

DOCTOR OF PHILOSOPHY

Incorporating Socio-economic Rights in World Trade

A Comparative Study of the Impact of Trade Liberalisation on the Right to Access Food in the European Union and Sub-Saharan African Countries

Young, Grace Chinyere

Award date:
2023

Awarding institution:
Coventry University

[Link to publication](#)

General rights

Copyright and moral rights for the publications made accessible in the public portal are retained by the authors and/or other copyright owners and it is a condition of accessing publications that users recognise and abide by the legal requirements associated with these rights.

- Users may download and print one copy of this thesis for personal non-commercial research or study
- This thesis cannot be reproduced or quoted extensively from without first obtaining permission from the copyright holder(s)
- You may not further distribute the material or use it for any profit-making activity or commercial gain
- You may freely distribute the URL identifying the publication in the public portal

Take down policy

If you believe that this document breaches copyright please contact us providing details, and we will remove access to the work immediately and investigate your claim.

Incorporating Socio-Economic Rights in World Trade: A Comparative Study of the Impact of Trade Liberalisation on the Right to Access Food in the European Union and Sub-Saharan African Countries



By

Grace Chinyere Young
Doctor of Philosophy (PhD)

January 2023

Incorporating Socio-economic Rights in World Trade: A Comparative Study of the Impact of Trade Liberalisation on the Right to Access Food in the European Union and Sub-Saharan African Countries

A thesis submitted in partial fulfilment of the University's requirement for
the Degree of Doctor of Philosophy
(Faculty of Business and Law (Centre for Financial and Corporate Integrity))

January 2023



(Word count: 88,779)

Declaration

I hereby declare that this thesis submitted for the degree of Doctor of Philosophy (PhD) to Coventry University is my own work and has not been submitted to any other university for the award of any degree and, to the best of my knowledge and belief, contains no material previously published by another person, except where due reference has been made in the text.

Dedication

I dedicate this work to the memory of my dear father, Prof Zak Obanu, mni, my hero and my mentor. And to the memory of my dear mother, Joy Obanu, my mother and my friend.

Acknowledgment

Firstly, I would like to acknowledge my supervisors- Margaret, Adam and Ayesha for their consistent support and guidance throughout this journey.

I want to acknowledge Uche and Ugo, my backbone.

My deep appreciation goes to Zara&Kc, Chizor&Emma, Joy&Uche, Chizzy&Iyke for always being there for me. And to my enduring friend through thick and thin- Dr Okeke.

My profound love and appreciation to Ezer, Michelle and Adiel for being so supportive and understanding.

Most importantly, I would love to acknowledge the Almighty God for His grace; grace ever so amazing!

Table of Contents

Certificate Of Ethical Approval	iii
Declaration	iv
Dedication	v
Acknowledgment	vi
Table of Contents	vii
List of Abbreviations	xi
List of Tables	xiii
List of Figures	xiv
Abstract	xv
Chapter 1: General Introduction	1
1.1 Introduction	1
1.2 Literature Review	4
<i>1.2.1 Right to Food: Legal or Moral Right?</i>	4
<i>1.2.2 Right to Food, a Justiciable Right?</i>	7
<i>1.2.3 Right to Food as Adequacy?</i>	9
<i>1.2.4 Food Security v Food Sovereignty</i>	13
<i>1.2.5 Trade Liberalisation v the Right to Food</i>	14
1.3 Contribution to Knowledge	16
1.4 Research Aim and Objectives	20
1.5 Research Questions	21
1.6 Conclusion	21
Chapter 2: Research Methodology	24
2.1 Introduction	24
2.2 Research Methodology	24
<i>2.2.1 Doctrinal Research Methodology</i>	24
<i>2.2.2 Socio-legal Research Methodology</i>	25
<i>2.2.3 Comparative Legal Research Methodology</i>	27
2.3 Research Scope	30
2.4 Research Instruments	33
<i>2.4.1 Legal Instruments</i>	33
<i>2.4.2 Analytical Instruments</i>	36
2.5 Research Approach:	42
2.6 Conclusion	44

Chapter 3: Theoretical Framework	45
3.1 Introduction	45
3.2 Contextual Framework of the Right to Food	45
3.2.1 The Right to Accessibility to Food	47
3.2.1.1 Physical Accessibility to Food	47
3.2.1.2 Economic Accessibility to Food	49
3.2.2 Duty of States to be Accountable	53
3.2.2.1 Accountability Through Public Participation.....	55
3.2.2.2 Accountability through Impact Assessment.....	57
3.2.2.3 Accountability Through Wellbeing Considerations	61
3.3 Analytical Concepts	65
3.3.1 The Wellbeing Theory	65
3.3.2 The Rights-Based Approach to Food.....	71
3.3.3 The Concept of Food Security	75
3.4 Conclusion.....	78
Chapter 4: Food as a Fundamental Human Right in Instruments Under International Law	80
4.1 Introduction	80
4.2 Legal Framework.....	80
4.2.1 Article 55 - 57 of UN Charter 1945	82
4.2.2 Articles 25 and 28 of the Universal Declaration on Human Rights 1948	85
4.2.3 Articles 2 and 11 of the International Covenant on Economic, Social and Cultural Rights 1976	86
4.2.4 The Universal Declaration on the Eradication of Hunger and Malnutrition 1974.....	89
4.3 Core Contents of the Right to Food.....	91
4.4 Fundamental Obligations Pertaining to the Right to Food	92
4.4.1 Normative Obligations.....	92
4.4.2 Absolute Obligations	94
4.4.3 Minimum Core Obligation	95
4.4.4 Extraterritorial Obligations of the Right to Food	99
4.5 Right to Food as a Principle to Achieve	104
4.6 Enforceability of The Right to Food.....	110
4.7 Violation of the Right to Food	118
4.8 Food as a Component of the Right to Development.....	121
4.8.1 Access to Food Under the Declaration on the Right to Development (DRD) 1986	121
4.8.2 Access to Food Through the Sustainable Development Goals (SDG) 2015	124
4.9 Conclusion.....	129

Chapter 5: A Critical Analysis of the Impact of World Trade Liberalisation on the Right to Food	130
5.1. Introduction	130
5.2 Human Rights and World Trade; Compatible or Conflicting?.....	130
5.3 The Agreement on Agriculture in Context.....	136
5.3.1 Market Access – Agreement on Agriculture Part III	137
5.3.1.1 Tariffication:	138
5.3.1.2 Comparative Advantage	144
5.3.1.3 Market Access Exceptions	147
5.3.2 Subsidies - Part IV-VI Agreement on Agriculture	157
5.3.2.1 Classification of Subsidies	159
5.3.2.2 Impact of Subsidy on Access to Food	163
5.4 Incorporating Socioeconomic Rights into World Trade Rules.....	169
5.4.1 Application of General Principles of Conflicting Laws	169
5.4.2 State Policy Goals under GATT Article XX.....	175
5.4.3 National Security Exceptions under GATT Article XXI).....	180
5.4.4 Generalised System of Preferences (GSP)	182
5.4.4.1 A Review of the EU/SSA Trade Agreement.....	185
5.5 Conclusion.....	190
Chapter 6: Right to Food in Sub-Saharan Africa.....	193
6.1 Introduction	193
6.2 Structural Indicators of the Right to Food in Sub-Saharan Africa.....	194
6.2.1 The Human Rights Mechanism of Sub-Saharan Africa	195
6.2.2 Rights to Food in the Domestic Laws of Sub-Saharan Africa	197
6.3 Outcome Indictors of the Rights to Food in Sub-Saharan Africa	205
6.3.1 Assessment of the Prevalence of Undernourishment.....	206
6.3.2 Assessment of the Prevalence of Poverty in SSA	212
6.3.3 Assessment of the Prevalence of Hunger.....	215
6.4 Process Indicators of the Right to Food in Sub-Saharan Africa	218
6.5 Incorporating Socioeconomic Rights in Sub-Saharan African Trade.....	222
6.5.1 Incorporating the Right to Food through the General Exception to the Protocol on Trade in Goods.....	223
6.5.2 Incorporating the Rights-Based Approach to Trade in Sub-Saharan Africa.....	225
6.6 Conclusion.....	230
Chapter 7: Right to Food In The European Union	232
7.1 Introduction	232

7.2 Structural Indicators of the Right to Food in the European Union	234
7.2.1 The EU Regional Framework and Human Rights Mechanism	234
7.2.2 The Framework and Human Rights Mechanism of EU Member States	245
7.3 Outcome Indicators of the Right to Food in the EU	247
7.3.1 Assessment of the Prevalence of Undernourishment.....	248
7.3.2 Assessment of the Prevalence of Poverty	249
7.3.3 Assessment of the Prevalence of Hunger.....	254
7.4 Process Indicators of the Right to Food in the EU	259
7.5 Incorporating Socioeconomic Rights into the EU	263
7.6 Conclusion.....	267
Chapter 8: Comparative Analysis.....	269
8.1 Introduction	269
8.2 Comparative Analysis of the Outcome Indicators of the Right to Food in EU and SSA .	270
8.2.1 Severe Food Insecurity in the EU and SSA	274
8.2.2 Undernourishment in the EU and SSA	276
8.2.3 Prevalence of Wasting in Children Below 5 Years of Age in the EU and SSA	277
8.2.4 Prevalence of Stunting in Children Below 5 Years of Age in the EU and SSA.....	278
8.3 Comparative Analysis of the Structural Indicators of Right to Food in EU and SSA	278
8.4 Comparative Analysis of the Process Indicators of Right to Food in the EU and SSA....	279
8.5 Incorporating the Right to Food Security in Trade Regimes	282
8.5.1 Realising the Right to Food Through Public Participation in Trade.....	284
8.5.2 Realising the Right to Food Through Wellbeing Considerations in Trade.....	292
8.5.3 Realising the Right to Food Through Period Impact Assessment of Trade Laws on Human Rights.....	295
8.5.4 Realising the Right to Food Through International Cooperation and Assistance	300
8.6 Conclusions	306
Chapter Nine: Conclusion	307
9.1 Introduction	307
9.2 Conclusion.....	307
9.3 Recommendation.....	315
9.3.1 Integrating Socioeconomic Rights in Trade Framework.....	315
9.3.2 Adopting the Rights-Based Approach (RBA) to Food Security in Trade.....	317
9.4 Final Statement.....	323
Bibliography	325

