

October 2004

E



منظمة الأغذية
والزراعة
للأمم المتحدة

联合国
粮食及
农业组织

Food
and
Agriculture
Organization
of
the
United
Nations

Organisation
des
Nations
Unies
pour
l'alimentation
et
l'agriculture

Organización
de las
Naciones
Unidas
para la
Agricultura
y la
Alimentación

**INTERGOVERNMENTAL WORKING GROUP FOR THE
ELABORATION OF A SET OF VOLUNTARY GUIDELINES TO
SUPPORT THE PROGRESSIVE REALIZATION OF THE RIGHT
TO ADEQUATE FOOD IN THE CONTEXT OF NATIONAL FOOD
SECURITY**

Information paper ¹

Rome

Justiciability of the Right to Food

Table of Contents

	Pages
I. Introduction	1
II. Definitions and Concepts	2
III. Justiciable Dimensions of the Right to Food	3
A. EXPLICIT ICESCR OBLIGATIONS	4
1. <i>To Take Steps</i>	4
2. <i>Non-Discrimination</i>	5
B. LEVELS OF OBLIGATIONS	7
1. <i>Respect</i>	7
2. <i>Protect</i>	8
3. <i>Fulfil (facilitate)</i>	8
4. <i>Fulfil (provide)</i>	9

¹ An advanced draft version of this paper was made available to the Third Session of the IGWG in July 2004.

For reasons of economy, this document is produced in a limited number of copies. Delegates and observers are kindly requested to bring it to the meetings and to refrain from asking for additional copies, unless strictly indispensable.
Most FAO meeting documents are available on Internet at www.fao.org

IV. Some Specific Issues concerning Justiciability	11
A. ARE SOCIO-ECONOMIC RIGHTS OF A DIFFERENT NATURE?	12
B. IS THE RIGHT TO FOOD TOO VAGUE?	13
C. IS JUSTICIABILITY COMPATIBLE WITH SEPARATION OF POWERS?	13
D. DO RESOURCE IMPLICATIONS PREVENT JUSTICIABILITY?	14
V. Possible Outcomes of Judicial and Quasi-Judicial Decisions	15
VI. Conclusion	17

I. Introduction

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

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

3. Judicial and quasi-judicial accountability are established through legislation, its implementation and, in the final instance, the ability of a free and independent judiciary or quasi-judicial body to uphold the law through the effective enforcement of judicial pronouncements, thus supporting both the separation and balance of power.²

4. The question of the justiciability of economic, social and cultural rights has again resurfaced within the context of the proposed Optional Protocol (OP) to the *International Covenant on Economic, Social and Cultural Rights* (ICESCR). Debates on this potential international instrument provide a wealth of information concerning the general nature of rights enshrined in the ICESCR, from which lessons and examples may be drawn to inform the present discussion. It should be borne in mind, however, that within the context of the Voluntary Guidelines, arguments concerning the justiciability of the right to food are somewhat different. Firstly, the right to food is closely related to the right to life - a civil right, well-recognized in international and regional law and through a number of national constitutions.³ Secondly, the IGWG is not debating whether an international quasi-judicial organ should be able to adjudicate potential state party violations of the ICESCR, but rather whether a competent national tribunal or quasi-judicial body would and should be able to make legal judgement as to whether the right to food had been adequately respected, protected and fulfilled.

5. While the right to food is justiciable in a number of states, others have voiced doubts as to whether the right to food should generally be considered to be justiciable and if so, whether it would be advisable for this right to be justiciable in all countries.⁴ In general, however, most nations have recognized the justiciability of the right to food, or some aspects of same, through legislative efforts ranging from social security guarantees, through food safety regulations, to land

² See Office of the High Commissioner for Human Rights, *Human Rights and Poverty Reduction: A Conceptual Framework*, United Nations, New York and Geneva, 2004.

³ See Art. 6 International Covenant on Civil and Political Rights which states: "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."; on the scope of Art. 6 see Human Rights Committee, General Comment 6: The right to life, 30 April 1982, para. 5, U.N. Document HRI/GEN/1/Rev. 6 of 12 May 2003, p. 128 where the Committee notes that "the right to life has been too often narrowly interpreted (...) The expression 'inherent right to life' cannot properly be understood in a restrictive manner, and the protection of this right requires that States adopt positive measures (...) [it] would be desirable [if States took] all possible measures to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics."

