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The Right to Food:
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Flavio Antonelli

Abstract

In a world that has the physical capacity to produce more than enough to stably feed the whole of the global population, a significant portion still suffer from hunger and malnutrition. The international system has been recognised at length to be unfair and detrimental to the aims of the fight against world hunger. The fundamental problem is the lack of political will on behalf of many (especially affluent) States to recognise binding entitlements and obligations stemming from food. The thesis analyses the two avenues of justiciability and indicators, taking stock of their evolution and the way they respond to the rising challenges posed by ever-accelerating technological and social progress. Both will have their strengths and weaknesses discussed in the present work, and an interesting complementarity between the two will emerge. Though the system they create in concert is certainly laudable and shows great promise for future evolution, it is necessary to recognise that, discouraging though it may be, it still lacks the power to address the fundamental lack of political will at the time being. This impasse may yet be overcome through an exogenous shock.

1. Introduction

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[1]. The current global food production was estimated by the FAO to potentially satisfy the daily caloric requirements of 12 billion people. Yet, the same FAO's SOFI reports of 2017 and 2018 signal that some 821 million people worldwide suffer from chronic undernourishment, a number that is rising again after decades of somewhat steady decline. Clearly the problem is not so much one of availability of food, as much as one of access to it – not production, but distribution, as was already lucidly pointed out by Sen in the early 1980s[2]. 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 that started in that same decade, still echoes to date[3]. Today's hungry are mostly agricultural workers[4]. Their problems pertain to a number of fields ranging from feeble legal tenure of land to a recurring exclusion from the benefits of development.

1.1 Structural challenges of the international system

The whole neoliberal, Washington Consensus-based international paradigm that informed both the commercial regulations of the WTO and the structural reforms imposed by the Bretton-Woods institutions was harshly criticised by the three rapporteurs and a rising number of States over the last two decades, under the realisation that world hunger is a political problem rather than a technical one[5]. They strongly condemned the WTO for creating and protecting a system of rules that foreseeably and avoidably hampers efforts to achieve food security and realise the right to food[6]. This is done especially with reference to the flawed design and skewed implementation of the Agreement on Agriculture (AoA), which allows the dumping of food products from the global North to the DCs disrupting internal production[7] and the blind application of patents on genetic resources under the TRIPS Agreement[8]. The Bretton-Woods institutions were instead accused of forcing onto DCs reforms that pushed them away from alimentary self-sufficiency and food security but failed to generate the intended benefits, causing the accumulation of a crushing debt instead[9]. Other problems pertain to the increasing mechanisation and concentration of food production that came with the Green Revolution (also contributing to environmental degradation)[10], deforestation and large-scale land acquisitions displacing rural workers with scarce legal tenure of land and

[1] See e.g.: J. Ziegler, *Report to the Commission on Human Rights*, E/CN.4/2001/53 (7 February 2001); *Report to the General Assembly*, A/56/210 (23 July 2001) and *Report to the General Assembly*, A/59/385 (27 September 2004).
[2] See A. Sen, *Poverty and Famines*, New York, Oxford University Press, 1981.
[3] H. Elver, *Report to the General Assembly*, A/70/287 (5 August 2015).
[4] H. Elver, *Report to the General Assembly*, A/73/164 (16 July 2018).
[5] See e.g.: 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).
[6] 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.»
[7] O. De Schutter, *Report to the Human Rights Council*, A/HRC/25/57 (24 January 2014).
[8] J. Ziegler, *Report to the General Assembly*, A/60/350 (12 September 2005).
[9] This was expanded upon by the vast majority of the reports cited in this thesis, especially those by Ziegler. See e.g.: J. Ziegler, *Report to the General Assembly*, A/56/210 (23 July 2001).
[10] O. De Schutter, *Report to the Human Rights Council*, A/HRC/25/57 (24 January 2014)..

indigenous communities[11] and various examples of misconduct from trans-national corporations (TNCs)[12]. Yet, the system seems remarkably impervious to reform efforts, due to the predominance of affluent States within the institutions that create and shape it, leading to the ongoing stall in the Doha Round of negotiations. Such States refuse to recognise a human right to food, which by creating entitlements would allow to subtract food from the market logic that pertains to it as a mere tradable commodity. Instead, they approach the fight against world hunger in a voluntarist fashion[13]. 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, such top-down lack of political will to understand the fight against world hunger as a compelling obligation will keep hampering the efforts to set globalisation on a more desirable course.

1.2 The merits of a rights-based approach

Some clarification on the difference between the two similar concepts of food security and right to food are now in order[14]. Food security is a policy concept with an aggregate focus and a low degree of stringency; it is measured against anthropometric, numerical and 'scientific' parameters: it is a 'societal' value. On the other hand, a rights-based approach to food security is anchored in the human right to adequate food. As such, it has an individualist perspective, rooted in the respect of the fundamental human dignity of the individual, which in turn commands other requirements (clarified shortly ahead). While food security, a policy concept, addresses the issue at a societal level and causes a 'fallout' sort of benefit upon individuals, the right to food, a human right of the individual (and, lately, communities) builds the system from the bottom up making the respect of the equal entitlements of every person the central concern at all times. A human rights-based approach to food security also commands that being food-insecure is not merely a missed policy objective, but the infraction of a right that can be vindicated in a court of law. The core elements of a rights-based approach are summarised by the FAO-sponsored PANTHER framework, the acronym symbolising participation, accountability, non-discrimination, transparency, human dignity, empowerment and rule of law. The fundamental difference between a rights-based and non-rights-based approach to food security lies in the founding concept of human rights, human dignity, of which all the letters of the PANTHER acronym represent indispensable. Only in a *lato sensu* democratic context can these points be comprehensively integrated[15]. By shifting from needs to entitlements, ensuring the inclusiveness and transparency of policymaking and the presence of accountability and remedial mechanisms, a rights-based approach targets the most vulnerable[16].

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[11] O. De Schutter, *Report to the General Assembly*, A/63/278 (21 October 2008). See also H. Elver, *Report to the General Assembly*, A/70/287 (5 August 2015).

[12] H. Elver, *Report to the General Assembly*, A/73/164 (16 July 2018). See also J. Ziegler, *Report to the Commission on Human Rights*, E/CN.4/2004/10 (9 February 2004), reporting how TNCs are accused of keeping food prices high despite a continuous decrease of the real production costs.

[13] 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.

[14] 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.

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

[16] 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.

1.3 Justiciability and indicators

The thesis analyses and compares the two main methods used by the proponents of the human right to adequate food to monitor and ensure its realisation. 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 Human Rights Indicators (HRIs), uses human rights-monitoring through statistical instruments to highlight critical issues in order to tailor objectives upon the national context and then 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 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 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 continued refusal to recognise the human right to adequate food.

2. Historical evolution of the human right to adequate food

Over the last century, the human right to adequate food has undergone a difficult process of progressive affirmation. Increased medical and nutritional knowledge demanded more nuanced and comprehensive normative content; similarly, the extremely fast (and ever-accelerating) march of technologic and social innovation compelled the jurisprudence to strive to keep up with its speed.

2.1 Early modern formulations: from the UDHR to the ICESCR

The Universal Declaration of Human Rights of 1948 enshrined the right to food in Article 25 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, in Articles 22 and 28. Yet, while its influence cannot be underestimated[17], the UDHR was deemed a 'common standard of achievements', rather than a document creating obligations.

The binding formulation would only come in 1966, with the ICESCR. Yet, the ideological rivalry between the two blocs of the Cold War and the simplistic perception that CP rights entailed exquisitely negative obligations drove a gash between the two categories of human rights, enshrined in two different covenants. ESC rights were thusly afforded a laxer regime of protection. This is most visible in the principle of 'progressive realisation' (Article 2) and the obligation to realise ESC rights 'to the maximum of available resources' (Article 1). These formulations were guided by the notion that the realisation of ESC rights is more expensive than that of CP rights; as such, they would afford less-developed States more time to discharge their obligations. Yet, they 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

[17] The Spanish Constitution, for instance, states in Article 10.2 that the whole document is to be interpreted in conformity with the UDHR and other relevant documents. Moreover, it is one of only two UN Declarations that carry the solemn adjective "universal". While its classification as a "recommendation" leaves it devoid of formal binding force or enforcement mechanisms, its indubitable sway lent credence to an interpretation proposing to consider it a "living document". See K. Vasak, "A 30-Year Struggle", *The UNESCO Courier*, no. 20 (November 1997): pp. 29-32.

the intergovernmental ECOSOC. The Covenant did nevertheless envisage the "right of everyone to be free from hunger" as a self-standing human right (Article 11.2). It also reiterated the obligation to cooperate internationally to achieve its realisation, «to ensure an equitable distribution of world food supplies in relation to need» (Article 11.2 (b)).