List of Abbreviations

1. AfCFTA	African Continental Free Trade Agreement
2. ACPHR	African Court on Human and Peoples' Rights
3. AoA	Agreement on Agriculture
4. AU	African Union
5. CAP	Common Agriculture and Fisheries Policy of the EU
6. CESCR	Committee on Economic, Social, and Cultural Rights
7. CFR	Charter of Fundamental Rights of the European Union (CFR) 2009
8. CJEU	Court of Justice of the European Union
9. CRC	UN Convention on the Rights of the Child 1989
10. DRD	Declaration on the Right to Development
11. DSB	Dispute Settlement Body of the WTO
12. DSU	Dispute Settlement Understanding of the WTO
13. EU	European Union
14. ECHR	European Convention on Human Rights 1950
15. ECtHR	European Court of Human Rights
16. FTA	Free Trade Area
17. GATT	General Agreement on Tariff and Trade
18. GHI	Global Hunger Index
19. GSP	Generalised System of Preference
20. ICESCR	International Covenant on Economic, Social and Cultural Rights 1976
21. ICCPR	International Covenant on Civil and Political Rights 1976
22. LDC	Least Developed Countries
23. MC	WTO Ministerial Conference

24. RBA	Rights-Based Approach
25. RtD	Right to Development
26. RtF	Right to Food
27. S&D	Special and Differential Treatment
28. SR	Special Rapporteur on the Right to Food
29. SSA	Sub-Saharan Africa
30. TBT	Agreement on Technical Barriers to Trade
31. SDG	Sustainable Development Goals
32. TEU	Treaty of the European Union
33. TFEU	Treaty on the Functioning of the European Union
34. TRIPS	Agreement on Trade-Related Intellectual Property Rights
35. UDEHM	Universal Declaration on the Eradication of Hunger and Malnutrition
1974	
36. UDHR	Universal Declaration of Human Rights
37. UN	United Nations
38. WHO	World Health Organisation
39. WTO	World Trade Organisation

List of Tables

TABLE 1: LEGAL INSTRUMENTS ON THE RIGHT TO FOOD	33
TABLE 2: ANALYTICAL FRAMEWORK ON INDICATORS OF THE RIGHT TO FOOD	37
TABLE 3: ANALYTICAL FRAMEWORK ON THE AGREEMENT ON AGRICULTURE	39
TABLE 4 ASSESSMENT OF CONSTITUTIONAL PROTECTION OF THE RIGHT TO FOOD IN SSA ...	199
TABLE 5 GLOBAL HUNGER INDEX IN SSA BETWEEN 2000 AND 2020	210
TABLE 6: EXPLANATION:	211
TABLE 7 ASSESSMENT OF SDG1- PROPORTION OF PERSONS LIVING IN EXTREME POVERTY IN SSA IN THE YEAR 2021	213
TABLE 8 SDG2- PREVALENCE OF HUGER IN SSA IN THE YEAR 2021	216
TABLE 9 GLOBAL HUNGER INDEX IN THE EU BETWEEN THE YEARS 2000 AND 2020	248
TABLE 10: EXPLANATION.....	249
TABLE 11: ASSESSMENT OF SDG1- PROPORTION OF PERSONS LIVING BELOW THE NATIONAL POVERTY LINE OF \$1.90 AND \$3.20 PER DAY	250
TABLE 12 SDG1- PROPORTION OF PERSONS LIVING IN EXTREME POVERTY IN THE EU (1999- 2021)	253
TABLE 13 SDG2- PREVALENCE OF HUGER IN THE EU IN 2021.....	255
TABLE 14 SDG2- PREVALENCE OF HUGER IN THE EU IN THE YEAR 2021	257
TABLE 15: KEY TO FIGURE 5	275

List of Figures

FIGURE 1: GENERAL OCCUPATION OF THE WORLD'S UNDERNOURISHED POPULATION	52
FIGURE 2: CYCLE OF POVERTY	127
FIGURE 3 GHI SCORES OF SSA BETWEEN 2000 AND 2021	271
FIGURE 4 GHI SCORES OF EU BETWEEN 2000 AND 2021	273
FIGURE 5 COMPARATIVE INDEX OF FOOD SECURITY INDICATORS IN SSA AND EU	275

Abstract

One of the greatest challenges facing the world today is to achieve food security among severely undernourished populations by reducing poverty while liberalising trade to ensure sustainable access to food across the globe. This study critically examines this challenge in view of the impact of trade liberalisation on access to food as a fundamental aspect of the legal right to food. It examines the RtF as access to food in SSA, comparing it with the situation in the EU to highlight the dire situation of food insecurity in SSA, and establish the impact of trade liberalisation on the realisation of RtF and how the progressive realisation of RtF could be facilitated by incorporating socioeconomic rights into international trade regimes. This study adopts the socio-legal research methodology, examining the impact of international trade on the wellbeing of the people- particularly on the right to an adequate standard of living, including food. It also adopts the comparative research methodology, comparing the situation in Sub-Saharan Africa (SSA) with the situation in the European Union (EU). It compares the extent of the realisation of the right to food and how this is impacted by regional trade in both regions.

Using SSA as the primary research area and contrasting with the EU, this study examines the structural indicators of the RtF, including the extent to which this right is protected and enforced in the regional and domestic laws of the respective Member Countries. It examines the outcome indicators, including the prevalence of poverty and food insecurity in these regions. It also examines the process indicators of the RtF, including the impact of trade liberalisation agreements of the World Trade Organisation on access to food in the region. A comparative analysis of the impact of world trade rules on both regions demonstrates that certain agricultural trade policies such as domestic support, tariffication, export subsidy and comparative advantage tend to limit the capacity of developing countries (including all SSA

countries) to fulfil their obligations for the progressive realisation of the right to food. This study further compares the EU and S

SA regional approaches to trade. It establishes that the EU tends to adopt a more holistic approach to trade, integrating the world of human rights into the world of trade and incorporating elements of the rights-based approach to food security into trade through enhanced public participation, wellbeing considerations in trade, and periodic impact assessment *inter alia*. Through this analysis, this study demonstrates areas of possible legal transplant and practical ways of incorporating socioeconomic rights into trade by integrating the elements of the Rights-Based Approach to food security into trade liberalisation regimes to enhance access to food in SSA through trade.

Chapter 1: General Introduction

1.1 Introduction

This study examines how the right to access food could be achieved in Sub-Saharan Africa (SSA) through accountable trade liberalisation rules and practices. Despite continuous technological advancements in farming and food production, all forms of malnutrition and undernourishment continue to threaten the lives and livelihoods of populations around the world, accounting for over 45 percent of infant mortalities worldwide.¹ In Sub-Saharan Africa (SSA) particularly, there is a dire picture of undernourishment owing to poverty, underdevelopment and overdependence on imported food, among other factors.² Although SSA is ranked as the region with the highest population of agriculturists worldwide,³ it ironically has the highest rate of infant mortality owing to starvation, and is notably among the regions of the world where hunger continues to increase.⁴ These challenges and other evidence of violations of RtF in SSA are examined in this study in light of the possible impact of trade liberalisation on the realisation/violation of RtF in SSA vis-à-vis the EU.

This study examines the right to food (RtF) in SSA based on the provisions of Article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) 1966. This Article establishes the right to an adequate standard of living, including adequate food, and the fundamental right to be free from hunger. The core contents of this right include adequacy,

¹ OHCHR 'Report of the Special Rapporteur on the Right to Food' (2020) para 30 and 34 UN Doc A/HRC/43/44; See also WHO, 'Children: reducing mortality', Fact Sheet, January 2016 <www.who.int/mediacentre/factsheets/fs178/en> accessed 25 August 2022

² Ibid

³ World Bank, 'Indicators' Employment in Agriculture (% of total employment) <<https://data.worldbank.org/indicator/SL.AGR.EMPL.ZS>> accessed 25 August 2022

⁴ Ademola Braimoh (ed.), 'Food Access Deficiencies in Sub-Saharan Africa: Prevalence and Implication for Agricultural Interventions' (2019) *Frontiers in Sustainable Food Systems* <www.frontiersin.org/articles/10.3389/fsufs.2019.00104/full#h9> accessed 17 February 2021; See also Pedro Sanchez, M. S. Swaminathan, Philip Dobie and Nalan Yuksel, 'Halving Hunger: It Can be Done, Summary Version of the Report of the Task Force on Hunger' (UNDP 2005) 4

availability, sustainability, acceptability, and accessibility.⁵ This study, however, examines the RtF as access to food in SSA on the basis that ‘the right to adequate food is realised when every man, woman and child, alone or in community with others, have physical and economic access at all times to adequate food or means for its procurement’.⁶ The RtF, as examined in this study, is achieved in a state of food security and is seen as being violated where there is widespread food insecurity⁷.

Food security refers to the individual’s ability to access food that is nutritious in quality and sufficient in quantity, while food insecurity refers to a lack of access to safe and nutritious food necessary for an active and healthy life.⁸ Sen suggested that food insecurity goes beyond notions of inadequate food production or regional overpopulation to involve failure of livelihood and uncertainty regarding the ability to access sufficient food.⁹ Thus, food insecurity is examined herein in terms of poverty and hunger. Recent research has also shown that widespread hunger is not unconnected to inequalities and poverty engendered by the economic and political structures which underpin the global economic system.¹⁰ This study, therefore, establishes the link between poverty, trade liberalisation and violations of RtF.