⁴ See "Intergovernmental Working Group for the Elaboration of a Set of Voluntary Guidelines to support the progressive Realization of the Right to Adequate Food in the context of National Food Security", Recognition of the Right to Food at the national level, FAO Document IGWG RTFG/INF2, Rome 2004 (hereafter "IGWG").

tenure legislation. This information paper will provide a framework definition with regard to the justiciability of the right to food, prior to engaging in a review of how the different aspects of this right are, and can be, justiciable, as illustrated from the practice of numerous and diverse judicial and quasi-judicial bodies. Furthermore, arguments against the justiciability of the right to food will be thoroughly examined. Finally, where violations of the right to food are found to exist, available remedies are canvassed in order to demonstrate the positive role that judicial and quasi-judicial bodies can play in relation to the protection and promotion of all human rights, including the right to food.

II. Definitions and Concepts

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

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

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

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

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

The Covenant [ICESCR] norms must be recognized in appropriate ways, within the domestic legal order; appropriate means of redress, or remedies must be available to any aggrieved individual or group and appropriate means of ensuring governmental accountability must be put in place.⁵

9. Further, through General Comment 12, the CESCR advised that any “person or group who is a victim of a violation of the right to adequate food should have access to effective judicial or other appropriate remedies”.⁶ “Other appropriate remedies” refers, in particular, to those provided by quasi-judicial mechanisms.⁷

⁵ Committee on Economic, Social and Cultural Rights, General Comment 9: The domestic application of the Covenant, U.N. Document E/C.12/1998/24 of 3 December 1998, para. 2 (hereafter “CESCR”).

⁶ CESCR, General Comment 12: The right to adequate food, U.N. Document E/C.12/1999/5 of 12 May 1999, paras. 32-35.

⁷ For the purposes of this paper, the concept “quasi-judicial mechanisms” denotes any non-judicial body that has the power to receive and consider complaints of individual or groups in a particular case. At the national level, a quasi-judicial mechanism is often found with a national human rights institution such as a human rights commission or a human rights ombudsman, whereas at the international level quasi-judicial bodies are, for example, the Human Rights Committee or the Committee for the Elimination of Racial Discrimination. Additionally see: Andreas Khol, *Zwischen Staat und Weltstaat: Die internationalen Sicherungsverfahren zum Schutze der Menschenrechte*, Wien 1969, p. 63.

10. Regional instruments contain similar provisions on the right to a remedy. These include Art. 25 (1) of the American Convention on Human Rights and Art. 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). In particular, the European Court of Human Rights has found the absence of remedies on the national level to be a violation of the ECHR.⁸

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

12. It may also be useful to distinguish between insufficient or inadequate access or use of food resulting in malnutrition or undernutrition and whether such situation is the result of a violation of the concerned individual's right to food. While a chronically malnourished individual could almost certainly claim that his or her right to food and nutrition was not realized, in order for a justiciable violation to exist, account must be taken of whether and to what extent the State had an obligation to take or not to take certain action, including, as appropriate, the possible inability of the said State to take action with regard to the realization of this right, or other such possible defences.⁹

13. The distinction between obligations of result (the actual enjoyment of the right to food as measured, for instance, through collection of anthropometric data) and obligations of conduct (the State takes steps that are reasonably calculated to achieve the enjoyment of the right to food) is also significant in the context of justiciability. The right to food entails obligations of conduct and of result,¹⁰ and both can be subject to determination by a competent organ as to whether a violation exists. The standards to be applied to assess whether a violation has occurred will vary, especially in view of the multifaceted nature of food insecurity and malnutrition. Thus, the mere existence of malnutrition in a given country is not conclusive in proving whether a violation of the right to food exists. However, if a country has relatively high income and relatively high levels of malnutrition, this could be an indication of a failure to take necessary and appropriate steps to the maximum of available resources.

III. Justiciable Dimensions of the Right to Food

14. With regard to the justiciability of the right to food and other economic and social rights, the South African Constitutional Court has affirmed that, "at the very minimum, socio-economic rights can be negatively protected from improper invasion".¹¹

According to his study a quasi-judicial remedy implies that legal protection is provided by an independent organ, free from state influence, whose procedures are spelled out in general terms and which is empowered to take a legally non-binding decision in particular cases..

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

⁹ CESCR, General Comment 12, *op. cit.*, para 17.

¹⁰ CESCR, General Comment 3, The nature of State parties' obligations, para. 1, U.N. Document HRI/GEN/1/Rev.6 of 12 May 2003, p. 14.