2.2 Food security and access to food

The international system increased its awareness of the importance of food security in the wake of the food crisis of the 1970s, which brought to light the possible perverse effects of food aid[18] and thus increased awareness of the complexity of the fight against world hunger. Therefore, in 1974 the World Food Conference formulated for the first time a concept of food security in its Universal Declaration on the Eradication of Hunger and Malnutrition. However, the document reflected the productivist paradigm that would characterise the 'Green Revolution' in the 1980s (and still echoes today). This would change in 1981, when Amartya Sen famously shifted the focus from availability to access to food, through his "capabilities approach", noting that it is not the scarcity of food that causes starvation but rather the unequal distribution of wealth and income that make some unable to acquire entitlement over a comprehensive basket of essential goods, including adequate food[19]. This signals a shift in perspective from an aggregate approach to food security as a societal value and a policy concept to one based on individual entitlements. Other developments were sparked by the crisis: the FAO created the Committee on World Food Security (CFS) in 1974 and the World Food Conference decided for the creation of the IFAD. In 1983, a document from the FAO took stock of Sen's insight and reappraised the concept of food security to include the dimension of access[20]. The World Bank further highlighted the diachronic dimension of food security by introducing the concept of 'stability'[21].

2.3 Progress on the front of the right to food

The 1980s also saw the creation of the Committee on Economic, Social and Cultural Rights (CESCR), a dedicated body of experts that inherited the monitoring functions previously covered by a division of ECOSOC. Aside from monitoring, an essential function of the Committee is also that of issuing General Comments, clarifying the normative content of ESC rights. Another important development was the study from Asbjørn Eide that created the tripartite framework of obligations for the human right to adequate food that now underpins the doctrine for all human rights: to respect, to protect and to fulfil. The first is a negative obligation not to engage in activities that prevent the enjoyment of the right; the second is a positive obligation to regulate actions from third parties preventing the enjoyment of the right; the third has two dimensions: a) to "facilitate", the positive obligation to create a system in which people can see their rights realised; and b) to "provide", the positive obligation to realise the right for those whom, due to reasons beyond their control, cannot feed themselves. Meanwhile, the right to food was recognised in the Convention on

[18] See e.g. 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; see also 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; and T. Schultz, "Value of U.S. Farm Surpluses to Underdeveloped Countries", *Journal of Farm Economics*. Vol. 42, No. 5 (1960), pp. 1019-1030.
[19] A. Sen, *Poverty and Famines*, New York, Oxford University Press, 1981.
[20] Food and Agriculture Organisation, *World Food Security: a Reappraisal of the Concepts and Approaches* (Rome: FAO, 1983).
[21] World Bank, *Poverty and Hunger* (Washington D.C.: World Bank, 1986).

the Rights of the Child (CRC) in 1990 and in the Convention on the Rights of Persons with Disabilities (CRPD) in 2006; the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) of 1979, while not expressly recognising the right, did protect the rights of women to have equal access to land, credit and other essential components of the right to food. The right was also incorporated in regional documents: it entered the American Convention on Human Rights with the Protocol of San Salvador of 1988; it is expressly recognised in the African Charter on Human and Peoples' Rights (AfCHPR) as part of the right to life; finally, while not expressly recognising the right to food, the 1996 revision of the European Social Charter does declare a right to a standard of living in relation to the level of wages.

2.4 Right to food and food security: towards a comprehensive formulation

The evolution in the concept of food security found a comprehensive formulation in the Rome Declaration on World Food Security and connected Plan of Action of the World Food Summit of 1996, revolving around the four concepts of availability, accessibility, utilisation and stability. The definition appropriately took stock of the developments thus far: access and utilisation found their place in the spotlight and the inclusion of stability introduced a forward-looking perspective. Most importantly, the Declaration highlighted the links between the fight against world hunger and a series of other factors, stressing the necessity for a cross-cutting approach. After the shift from supply to access and that from quantity to quantity and quality (in line with the rising knowledge of the links between nutrition and health), this signalled a third, important shift, from a national/local understanding to a global perspective[22]. The two documents also included two references to the right to food, and a commitment to halving the number of hungry in the world by 2015 that was therefore somewhat covertly tinged of an obligational colour. In Commitment 7.4 of the Declaration, the States requested clarification on the juridical content of the Right to Food as contained in the ICESCR from competent bodies, especially the CESCR.

The CESCR accommodated the request through its General Comment No. 12, in 1999, in which it provided a series of clarifications regarding Article 11 of the Covenant. The definition offered by the document hinged on the "three A's" of availability, accessibility and adequacy[23], as well as a formulation of the right in a collective dimension[24]. Availability refers to both the physical presence of adequate food or productive resources and the existence of distribution mechanisms able to distribute said food as appropriate[25]. Accessibility of both food and productive resources has two dimensions: physical accessibility is important especially as concerns the most vulnerable, be it because physically impaired or because victims of natural disaster; economic accessibility is the possibility to purchase an adequate basket of foods in a way that does not constitute a trade-off with other fundamental rights. Adequacy refers to dietary needs, sanitation and cultural acceptability[26]. Exploring the obligations of States, the Comment clarified what it means to respect, protect and fulfil the right to food, and addressed the hoary matter of the "principle of progressive realisation" (addressed in the next chapter). Violation can indeed come from acts of both commission and

[22] 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.
[23] 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. 8.
[24] As per the formulation "alone or in community with others" (ibidem, Para. 6).
[25] Ibidem, Para. 12.
[26] Ibidem, Paras. 8-11.

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. The three obligations were also articulated in an international fashion: respect (e.g. in drafting agreements), protect (citizens of other States from the possible harmful action from privates under the State's jurisdiction) and facilitate (cooperate to create an enabling international environment) and provide (aid to States facing crises beyond their capabilities). Implementation is to be conducted with the assistance of UN technical bodies and through appropriate use of monitoring, benchmarks and frameworks, in a participatory fashion, and to provide judicial remedy for infraction.

2.5 Strengthening commitments in the new millennium

The new millennium saw a flurry of new developments. In 2004, the FAO drafted the "Voluntary Guidelines to Support the Realisation of the Right to Adequate Food in the Context of National Food Security" ("Right to Food Guidelines"). While the open reference to the right to food signals a willingness to recognise food as engendering entitlements[27], the non-binding nature of the document evokes the opposite intent[28]. Significantly, the document establishes that food security is to be considered as the outcome of the realisation of existing rights, to be pursued through rights-based approaches recognising the universality, interrelatedness, interconnection and indivisibility of all human rights (as expressed in the Vienna Declaration of 1993)[29].

Yet another global event was held in 2009: the World Summit on Food Security. 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 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 to and recognises the "right to adequate food" in paragraph 2 and Principle 3.

In 2000, the Millennium Declaration and its MDGs represented a global commitment of unprecedented scale to, among others, fight world hunger. Yet, the framework faced numerous critiques, among which the fact that the commitment expressed in the formulation of the World Food Summit was watered down 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[30]. Notwithstanding, come the deadline of the project (2015), most of the Goals were not on track to be fully met. The follow-up to the plan took shape in the "2030 Agenda for Sustainable Development" and its SDGs. The new framework improved compared to the old one in numerous respects: most notably, most SDGs did incorporate human rights as their guiding principles. Much in spite of the decades of progress described in this chapter, however, diplomatic opposition orphaned 'SDG 2: Zero Hunger' of its guiding human right to adequate food, thus making a rights-based approach to development in such field completely optional. This essentially voluntarist nature reflects in the lack of a clearly-set division of labour among the relevant parties –

[27] 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.
[28] G. Kent, *Freedom from Want*, Georgetown University Press, Washington D.C., 2005, p. 58.
[29] Ibidem, Para. 19.
[30] See: T. Pogge, *Politics as Usual: What lies behind the pro-poor rhetoric*, Cambridge, Polity Press, 2010, pp. 57-74.

a regrettable inheritance of the previous framework[31]. A praiseworthy development of the Agenda is certainly the shift 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[32].

2.6 A turning point for justiciability: the OP-ICESCR

The right still reached an important milestone with the approval in 2008 of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (OP-ICESCR), which endowed the CESCR with a quasi-judicial function. It enabled individual complaints and even, if meeting certain requirements, for a third party to raise the case on behalf of the victim. Most importantly, the Committee evaluates the "reasonableness" of the action of States in discharging their obligations under Article 2.1 of the Covenant (the obligation to do all that is in their power to prevent a violation). If the State is found guilty, the Committee issues recommendations and arranges for follow-up. Two opt-in procedures, which to date only registered five accessions, also enable interstate complaints (Article 10) and inquiry procedures (Article 11). While the recognition of an international judicial authority is a supremely important development, since its entrance into force in 2013 only 45 States have signed the Protocol, 24 have ratified it and only five have opted into the two procedures above. The reduced number of ratifiers may be due to the gradual exclusion 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[33]. Moreover, the rate of accession seems to be on the decline.

3. The approach of justiciability

This chapter explores the judicial approach to the right to adequate food; in the thesis, it is divided into two chapters: the former exploring the evolution of the doctrine and the second focusing on the practice worldwide. For reasons of conciseness, this extract will treat them together as one. It will first address the philosophical debate that underlies the divide between the proponents and the detractors of the right to food. Then it will move on to observations of a more juridical nature, analysing the normative evolution of the right: 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. The third paragraph will address the latter point though a review of the current state of diffusion of the right worldwide.

3.1 The philosophical debate

There is no clear consensus in the doctrine as to the reasons of the refusal of various countries to recognise the right to food. While understanding their true motives is beyond the scope of the present work, a look into the academic perspective under which these points have been forwarded

[31] 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.
[32] Ibidem.
[33] 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).

can contribute a great deal to the discussion. 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, especially in their international articulation. The fundamental choice is between opting for 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.

