, but the same positive correlation between e.g. private investment and human rights remains unexplored. Moreover, it assumes that, firstly, non-State stakeholders will be able to develop and implement HRI monitoring as appropriate in the long run, and secondly, that they may act as pervasive and all-seeing eyes, when they may in some cases meet debilitating obstruction in their access to data or in their performance of surveys and other data-gathering activities. Nevertheless, keeping in mind the limited scope of the model, it can be concluded that there is indeed an incentive to adopt the Framework in the long run.

Conclusion

Justiciability and indicators have both undergone a wide-ranging process of evolution. An immediately evident difference of scope passes between the two. Justiciability is a backwards-oriented process, detecting a violation in the past, and providing remedy and reparation as appropriate so as to safeguard the rights of the victim. Correcting a violation surely upholds the rule of law by creating the certainty of punishment and remedy, but that is about the extent to which a court is able ensure non-repetition. On the other hand, HRIs, especially when used as guiding principles for development programmes, rather constitute a promise for the future, facilitating the construction of an enabling environment in which the rights can be continuously and stably enjoyed by all. The fact that they are set autonomously by the State, together with their communicative potential and ability to strengthen monitoring, also entails a stronger persuasive power. They do however lack the co-

gency and immediateness of a court's decision, which is to some extent better suited for the compelling obligation for expeditious remedy of violations of human rights, and they are subject to the many pitfalls explored in the last chapter. Both avenues, each with their strengths, represent the strife to adapt to the challenges of the globalised world, like the proliferation of relevant actors to hold accountable. Together, they create a framework whereby indicators direct development on a desirable path, complementing justiciability in its most controversial field, that of judging compliance with the obligation to fulfil (which is still making progress in courts at all levels, through a review of the reasonableness of the positive action of States). Courts, on the other hand, provide a steady basis of certainty to human rights by ensuring their protection under rule of law, and correct the course of development by providing punishment and remedy wherever it may find violations. The former act on a systemic level, in a top-down fashion, striving to anchor development to an individual dimension of human dignity; the latter act on an individual (and community) level, in a bottom-up fashion, protecting entitlements in order to ensure that development is inclusive. To such regard, they create a remarkable and much needed framework that has great potential to achieve progress in the realisation of human rights, if evolution continues on such path. Nevertheless, the framework still presents some shortcomings: both the legal incorporation of the right to food and the decision to submit the State to the authority of regional and international monitoring mechanisms, and the incorporation of HRIs into domestic monitoring are ultimately voluntary. On the same note, neither of the two avenues, the former working on sanctions and obligations, the latter on incentives, has any credible way to engender the necessary transformative change in the international regulatory framework, which will continue to hamper the global effort to the universal realisation of the right to food until political will, established since the introduction to be the root cause of world hunger, will manifest. Despite the considerations advanced as to the international obligation to fulfil, such commitment has yet to take root at the international level, as testified by the low levels of ODA, the lack of reform of the regulatory framework and the exclusion of the right to food from SDG 2. To such regard, a foreseeable evolution may only come through a systemic shock radically changing the global balance of power, as perhaps the Chinese BRI will bring about through massive investment in developing countries — although the Initiative is rife with challenges and potential undesirable consequences.