¹¹ Ex parte Chairperson of the Constitutional Assembly: in Certification of the Constitution of the Republic of South Africa 1996 (First Certification judgment) 1996 (4) SA 744 (CC), paras. 77 - 78.

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

*While governments intentionally violate civil and political rights with considerable frequency, the deliberate infliction of poverty, famine, or ill health is far less common. When it does occur – when deprivations are deliberately imposed on a population in whole or in part, especially from discriminatory motives – sanctions are, of course, appropriate.*¹²

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

16. In the following, international, regional and national jurisprudence will be cited. It should be noted, however, that while the cases do not all concern the right to food, they serve to illustrate the reasoning of Court judicial and quasi-judicial bodies regarding principles applicable to the right to food

A. EXPLICIT ICESCR OBLIGATIONS

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

1. To Take Steps

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

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

19. In relation to the right to food, this paragraph essentially requires States Parties to “do something” - engage in actions dedicated to the realization of the right to food. While it is recognized that the full realisation of this right can only be achieved over time and is subject to the availability of resources, States Parties to the ICESCR signalled their commitment to be accountable at the international level with regard to the right to food. National level accountability will depend on the domestic laws of a country, including the status of international treaties,

¹² Dennis, Michael J. and David P. Stewart, *Justiciability of Economic, Social and Cultural Rights: Should There Be an International Complaints Mechanism to Adjudicate the Rights of Food, Water, Housing and Health?*, American Journal of International Law, VOL 98, No 3, July 2004, at 498

Constitutional provisions, the rule of law and political accountability. For the purpose of this paper it will be assumed that countries have in one way or another undertaken to take steps towards the realization of the right to adequate food. Elaborating on the principle of “taking steps”, the CESCR has advised that States Parties cannot defer action indeterminately, even if the rights are to be realized progressively over time and are constrained by available resources.¹³ However, the extent of such steps could vary according to the level of economic resources available.

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

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

22. In *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*¹⁴ (the “Ogoni Case”), the African Commission on Human and People’s Rights considered a communication that involved a violation of wide-ranging rights, including the right to food. The Commission had to consider whether or not the then military government of Nigeria had, through action and inaction, violated the rights of the Ogoni community. While the right to food is not explicitly enshrined in the *African Charter on People’s and Human Rights*, the African Commission read this right into the Charter and held that it was implicit in many other rights, such as the right to life, health, and to economic, social and cultural development. In its holding, the African Commission found that:

*Of course, the Commission here is not blaming the Nigerian Government for its endeavours to make use of its resources and thereby bring development to its people. Rather, the blame is qualified in that the Government has not taken such steps as would [be necessary] to protect the Ogoni population from harms done by the NNPC-Shell consortium.*¹⁵

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

2. Non-Discrimination

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

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

¹³ CESCR, General Comment 3, op.cit., para. 2.

¹⁴ Decision regarding Communication No. 155/96, Case No. ACHPR/COMM/A044/1 of 27 May 2002.

¹⁵ *Ibidem*, para. 56.

25. In the words of the CESCR, Article 2 mandates that
- any discrimination in the access to food, as well as to means and entitlements for its procurement, on the grounds of race, colour, sex, language, age, religion, political or other opinion, national or social origin, property, birth or other status with the purpose or effect of nullifying or impairing the equal enjoyment or exercise of economic, social and cultural rights, constitutes a violation.*¹⁶
26. The principle of non-discrimination is reflected in the United Nations Charter, the UDHR, and is additionally reaffirmed in a large number of binding international and regional human rights instruments. Within the national context, the principle of non-discrimination is deeply rooted in numerous constitutions, common legislation and national jurisprudence. If national economic, social or cultural rights legislation and/or state programmes/actions were found to discriminate against persons on the basis of such unlawful criteria, the question of justiciability in this regard would be easily resolved. The following four cases are illustrative of this point.
27. In *Khosa and others v Minister of Social Development*¹⁷ the South African Constitutional Court ruled on social security legislation, which was challenged on the basis that they excluded permanent residents who were non-citizens from having access to the social assistance scheme. The Court struck down the law as being unconstitutional and unreasonable as it excluded vulnerable persons lawfully residing in South Africa. By way of remedy, the Court judicially amended the legislation to remove its discriminatory effects, i.e. by “reading in” the words “or permanent resident” into the relevant provision.
28. In *F. H. Zwaan-de Vries v. The Netherlands*¹⁸ the United Nations Human Rights Committee affirmed the principle of non-discrimination in relation to social rights when it ruled that Dutch legislation barring married women - but not married men - from obtaining unemployment benefits, was discriminatory and could not stand.
29. While the Constitution of the United States is silent on economic, social and cultural rights, it does contain provisions on equal protection under the law (14th Amendment), which the Supreme Court has used in the past to ensure access to public assistance programmes. Thus, in *Plyler v. Doe*,¹⁹ the State of Texas was forbidden to deny public education to undocumented immigrant children.
30. In *Eldridge v. British Columbia (Attorney General)*²⁰, the Supreme Court of Canada declared that the failure of health care programmes to provide for interpretation services for the deaf constituted discrimination and thus violation of the equality provisions of the Canadian *Charter of Rights and Freedoms*. This failure denied deaf people the equal benefit of the law and discriminated against them, in comparison with hearing persons. The Court confirmed the principle that discrimination can accrue from a failure to take positive steps to ensure that disadvantaged groups benefit equally from services offered to the general public and acknowledged that the duty to take positive action to ensure that members of disadvantaged groups benefit equally from services offered to the general public is subject to the principle of reasonable accommodation.
31. It may be safely concluded that, as applied to the right to food, the principle of non-discrimination would be amenable to justiciability before national Courts