3.1.1 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[34]. The Declarations seems to check the first requisite, but fail the second due to the often questionable application of its terms. It has been much debated whether this is due to fundamental cultural differences or whether there is a common idea of human dignity irrespective of culture and circumstances[35]. To such regard, the thesis agrees Sen in asserting that a universally shared set of human rights does emerge from an unhindered and all-inclusive global debate[36] and adding that there is no reasonable objection to the inclusion of ESC rights among human rights[37]. However, Sen argues thusly based on a very weak understanding of human rights, only ethical and non-inherently legal, arguing that justiciability might be undesirable in cases of Kantian "imperfect obligations"[38], as predominantly pertain to ESC rights. This is in contrast with the understanding of human rights advanced by the CESCR, which shied away of asserting an obligation for legal incorporation mostly for political reasons, but still encouraged it strongly. There is also a problem of internal coherency when influential States arbitrarily refuse to recognise a human right to food whilst declaring their recognition of the right to life. The content of the widely-signed Vienna Declaration echoed in a number of other human rights documents[39], and the interrelatedness of all human rights has become a staple principle advocated by the Human Rights Council of the United Nations[40]. It is now widely recognised that the enjoyment of other rights is thwarted whenever a

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

[35] 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.

[36] 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.

[37] Ibidem, pp. 345-348.

[38] Ibidem, pp. 338-342.

[39] Declaration of Montreal, Part 2; Yogyakarta Principles, p.7; CRPD, p.1.

[40] Cited also with specific reference to the right to food, e.g. 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). To this regard, one could notice that the Committee itself 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 (UN Human Rights Committee, *CCPR General Comment No. 6: Article 6 (Right to Life)*, 30 April 1982, para. 5.)

human right is infringed upon[41]. 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 degree of rigidity, to ensure that some principles will not be sacrificed to competing interests. While it is correct to argue that the UDHR represents a "common standard of achievements", a standard has no meaning if its thresholds can be crossed with impunity, rendering accession a free-of-charge reputational benefit[42]. Not only does it take away the compass of human rights from its function of guiding domestic and global progress, it also renders hypocritical the solemn statements declaring world hunger an unacceptable global injustice. For these reasons, the thesis agrees instead with Alston when he argues that failure to recognise a minimum content would void the whole meaning behind elevating a claim to the status of right[43]. Insofar as such minimum content (which will be clarified in the next paragraph) is concerned, there are no discernible reasonable arguments against the justiciability of a right, right to food included.

3.1.2 The nature of international obligations

The discussion becomes more controversial when analysing the international obligations: whether States have obligations towards people beyond their borders and how stringent these are. If States invoke resource constraints as their main argument against a justiciable right to food and if their efforts to realise said right largely depend on the presence of a facilitating international environment, the question boils down to "who is at fault for world hunger". 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 the refusal of many developed States to recognise a human right to food - thus validating the postulation whereby world hunger is essentially a political issue. A methodological premise: the thesis espouses a cosmopolitan perspective, which it analyses to be descriptively and prescriptively superior in treating human rights to realism. While the descriptive merits of such perspective are herein abridged for the sake of brevity, the prescriptive merits are best understood through the words of Thomas Pogge. He points out how, in the post-Westphalian world, poverty and hunger are the main source of human misery. Although most of the deaths they cause would be avoidable through a mere 2% shift in global household income, inequality is high and rising and ODA dangles low, despite the threshold having already been lowered from 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. The answer to the first question is firmly positive, as 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[44]. The system fails to realise the moral principle of Article 28 of the UDHR. The thesis explores his responses to the arguments advanced in denial of the inherent injustice of the regulatory framework; this is herein abridged for the sake of brevity. In the eyes of the author, there is therefore a moral duty to repay the victims of the damage caused by such system, and not to

[41] See e.g.: 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."

[42] A phenomenon pointed out 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.

[43] 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.

[44] T. Pogge, *Politics as Usual: What lies behind the pro-poor rhetoric*, Cambridge, Polity Press, 2010, p. 52. These arguments resonate strongly with those advanced by the Rapporteurs.

participate in it insofar as it foreseeably and avoidably causes such vast violations of human rights. 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: a "prisoner's dilemma" of sorts, whereby nobody wants to suffer comparative disadvantages by taking the first step and the others not following suit. 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[45].
Therefore, this paragraph concludes that a reform of the system is both feasible and desirable; indeed, the coherency of the human rights system would command it be undertaken as a matter of enforceable obligation. This chapter will however show how the latter is unfeasible at present.

3.2 Overcoming the objections to the justiciability of ESC rights

The division of human rights among different "generations" still held consistent sway until recently and has for long justified a different treatment of ESC and CP rights. The differences are self-evident from a glance at the text of the two Covenants. The ICCPR straightforwardly posits an obligation to legally incorporate Covenant rights[46] and to provide (preferably judicial) remedy[47]. By contrast, the ICESCR is devoid of the latter and, as concerns the former, the provision of "all appropriate means, *including particularly* […] legislative measures"[48] (emphasis added) does not seem to posit any stringent obligation for legal incorporation. Furthermore, while the former came with an Optional Protocol (OP-ICCPR 1) creating a dedicated oversight mechanism that could also act in a quasi-judicial vest, monitoring the latter was entrusted to the intergovernmental ECOSOC. A dedicated mechanism would come only two decades later, and two more would pass before the CESCR would be endowed with a quasi-judicial function.
Four are the main arguments advanced by detractors of the justiciability of ESC rights: 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[49]. The CESCR has worked to overcome these objections and show their fallacies in its General Comments. While lacking binding force, thus being unable to command a judicial evolution of the enforcement of such rights, these authoritative documents 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 decisions not only shape the work of UN Agencies and NGOs in their advocacy efforts[50], but are also at times cited by international[51], regional[52] and national courts[53]. As concerns the right to food, such legitimacy is

[45] Ibidem, pp. 52-56.
[46] UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, Article 2.2.
[47] ICCPR, Art. 2.3.
[48] 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.
[49] J. Ziegler, *Report to the Commission on Human Rights*, E/CN.4/2002/58 (10 January 2002).
[50] A.J. Rosga, M. L. Satterthwaie, 'The Trust in Indicators: Measuring Human Rights', *Berkeley Journal of International Law*, Vol. 27, Issue 2, 2009, pp. 289-293.
[51] 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. 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. As pointed out in [note 17 above].

further reinforced by the likewise authoritative opinion of the Special Rapporteurs, all three of whom have encouraged a justiciable evolution of the right. Granted, these evolutions taking place in supranational institutions do not automatically 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 seems to lend credibility to the transformative effect of this doctrinal evolution.

3.2.1 Critique no. 1: positive obligations

A hoary fallacy saw CP rights largely held to entail exquisitely negative obligations, whereas the realisation of ESC rights was held to imply positive ones, 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. According to paragraph 5 of the authoritative Vienna Declaration of 1993, «[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.»[54] The CESCR therefore commented 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»[55]. 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.»[56]

3.2.2 Critique no. 2: the principle of "progressive realisation"

The principle of "progressive realisation" contained in Article 2.1 of the ICESCR has been consistently interpreted as remitting implementation to the States' goodwill[57], 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 consequently been argued that, as the Covenant refrained from setting forth individual entitlements, it is hardly conceivable for a judicial body to adjudicate on the matter based only on the Covenant, without national legislation[58].

There are however substantive limitations to such principle. The Limburg Principles already asserted in 1986 that the principle of progressive realisation cannot be understood as an excuse to indefinitely put off the realisation of Covenant rights; while some may be immediately justiciable,

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[52] See e.g. *Kurt v Turkey, Appl. No. 15/1997/799/1002, (European Court of Human Rights, 25 May 1998)*, Para. 65. As pointed out in [note 17 above].

[53] See e.g. *State v Makwanyane and Another, CCT 3/94 (Constitutional Court of South Africa, 6 June 1995)*, Paras. 63-67. As pointed out in [note 17 above].

[54] UN General Assembly, *Vienna Declaration and Programme of Action*, 12 July 1993, A/CONF.157/23, Para. 5. The Declaration is a very authoritative document as, albeit non-binding, no fewer than 171 States agreed on it by consensus; as pointed out by J. Ziegler, *Report to the Commission on Human Rights*, E/CN.4/2002/58 (10 January 2002).

[55] 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.

[56] Ibidem.

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

[58] See e.g. C. Tomuschat, *Human Rights: Between Idealism and Realism*, Oxford, New York, Oxford University Press, 2008, p. 54.

the others must become so over time.[59] Likewise, the CESCR clarified 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 make up the "core content" of the rights, which should be uncontroversially justiciable in domestic courts. The first one is the principle of non-discrimination[60], which is an intuitive procedural requirement. The second one could be dubbed "minimum level and non-regression"[61]: a minimum level of satisfaction of the rights must be guaranteed at all times, even during crises; furthermore, the State must not act so as to compromise the achieved levels of satisfaction. The "minimum level" principle is particularly important as concerns the obligation to provide vis à vis people who are unable to fend for themselves. General Comment No. 12 further elaborates that, in case they fail to achieve such objective, States must demonstrate having done all that was in their power, including appealing for international assistance[62]. Closely evoked by such principle is the third limitation, posed by the obligation to respect: as a merely negative one, it cannot be subjected to the principle of progressive realisation and should unobjectionably be immediately justiciable[63].
There is one last, more controversial obligation that was recognised as a component of the core content: the obligation to "take steps"[64] under Article 2.1 of the ICESCR, whereby States are still bound to act "to the maximum of their available resources" and, fundamentally, do the best they can. The controversial part lies in whether a court could judge compliance with such obligation. A paramount example comes from the landmark sentence of the South African Constitutional Court in *Government of the Republic of South Africa. & Ors v Grootboom & Ors* (1999), which introduced in the jurisprudence of ESC rights the criterion of the "reasonableness" of State action. The Court judged the State to have infringed the right to housing of the plaintiffs by failing to guarantee a minimum level of satisfaction, and ordered the governments to provide remedy as appropriate. The case had enormous repercussions served as a basis for a wealth of successful ESC litigation globally[65] - most notably, as will be explored ahead, the CESCR in its quasi-judicial vest and the Inter-American Court on Human Rights (IACtHR). 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)[66].