Furthermore, this study examines the impact of trade liberalisation on the realisation of RtF in SSA vis-à-vis the EU and demonstrates possible ways of incorporating socioeconomic rights in trade to facilitate the realisation of RtF in SSA. It examines the agricultural trade liberalisation laws of the WTO and the extent to which it impacts food production, distribution and economic access to food in the EU and SSA. The EU as a region comprises predominantly

⁵ William D. Schanbacher, *Food as a Human Right: Combatting Global Hunger and Forging a Path to Food Sovereignty* (Praeger 2019)

⁶ CESCR General Comment No 12, ‘The Right to Adequate Food (Art. 11)’ Adopted at the Twentieth Session of the Committee on Economic, Social and Cultural Rights on 12 May 1999 (Contained in Document E/C.12/1999/5) para 6

⁷ Violation may be perpetrated by persons responsible for the welfare of the vulnerable. This may include the State under Art 11 ICESCR 1976 and the parents of a child under Art 27 CRC 1989

⁸ FAO, ‘Hunger and Food Insecurity’ <www.fao.org/hunger/en/> accessed 21 December 2022

⁹ Amartya Sen, *Poverty and Famines: An Essay on Entitlement and Deprivation* (OUP 1981)

¹⁰ Raj Patel, *The Value of Nothing: How to Reshape Market Society and Redefine Democracy* (Picador 2010)

developed food-exporting countries, while SSA as a region comprises predominantly developing food-importing countries. This study compares the impact of trade liberalisation on the realisation of RtF in both regions to highlight necessary areas of legal transplant from the EU system to aid the realisation of RtF in SSA. It compares the applicable human rights and trade laws in both regions, demonstrating how these laws facilitate the realisation of RtF. Using the ICESCR as the normative standard to determine the requirements of the RtF and adopting the UN list of illustrative indicators on the right to adequate food (ICESCR, Art. 11)¹¹ as the standard for determining compliance with the ICESCR, this study demonstrates how trade liberalisation impacts on access to food and on the ability of States to fulfil their RtF obligations in SSA vis-à-vis the EU.

This study further demonstrates how incorporating socioeconomic rights into world trade will augment the realisation of the RtF in SSA. Given the multifarious nature of the problem of widespread food insecurity and considering the dynamic globalised systems of the world, this study suggests that measures to enhance the realisation of RtF ought to adopt an equally globalised and comprehensive approach. This approach involves embracing the Rights-Based Approach (RBA) to food security in contrast to alternative food systems such as food sovereignty, plurilateralism and other propositions which tend to boycott international trade. This study proposes that achieving sustainable food security requires an open-minded perception of the global food system and continuously expanding on this perception to adopt a wide range of measures that address poverty, underdevelopment, inequalities and other foundational causes of widespread hunger while promoting the human rights-based approach to food security in trade.¹² This study proposes a rule-based, transparent, predictable, inclusive

¹¹ OHCHR, 'Report on Indicators for Monitoring Compliance with International Human Rights Instruments' prepared in response to the request of the seventeenth meeting of the chairpersons of the human rights treaty bodies A/60/278 on 11 May 2006 (Contained in Document HRI/MC/2006/7)

¹² SDG UN, 'Transforming our World: The 2030 Agenda for Sustainable Development' (2015) <<https://sustainabledevelopment.un.org/post2015/transformingourworld>> accessed 12 June 2020; See also Sigrun I Skogly, 'Is There A Right Not To Be Poor?' (2002) 2(1) Human Rights Law Review, 59, 71

and equitable international trading system to augment the realisation of RtF, particularly among import-reliant countries of SSA.¹³

1.2 Literature Review

This section examines the existing gap in literature and articulates the contribution of this study to knowledge, particularly as it relates to RtF, global food systems and the impact of trade liberalisation on the realisation of RtF. It reviews previous literature on the concepts, legality, justiciability and enforceability of socioeconomic rights and the RtF. It also examines various schools of thought on global food systems as well as arguments on the relationship between trade liberalisation and the realisation of RtF,

1.2.1 Right to Food: Legal or Moral Right?

Earlier research on the RtF examined socioeconomic rights, including the RtF as aspirational, having moral force but lacking in legality.¹⁴ This notion is partly hinged on the normative differentiation between civil and political rights under the International Covenant on Civil and Political Rights (ICCPR) 1976 and socioeconomic rights under the ICESCR 1976. While the ICCPR 1976 requires State Parties ‘to respect and to ensure’ the realisation of the rights and to provide an effective remedy,¹⁵ the ICESCR 1976 requires State Parties to ‘take steps’ to achieve the progressive realisation of the recognised rights.¹⁶ Similarly, the RtF generally requires States to ‘take appropriate steps’ including ‘specific measures’ to guarantee

¹³ See SDG UN, ‘United Nations Sustainable Development Goals Knowledge Platform’ (2015) <https://sustainabledevelopment.un.org/content/documents/2051AAAA_Outcome.pdf> accessed 17 February 2021

¹⁴ Philip Alston, ‘International Law and the Human Right to Food’ in Philip Alston and Katarina Tomaševski (eds), *The Right to Food* (Martinus Nijhoff Publishers 1984) 55. See also Jeane J Kirkpatrick, *Legitimacy and Force: State Papers and Current Perspectives: Political and Moral Dimensions* (1st edn, Routledge 1988) 130-31

¹⁵ International Covenant on Civil and Political Rights (ICCPR) 1976, Article 2

¹⁶ ICESCR 1976, Article 2

fundamental freedom from hunger.¹⁷ Some scholars, such as Cranston, have argued that referring to socioeconomic rights as legal rights waters down the very concept of human rights and diverts human rights activism from a morally compelling state into the “twilight world of utopian aspiration”.¹⁸ This school of thought maintains that, like other socioeconomic rights, the RtF is amorphous and should not be accorded the legal status of a human right.¹⁹

Further academic discourse regarded the RtF as impracticable because it creates positive obligations which require the direct financial involvement of the State for its fulfilment.²⁰ The key rationale behind this notion is the conceptual distinction between civil and political rights as ‘negative rights’, which seem to require States to do nothing, and socioeconomic rights as ‘positive rights’, whose realisation is dependent on the performance of an act by the State. In this sense, civil and political rights create negative obligations which only require the State to avoid measures that could violate the rights of the people, while socioeconomic rights create positive obligations which require the State to take steps to achieve the realisation of the protected rights. In light of the positive obligations it imposes on the State, the RtF has been described as Utopian and impracticable.²¹ It is particularly criticised as demanding the performance of an impossible act because no agency or authority can realistically fulfil the obligation of feeding all the hungry or ensuring that all people have adequate food.²² Furthermore, several developing states, particularly in SSA, may lack the financial and technological capacity to accomplish their obligations to protect and fulfil the RtF, thus rendering the realisation of the RtF in such States impracticable.²³

¹⁷ ICESCR 1976, Article 11

¹⁸ Maurice Cranston, ‘Human Rights: Real and Supposed’ in D D Raphael (ed) *Political Theory and the Rights of Man* (Indiana University Press, 1967) 52

¹⁹ Rhonda Ferguson, *The Right to Food and the World Trade Organization’s Rules on Agriculture, Conflicting, Compatible or Complimentary* (International Studies in Human Rights, Brill | Nijhoff, 2018) 113-4

²⁰ Onora O’Neill, ‘The dark side of human rights’ in Thomas Christiano and John Christman (eds) *Contemporary debates in political philosophy* (Blackwell Publishing 2009) 427

²¹ Joseph Raz, ‘Human Rights in the Emerging World Order’ (2010) 1 *Transnational Legal Theory* 21-47

²² O’Neill (n 20)

²³ Kirkpatrick (n 14) 226

On this basis, RtF as a socioeconomic right has been construed as mere moral rights which do not conform to universal duties created under international law.²⁴ The extraterritorial nature of its obligations has been particularly challenged by some scholars who contest that the duty to assist poorer economies cannot be more than a moral obligation. Scholars like Coomans have raised questions suggesting that such extraterritorial obligations are vague- 'is it possible to impose and enforce the fulfilment of responsibilities?'²⁵ And how will the Committee²⁶ assess whether a State is rich and in a position to assist?'²⁷ In his popular treatise, Hardin likened the food system to a lifeboat, arguing that there is limited room in the lifeboat and it cannot be made to accommodate more people than it is designed to keep.²⁸ He contends that the extraterritorial obligations of the RtF can, at best, be discretionary because compelling the rich economies to assist the poor would impoverish the rich and sink the lifeboat.²⁹ He concluded that the RtF does not measure as real human rights because real human rights should be practicable and feasible, but RtF creates unclear duties.³⁰

However, other schools of thought differ remarkably in their perception of socioeconomic rights. These scholars contest that by virtue of its establishment in international instruments and conventions, particularly the Universal Declaration of Human Rights (UDHR)³¹ and ICESCR,³² the RtF is a legal right with full legal status as any other class of human right.³³ The RtF is also established in a number of domestic and regional legislations,³⁴ and the CESCR

²⁴ Ibid 50

²⁵ Fons Coomans, 'The Extraterritorial Scope of the International Covenant on Economic, Social and Cultural Rights in the Work of the United Nations Committee on Economic, Social and Cultural Rights' (2011) 11(1) Hum Rts L Rev 23

²⁶ Committee on Economic, Social and Cultural Rights

²⁷ Coomans (n 25)

²⁸ Garrett Hardin, 'Lifeboat ethics: The case against helping the poor' (1974) Psychology Today <<https://rintintin.colorado.edu/~vancecd/phil1100/Hardin.pdf>> accessed 15 January 2020

²⁹ Ibid.