¹⁶ CESCR, General Comment 12, op. cit., para. 18.

¹⁷ Case No. CCT 13/03, decision of 4 March 2004; the case was decided together with *Mahlaule and others v. Minister of Social Development and others*, Case No. CCT 12/03 on account of the similarities of the two cases.

¹⁸ Communication No. 182/1984, U.N. Document CCPR/C/29/D/182/1984 of 9 April 1987.

¹⁹ 457 US 202 (1982).

²⁰ Case No. [1997] 3 S.C.R. 624.

B. LEVELS OF OBLIGATIONS

32. The following typology of State obligations is utilised to examine justiciability with regard to the right to adequate food: obligations to respect, protect and fulfil (the latter comprising obligations to facilitate and provide). This typology, which has been applied by the CESCR to clarify the obligations of State Parties to the ICESCR²¹, goes beyond the simple denotations of obligations as being either negative or positive. Judicial practice from a number of States conforms to this typology, notwithstanding the manner in which the recognition finds expression in a particular national constitution or legislation.

1. Respect

33. The obligation to respect the right to adequate food requires States not to take any measures that result in preventing individuals and/or groups from utilising their own efforts to satisfy this right.²² Conceptually, this formulates a key negative obligation, which would be violated if a State were to authorize, instruct or otherwise tolerate official policies, programmes and/or actions that destroyed people's food sources - such as crops or food stocks - without a valid reason or reasonable compensation. Other deprivations of income leading to inability to purchase adequate food could also fall hereunder. The obligation to respect may also include a prohibition against the suspension of legislation or State policies that enable people to have access to food, or the implementation of a food policy that excluded segments of the population vulnerable to hunger and food insecurity. The following four cases illustrate violations of the obligation to respect.

34. In the *Ogoni case*, cited above, the African Commission held that by destroying the people's food sources and arbitrarily evicting them from their homes, the authorities had breached their negative obligation not to interfere with people's access to food. In *Residents of Bon Vista Mansions v. Southern Metropolitan Local Council*²³, an action was brought before the High Court of South Africa, following a local council decision to disconnect the water supply to the flats, due to non-payment of water charges. The Court found that the applicants had existing access to water before the Council disconnected their supply; that the conditions and procedures for disconnection had not been "fair and equitable" in accordance with the applicable statute, and that the Council's disconnection of the water supply constituted a *prima facie* breach of its constitutional duty to respect the right of existing access to water. The water supply to the flats was subsequently reinstated.

35. In *Carlos Torres Benvenuto and others v Peru*,²⁴ the Inter-American Commission for Human Rights found that the Republic of Peru violated the rights of pensioners when it failed to pay monies calculated in the manner established by law, once petitioners began receiving payments under a specific system: accordingly, the subsequent modifications of pension schemes constituted a violation of the right to progressive development with respect to economic, social and cultural standards established under Articles 21, 25 and 26 of the American Convention.

36. Finally, in *Ain O Salish Kendro (ASK) & Ors v Government of Bangladesh & Ors*²⁵ the Bangladesh High Court held that the Government's demolition of 'Basties' (slum-dwellings) and the eviction of their inhabitants was contrary to the respect for human dignity.

²¹ First introduced in CESCR, General Comment 12, op.cit. and subsequently used in General Comments 13, 14 and 15.

²² CESCR, General Comment 12, op. cit., para. 15.