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[59] *The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights*, 1986, Paras. 16-34.
[60] 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.
[61] UN CESCR, *General Comment No.12*, Para.6 and *General Comment No. 3*, Para.10. Significantly, the Committee stressed in the latter 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.» Such view can also be found in 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. The principle of non-regression was pointed out by Ziegler (J. Ziegler, *Report to the Commission on Human Rights*, E/CN.4/2002/58 (10 January 2002).
[62] UN CESCR, *General Comment No. 12*, Para. 17.
[63] Ibidem.
[64] UN CESCR, *General Comment No. 3*, Paras. 2-4; see also UN CESCR, *General Comment No. 12*, para. 6.
[65] *Government of the Republic of South Africa. & Ors v Grootboom & Ors 2000 (Constitutional Court of South Africa 1999).*
[66] 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 light of the content of this sub-paragraph, it stands to reason that, even if the principle of progressive realisation does pose limits to the justiciability of the right to food, such "core content" of the right should be understood as immediately justiciable. The obligation to guarantee a minimum level of satisfaction and that to "take steps" remain the most debated ones to date.

3.2.3 Critiques no.3 and 4: vague normative content and lacking legal incorporation

The vagueness of the normative content in terms of entitlements, obligations, duty-holders and rights-holders was a valid objection to the justiciability of the right some four decades ago; today, the gradual evolution of the right, especially at the hands of the CESCR, largely voids it of validity. Other developments include General Comment No. 15, in which the Committee specifies that 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[67]. As concerns the lacking legal incorporation, this chapter will explore how the right has made consistent strides and made its way into numerous national legal systems, as well as regional and international instruments.

3.3 Adapting the right to food to a globalised world

The first chapter has provided some insight on how the complex and multifaceted reality of today's globalised and interconnected world has created a plethora of challenges that the doctrine of human rights at large, and of the right to food in particular, have striven to keep up with. This paragraph will account for the main ones among such developments.

3.3.1 Extraterritorial obligations

In a globalised, interconnected world in which food production is largely absorbed by world-scale supply chains in which the actions of States have effects well beyond their territorial boundaries, a strictly territorial application of human rights obligations is outdated[68]. 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; moreover, Articles 22 and 28 of the UDHR, as mentioned before; Articles 2.1, 11.2, 22 and 23 of the ICESCR provide further basis, reinforced by the CESCR's General Comment No. 3, under paragraphs 13 and 14; further stressing the concept is Resolution 7/14 of the Human Rights Council[69]. It is therefore safe to say 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. The extraterritorial obligation to respect entails not only refraining from food embargoes but also a duty not to sponsor (and indeed, oppose) regulations that have a foreseeable effect of harming the right to food of foreign populations in negotiations within multilateral institutions (MLIs) like the WTO, IMF and World Bank. The extraterritorial obligation to protect is particularly important in view of the rise of TNCs. 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 instance by

[67] 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.
[68] J. Ziegler, *Report to the Commission on Human Rights*, E/CN.4/2006/44 (16 March 2006).
[69] J. Ziegler, *Report to the Commission on Human Rights*, E/CN.4/2005/47 (24 January 2005); O. De Schutter, *Report to the General Assembly*, A/63/278 (21 October 2008); and H. Elver, *Report to the General Assembly,* A/69/275 (7 August 2014).

passing fair and equitable trade rules within the dedicated MLIs. The duty to "provide", conditional on available resources, is the duty to give assistance to States that rightfully request it[70].

3.3.2 Duty-holders

As human rights law is based on conventions, which are essentially international treaties, the State is the primary duty-holder. However, as repeatedly stressed, the States are far from being the only actors whose actions have an impact on the enjoyment of the right to food; hence the efforts of the doctrine to create direct accountability upon MLIs and TNCs.

Calls for an evolution towards direct accountability of MLIs came in multiple occasions from the UN system itself. A Resolution by the UNGA in 2006 requested 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].»[71] 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 due to them having decision-making bodies, and are therefore bound to the obligations stemming from the international agreements to which they are parties[72]. A further consideration arises, as it is the States who are parties to the human rights conventions, not the MLIs. Of the three replies that Ziegler offered[73], only that of considering the right to food as stemming from customary international law due to the wide status of ratification of the relevant instruments finds the agreement of the second Rapporteur[74].

There are multiple cases of TNCs harming the human right to food of people in host countries. One glaring example was *SERAC and CESR v. Nigeria* (2001)[75], in which the African Commission on Human and Peoples' Rights found the State to have failed its obligation to protect the rights of its citizens against the actions of a TNC. However, the doctrine is undergoing an evolution towards the direct accountability of corporations and indeed, there are already cases in which responsibility has been recognised both onto the State (for failing its obligation to protect) and onto the TNC. While the thesis analyses the juridical basis and the case law for this in depth, this laudable and important development is not of direct impact on the discourse of the thesis and will therefore be omitted in this extract.

3.3.3 Right-holders

The evolution towards a collective dimension of right-holders of human rights fills a hoary gap in international human rights law, allowing to better protect the interest of indigenous and rural smallholder communities. While this is an immensely important ongoing development that owes much to the jurisprudence of the IACtHR, it is not of direct import to the exploration at hand. The analysis presented in the thesis is therefore herein omitted for the sake of brevity.

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[70] Ibidem.

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

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

[73] Ibidem, Para. 48.

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

[75] *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).*

3.4 Legal incorporation of the human right to adequate food worldwide

Despite the progress displayed thus far, judicial recognition of the right to food worldwide is still lacking. This paragraph will be dedicated to an overview of the existence and scope of legal incorporation and remedial mechanisms the right at the national, regional and international level. The section of the thesis reviewing the justiciability of the right to food based on a "vital minimum" and on the means to procure oneself food will be omitted in this extract for the sake of brevity. For the same reason, a great part of the large body of jurisprudence cited in the thesis will be omitted.

3.4.1 National level

According to data from the FAO[76] States chiefly recognise the right to food by implicitly or explicitly incorporating in the constitution, by giving direct applicability to relevant international instruments or by enshrining it as a directive principle of State policy. Constitutional incorporation of the right to food is not only the most stable level of recognition that a national legal system can afford, but also the highest, entailing a cascading effect on lower legislation, strategies and policies[77]. To date, 30 countries have constitutional articles explicitly protecting the right, whereas 74 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[78]. Moreover, a total of 97 legal systems have constitutional provisions granting direct applicability to international law. 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. Accounting for the overlaps between these, the number of countries that present at least one of such characteristics totals 119[79]. In addition to this, Chile and the United States of America, albeit devoid of any of the above traits, are monist legal systems. Yet, not all the countries that have only the latter of these three traits have ratified all the relevant treaties. The USA should to such regard be taken out of the list entirely, as they alone have ratified none of the relevant instruments; still, even in the USA two cases show courts effectively realising the right to food of the plaintiffs[80]. The other 10 States that have not ratified all the relevant treaties 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, 102 countries (73 overlapping) incorporate the right to food in directive principles of State policy. While this brings the total number of States to a reassuring 151, this last group of provisions is understood to be non-enforceable by a court[81].

Finally, countries may still provide legal protection to the right in sources other than the constitution: specifically, framework laws incorporating the provisions of the ICESCR, including

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[76] The FAO website provides a comprehensive list of the States enshrining the right to food in four different ways: explicit and implicit constitutional recognition, direct applicability of international instruments and directive principle of State policy. 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).

[77] 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.

[78] 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.

[79] 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, nor direct applicability of international instruments.

[80] 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)*.

[81] As clarified in the "Methodology" section of the FAO website which collects such data (see note 43 above).

the tripartite scheme of obligations, in the national legal system. These were explicitly encouraged by the CESCR as a "major instrument in the implementation of the national strategy concerning the right to food."[82] Indeed, framework laws 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[83].

Is there a duty to incorporate the right to food in domestic legal systems? Some principles suggest a veritable obligation for legal incorporation: good faith, effectiveness, the right to a remedy and the general support that the need to incorporate the right to food in the national legal system finds in the UN bodies[84]. However, the CESCR's doctrine has never been clear on the matter: though it has often stressed the preferability of incorporation, paragraphs 5 and 9 of its General Comment No. 9 (1999) suggest that there is no consistent ground to argue for such legal obligation.

Enshrining the right in law is not sufficient, per se: there is also the need for comprehensive national strategies[85], 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[86]. 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[87]. 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[88]. 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[89]; however, they will only marginally be considered herein, insofar as their setting-up has been commissioned by a court. One such case is *People's Union for Civil Liberties v. Union of India* (2001)[90], which is explored at length in the thesis and will be mentioned only briefly in this extract. The case provides great insight as to the power of a court to forcefully push a reluctant State to not only remedying a violation, but also undertaking extensive proactive engagement through law and policymaking in

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[82] CESCR, General Comment No. 12, Para. 29.