³⁰ Ibid

³¹ UDHR 1948, Article 24

³² ICESCR 1976, Article 11

³³ G.J.H. Van Hoof, 'The Legal Nature of Economic, Social and Cultural Rights: A Rebuttal of Some Traditional Views' in Philip Alston and Katarina Tomaševski (eds) (n 14) 99

³⁴ See for instance Malawi's Constitution 1994 with Amendments through 2017, Article 30.2; Constitution of the Federal Republic of Nigeria 1999, S 16.2(d); See also *SERAC and Anor v Nigeria* [2001] ACHPR

reinforces its extraterritoriality.³⁵ Scholars like Swaminathan submit that although the RtF, like other socioeconomic rights, lacks coercion and clarity, this weakness does not vitiate the legality of the protected rights.³⁶

Aligning with the latter school of thought, this study submits that socioeconomic rights are legal rights, and the RtF is a compendium of inalienable legal obligations incumbent on the State and the international community. Although the RtF and all socioeconomic rights create positive obligations, these positive obligations do not render the RtF impracticable. Contrary to Hardin's argument above, the RtF does not impose an obligation on the State to spoon-feed the people, rather it creates an obligation to adopt measures to improve food production, storage and distribution systems; disseminate appropriate information; and the duty to enhance access to food through responsible economic and political measures *inter alia*.³⁷

1.2.2 Right to Food, a Justiciable Right?

Justiciability is significant to the overall validity of socioeconomic rights because, without judicial inclusion, socioeconomic rights might become 'empty rights and false promises'.³⁸ The controversies on the justiciability of RtF are hinged on conceptual divides surrounding the normative framework of socioeconomic rights in contrast to civil and political rights. On the contrary, under the ICCPR, State Parties 'undertake to respect and to ensure' the rights recognised in the Covenant,³⁹ thus implying that civil and political rights are immediately

Communication No. 155/96; See also CESCR, General Comment No 14, 'The Right to Highest Attainable Standard of Health (Art. 12)' Adopted at the Twenty-Second Session of the Committee on Economic, Social and Cultural Rights on 4 July 2000 (Contained in document E/C.12/2000/4); 8 IHRR 1 (2001) para 39 and, CESCR General Comment No 15, 'The Right to Water (Arts 11 and 12)' Adopted at the Twenty-Ninth Session of the Committee on Economic, Social and Cultural Rights on 20 January 2003 (Contained in document E/C.12/2002/11)

³⁵ ICESCR 1976, Article 11.2

³⁶ Moncompu Sambasivan Swaminathan, 'Food: A Basic Human Right' (2013) 7(2) Indian Journal of Human Development (Sage Publishers 2013) 333

³⁷ ICESCR 1976, Article 11.2

³⁸ Katharine G Young, 'The Minimum Core of Economic and Social Rights: A Concept in Search of Content' (2008) 33 Yale J Int'l L 158

³⁹ ICCPR 1976, Article 2.1

enforceable. On the other hand, the ICESCR requires State Parties to ‘take steps... with a view to achieving progressively the full realisation of the rights recognised’ in the Covenant,⁴⁰ thus making socioeconomic rights of progressive rather than immediate realisation. Consequently, it has been argued that in creating rights which are not immediately realisable, the ICESCR renders socioeconomic rights unenforceable.⁴¹ Hence socioeconomic rights appear as goals to be achieved rather than legal rights to be enforced.⁴²

However, treating socioeconomic rights as a matter of progressive rather than immediate realisation does not diminish its legality, as access to court is not a complete measure of legal or social value.⁴³ Despite the language of the ICESCR and the overall progressive nature of its obligations, socioeconomic rights create certain immediate obligations:⁴⁴ ICESCR Articles 2.1 and 11.2 require State Parties to ‘take steps,’⁴⁵ and Article 2.2 requires States to guarantee that the protected rights are exercised without discrimination.⁴⁶ This duty to take steps is in itself an immediate obligation.⁴⁷ While the full realisation of socioeconomic rights may be achieved progressively, the Committee on Economic, Social and Cultural Rights (CESCR) determines that steps towards that goal must be immediate, deliberate, concrete and targeted.⁴⁸ The UN Economic and Social Council further emphasised in its 2009 report that a State is not allowed to take retrogressive steps or to do nothing⁴⁹. It must take steps, and the steps must be progressive, towards the realisation of protected rights. Article 2.2 ICESCR also

⁴⁰ ICESCR 1976, Article 2.1

⁴¹ Cathy Albisa and Jessica Schultz ‘The United States: A Ragged Patchwork’ in Malcolm Langford (ed) *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (CUP 2008)

⁴² See James Harrison, *The Human Rights Impact of the World Trade Organisation* (Hart 2007) 26

⁴³ Daniel J. Whelan and Jack Donnelly, ‘The West, Economic and Social Rights and the Global Human Rights Regime: Setting the Record Straight’ (2007) 29 *Human Rights Quarterly*, 908

⁴⁴ CESCR General Comment No 12 (n 6) para 1

⁴⁵ ICESCR 1976, Article 2.1 and 11.2

⁴⁶ *Ibid* Article 2.2

⁴⁷ *Ibid* Article 11.2

⁴⁸ UN Economic and Social Council, ‘Report of the High Commissioner for Human Rights on implementation of Economic, Social and Cultural Rights’ presented at the Substantive session of 2009 Geneva on 6-31 July 2009 (Contained in document. E/2009/90); See also CESCR General Comment No 3, ‘The Nature of States Parties Obligations (Art. 2, Para. 1, of the Covenant)’, Adopted at the Fifth Session of the Committee on Economic, Social and Cultural Rights, on 14 December 1990 (Contained in Document E/1991/23) para 2

⁴⁹ UN Economic and Social Council, *Ibid* para 14

provides the duty to ensure that the protected rights are exercised without discrimination.⁵⁰ This duty is of immediate realisation.⁵¹ The minimum core of the RtF, as established by the CESCR in General Comment 3, includes the minimum requirements/fundamental obligations which must be realised for the RtF to be achieved.⁵² The Committee determined that the core obligation to respect, protect and fulfil the minimum essential levels of socioeconomic rights is absolute and of immediate realisation.⁵³ The Committee also directs States to incorporate these rights into their domestic laws,⁵⁴ and where this is done, the RtF becomes immediately enforceable.⁵⁵ Thus suggesting that the RtF is neither aspirational nor discretionary but may be unambiguously mandatory and subject to immediate enforcement in whole or in substantial part.

1.2.3 Right to Food as Adequacy?

The right to adequate food includes the right of everyone to have access to safe and nutritious food and the right of everyone to be free from hunger.⁵⁶ Research on the normative concept of the RtF has taken diverse perspectives but is very often centred on adequacy, thus limiting its applicability to nutritional values and calorie intake.⁵⁷ It relegates the RtF to providing basic calorie needs for impoverished populations, thereby forfeiting other essential values of the RtF.⁵⁸ Likewise, violation of RtF is confined to analysing widespread hunger and undernutrition in developing countries or malnutrition and obesity in developed countries.⁵⁹

⁵⁰ ICESCR 1976, Article 2(2)

⁵¹ Ibid

⁵² CESCR General Comment No 3 (n 48)

⁵³ Ibid para 10

⁵⁴ Ibid paras 3 and 8

⁵⁵ For instance S43.1(c) of the Constitution of Kenya 2010 recognises the right ‘to be free from hunger, and to have adequate food of acceptable quality’. See also *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya* [2010] ACHPR Communication No 276/2003

⁵⁶ ICESCR 1976, Article 11

⁵⁷ Alok Bhargava, *Food, Economics and Health* (OUP 2008)

⁵⁸ Schanbacher (n 5)

⁵⁹ Sandra Raponi, ‘A Defense of the Human Right to Adequate Food’ (2017) 23(1) *Res Publica Dordrecht* 99

The danger is that such research often produces prejudiced findings, leading to recommendations which do not contemplate the possible international effect of applying its findings.

Bhagarva, for instance, examined the RtF as adequacy in the developing countries of India, The Philippines, Kenya and Bangladesh.⁶⁰ He used randomised controlled trials, household surveys and macro-economic analysis based on food intake data in these regions to show income elasticities of energy and micronutrients. He found that poor nutrition was predominant in the research area and was responsible for the people's poor psychological and economic wellbeing.⁶¹ He, therefore, called for State intervention in surveying the nutritional intake of the people and subsidising nutritional staple foods.⁶² In doing so, he failed to appreciate the limitations of the State and the impact of international trade and extraterritorial influences on the ability of the State to achieve the right to adequate food.

Researchers like Swaminathan examined RtF as access to sufficient food and calories in developing countries. He found widespread hunger in developing countries despite high involvement in agriculture hunger as a consequence of land diversion from food production to export-oriented farming.⁶³ Swaminathan thus recommended an income orientation to farming to boost local production of culturally acceptable food, generate income and discourage land diversion.⁶⁴ However, by focusing narrowly on nutritional patterns within a country, Swaminathan failed to acknowledge the possible impact of transnational trade and international economic measures like dumping on the domestic agricultural market and how these external influences reinforce dependency on food importation and violate the RtF.⁶⁵

⁶⁰ Bhargava (n 57)

⁶¹ Ibid

⁶² Ibid

⁶³ Swaminathan (n 36)

⁶⁴ Ibid

⁶⁵ For instance, the Haiti food crisis of 1993-2000 was as a result of the US flooding the Haitian market with subsidised foods which frustrated local producers out of the market, destroying Haiti's agricultural sector, and exploiting labour through low wages and poor working conditions. See Schanbacher (n 5)

Raponi obtained a similar result from her analysis of the RtF as quantitative and qualitative adequacy in developed countries. Raponi's research focused on sustainability and access to nutritious food among food deserts in the United States, examining the impact of the food subsidy reduction by the US government between 2014 and 2017 on poor households.⁶⁶ It found that the withdrawal of food subsidies limited access to adequate food among vulnerable populations.⁶⁷ She, therefore, called for direct government involvement through increased food subsidies, supportive environmental and agricultural policies; and zoning laws to limit fast food restaurants, create incentives for grocery stores and subsidise the cost of staple foods to protect the right to nutritious food.⁶⁸ This conclusion equally appears prejudiced as the RtF does not obligate the State to regulate what the people eat and how. Doing so may overstretch its obligations beyond the contemplation of the ICESCR.⁶⁹ The RtF is not a coercive measure. It does not limit the consumers' physical access to food nor diminish the traders' economic access in order to promote nutritional values. Actual happiness and satisfaction (wellbeing), which the RtF procures, respect a person's choices and goes further (through effective policymaking, wealth creation and public awareness) to arm the people with the knowledge to make informed choices while securing economic access to healthier options.⁷⁰ Furthermore, such limited analysis of the RtF does not visualise the global picture; it neither considers the possible effect of trade liberalisation or international economic regulations on domestic policies and the ability of States to fulfil their RtF obligations.