²³ 2000 (6) BCLR 625 (W), Case No.: 01/12312.

²⁴ Case No. 12.034.

²⁵ [1999] ICHRL 118 (3 August 1999).

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

2. Protect

38. The obligation to protect requires States to ensure that private parties, such as enterprises or individuals, do not deprive other individuals of access to adequate food.²⁶ Such measures would include the enforcement of existing legislation and rule of law guarantees that protect the most vulnerable segments of society against outside interference. A violation of the obligation to protect could, for instance, arise in the event of unsafe food being sold and consumed, if this could be attributed to a failure in establishing or enforcing food safety standards and controls. Another example could be failure to protect tenants from illegal eviction from their farmland by other individuals or corporations. The following cases are illustrative.

39. In the *Ogoni Case* referred to above, the African Commission found that the military Government of Nigeria had also violated its obligation to protect the right to food, as it did not prevent the oil companies from depositing oil and waste products that led to the contamination of water for farming and fishing, the destruction of crops and the death of farm animals: factors which resulted in malnutrition amongst the Ogoni.²⁷

40. In “*Social Insurance Law*”²⁸, the Constitutional Court of the Republic of Latvia noted that the Constitution and international treaties protected the right to social security:

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

41. In its holding, the Court found that the Latvian system of collecting the dues from employers was not sufficient as it could lead to employees being deprived of social insurance. As such, the legislation supporting this system was found to be null and void.

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

3. Fulfil (facilitate)

43. The obligation to fulfil (facilitate) means that the State must pro-actively engage in activities intended to strengthen people’s access to and utilisation of resources and means to ensure their livelihood, including food security.²⁹ These activities do not necessarily entail the provision of substantial financial resources and could imply simply ensuring access to information regarding opportunities to satisfy the right to food. Examples of typical measures to facilitate access to food include education and training, agrarian reform, policies supportive of urban and rural development, market information etc..

²⁶ CESCR, General Comment 12, op. cit., para. 15.

²⁷ Op. cit, footnote 12., para 66.

²⁸ Case No. 2000-08-0109, decision of 13 March 2001.

²⁹ CESCR, General Comment 12, op. cit., para. 15.

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

45. An example of judicial involvement in facilitation measures rests in an order made in *People's Union for Civil Liberties versus Union of India and others*³⁰ (the “*PUCL case*”). In this case, the Supreme Court of India ruled that beneficiaries of various official food security programmes must enjoy legal entitlements under same, as this would facilitate their access to food. Furthermore, the Court ruled that Indian States should carefully identify vulnerable groups under their jurisdiction and ensure that these groups are informed as to the way in which their right to food may be satisfied.³¹ These orders were, however, auxiliary, and the Court was relying on existing programmes. Similarly, in the as-of-yet unsettled *Orissa Starvation Deaths Proceedings*,³² the National Human Rights Commission of India has considered a wide range of measures taken by the State of Orissa to facilitate access to food, including land reform, soil conservation, afforestation, primary health care and rural development programmes.

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

4. Fulfil (provide)

47. According to the CESCR, whenever an individual or group is unable, for reasons beyond their control, to enjoy the right to adequate food by the means at their disposal, States have the obligation to fulfil (provide) that right directly, within the means at their disposal (maximum of available resources).³³ This obligation also applies to persons who are victims of natural or other disasters. The obligation is, thus, not to provide for every individual but for those who cannot provide for themselves, due to age, infirmity or other such reasons.

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

49. There exists a wealth of jurisprudence from developing and developed nations on the obligation to provide. For example, as referenced above, while the final judgment in the *PUCL Case* has yet to be delivered, the Indian Supreme Court has issued a number of interim orders, which make the justiciability of this obligation before national Courts quite clear.³⁴ Indeed, the Court has issued orders according to which food grains are to be “provided to the aged, infirm,

³⁰ *People's Union for Civil Liberties versus Union of India and others*, Writ Petition [Civil] No. 196 of 2001 (hereinafter *PUCL case*).

³¹ *PUCL case*, op. cit., Court orders of 23 July 2001, 17 September 2001 and 28 November 2001.

³² Case No. 37/3/97-LD, decision of 17 January 2003.

³³ CESCR, General Comment No. 12, op.cit., para. 15.