[83] 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.

[84] 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.

[85] CESCR General Comment No. 12, Para. 21.

[86] FAO Right to Food Guidelines (2004), Guideline 3.

[87] 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.

[88] Ibidem, p. 8.

[89] Ibidem, pp. 12-13.

[90] *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)*.

order to humanise development under a rights-based approach[91]. 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)[92].

3.4.2 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 ACHR 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.

The European Social Charter of 1961 does not recognise the right to food and even for other ESC rights the commitments it entails are rather weak[93]. The analysis of the European tutelage of the right to food will therefore be herein skipped for the sake of brevity.

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 1999, with the so-called "Protocol of San Salvador", which explicitly envisages and protects the right to food in Article 12. The document moves much along the same lines as the ICESCR. The ACHR and the Protocol are binding documents, compliance with the terms of which is overseen by the Inter-American Commission on Human Rights (IACHR) and 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, often evicted from their ancestral lands due to lacking legal tenure. The analysis of the Court's jurisprudence offered in the thesis highlights some important elements. In one case[94], it expanded the traditional right to property to include property arising from indigenous tradition, based on the *pro homine* principle and on the principle whereby treaties must be interpreted so as to lead to the fullest satisfaction of the rights of the victim (Vienna Convention on the Law of Treaties, Article 31.1). In two more cases[95], are relevant as they consolidated the jurisprudence of the Court in the defence of indigenous communities (identifying a link between them and their ancestral grounds with specific reference to access to adequate food) and highlight that States have positive obligations to ensure a dignified life to individuals, especially as concerns vulnerable groups. Yet another litigation[96] is

[91] 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.
[92] Ibidem, pp. 703-718.
[93] C. Tomuschat, *Human Rights: Between Idealism and Realism*, Oxford, New York, Oxford University Press, 2008, p. 32.
[94] *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).
[95] *Indigenous Community Yakye Axa v. Paraguay (Inter-American Court of Human Rights, 2005)*. Available at https://www.escr-net.org/caselaw/2006/case-indigenous-community-yakye-axa-v-paraguay-eng (accessed on 26 December 2018) and *Indigenous Community Xákmok Kásek v. Paraguay (Inter-American Court of Human Rights, 2010)*. Available at https://www.escr-net.org/caselaw/2014/case-indigenous-community-xakmok-kasek-v-paraguay (accessed on 26 December 2018).
[96] *Sawhoyamaxa Indigenous Community v. Paraguay (Inter-American Court of Human Rights, 2006)*.

important both as an example of the right to food being litigated based on the right to life and because IACtHR essentially performed a review of State action of the '*Grootboom*' school.
Finally, the African Charter of Human and Peoples' Rights (AfCHPR), overseen by the African Commission on Human and Peoples' Rights (AfCoHPR), enjoys wide ratification. While it does not explicitly envisage the right to food, 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[97]. However, some notable progress came about with *Purohit and Another v The Gambia*, in which the Commission 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 doctrine on progressive realization[98]. 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[99]. One dashing characteristic of the Court is that it can judge compliance not only with the Charter but also with the obligations under other international human rights instruments ratified by the State concerned. This is an element unique to the African human rights system, attempting to unify the international and the regional human rights regimes. This opens up to problems, as well, like the possibility of interpretive dissonance and the risk that having to apply the contents of the Charter in line with international human rights law could be compromise the "African Court's enterprise of redeeming the poor"[100].

3.4.3 International level
The international sources of the right to food have already been discussed at length over the course of the thesis; this section will focus on the quasi-judicial vest of the CESCR that came with the entry into force of the OP-ICESCR in 2013. While ratification remains low and no cases concerning the right to food have yet been brought before the Committee, some insight on the Protocol's procedural aspects, significance and potential exercise has been offered by eminent scholars from the International Network for Economic, Social and Cultural Rights (ESCR-Net).
The authors argue[101] that its significance is best appreciated with regard to its ability to attract more States into membership, to reinforce the notion of ESC rights as justiciable in other systems, 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. This will largely depend on the stance that the CESCR will take during these first years of practice under the Optional Protocol. Lest it deters sceptical States, it should be careful not to embark in too many

[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 6.1.3.
[98] Idem.
[99] African Court of Human and Peoples' Rights, 'Welcome to the African Court', http://www.african-court.org/en/index.php/12-homepage1/1-welcome-to-the-african-court, 2019 (accessed on 2 January 2019).
[100] 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.
[101] 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.

cases which entail its intrusion on the States' sovereignty to decide on budget allocation[102]. 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.

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 State action, which has been established before to be possibly the most contentious point of justiciability. Porter commented this pivotal article in the dedicated section of the study[103]. 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. It meant overcoming the predominant conception of violations coming from acts of commission – typical of CP rights but ill-suited to ESC rights, most often violated through acts of omission. Opposition during negotiation, reportedly coming from the well-known detractors, was progressively forced to regress its trenches: from obstructing the draft itself, to limiting it to an à la carte approach, to opposing the possibility to judge State effort under Art. 2.1. Likewise discarded were the proposals to substitute the requisite of 'reasonableness' with that of 'not being unreasonable' and to include a 'margin of discretion/appreciation' (entailing complete deference to the States' competence to elaborate and implement policy). Throughout negotiation, the Committee consistently held that 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, especially through low-cost programmes targeted at the most vulnerable and marginalised. Among the criteria under which to assess reasonableness are 1) the discernible intent of the action, 2) the respect of non-discrimination and precedence to the most vulnerable, 3) timeliness, 4) whether a State has taken, among the options available, the one least restricting ESC rights and 5) whether the State's reasons for inaction may be deemed reasonable. The concept of 'reasonableness' itself was on the rise during those years, having recently been incorporated in the CRPD. 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 States remain sovereign to elaborate policies and determine the remedy, 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.

Also relevant is the analysis by Cali[104] concerning the follow-up to the Committee's Views (Article 9) and the opt-in inquiry procedure (Article 12); in other words, enforcement. Under the deep-seated principle of 'effectiveness' the follow-up clauses must be interpreted so as to ensure effective enforcement, with remedies appropriate for ESC rights, and in line with the enforcement practices of the rest of the UN Treaty System. The practice of follow-up is in itself a shared and emerging body practice among all human rights treaty bodies, overcoming the notion whereby, due

[102] The prudent but effective recommendation offered in the first case it undertook (*I.D.G. v. Spain*) seems to confirm that the Committee is well aware of its predicament.

[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.

[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.

to them not being courts, States parties are entirely sovereign as concerns implementation. As concerns the nature of remedy, 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, it is noteworthy how Article 14, which sets duties of assistance upon intergovernmental organisations like the UNDP or the World Bank can be interpreted as a duty for these institutions to withdraw support from, e.g., investment projects harming the ESC rights of the plaintiffs. However, the duties of these entities remain complementary to the duties of States.
The jurisprudence of the Committee under the Protocol, analysed in the thesis, shows how the practice of the Committee is in line with the theorisation of the scholars explored thus far.

3.5 The limits of justiciability

The justiciability of the human right to adequate food has achieved a great deal of progress. Court cases not only advance the jurisprudence, but they can also be raised to public attention to increase awareness and engender transformative social change. As authoritative guardians of the right to adequate food, they can help provide the fight against world hunger the urgency that the moral stringency of the entitlements deriving from this human right and the urgency of the crisis 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'. Justiciability confers credibility to the strength of the individual entitlements to all that composes human dignity by both promising remedy in cases of violation and creating barriers which must not be crossed to State action. It contributes to the fight against world hunger 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, like access to justice (explored more in depth in the main body of the thesis).
Most importantly, justiciability does indeed find limitations in the ability and resources of States. Tomuschat rightly argues that the argument whereby the two categories of rights both entail positive obligations is misleading, as it masks the different entity of such obligations: ESC rights most often require, especially in developing States, expensive sweeping systemic reform[105]. States need international assistance if they are to discharge successfully their obligations deriving from ESC rights, as the international system is tilted in their disfavour. However, ODA dangles low and the system seems impervious to reform. 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. Insofar as the problem is truly one of a "prisoner's dilemma", where the reluctance stems primarily from the fear of a comparative disadvantage, it would seem credible that States would accept a top-down effort of such nature. If, as Edkins seems to suggest[106], there is instead a will to hold down the

[105] 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.
[106] 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 discernible strategic function of hampering the development of the States of the Global South and "rob the poor of greater political voice".

developing States in their poverty for geo-strategic reasons, 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 diffused responsibility that the *erga omnes* nature of such obligation would have. In any case, the still scarce rate of ratification of the Protocol and the cautious jurisprudence that the Committee must adopt in this early phase make the prospect extremely unlikely in the foreseeable future. Further considerations to this regard must be advanced on the "neutrality" of human rights. In creating and upholding a demonstrably flawed international system, the more developed States can be reasonably argued to be in violation of the authoritative provisions to create a facilitating international environment – chief among which Articles 22 and 28 of the UDHR. 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, however, this calls into question their political neutrality, as they become instruments in a fight for the world order between the global South and the global North. It is evident that most States were keenly aware of this issue from the fact that, during the negotiations for the OP-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.»[107] Reducing human rights to instruments in a power struggle means gravely perverting their purpose of ensuring an inclusive development that makes human dignity its central concern and is one of the main reasons behind the disenchantment that currently affects them. Therefore, though potentially effective, the desirability of using them thusly to induce change is questionable.