However, the right to adequate food is dynamic, reaching beyond the requirement for adequacy to involve other basic and ancillary issues which must all be taken into consideration, including economic access and the need for an equitable distribution of world food supplies in

⁶⁶ Raponi (n 59)

⁶⁷ Ibid

⁶⁸ Ibid 107

⁶⁹ ICESCR 1976, Article 2 and 11

⁷⁰ Ibid

relation to need.⁷¹ The right to adequate food must not be restricted to issues of adequacy nor overdrawn to conflate on States, the additional responsibility of monitoring the nutritional intake of the people, or other responsibilities which overreach the requirements of the law and impose an impossible task on the State.

The right to adequate food must also contemplate the express right of everyone to be free from hunger. Hunger is a chronic problem that arises and persists when access to food is limited or denied.⁷² Ferguson argues that hunger is not merely scarcity of food but a deep-rooted chronic problem with multifarious causes, ranging from scarcity resulting from manmade and natural disasters to economic and political manipulations at local and international levels.⁷³ According to Sen's findings, hunger and starvation occur 'not from people being deprived of things to which they are entitled, but from people not being entitled to adequate means for survival'.⁷⁴ In other words, hunger is not caused by a mere deprivation of rights, but a lack of economic power to access/purchase food. It is contested that the world produces enough food to feed its population.⁷⁵ Hence, widespread hunger and starvation in SSA are not caused by the unavailability of food but by a lack of entitlements/purchasing power.⁷⁶ Hunger exists and persists primarily because of poverty and inequality: inequality in global economic policies, inequality in access to productive resources, inequality in global market access, inequality in global food distribution and inequality of access to food,⁷⁷ thus highlighting the importance of economic access to food as an essential aspect of the right to adequate food.

⁷¹ Ibid Article 11.2(b)

⁷² FAO, 'Hunger and Food Insecurity' (n 8)

⁷³ Ferguson (n 19) 100-103

⁷⁴ Amartya Sen, 'The Right not to be Hungry' in Philip Alston and Katarina Tomaševski (n 14) 69 - 82

⁷⁵ Jacqueline Mowbray, 'The Right to Food and the International Economic System: An Assessment of the Rights-Based Approach to the Problem of World Hunger' (2007) 20(3) *Leiden Journal of International Law* (CUP 2007) 545-547

⁷⁶ Sen, *Poverty and Famines: An Essay on Entitlement and Deprivation* (n 9) 154

⁷⁷ Ibid; See also Ana Gonzalez-Pelaez, *Human Rights and World Trade: Hunger in International Society* (Routledge 2005)

The obligation of States to fulfil the right to adequate food involves an obligation to take measures which facilitate access to food by eradicating poverty among vulnerable populations. It includes an obligation to be accountable and inclusive when making laws and policies, taking into consideration the wellbeing and socioeconomic needs of the people, and the need to facilitate the realisation of RtF through measures that promote access to adequate food.⁷⁸ Such measures may not directly legislate on food but may incorporate economic policies which regulate trade in agriculture, enhance economic development and reduce poverty to engender access to food.⁷⁹ Scholars have propounded some concepts of food administrative systems to assist States in fulfilling their RtF obligations. They include the food security and food sovereignty systems.

1.2.4 Food Security v Food Sovereignty

The food security and food sovereignty concepts are two major schools of thought on food administrative and distributive systems. The food security concept embraces international cooperation and assistance to enhance the individual's ability to access food that is nutritious and sufficient in quantity, while food sovereignty propounds that the people who produce, distribute, and consume food also control the mechanisms and policies of food production and distribution.

On the one hand, proponents of food security, such as Gonzalez-Pelaez, advocate liberalism, underscoring the importance of concerted measures at national and international levels in achieving global food security.⁸⁰ They maintain that it is the primary obligation of the State to respect, protect and fulfil the RtF.⁸¹ This implies an inalienable duty on the State to take steps independently and through international cooperation to progressively achieve the

⁷⁸ CESCR General Comment No 12 (n 6) paras 7 and 8,

⁷⁹ UDEHM 1974, Article 2 and 3

⁸⁰ Gonzalez-Pelaez (77) xi

⁸¹ ICESCR 1976, Article 2.1

realisation of the RtF.⁸² On the other hand, the food sovereignty concept, born out of increasing disappointment in the global economic structures and the increasing evidence that the current world trading system is hurting the food security of the vulnerable, proposes protectionism and the preservation of the non-economic values of food. Proponents of food sovereignty, such as Schanbacher, advocate strengthening national autonomy to allow states to dictate their preferred food systems and administer the same with minimal international interference.⁸³ They contend that food security is not a suitable remedy for the global food crisis because it only proposes the desired result, not the process.⁸⁴ Other proponents like Mowbray contend that the right-based approach (RBA) is inadequate to effectively address the international economic, social and political structures that anchor the current food crisis because its language is allegedly weak and impractical.⁸⁵ However, food security proponents like Gonzalez contend that in light of the increasing relevance of international structures to a continuously globalising world, the mutual integration of international and local systems is necessary to address global food challenges rather than expending energy on pluralism.⁸⁶ The rights-based approach to food security emphasises the inalienability of State obligations and the importance of international cooperation through trade and other alliances to promote access to food, particularly among developing countries.

1.2.5 Trade Liberalisation v the Right to Food

Having established the importance of a holistic approach to addressing the problem of food insecurity, this section reviews further literature on the impact of international trade

⁸² Shona Hawkes and Jagjit Kaur Plahe, 'Worlds Apart: The WTO's Agreement on Agriculture and the Right to Food in Developing Countries' (2012) 34(1) *International Political Science Review* (Sage Publishers) 34

⁸³ Schanbacher (n 5)

⁸⁴ Raj Patel, *Stuffed and Starved: The Hidden Battle for the World Food System* (Melville House Publishing 2007)

⁸⁵ Mowbray (n 75) 558

⁸⁶ Gonzalez-Pelaez (77) 46

liberalisation regimes, such as the World Trade Organisation and regional trade regimes like the European Union (EU) and the African Continental Free Trade Area (AfCFTA) Agreement 2019 on the realisation of RtF. As the foremost global trade liberalisation organisation, the WTO has been severally criticised for sponsoring widespread violation of human rights. This is because its trade liberalisation policies appear to be driven by economic motives with little regard for human rights and the sociological impact of trade laws on vulnerable populations.⁸⁷ Consequently, the Agreement on Agriculture (AoA) and other related agreements that regulate world trade in agriculture have been criticised because of their impact on food-importing countries.

The AoA is generally criticised for impairing the RtF of developing countries as it tends to expose developing economies to inequitable global competition through trade liberalisation policies such as comparative advantage and subsidy prohibition policies.⁸⁸ For instance, the AoA adopts 1986-88 as the base period for the progressive reduction of domestic support and export subsidies.⁸⁹ This policy serves the economic purpose of eliminating trade barriers and opening up the global market. However, it appears to unfairly disfavour developing countries with no established subsidy schemes at the stated time.⁹⁰ Furthermore, the AoA operates the comparative advantage policy, which encourages countries to specialise in the products in which they have a competitive advantage and to open up their borders to import other products. Competitive advantage has been criticised because it appears to serve the short-term benefit of improving agricultural specialisation, production and exportation with little regard for the long-term effects such as discouraging diversification, suppressing local production and encouraging over-dependence on food importation.⁹¹ Hawkes argued that although the WTO

⁸⁷ Schanbacher (n 5) 9

⁸⁸ OHCHR 'Report of the Special Rapporteur on the Right to Food Olivier De Schutter - Addendum - Mission to the World Trade Organisation' (2009) UN Doc A/HRC/10/5/Add.2

⁸⁹ Agreement on Agriculture (AoA) 1994 Arts 6, 9 and Annexure 3

⁹⁰ Mowbray (n 75)

⁹¹ Sarah Joseph, *Blame it on the WTO? A Human Rights Critique* (OUP 2011)

policies support increased productivity by liberalising global trade in agriculture, a side effect is that they tend to intensify inequalities in the global market.⁹² They tend to sponsor regressive measures by exposing the vulnerable market of developing countries to well-financed offshore competitors, thereby stifling subsistence farming, encouraging neo-monopoly, and increasing dependency on food importation.⁹³

Taking a slightly different tone, Joseph opines that the WTO is not the villain it is often portrayed as.⁹⁴ The harsh effects of the AoA were not premeditated to deprive the vulnerable but were mere fallouts of the corporatisation of the food industry and the liberalisation of the agricultural market.⁹⁵ WTO policies do not outrightly proscribe human rights values, but they impose trade requirements which may contradict the human rights obligations of states, making it difficult for them to fulfil their socioeconomic rights obligations. They tend to limit the government's ability to regulate or take other measures to protect human rights at the national or regional level. Since the AoA does not recognise human rights as a valid trade exception, it tends to limit the ability of Member States to impose countermeasures on third-party States who interfere with their human rights obligations.⁹⁶ By so doing, it tends to limit the power of the States to protect the RtF from adverse external influence and thus limits the ability of States to fulfil their RtF obligations.