³⁴ *PUCL case*, op. cit., Interim Order of 23 July 2001.

disabled, destitute women, destitute men who are in danger of starvation, pregnant and lactating women and destitute children, especially in cases where they or members of their family do not have sufficient funds to provide food for them”.³⁵

50. A second example pertaining to the justiciable nature of the obligation to provide, emanates from the Swiss Federal Court which, in *Gebrüder V. v. Regierungsrat des Kanton Berns*³⁶, recognized a previously unwritten constitutional right to basic minimum subsistence. This case was brought by three stateless Czech refugees who found themselves in Switzerland with no food and no money. They could not work because they could not get a permit and without official identity documents they could not leave the country. They asked the authorities for assistance but were refused. The Court decided that these individuals must have the right, at the very least, to basic minimum conditions within Switzerland so as to prevent them from being reduced to begging.

51. The third example of the obligation to provide as adjudicated through national Courts resides in *Grootboom and others v. Government of the Republic of South Africa and others*³⁷ (the “*Grootboom Case*”) where the Constitutional Court of South Africa considered the constitutional right to housing. Since the Court explored the implications of the obligation to provide, very thoroughly, the case will be presented in some detail. The applicant, Ms. Grootboom, a member of a large group of 510 children and 390 adults, lived in appalling circumstances in an informal settlement. After having illegally occupied nearby land earmarked for low-cost housing, the State evicted the community by force, with no provision for alternative accommodation. Thereafter the community settled on a sports field.

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

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

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

54. The Constitutional Court concluded that the South African housing programme was not reasonable in that it did not provide for the immediate relief of “people in desperate need”, such as those “who have no access to land, no roof over their heads and who are living in intolerable

³⁵ PUCL case, op. cit., Interim Order of May 2, 2003

³⁶ See Entscheidungssammlung des Schweizerischen Bundesgerichts, Urteil der 2. öffentlichrechtlichen Abteilung vom 27. Oktober 1995 (ATF 121 I 367, 371, 373).

³⁷ *Grootboom and others v. Government of the Republic of South Africa and others*. Case No. CCT 11/00, decision of 4 October 2000 (hereinafter *Grootboom case*).

conditions or crisis situations”.³⁸ The Court issued a declaratory order that the programme fell short and required the State to devise, fund, implement and supervise measures to provide relief to those in desperate need.

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

56. A fourth example, the case before the Constitutional Court of South Africa *Minister of Health and others v Treatment Action Campaign and others*³⁹ (the “TAC Case”), concerned the obligation to provide health care. The Treatment Action Campaign (TAC) challenged the decision by the South African Government to limit provision of the drug Nevrapine, used to limit mother-to-child-transmission of HIV/AIDS, to certain pilot health-care centres. The challenge was based on the right of access to health care services. Again, employing the reasonableness test developed in the Grootboom Case, the Constitutional Court ruled that the State had breached its obligations in relation to the right to health, by restricting access to the Nevrapine to only a few, while excluding others equally in need of it. The Court thus ordered the State to remove the restriction and roll out a national comprehensive programme.

57. *Gosselin v. Quebec*⁴⁰ before the Supreme Court of Canada concerned regulations providing for reduced welfare benefits for individuals under 30 not participating in training or work-experience employment programmes. The Supreme Court of Canada rejected that the regulations were discriminatory and further ruled that the circumstances of the case did not warrant a new application of section 7 of the Canadian Charter of Rights and Freedoms (which protects the right to life, liberty and security of the person) as the basis for a positive State obligation to guarantee adequate living standards. On this latter point, Justice Arbour (dissenting) considered that the right to a minimum level of social assistance was clearly connected to “security of person” in section 7 and that the interest claimed in this case fell within the range of entitlements that the State is under a positive obligation to provide under section 7. She further noted that the right was independent of any particular Statute and that the under-inclusiveness of the regulations in this case was clear as the State of Quebec had itself defined the minimum level of necessary income, which was higher than the welfare benefit payable to persons under 30.

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

IV. Some Specific Issues concerning Justiciability

59. While it is clear that many aspects pertaining to the right to food are justiciable in many countries, this is not fully recognized in all countries, or in all circumstances. Of course, as experience is shared between countries and as lawyers are increasingly arguing for the right to

³⁸ Grootboom case, op.cit., para. 99.