Yet, insofar as the result of national efforts largely depends on the regulatory framework, fighting against world hunger is necessarily, to an extent, a matter of challenging the existing international paradigm. 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, in the long run. 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. 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. While justiciability is an adversarial and rights-based approach aiming to exact from the State compliance with its obligations, the statistical one analysed in the next chapter has a more uncertain connection with the right; it has the strength of favouring development by channelling the resources of other States through ODA, the corresponding weakness being that the influx of resources is largely left to the goodwill of donors.

[107] 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.

4. The approach of human rights indicators

The push towards the adoption of human rights indicators (HRIs) 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 the elements of a rights-based approach, 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 SDG2, HRIs have the potential to lead development 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: strengths and weaknesses, the process that led to their creation and the OHCHR's Framework[108]. The second paragraph will analyse the utilisation of HRIs in practice. The third paragraph will build a simple model to estimate the potential impact that the incorporation of HRIs in national monitoring can have on the developing States' inflows of ODA.

4.1 Indicators in theory

4.1.1 The nature of indicators and potential pitfalls

One general and uncontroversial definition of "indicator" is to say that they are statistical measurements. Merry defined them 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."[109] Their ease of use have made them popular instruments to measure development: "development indicators" are commonly produced and used for instance by the UNDP, the World Bank and the FAO. The allure of statistical instruments for monitoring and accountability is easily understood: a number is impartial, objective. Despite such alluring apparent neutrality, indicators do however conceal a degree of evaluation: the choice of what to measure, how to measure it and how to interpret the data all have an impact on the message that the indicator will convey and, consequently, how they will impact policy-making. Merry provided a useful distinction between two functions of indicators. Firstly, a' knowledge' effect, whereby by labelling (deciding what to measure) they bestow upon the object of measurement an importance that it might not have had otherwise. Secondly, a 'governance' effect, whereby easily understandable indicators influence policymaking and other important phenomena like the movement of global resources (e.g. the World Bank's "Ease of Doing Business Index")[110]. Indicators are particularly attractive instruments for decision-making in a world in which the elimination of corruption is very high on the global public agenda; however, their concealed non-neutrality invites caution[111]. However, by an appropriate use of metadata sheets, the processes of deciding what to measure, how and how to interpret the results may be made more transparent. Porter also cautions against the fact that indicators are primarily produced in the Global North, as these are the countries with the highest technical expertise. This

[108] While the thesis does acknowledge the existence of other proposed set of HRIs such as the IBSA set, the OHCHR was closely involved of the development of the latter, which therefore carries significant similarities to the Framework.
[109] S. E. Merry, 'Measuring the World: Indicators, Human Rights and Global Governance', *Current Anthropology*, Vol. 52, Supplement 3, April 2011, p. S86.
[110] Ibidem, pp. S84-S85.
[111] 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 note 2 above].

concentrates into their hands a considerable amount of (already abundant) decision-making power[112]. Concerns are likewise raised on the possible detrimental ways in which indicators can influence policymaking; Rosga and Satterthwaie[113] have highlighted two. 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 score on the indicator: the "measure" becomes the "target"[114]. Secondly, by the tendency to select outcome indicators based on their ease of measurement[115]. To foreshadow the content of the next paragraph, the answer to such problem lies in ensuring a participatory approach.

4.1.2 Indicators for human rights

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 1993, an attempt to create a set of indicators for each ESC right borrowing from the existing development ones failed due to a lack of consensus over whether they 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 were suitable for monitoring human rights[116]. 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 latter[117]. The quest for appropriate HRIs found new impetus at the turn of the millennium, with the High Commissioner on Human Rights stressing that the urgency of the crisis required precise analytical tools[118]. There was a discernible need for harnessing the power of statistical instruments for the aims of a human 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. While it is important to account for these pitfalls, indicators remain instruments with a great potential to contribute to the realisation of human rights. Exactly because of their power to raise issues on the agenda, when their underlying objective is made to be the realization of human rights, they show great potential for introducing them within a reluctant development discourse. If coupled with benchmarks and deadlines, they go beyond a merely descriptive function and instead become an instrument for accountability and compliance. By bringing issues that usually pass under the radar (like discrimination and inequalities, due to the isolation of the marginalised groups) to public attention 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.

[112] Ibidem.
[113] 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.
[114] Ibidem, pp. 265-288.
[115] Ibidem, pp. 304-311.
[116] 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.
[117] 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.
[118] 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.

Perhaps most importantly, HRIs can 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 effectively with stakeholders that may not be savvy to such language. This might finally provide a way to bridge the gap between theory and practice[119].
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[120].

4.1.3 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, its follow-up in 2008[121] and the 2012 "Human Rights Indicators - A Guide to Measurement and Implementation" provided a decisive push towards the development of the comprehensive framework that is currently in use. The documents defined HRIs by clarifying how they are to be drafted and providing a template list of indicators from which the countries may develop their own according to national context.
A first fundamental element is that human rights-monitoring requires not only merely quantitative indicators (like development indicators), but also qualitative ones[122]. Both types can in turn be objective (based on facts) or subjective (based on individual opinions and perception)[123]. The OHCHR specified that all four kinds of indicators are necessary, but explicitly expressed a priority for objective over subjective indicators, and quantitative over qualitative[124].
Moreover, there is a number of salient features that are specific to HRIs[125]. Firstly, their being anchored to the normative content of the right (whereas development indicators are tangent to it and thus merely 'adaptable' to a monitoring function). Indeed, each indicator is divided into attributes (averagely four of them) based on the normative content of the right[126]. Secondly, in line with the interconnectedness of human rights, a right with its own set of attributes may itself be an attribute for another right (e.g. in the list proposed by the OHCHR the right to life had among its attributes the right to adequate food). Thirdly, they integrate the overarching requirements of human rights such as non-discrimination, equality, and participation. Fourthly, and most importantly, they are able to capture the effort of the States in complying with their obligations under human rights instruments, in terms of both 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 of governments and the existence of efficient remedial mechanisms.

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[119] Ibidem, pp.1 and 43.
[120] As appraised 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. 278-279.
[121] 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].
[122] 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] The Report seems to utilise the distinction provided by Green in 2001 (see point 7 above, pp. 1076-1084) between "statistic" and "thematic" indicators.
[123] *Human Rights Indicators Guide*, 2012, p. 17.
[124] Ibidem, p. 18.
[125] *Report on Indicators*, 2006, para. 13. See also *Human Rights Indicators Guide*, 2012, p. 33.
[126] *Human Rights Indicators Guide*, 2012.

Based on the individuated attributes, indicators of three kinds were built for each right[127]. Firstly, 'structural' indicators are meant to capture the States' commitment to human rights treaties, monitoring for instance the rate of ratification of the relevant international instruments, the legal incorporation of the rights and the existence of strategies to realise the right. 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 connected with assessing compliance with the obligation to "take steps". This category is the most dynamic of the three: while 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 by such institutions and the tangible results of programmes, thus establishing a 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. By using this tripartite structure, HRIs can capture both the dimension of the State's compliance with obligations, and the actual degree of realisation of the rights. Structural, process and outcome indicators respectively capture commitment, effort and realisation; the first two capture 'intent', the latter captures 'results'. This structure was preferred to the 'respect-protect-fulfil' one that is typical of the discourse on justiciability, as it is just as adequate in capturing the States' compliance with these three dimensions of their obligations with the added benefit of being more easily communicated.

Out of the large number of possible indicators resulting from this process, the choice of the most appropriate ones must follow some methodological criteria. 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. Secondly, they have to be designed with the democratic participation of all the population, to the widest possible extent, so as to capture the perceived needs of the rights-holders and especially give a voice to marginalised groups. Thirdly, it is essential for HRIs to be "disaggregated based on the prohibited grounds of discrimination": ethnicity, race, religion, language, sex etc. must act as stratifiers along which to disaggregate data, in order to highlight discriminatory practices and pursue equality[128]. 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[129]. There is moreover a caveat: the act itself of identifying minorities may reinforce their marginalisation[130]; to this regard, it is useful to allow for the self-identification of the individual[131]. Fourthly, safeguards like strict laws on data confidentiality and decentralisation of data can help ensure that such sensible information is not misused[132]. Data must be relevant and reliable, gathered independently from the

[127] *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.
[128] *Report on Indicators*, 2006, Paras. 21-22.
[129] Ibidem, para. 27. See also *Human Rights Indicators Guide*, pp. 21-22.
[130] Randeria reports how the divisions in the Indian caste system became much more rigid when the British colonisers started disaggregating the census by castes. 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.
[131] *Human Rights Indicators Guide*, 2012, p. 48.
[132] Ibidem, p. 46.

monitored party, of global interest but amenable to contextual adaptation, anchored to human rights, gathered with transparent methodologies, simple and specific[133]. Data sources should vary according to availability and the nature of the object of monitoring: NGOs, testimonies, official reports of the States and information provided by the international monitoring mechanisms are recommended sources of "event-based data", while "socio-economic and administrative statistics" are available by most governmental statistical offices. These datasets have multiple functions that confer them paramount importance as sources for HRIs: they constitute the basis for the State's policy-making for realizing human rights and they are used by UN Agencies and NGOs to monitor the countries' human rights performance.