1.3 Contribution to Knowledge

In light of the above, this study introduces a different perspective to the discourse on RtF. It examines the RtF as access to food in SSA, comparing it with the situation in the EU to highlight the dire situation of food insecurity in SSA, and establish the impact of trade

⁹² Shona Hawkes and Jagjit Kaur Plahe (n 82) 21-34

⁹³ Schanbacher (n 5) 35-39

⁹⁴ See Joseph (n 91)

⁹⁵ Ibid 179

⁹⁶ Joseph (n 91) 40-44

liberalisation on the realisation of RtF and how the progressive realisation of RtF could be facilitated by incorporating socioeconomic rights into international trade regimes. It focuses on access to food in SSA because of the alarming levels of chronic food insecurity in this region, and it contrasts with the EU because the EU has attained a remarkably higher level of food security than SSA. This comparison appears to have been avoided by previous scholars because of the vast cultural, economic and political differences between both regions, which could render any proposals for legal transplant impracticable. However, this comparative analysis is essential to highlight the depth of deprivation in SSA because the extent of the deprivations in SSA may not be readily appreciated if considered in isolation. In light of the possible challenges of legal transplant due to the legal, economic and sociocultural differences between the EU and SSA, this study reinforces the Rights-Based Approach to food security under the Voluntary Guidelines for the realisation of RtF in terms of food security because these Guidelines are of universal application and are suitable for adaptive legal transplant from EU to SSA.

Moving away from the conventional perception of the RtF as the adequacy of food, this study examines physical and economic access to food as fundamental aspects of the right to an adequate standard of living under Article 11 ICESCR. It also analyses access to food as an objective indicator of wellbeing pursuant to the Declaration on the Right to Development (DRD) 1986⁹⁷ and Sen's theory of economic wellbeing, where wellbeing is synonymous with an adequate standard of living under Article 11 ICESCR. This analysis involves examining net food-importing countries of SSA and how they fare in terms of food availability and affordability compared to food-exporting countries of the EU. These indices are measured using the Global Hunger Index (GHI), and the Sustainable Development Goals (SDG) reports

⁹⁷ Preamble to the Declaration on the Right to Development (DRD) Adopted by General Assembly Resolution 41/128 on 4 December 1986 See also ICESCR 1976, Article 11 and Preamble to the UDEHM 1974, Para G

on poverty elimination and zero hunger. Thus, this study establishes the connection between poverty and the violations of RtF in SSA and how these are influenced by international trade regimes.

In contrasting the realisation of RtF in SSA with the EU and how this is influenced by trade liberalisation, this study examines the WTO Agreement in Agriculture, comparing its impact on access to food in developing and developed countries (including all SSA and EU countries), respectively. It also compares the structural, process and outcome indicators of the RtF in SSA and the EU. As part of the structural indicators, this study compares the extent to which the RtF is protected in the regional laws and the domestic laws of the respective SSA and EU countries. As part of the outcome indicators, it contrasts the prevalence of poverty, food insecurity and the incidences of regressivity in both regions as a violation of the progressive realisation of RtF. As part of the process indicators, this study compares the human rights, trade and political regimes of both regions, demonstrating how the EU integrates socioeconomic rights into trade by incorporating elements of the Rights-Based Approach to food security in trade and how this process indicator influences the outcome indicators because it tends to augment the realisation of RtF in the EU. This comparative analysis demonstrates areas of possible transplant from the EU into SSA and world trade regimes to facilitate the realisation of RtF in SSA.

Furthermore, this study adopts an international and multidisciplinary approach to the food crisis in SSA, recognising the complex nature of global hunger and acknowledging that neither an exclusive economic approach nor a purely legal approach bears the solution thereto. It utilises economic principles alongside principles of international human rights law to support balanced research. It examines hunger as a chronic deprivation of entitlement to food, a fundamental indicator of the violation of RtF, and a complex phenomenon which is deeply rooted in poverty. It contends that poverty lies at the heart of a number of human rights

violations, especially the RtF. It examines food security as the primary indicator of adequate access to food, the ultimate goal of the fundamental right to be free from hunger and as an effective food administrative system. Without undermining the possible challenges of trade liberalisation on access to food, this study highlights the importance of international cooperation through free trade agreements in facilitating access to food in SSA. As the levels of deprivation are better appreciated in a broader/comparative context and the general perception of food insecurity is constantly influenced by a globalised outlook, the approach towards procuring a solution to food insecurity must also be taken from a global standpoint. Effectively addressing market inequalities and deprivation of access to food requires a paradigm shift in the attitude towards inequality and the larger questions of widespread starvation, poverty and underdevelopment. This study thus reinforces the Rights-Based Approach to food security, proposing that the RtF is best secured, not by the boycott of international trade relations but by the cooperative effort of domestic and international structures, cutting across various fields of study to incorporate socioeconomic rights into trade liberalisation regimes to facilitate the realisation of RtF through trade. These issues must be approached as global problems within a global market society.

In summary, building on the extraterritoriality of the RtF obligations, this study proposes a fundamental change in the approach towards the global food crisis, particularly in SSA. International trade and human rights must hence be viewed, not as distinct water-tight capsules but as an intertwined global space whose processes are interactive and must thus be administered as a multifaceted globalised system, reconciling human rights and trade at all levels of responsibility for the common good of all. Addressing widespread violations of the RtF requires a renewed understanding of how trade measures at the global and regional levels could be part of an integrated network of efforts to achieve the progressive realisation of RtF in a global market society. Hence, this study proposes incorporating socioeconomic rights into

world trade to augment the progressive realisation of RtF in SSA. This approach is lacking in previous academic research on the RtF.

1.4 Research Aim and Objectives

This research aims to critically examine the impact of agricultural trade liberalisation on access to food in SSA vis-à-vis the EU and to demonstrate how socioeconomic rights could be incorporated into trade to augment the realisation of RtF in SSA through trade. To achieve this aim, this study pursues the following objectives:

- To critically examine the right to food as a socioeconomic right in international law, reinforcing its justiciability and enforceability as a legal right.
- To conduct a critical and comparative evaluation of the realisation and violation of RtF in SSA and the EU using the UN list of illustrative indicators on the right to adequate food (ICESCR, Art. 11).
- To critically examine the RtF as access to food in SSA and EU, demonstrating the relationship between trade liberalisation and violations of the RtF in SSA.
- To critically examine trade and human rights in light of their overlapping interest, consistencies and incongruity, and to demonstrate how these overlaps could be leveraged to facilitate the realisation of RtF by integrating socioeconomic rights in trade.
- To critically examine agricultural trade liberalisation under the WTO and its comparative impact on the realisation of RtF in SSA vis-à-vis the EU.
- To critically examine the regional trade and human rights regimes of SSA and the EU, demonstrating how regional trade could be leveraged to promote the realisation of RtF in light of the extraterritoriality of the RtF obligations.

- To examine the structural, process and outcome indicators of RtF in SSA, comparing it with the corresponding indicators in the EU to highlight how structural and process reforms could augment the outcome of adequate access to food.
- To examine the duty of States as the duty of accountability, highlighting how the States could facilitate the progressive realisation of RtF through the Rights-Based Approach to food security in trade.

1.5 Research Questions

The main research question this study addresses is:

How can the relationship between trade and socioeconomic rights be leveraged to enhance the realisation of RtF in SSA through trade?

The sub-questions arising from these research questions are:

Sub questions

- i. In what ways does agricultural trade liberalisation affect food security in net food-importing countries of SSA?
- ii. How can socioeconomic rights be integrated into trade liberalisation regimes to facilitate the realisation of RtF in SSA vis-a-vis the EU?

1.6 Conclusion

This chapter provides an introduction to the study. It reviewed various research and scholarly opinions on the scope, elements, and obligations arising from the RtF. It finds that the RtF is a legal right established by the ICESCR and is enforceable, particularly where it is

recognised in the fundamental laws of any State/jurisdiction. This chapter also finds that the RtF is a broad concept and should not be limited to an analysis of the adequacy or calorie requirements of food. Rather, it should incorporate a wide range of issues, including access to adequate food and a recognition of the impact of external forces, such as international trade relations, on the realisation of RtF. It thus sets the background for the central aim of this study- the incorporation of socioeconomic rights in world trade to facilitate the realisation of RtF in SSA through trade. Having examined previous literature on the RtF, this chapter sets out the contribution to knowledge, research aim, objectives and the research question that this study addresses.

Chapter two discusses the research methodology. It delineates the research scope, introduces the relevant legal instruments and explains the research approach adopted in this study. It also defines the research area, clarifying what countries are regarded as SSA and EU and the reasons for choosing the research area. Chapter three examines the RtF as a socioeconomic right. It examines the legal framework of the RtF, its legal requirements, components and what constitutes an act of violation. It defines the context of RtF in this study, analysing the RtF as the right to access food and the duty of States as the duty of accountability. It also conceptualises the right to development (RtD), the Sustainable Development Goals (SDGs) and their importance to the realisation of RtF in SSA. Chapter four establishes the conceptual framework which underpins this study. It defines the major research concepts, including wellbeing, hunger, accountability, poverty and food security, and it establishes the context in which these concepts are applied to this study.

Chapter five is the first of the analytical chapters. It analyses the AoA and other relevant agreements that regulate trade in agriculture under the WTO, examining the impact of agricultural trade liberalisation on food security in SSA vis-à-vis the EU. It demonstrates the inequalities in the agricultural trade liberalisation laws of the WTO, and how these trade laws

impact the ability of import-reliant States to fulfil their RtF obligations, thereby leading to regressivity which is indicative of violation of RtF, particularly in SSA. Chapter six analyses the regional human rights and trade regime of SSA. It assesses the extent to which the RtF is recognised and enforced in SSA. It also examines the violations of RtF in SSA and how the trade liberalisation laws of the AfCFTA impact this. It evaluates the realisation of the RtF in SSA using the relevant structural, process and outcome indicators under the UN list of illustrative indicators on the right to adequate food (ICESCR, Art. 11).⁹⁸ Chapter seven analyses the regional human rights and trade regime of the EU. It evaluates the realisation of the RtF in the EU using the relevant structural, process and outcome indicators under the UN list of illustrative indicators on the right to adequate food.⁹⁹ It assesses the regional and State laws of the EU and its Member States to determine the structural indicators of the RtF. It also examines the outcome indicators and how the EU manipulates the process indicators by adopting practical measures to incorporate socioeconomic rights into trade, thus facilitating access to food in the region through trade. Chapter eight compares the state of food insecurity in SSA with the situation in the EU. It compares both regional trade liberalisation regimes in light of the WTO trade commitments and demonstrates how regional trade policies enhance access to food within the regions. This chapter also highlights the need for legal and policy reforms to facilitate the realisation of the RtF in SSA. Chapter nine draws the conclusion and recommendations of the study. Taking a leaf from the EU regime, this chapter recommends practical ways of incorporating socioeconomic rights into trade by adopting the Rights-Based Approach to food security in trade in light of the Voluntary Guidelines¹⁰⁰ for the progressive realisation of RtF in SSA.