³⁹ *Minister of Health and others v Treatment Action Campaign and others*. Case No. CCT 8/02 (hereinafter *TAC case*)

⁴⁰ *Gosselin v. Quebec (Attorney General)* Case No. 2002 SCC 84.

food as a basis for decisions, it is likely that justiciability of the right to food will continue to expand over time. Yet, it must be acknowledged that there still remain arguments against justiciability, on a number of grounds. Governments may fear the cost implications of losing cases brought by people claiming a violation of the right to food. Some argue that economic, social and cultural rights, as stated in the ICESCR, are not justiciable, because they are imprecise, resource-demanding, and are subject to available resources and progressive realization.⁴¹

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

A. ARE SOCIO-ECONOMIC RIGHTS OF A DIFFERENT NATURE?

61. Even today, it is sometimes mooted that economic and social rights are merely aspirational and not "real" rights, as they are fundamentally different from civil and political rights. For this reason, there were two separate international Covenants - one for economic, social and cultural rights and one for civil and political rights - with each Covenant employing different wording as to States' obligations. Many national Constitutions also separate economic and social rights in different chapters from civil and political rights, to the effect that the former are not intended to be directly justiciable.⁴²

62. However, most countries do indeed recognize some aspects of at least some economic and social rights at the national level and through their ratification of various international treaties.⁴³ In fact, since the 1993 World Conference of Human Rights there is general consensus that all human rights, civil, cultural, economic, political and social, are indivisible, interdependent and interrelated.⁴⁴ The distinction between the types of human rights is thus gradually dissolving.

63. Indian jurisprudence is the clearest example of judicial action to overcome distinctions between socio-economic and other human rights, by extending the scope of the right to life to encompass the right to a dignified life and thus to a number of elements which are indispensable for it. This is the case not only for the right to food,⁴⁵ which is easily interpreted in the right to life (as the right to biological survival), but also for the right to education, which the Indian Supreme Court has ruled to be protected under the same ambit.⁴⁶

64. Another example is the South African Constitution, a relatively new construction, which does not distinguish between categories of rights, but stipulates that all recognized human rights

⁴¹ Ida Elizabeth Koch/ Jens Vedsted-Hansen, *Judicialised Protection of International Human Rights and the Issue of Power Balance*, in: Martin Scheinin (ed.): *The Welfare State and Constitutionalism in Nordic Countries*, The Nordic Council of Ministers 2001, pp.198 ff.

⁴² For instance, the Constitutions of India and Sierra Leone maintain such separation.

⁴³ See IGWG, *Recognition of the Right to Food at the National Level*, op. cit.

⁴⁴ World Conference on Human Rights: Vienna Declaration and Programme of Action, U.N. Document A/CONF.157/23, Part 1, para. 5.

⁴⁵ *People's Union for Civil Liberties v. Union of India and others*, op cit.

⁴⁶ *Unni Krishnan v. State of Andhra Pradesh*, AIR 1993 SC 2178, cited in: Kundu A. and S. Jain, IGWG RTFG/INF.4/APP.5, Right to food case study: India, p. 17.

must be respected, protected and fulfilled. As appropriate, specific rights, including the right to food, are then subject to realization within available resources and by taking reasonable steps.⁴⁷

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

B. IS THE RIGHT TO FOOD TOO VAGUE?

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

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

C. IS JUSTICIABILITY COMPATIBLE WITH SEPARATION OF POWERS?

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

The precise contour and content of the measures to be adopted are primarily a matter of the legislature and the executive. They must, however, ensure that the measures they adopt are reasonable. In any challenge based on section 26 in

⁴⁷ See section 27, Constitution of South Africa of 7 February 1997: “The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights”.

*which it is argued that the state failed to meet the positive obligations imposed upon it by section 26(2), the question will be whether the legislative and other measures taken by the state are reasonable. A court considering reasonableness will not enquire into whether other more desirable or favourable measures could have been adopted, or whether public money could be spent. The question would be whether the measures that have been adopted are reasonable.*⁴⁸

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

D. DO RESOURCE IMPLICATIONS PREVENT JUSTICIABILITY?

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

71. Additionally, it must be borne in mind that the realization of all human rights requires a dedication of State resources. For instance, organising elections or ensuring fair trials require a substantial allocation of resources. Furthermore, within the realm of civil and political rights, Courts have not shied away from issuing decisions that entail considerable cost implications. For instance, the European Commission on Human Rights' decision of *Jón Kristinnsson v. Iceland*⁴⁹ led to the country having to establish a number of new Courts to ensure the separation of the judiciary from the executive powers. The financial implications of this decision were considerable.

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

73. Another safeguard built into the ICESCR is the notion of "progressive realization", which explicitly recognizes that countries may not be able to fulfil all economic, social and cultural rights for all people, immediately. In this regard, it is important to distinguish between dimensions of the right to food that can be implemented immediately and those that can only be fully realized

⁴⁸ *Grootboom case*, op.cit., para 41.