Due to their substantive and procedural requirements, HRIs cannot have a universal scope, instead needing adaptation to the national context so as to accurately reflect the national challenges and efforts and be acceptable by the countries that will be monitored against them[134]. Adopting an indicator that is not properly tailored on the national context can also have perverse consequences in terms of the aforementioned Goodhart's Law. 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. 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 rights[135].

As concerns the practice of establishing rights-based monitoring (RBM) at the country level, the follow-up Report of 2008 provided the necessary guidelines[136]. It specified that the fundamental difference with the existing monitoring procedures revolves around a shift from aggregate measures and national averages to specific measurements, centred on target groups or, ideally, individuals. Firstly, it recommended identifying the regular monitoring stakeholders and bringing together their expertise. Secondly, identifying the targets of monitoring: vulnerable groups, also discerning which attribute of the right best describes their vulnerability. Thirdly, it encouraged paying attention to develop indicators able to detect existing patterns discrimination that could compromise the access of discriminated segments of the population to the object of their rights. Finally, because human rights monitoring depends on continuous monitoring and effort, data should be available on a regular basis and also made public and disseminated through an appropriate framework.

4.1.4 Human rights indicators for the right to adequate food

The right to food was articulated into the attributes of 'nutrition', 'food safety and consumer protection', 'food availability' and 'food accessibility'[137]. The choice of indicators based on these is telling of how the principles above were applied in the design of the Framework. This extract will forego all examples presented in the thesis and only highlight the findings. Firstly, the holistic approach is reflected in the fact that some of the same indicators are present in multiple rights. Secondly, all tables of indicators specify that all the indicators are to be properly "disaggregated by prohibited grounds of discrimination, as applicable". Thirdly, there is a noteworthy absence of subjective indicators for the right to adequate food. Fourthly, the indicators on 'availability' also

[133] Ibidem, p. 50. These are the requisites set forth by the RIGHTS framework.
[134] Ibidem, p. 44.
[135] Idem.
[136] *Report on Indicators*, 2008, Para. 35-40.
[137] See *Human Rights Indicators Guide*, 2012, p. 89.

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.
Notwithstanding the notable omission of the attribute of "acceptability", the proposed framework seems to largely reflect the characteristics of the PANTHER one. Participation is both treated as an overarching principle, and has its own set of indicators. Accountability is reflected in the indicators capturing the action of the State and the remedial systems. Non-discrimination is guaranteed through data disaggregation. Transparency is a methodological premise, calling for participatory policymaking and the drafting of indicators. Human dignity is reflected in the very nature of HRIs, anchored to the normative content of human rights. Empowerment is ensured through extensive monitoring of discriminated minorities, involved in policymaking. 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.

4.2 Human rights indicators in practice

This paragraph will assess the practical use of HRIs, first assessing their current diffusion, then analysing their significance for the CESCR and its usage of them and finally addressing how alternative stakeholders can use them in order to fill the "monitoring gap" in the right to food.

4.2.1 The current state of practice: an ongoing process

As the development of a stable framework of HRIs is recent, so is their diffusion in its early stages. Though the thesis highlights some promising cases of national adoption under the guidance and advocacy of the OHCHR, the CESCR's repeated complaints about the lack of adequate indicators for developed and developing States alike is telling of how their adoption is still limited. 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.

4.2.2 The impact of human rights indicators on monitoring

The criterion for the choice of human rights monitoring over the other uses of indicators is its similarity with the avenue of justiciability. The difference is primarily one of perspective: a court may address a single case, verifying the compliance of State action with the requirements of the human right, whereas the Committee addresses the general state of the right within the State and suggests ways to improve it based on the information received by the State, NGOs, CSOs and relevant UN Agencies. HRIs are powerful instruments in the hands of human rights monitoring mechanisms, especially when coupled with benchmarks and timeframes. Hence the insistence of the CESCR that States adopt such instruments[138]. 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 targets like the SDGs[139]. In General Comment No. 14,

[138] 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).
[139] *Human Rights Indicators Guide*, 2012, pp. 105-106.

the CESCR encouraged a cyclical reporting and monitoring process in four steps[140], where the indicators and benchmarks are constantly updated in light of the successes and shortcomings of the States.

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'. In their quasi-judicial vest, human rights treaty bodies face great difficulties in generating compliance. 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[141], which opens to allegations of politicisation aimed at undermining its legitimacy. This reinforces an adversarial relation between the Committee and the State. Indicators, on the other hand, can circumvent the pitfalls of human judgement. As HRIs are selected by each State, the function of the Committee shifts from merely monitoring compliance to an additional role of auditing: the auditee develops its own indicators, the auditor reviews their adequacy. The evolution entails a basic shift of responsibility: from the overseer to the overseen, which becomes responsible for monitoring its own compliance with the indicator it itself drafted, in what has been defined "government at a distance"[142]. 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 them and which data to rely on in the exercise of the monitoring function[143]. Nonetheless, the monitoring activity of human rights bodies will never be completely neutral: despite the heavy reliance of the Framework on quantitative (thus objective) indicators, human rights retain a "pesky, irreducible core of human judgement."[144] This still-ongoing change 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.

4.2.3 "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[145]. Some more elements of the Committee's Concluding Observations are worth noting, as concerns its "monitoring of monitoring". The CESCR often lamented the insufficiency [146] or inadequacy (especially as concerns disaggregation)[147] of data. It repeatedly encouraged more inclusiveness in data-gathering and

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[140] 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.

[141] See A.J. Rosga, M. L. Satterthwaie, 'The Trust in Indicators: Measuring Human Rights', *Berkeley Journal of International Law*, Vol. 27, Issue 2, 2009.

[142] S. E. Merry, 'Measuring the World: Indicators, Human Rights and Global Governance', *Current Anthropology*, Vol. 52, Supplement 3, April 2011, p. S90.

[143] Ibidem, p. S88.

[144] A.J. Rosga, M. L. Satterthwaie, 'The Trust in Indicators: Measuring Human Rights', *Berkeley Journal of International Law*, Vol. 27, Issue 2, 2009, p. 304.

[145] See e.g.: Committee on Economic, Social and Cultural Rights, *Concluding observations on the initial repot of South Africa*, E/C.12/ZAF/CO/1, 29 November 2018, Para. 81. The same invitation is reiterated in a plethora of other reports. Refer to the main body of the thesis for an extensive list.

[146] See e.g. 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. 13. Refer to the thesis for more examples.

[147] See e.g.: 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, Paras. 11 and 12 (b). Refer to the thesis for more examples.

decision-making[148], ensuring the existence of proper monitoring mechanisms[149] and creating appropriate indicators for monitoring national development programmes[150], "treating beneficiaries of public programmes as rights-holders who can claim entitlements."[151] While some themes, such as an overall lack of data, are more commonly present in Observations to less-developed States, the invitation to adopt human rights-specific indicators for monitoring the compliance with Covenant obligations and the demand for more disaggregated data are overarching. Indeed, the vast majority of the concluding observations submitted over the last six years (a time deemed appropriate to garner a general idea, due to the quinquennial occurrence of State periodic reporting) contains expressions of regret and concern from the Committee for the inappropriateness of national monitoring.

4.2.4 Filling the void: bottom-up monitoring for the right to adequate food

Non-State stakeholders like national human rights institutions, NGOs and CSOs also submit data to the CESCR, parallel to the State, thus allowing the Committee to offer insight and suggest ways forward even when national self-reporting is lacking (or altogether absent). Through the appropriate use of HRIs, they can also direct the eyes of governments on otherwise invisible issues, or expose a possible misconduct on behalf of the State and provide an instrument for the downtrodden to hold governments accountable. 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.

An analysis of FIAN International and its 'Food First Information and Action Network' shows how this NGO, one of the leading non-governmental advocates of the right to food, is striving to create its own set of HRIs. Its objectives are to provide a bottom-up collection of data through the coordination of grassroots organisations, making sure such data has a qualitative component aside from the more traditional quantitative one, so as to complement the top-down and hard data-based approach of international monitoring bodies with a bottom-up "peoples-based narrative". The progress is however still in its early stages, and more work is needed across the board. Refer to the main body of the thesis for a more in-depth analysis.

4.3 Why human rights indicators? Incentives and disincentives

The adoption of HRIs is not *per se* a costly transition, entailing more a methodological shift than anything else. While the financial obstacles of adapting national monitoring systems to human rights monitoring may shed some light on the reticence of most States (especially DCs) to adopt them, other elements may affect their spread. Though the practical articulations of HRIs may still be scarce, their conceptual premises are sufficiently clear to build a simple model of limited scope for understanding the potential impact of the incorporation of HRIs on the inflow of ODA.

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[148] See e.g. the Observations for Argentina, Para. 12 (c). Refer to the thesis for more examples.

[149] See e.g.: Committee on Economic, Social and Cultural Rights, *Concluding observations on the combined fifth and sixth periodic reports of Mexico*, E/C.12/MEX/CO/5-6, 17 April 2018, Para. 51 (d). Consult thesis for more examples.

[150] See e.g.: 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. 43.

[151] See e.g.: Committee on Economic, Social and Cultural Rights, *Concluding observations on the initial report of Bangladesh*, E/C.12/BGD/CO/1, 18 April 2018, Para. 74. Refer to the thesis for more examples.