⁹⁸ OHCHR, 'Report on Indicators for Monitoring Compliance with International Human Rights Instruments' (n 11)

⁹⁹ Ibid

¹⁰⁰ See FAO, 'Voluntary Guidelines to Support the Progressive Realisation of the Right to Food in the Context of Food Security' <www.fao.org/3/a-y7937e.pdf> accessed 14 October 2022

Chapter 2: Research Methodology

2.1 Introduction

This chapter sets out the research methodologies, for determining how agricultural trade liberalisation affects food security in net food-importing countries of SSA. These are the doctrinal, socio-legal and comparative methodologies. This chapter delineates the research area and sets out the research scope, which is international and multidisciplinary, involving examining the socio-legal impact of international trade liberalisation on the RtF in SSA and the EU. Given the multi-dimensional nature of the RtF, assessing the violations thereof must be done from an equally broad standpoint involving elements of trade and human rights; a socio-legal, comparative, multidisciplinary and international approach is considered most appropriate in addressing the problem of widespread food insecurity, particularly in SSA. This chapter also sets out the research approach and the research instruments.

2.2 Research Methodology

The Research Methodologies are Doctrinal, Socio-legal and Comparative.

2.2.1 Doctrinal Research Methodology

The doctrinal research methodology supports a critical examination of the letter of the law and legal principles to derive answers to the research questions.¹⁰¹ Using this methodology, this study conducts a detailed analysis of the provisions of Art 11 ICESCR and other relevant provisions and case law on the RtF to establish the legal requirements and enforceability of the RtF. The doctrinal methodology underpins the analysis of the realisation of RtF in SSA and

¹⁰¹ Terry Hutchinson and Nigel Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17(1) Deakin Law Review 83

EU, particularly as it relates to the structural indicators of this right. It also underpins the analysis of the wellbeing theory and the Rights-based Approach to food security in this study to examine the process and outcome indicators of RtF in the research area. This methodology is useful in providing a strong basis to establish the argument in legal research. However, it is criticised for its formalistic approach and its inability to monitor the actual application of the legal principle and possible impact on the society. To mitigate this lapse, this study further adopts the socio-legal methodology to support the examination of the realisation of RtF in SSA and how this is impacted by agricultural trade laws.

2.2.2 Socio-legal Research Methodology

The socio-legal methodology is an inter-disciplinary research methodology used to analyse specific laws and their relationship with the broader society, thus contextualising law as a social phenomenon.¹⁰² It is used to analyse legal ideas and practices, and how they influence and are influenced by the social, political and cultural context.¹⁰³ The socio-legal methodology helps to achieve the right balance in this study, analysing trade laws and their impact on human rights and the wellbeing of the people. This method is preferred in this study because it creates an interface whereby sociological considerations are assessed as a tool for analysing and addressing core legal and economic policy issues.¹⁰⁴ It supports the objectives of this study, traversing the doctrinal, qualitative, and quantitative analysis of the realisation of RtF in SSA. The socio-legal research is both qualitative and participatory and is thus effective in assessing the legal and social impact of trade on the prevalence of poverty and food insecurity in SSA and the EU.¹⁰⁵ Given the multidisciplinary nature of this study, this method is most suitable

¹⁰² Max Travers and Reza Banakar (eds), *Theory and Method in Socio-Legal Research* (Hart Publishing 2005)

¹⁰³ Ibid

¹⁰⁴ Ibid

¹⁰⁵ Deepa Narayan and Michael Walton (eds), *Voices of the Poor: Can Anyone Hear Us?* (World Bank Publications OUP 2000) 15

because it supports the analysis of the origin, synthesis and application of international human rights and trade instruments and the examination of its sociological and economic impact on net food-importing countries of SSA

The socio-legal method is used in this study to critically examine the requirements of the RtF, the impact of international trade laws on the realisation of this right and the legal reforms necessary to facilitate food security and socioeconomic wellbeing in SSA through trade. Thus it examines the social menace of poverty, hunger and food insecurity and how they are engendered by trade laws and economic policies. It also examines how incorporating socioeconomic rights into these trade laws and policies through public involvement, and impact assessment *inter alia* could help facilitate access to food and, as such, the realisation of RtF in SSA. These social factors are generally analysed in this study as socioeconomic wellbeing and are fundamental indicators of the violation of RtF in SSA. Thus the socio-legal method is used to evaluate the WTO, EU and SSA trade laws based on their wellbeing impact and how they can be reformed by making them more socially responsive so as to facilitate the realisation of RtF in SSA.

The socio-legal research method further validates the examination in this study of the prevalence of poverty and food insecurity as indicators of the violation of RtF in the research area. It validates the use of the RBA to reinforce the obligation of States to be accountable, and to incorporate public participation, periodic impact assessment and wellbeing considerations in trade policymaking and international trade negotiations. It ultimately underpins the examination in this study of practical ways of incorporating socioeconomic rights into world trade to facilitate the realisation of RtF in SSA.

The socio-legal methodology has been criticised as insufficient for thorough legal and doctrinal analysis.¹⁰⁶ It is contested that its ability to accommodate other non-law issues in

¹⁰⁶ Hans Kelsen, *General Theory of Norms* (OUP 1991) 301

multidisciplinary research, such as this one, implies that it places insufficient focus on core law issues. Thus, researchers have questioned whether it is legal, economics, sociology or political.¹⁰⁷ These researchers argue that because it accommodates all these research areas, the socio-legal methodology provides a disjointed argument that weakens the understanding of the legal reforms the study proposes.¹⁰⁸ However, it is preferred in this study because it provides a versatile basis for a rich, balanced analysis of legal issues. It allows a wider consideration that supports the argument in this study for incorporating socioeconomic rights in trade.¹⁰⁹ Using this methodology, this study considers economic and political issues, examines their impact on human rights and canvasses for a holistic approach to trade liberalisation to augment the realisation of RtF through trade.

2.2.3 Comparative Legal Research Methodology

The comparative research methodology involves comparing the research object with another.¹¹⁰ It is often used to demonstrate areas of necessary political reforms in the legal object through legal transplants from the comparator. This methodology supports a balanced and objective analysis of the impact of agricultural trade liberalisation on the realisation of RtF in SSA in light of the situation in the EU.¹¹¹ Adopting the comparative method in this study helps to appreciate and contrast the peculiar effect of agricultural trade liberalisation on net food-importing countries vis-à-vis its impact on food-exporting countries using SSA and the EU as case studies for each research group, respectively.¹¹² From a comparative standpoint, this study

¹⁰⁷ Hans Kelsen, *Introduction to the Problems of Legal Theory* (OUP 1992)

¹⁰⁸ Ibid

¹⁰⁹ Roger Cotterrell, 'Why Must Legal Ideas Be Interpreted Sociologically?' (1998) 25(2) *Journal of Law & Society* 171-192

¹¹⁰ Ishwara P. Bhat, 'Comparative Method of Legal Research: Nature, Process, and Potentiality', *Idea and Methods of Legal Research* (Oxford Academic 2020) 286 - 299

¹¹¹ The EU is a supranational body consisting mostly of developed, food-exporting countries of Europe while Sub-Saharan Africa (SSA) is a geographical region consisting mainly of developing food-importing countries lying south of the Sahara and governed by a supranational body, the African Union (AU).

¹¹² Hugh Collins, 'Methods and Aims of Comparative Contract Law' (1991) 11(3) *Oxford Journal of Legal Studies* 396

analyses the sociological impact of the AoA and specific agricultural trade policies such as domestic support, tariffication, export subsidy and comparative advantage on both regions of the EU and SSA. It examines how these trade issues particularly impair access to food in SSA compared to the EU. This study also examines how these trade policies affect the production, distribution and importation of food, how it increases reliance on imports, making SSA highly susceptible to the volatilities of the global market. Through this analysis, this study reinforces State accountability and the consideration of human rights obligations in international trade negotiations and policymaking.

The comparative research method also underpins the evaluation of the realisation of the RtF in SSA vis-à-vis the EU. Using the UN list of illustrative indicators on the right to adequate food (ICESCR, Art. 11),¹¹³ this study analyses and compares the structural, process and outcome indicators of the RtF in SSA and the EU. It compares the EU and SSA's regional trade and human rights regimes in light of their world trade commitments. It examines how both regions incorporate human rights into trade and how the EU tackles the problem of food insecurity by integrating elements of the RBA into its external trade policy, Common Agricultural Policy (CAP) and other relevant trade policies. A major setback to the AfCFTA Agreement is the fact that the Agreement is novel and its protocols are still being negotiated. Prior to the AfCFTA, SSA did not have a structured agricultural policy, it only had a fragmented system where each sub-regions operated a separate trade regime. This study thus compares the human rights and trade regimes of both regions to highlight the lapses and areas of necessary improvement.

Based on the comparative analysis, this study identifies the lapses in the respective trade and human rights regimes and demonstrates plausible areas for legal transplants. Legal

¹¹³ OHCHR, 'Report on Indicators for Monitoring Compliance with International Human Rights Instruments' (n11)

transplant involves identifying better legal solutions in foreign legal systems and recommending their incorporation into other jurisdictions.¹¹⁴ Hence, this study contrasts the state of food security in the EU and SSA, examining how the respective regional trade laws facilitate access to food and enhance the ability of States to fulfil their RtF obligations in the respective regions. Through this comparative analysis, this study highlights the lapses in the SSA trade regime and demonstrates practical areas for effective legal transplants.