⁴⁹ Case No. 13/1989/173/229.

over time.⁵⁰ Immediate measures would include stopping any State or non-State interference with the right to food, whereas progressive measures would include establishing and maintaining adequate safety nets for those unable to provide for themselves.

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

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

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

77. It should also be noted in this context that hunger and malnutrition carry costs both for the individuals and for societies as a whole. In certain circumstances, therefore, it may be more expensive in the long run to take no steps to address malnutrition.

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

V. Possible Outcomes of Judicial and Quasi-Judicial Decisions

79. According to CESCR General Comment 12, all victims of violations of the right to food should be entitled to adequate reparation at the national level, which "may take the form of restitution, compensation, satisfaction or guarantees of non-repetition".⁵¹ This section gives an overview of the types of redress generally available to Courts and quasi-judicial mechanisms, as well as remedies actually prescribed in the case law.

80. In the preceding chapter, the question of justiciability (for example, whether legal institutions can determine violations of the right to food in a meaningful way) has been answered in the affirmative. Appropriate remedies for violations of the right to food would, of course, depend on the nature of the violation. For example, if a law, State policy or official action violated the negative duty to respect the right to food, a Court might declare the law invalid, or order the

⁵⁰ See Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights of 1986, U.N. Document E/CN.4/1987/17, Annex, para. 8.

⁵¹ CESCR, General Comment 12, *op.cit.*, para. 32.

cessation of the unlawful conduct. In addition, it might order the relevant authority to correct the defect in the law or issue an interdict preventing the threatened violation from occurring. In respect of the positive obligation to protect and fulfil, a Court may direct the State to enforce legislation or devise and implement a reasonable programme giving effect to the right to food. The highlighted jurisprudence demonstrates that a wide variety of remedies may be advanced which take into account available resources, margin of appreciation, progressive realization and the separation of powers. The following cases reveal the wide range of potential remedies that may be utilised by Courts in protecting and promoting the right to food.

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

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

83. In *Grootboom*, cited above, the South African Constitutional Court declared that there had been a violation of the right to housing and that the State housing programme had to include measures “to provide relief for people who have no access to land, no roof over their heads and who are living in intolerable conditions or crisis situations”.⁵² The details of such a revised housing programme were however to be decided by the legislative and executive powers as monitored by the South African Human Rights Commission.

84. In a case before the Administrative Disputes Tribunal of the City of Buenos Aires, Argentina,⁵³ which concerned the exclusion of a family from a new food programme, “Vale Ciudad”, the Tribunal ordered the Secretary for Social Development (Buenos Aires) to incorporate the claimant and her family in the new food assistance programme on a provisional basis. Alternatively, the City Government could provide the family with the necessary food rations. The case demonstrates, on the one hand, that the threshold for an interim measure may be quite low in a case such as this, in which delay could have irreparable damage. On the other hand, the case demonstrates a flexible approach by a tribunal, providing the authorities with alternatives.

85. The Indian Supreme Court, in its interim orders in the *PUCL Case*, has given very detailed instructions to the State and Federal Governments for the implementation of eight different centrally-sponsored schemes for food security and the introduction of cooked mid-day meals in all government and government-assisted schools. However, with the exception of the mid-day meals, the orders relate to the implementation of programmes already established by the Government. The Court held that it is not possible to compel the State through the judicial process to make provision by statutory enactment to ensure implementation of those rights, but “where such legislation is already enacted by the State providing these basic requirements (...) the State can certainly be obligated to ensure observance of such legislation”.⁵⁴

⁵² *Government of the Republic of South Africa and others v. Grootboom and others*, op. cit., para. 99.

⁵³ Expediente No EXP-6985/0: Maria Delia Cerrudo y otros c/ Gobierno de la Ciudad de Buenos Aires, cited in Background paper prepared by the Secretariat: Selection of case law on economic, social and cultural rights, UN document E/CN.4/2004/WG.22/CRP.1, November 2003, page 6

⁵⁴ See *PUCL case*, op. cit., Court orders of 28 November 2001.

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

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

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

VI. Conclusion

89. From the above analysis, it may be persuasively concluded that there is nothing inherent in the right to food that dictates its non-justiciability at the national level. Indeed, there are powerful arguments in support of the justiciability of the right to food. First is the uncontested fact that the right is already justiciable in a number of countries, as the review of relevant case law has shown. Second, there is a fundamental principle in international human rights law whereby everyone has the right to an appropriate “effective remedy” when his/her right or rights have been violated.

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

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