Research indicates that global public opinion pressures donor governments of the OECD to pay attention to the human rights record of the recipient country[152], drawing a positive correlation between perceived human rights record and inflow of ODA. Based on such premise, the thesis constructs a simple model aimed at assessing the impact of this correlation on the diffusion of HRIs in national monitoring systems. Even though the model relies on some rather heavy simplifying assumptions, there seems to be an incentive towards the adoption of human rights indicators in the long run that is promising as concerns their future diffusion. The analysis was herein severely abridged for the sake of brevity, presenting only the conclusion: refer to the thesis for more details.

5. 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; likewise, the thesis has discussed how courts can be able to engender some degree of transformative change in the long run; but that is about the extent to which they are able to 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 cogency and immediateness of a court's decision, which is to some extent better suited for the compelling obligation to expeditiously remedy violations of human rights, and their use has been analysed to come with a number of caveats. 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.

[152] 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.

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 systems 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. This impasse will continue 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 reshaping the global balance of power, as perhaps the Chinese "Belt and Road Initiative" might bring about through massive investment in developing countries. Especially so, given China's status as a country closely associated with the G-77 that developed largely in disregard of the international regulatory framework. This might either bring about a reform of such system (which, as Chinese diplomats often remark, was drafted when they were not sitting at the table) or overcome the impasse for DCs through a "development before rights" approach that characterised both China and the many countries that developed on its coattails. However, many elements like the so-called "debt traps" that seem to be an integral part of the Initiative should be looked at with wariness. This final thought had a merely speculative character and was meant to invite further reflection.

6. References

Books

Cardwell, R., *Food Assistance and International Trade*, in Encyclopedia of Food and Agricultural Ethics, P. B. Thompson and D. M. Kaplan (eds.), Dordrecht, Springer, 2014.

Edkins, J., 'Whose Hunger? Concepts of Famine, Practices of Aid', in *Borderline Series*, Minneapolis, University of Minnesota Press, Vol. 17, 2000.

Francioni, F., *Access to Justice as a Human Right*, Oxford, New York, Oxford University Press, 2007.

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

Langford, M. et al., *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: a Commentary*, in: M. Langford, B. Porter, R. Brown, and J. Rossi (eds.), Pretoria University Press, 2016.

Magnan, A., Economy of Agriculture and Food, in Encyclopedia of Food and Agricultural Ethics, P. B. Thompson and D. M. Kaplan (eds.), Dordrecht, Springer, 2014.

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

Scanlon, T. M., *The Difficulty of Tolerance. Essays in Political Philosophy*, Cambridge, Cambridge University Press, 2009.

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

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

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

Scholarly articles

Alston, P., 'Out of the Abyss: The Challenges Confronting the New U. N. Committee on Economic, Social and Cultural Rights', *Human Rights Quarterly*, John Hopkins University Press, Vol. 9, No. 3, 1987, pp. 332–381.

Birchfield, L., Corsi, J., 'Between Starvation and Globalisation: Realising the Right to Food in India', *Michigan Journal of International Law*, Vol. 31, Issue 4, 2010, pp. 691-764.

Dennis, M.J. and Stewart, D.T., '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. 462-515.

Green, M., 'What We Talk about When We Talk about Indicators: Current Approaches to Human Rights Measurement', *Human Rights Quarterly*, Vol. 23, Issue 4, 2001, pp. 1062-1097.

Kim, Y., Whang, T., Soh, C., 'Human Rights, Official Development Assistance (ODA) and Globalization: Quantitative Studies and the Case of South Korea', *Korea Observer*, Vol. 46, No. 1, 2015, pp. 27-51.

Langford, M., '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, pp.1-28.

Mbazira, C., ‘Enforcing the economic, social and cultural rights in the African Charter on Human and Peoples’ Rights: Twenty years of redundancy, progression and significant strides’, *African Human Rights Law Journal*, Vol. 6, No. 2, 2006, pp. 333-357.

Mechlem, K., ‘Food Security and the Right to Food in the Discourse of the United Nations’, *European Law Journal*, Vol.10, No. 5, 2004, pp. 631-648.

Merry, S. E., 'Measuring the World: Indicators, Human Rights and Global Governance', *Current Anthropology*, Vol. 52, Supplement 3, April 2011, pp. S83-S95.

Pogge, T., Sengupta, M., ‘Assessing the Sustainable Development Goals from a Human Rights Perspective’, *Journal of International and Comparative Social Policy*, Vol. 32, Issue 2, 2016, pp. 83-97.

Rosga, A.J., Satterthwaie, M. L., 'The Trust in Indicators: Measuring Human Rights’, *Berkeley Journal of International Law*, Vol. 27, Issue 2, 2009, pp. 253-315.

Schultz, T., ‘Value of U.S. Farm Surpluses to Underdeveloped Countries’, *Journal of Farm Economics*, Vol.42, No.5, 1960, pp. 1019-1030.

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

Schmaljohann, M., ‘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, 45 pp.

Vivero Pol, J. L., Schuftan C., ‘No right to food and nutrition in the SDGs: mistake or success?' *BMJ Global Health*, 2016, doi:10.1136/ bmjgh-2016-000040.

UN Publications

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.

FAO, *World Food Security: A Reappraisal of the Concepts and Approaches*, Rome, 1983.

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

UN Office of the High Commissioner for Human Rights (OHCHR), *Human Rights Indicators – A Guide to Measurement and Implementation*, HR/PUB/12/5, 2012.

Vasak, K., ‘A 30-Year Struggle’, *The UNESCO Courier*, No. 20, November 1997, pp. 29-32.

UN Documents

International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004.

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

UN Committee on Economic, Social and Cultural Rights (CESCR), *Concluding observations on the initial report of Bangladesh*, E/C.12/BGD/CO/1, 18 April 2018.

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

UN Committee on Economic, Social and Cultural Rights (CESCR), *Concluding observations on the fifth and sixth periodic reports of Mexico*, E/C.12/MEX/CO/5-6, 17 April 2018.

UN Committee on Economic, Social and Cultural Rights (CESCR), *Concluding observations on the initial report of the Niger*, E/C.12/NER/CO/1, 4 June 2018.

UN Committee on Economic, Social and Cultural Rights (CESCR), *Concluding observations on the fourth periodic report of the Republic of Korea*, E/C.12/KOR/CO/4, 19 October 2017.

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)*, E/1991/23, 14 December 1990.

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

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

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

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

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

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

UN General Assembly, *Report of the Human Rights 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.

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

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

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

UN Office of the High Commissioner for Human Rights (OHCHR), *Report on Indicators for Monitoring Compliance with International Human Rights Instruments*, HRI/MC/2006/7, 11 May 2006.

UN Office of the High Commissioner for Human Rights (OHCHR), *Report on Indicators for Promoting and Monitoring the Implementation of Human Rights*, HRI/MC/2008/3, 6 June 2008.

Other documents

De Schutter, O., *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.

World Bank, *Poverty and Hunger*, Washington D.C., 1986.

Reports of the Special Rapporteurs

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

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

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

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

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

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

Ziegler, J., *Report to the Commission on Human Rights*, E/CN.4/2002/58 (14 January 2002).
Ziegler, J., *Report to the Commission on Human Rights*, E/CN.4/2004/10 (9 February 2004).
Ziegler, J., *Report to the Commission on Human Rights*, E/CN.4/2005/47 (24 January 2005).
Ziegler, J., *Report to the Commission on Human Rights*, E/CN.4/2006/44 (16 March 2006).
Ziegler, J., *Report to the General Assembly*, A/56/210 (23 July 2001).
Ziegler, J., *Report to the General Assembly*, A/59/385 (27 September 2004).
Ziegler, J., *Report to the General Assembly*, A/60/350 (12 September 2005).

Websites

African Court of Human and Peoples' Rights, 'Welcome to the African Court', http://www.african-court.org/en/index.php/12-homepage1/1-welcome-to-the-african-court, 2019 (accessed on 2 January 2019).

Court cases

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). Available at https://www.escr-net.org/caselaw/2006/social-and-economic-rights-action-center-center-economic-and-social-rights-v-nigeria (accessed on 17 December 2019).

Government of the Republic of South Africa. & Ors v Grootboom & Ors 2000 (Constitutional Court of South Africa 1999). Available at https://www.escr-net.org/caselaw/2006/government-republic-south-africa-ors-v-grootboom-ors-2000-11-bclr-1169-cc (accessed on 29 November 2019).

I.D.G. v. Spain E/C.12/55/D/2/2014 (Committee on Economic, Social and Cultural Rights, 2015). Available at https://www.escr-net.org/caselaw (accessed on 4 January 2019).

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

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

Kurt v Turkey, Appl. No. 15/1997/799/1002, (European Court of Human Rights, 25 May 1998).

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 on 25 December 2018).

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.escr-net.org/caselaw/2006/peoples-union-civil-liberties-v-union-india-ors-supreme-court-india-civil-original (accessed on 14 January 2019).

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).

Robidoux v. Kitchel, 876 F. Supp. 575 (U.S. District Court, 2nd district, 1995).

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

State v Makwanyane and Another, CCT 3/94 (Constitutional Court of South Africa, 6 June 1995).

U.S. Department of Agriculture v. Moreno, 413 U.S. 528 (U.S. Supreme Court, June 1973).