The comparative legal method has been criticised because it uses a mix of countries for its analysis, and where the mix of countries selected in comparative studies is not comparable, it may affect the quality of the research.¹¹⁵ It is contested that by its very nature, comparative research will require greater compromises than a single-country focus because it will have to establish comparable groupings and data. In light of this challenge, this study conducts its comparative analysis based on a universal phenomenon – the realisation of RtF under the ICESCR. It adopts the figures already provided by the UN and other recognised international bodies. It also adopts the UN list of illustrative indicators on the right to adequate food (ICESCR, Art. 11),¹¹⁶ which applies to all UN Member States, including all EU and SSA countries. It also uses universally applicable data that is not restricted to any region- prevalence of poverty and food insecurity.

Comparative research is also criticised because it encourages direct transplant from foreign legal systems, which may eventually prove inappropriate because of the different social and economic structures of the two jurisdictions involved in the research.¹¹⁷ However, such criticisms would mostly apply in the context of the imposition of socially unacceptable systems

¹¹⁴ Ibid

¹¹⁵ Maurice Adams and John Griffiths, 'Against comparative method: Explaining similarities and differences' In Maurice Adams and Jacco Bomhoff (Eds.), *Practice and theory in comparative law* (CUP 2012) 279-301; See also Melinda Mills, *Comparative Methodology: Theory and Practice in International Social Research* (Sage Publishers 2006)

¹¹⁶ OHCHR, 'Report on Indicators for Monitoring Compliance with International Human Rights Instruments' (n11)

¹¹⁷ Otto Kahn-Freund, 'On Uses and Misuses of Comparative Law' (1974) 37 *Modern Law Review* 1 -27

or the imposition of commercial law by colonial powers on less developed societies that may not have the capacity to accommodate them.¹¹⁸ Bearing the cultural, political and economic differences between the EU and SSA in mind, the findings in this study relate to the broader context of incorporating elements of RBA to food security in trade. The elements of the RBA and the Voluntary guidelines for the progressive realisation of RtF¹¹⁹ are universally applicable to all countries, although the mode of application may differ from State to State.

The comparative methodology complements the socio-legal methodology in this study to provide a more holistic analysis of the impact of trade on access to food in SSA. Both methodologies enhance a different and deeper understanding of the interrelations between trade liberalisation and the realisation of RtF in SSA. A combination of both research methods helps establish the contribution to knowledge.

2.3 Research Scope

This study is founded on international law. The legal framework for the analysis in this study is based on international human rights conventions of the UN and trade liberalisation laws of the WTO, EU and SSA. The analysis of RtF in this study is based on international treaties and conventions, particularly the International Covenants on Economic, Social and Cultural Rights (ICESCR), UDHR, UDEHM, DRD and the UN Sustainable Development Goals (SDGs). It reaches beyond national boundaries to compare the impact of international trade liberalisation on the realisation of RtF across regions of SSA and EU. It analyses the AoA and other relevant trade agreements of the WTO in light of the UN Conventions on the RtF, examining the manner and extent to which the trade policies facilitate or impair the RtF in SSA and the EU. It further reviews other relevant human rights laws, case law and trade policies of

¹¹⁸ Hugh Collins (n 112)

¹¹⁹ See FAO, 'Voluntary Guidelines to Support the Progressive Realisation of the Right to Food in the Context of Food Security' (n 100)

the EU and SSA, contrasting the measures taken by both regions to facilitate food security and the need for legal transplant to facilitate the realisation of RtF in SSA.

The research area is Sub-Saharan Africa (SSA), a geographical region comprising African countries lying south of the Sahara.¹²⁰ SSA are mainly developing countries and predominantly importers of food and agricultural products. All SSA countries are members of the African Union (AU) and are bounded by an economic union, the AfCFTA. The AU is governed by a common Charter which specifically reaffirms the commitment of State Parties to the UDHR and other human rights instruments of the UN, thus recognising the duty of Member States to achieve the protected rights, including the RtF. Additionally, the Right to Development was first recognised in Article 22 of the Banjul Charter in 1981 before it was subsequently proclaimed by the UN in 1984.¹²¹

SSA is adopted in this study because it ranks among the world's most food-insecure regions. In 2019, SSA had the highest global hunger index score at 28.4 due to high rates of undernourishment, child mortality rates and child undernutrition.¹²² In 2019 also, SSA had the highest rate of undernourishment and child mortality rates globally at 22.3 and 75 percent, respectively.¹²³ Ironically, SSA is the region of the world with the highest percentage of its population employed in agriculture, at 55 percent in 2019, but with the lowest agricultural productivity rate worldwide.¹²⁴ This study examines the human rights charter of the AU and

¹²⁰ There are 49 SSA countries : Angola, Benin, Botswana, Burkina Faso, Burundi, Cape Verde, Cameroon, Central African Republic, Chad, Comoros, Democratic Republic of the Congo, Republic of the Congo, Cote d'Ivoire, Djibouti, Equatorial Guinea, Eritrea, Ethiopia, Gabon, Gambia, Ghana, Guinea, Guinea-Bissau, Kenya, Lesotho, Liberia, Madagascar, Malawi, Mali, Mauritania, Mauritius, Mozambique, Namibia, Niger, Nigeria, Rwanda, Sao Tome and Principe, Senegal, Seychelles, Sierra Leone, Somalia, South Africa, South Sudan, Sudan, Swaziland, Tanzania, Togo, Uganda, Zambia, and Zimbabwe

¹²¹ Under the UN's current classification, all of Europe and Northern America along with Japan, Australia and New Zealand are classified as developed regions, and all other regions are 'developing'. See UN 'Country Classification' (2014)

<www.un.org/en/development/desa/policy/wesp/wesp_current/2014wesp_country_classification.pdf> accessed 11 February 2021

¹²² GHI, 'Global Hunger Index 2019: The Challenge of Hunger and Environment'
<www.globalhungerindex.org/pdf/en/2019.pdf> accessed 14 September 2020.

¹²³ Ibid

¹²⁴ World Bank, 'Indicators' (2019) <<https://data.worldbank.org/indicator>> accessed 15 September 2020

the domestic laws of the member countries to demonstrate the extent to which the RtF is protected in SSA. It also examines the regional trade agreement of the AU- AfCFTA Agreement 2018 to assess the contribution of regional trade liberalisation to access to food in SSA.

This study draws a comparison with the EU because of its direct economic contrast with the SSA. The EU is a geographical region bounded by a strong economic union, EU. It comprises mostly developed, food-exporting countries of Europe. The EU is among the most food-secure regions of the world. While 18 percent of the households in its 27 member countries experience moderate or severe food insecurity, cases of undernourishment, starvation and child mortality are not as common as in SSA.¹²⁵ And while food insecurity in SSA presents mainly as widespread starvation and limited access to the required daily amount of calories, in the EU, it presents more as obesity and food deserts.¹²⁶ The EU has well-developed food and agricultural policies binding on all Member States. This study examines the EU's human rights regime and its member countries' domestic laws to demonstrate the extent to which the RtF is protected in SSA. It also examines the regional trade regime under the relevant treaties and policies of the EU to assess the contribution of regional trade liberalisation to food access in the region.

This study compares the social impact of world trade laws on these two regions, the role of the State and the contributions of regional trade laws towards the realisation of RtF in the respective regions. Through this comparative analysis, this study demonstrates the necessary areas of legal, political and economic cross-pollination to facilitate the realisation of RtF in SSA.

¹²⁵ See Özge Niyaz, 'The Evaluation of Food Security in European Union' (2016) 22(1) Mustafa Kemal University Journal of Agriculture Faculty 216

¹²⁶ Ibid

2.4 Research Instruments

These include the legal and analytical instruments used in this study to analyse the core contents, realisations and acts of violation of the RtF.

2.4.1 Legal Instruments

The legal instruments include the ICESCR and other relevant instruments such as the UDHR, DRD, the respective regional laws of the EU and SSA, as well as the domestic laws of the various Member States. The ICESCR is considered most appropriate for this analysis because of its broad coverage and legally binding effect. All 27 EU countries and the Union itself have ratified the ICESCR and are therefore subject to the ICESCR. All 46 SSA countries have also ratified the ICESCR and are subject to its provisions save Botswana, South Sudan and Mozambique.¹²⁷

This study also adopts relevant secondary instruments which are not legally binding but validate and further amplify the provisions of the ICESCR. These include the UDHR and the Universal Declaration on the Eradication of Hunger and Malnutrition (UDEHM) 1974. The UDHR is soft law. It is not legally binding but is recognised by the ICESCR and the African Union Charter and is therefore applicable to the SSA countries that have ratified the ICESCR.¹²⁸ The UDEHM is soft law, but most SSA countries recognise it as they were present at the 1974 World Food Conference where this Declaration was adopted and at the UN General Assembly where it was subsequently endorsed in the same year.¹²⁹ Table 1 below explains the relevance of these legal instruments to the analytical framework of this study.

Table 1: Legal Instruments on the Right to Food

S/N	Relevant Convention	Relevance to the RtF
1.	UDHR Article 25	It creates the right to an adequate standard of living- for the health and wellbeing of every individual, including adequate food

¹²⁷ See OHCHR ‘Status of Ratification’ <<https://indicators.ohchr.org/>> accessed 16 September 2022

¹²⁸ See the Preamble to the ICESCR 1976; Preamble to the Banjul Charter 1986 and Article 60

¹²⁹ See UDEHM 1974

	UDHR Article 28	It establishes the right to a social and international order in which a person's rights and freedoms can be fully realised.
	Obligations	It creates a duty of States to facilitate an adequate standard of living and access to adequate food for the health and wellbeing of every individual
	Trade Implications	International trade should help improve the standard of living and access to adequate food through fair trade terms. It should create an enabling international order and enhance the capacity of vulnerable States to realise the RtF
2.	ICESR Article 2(1)	The State Parties commit to act individually and in cooperation, to the maximum of their available resources, to realise the protected rights by all appropriate means progressively
3.	ICESR Article 11	It creates the right to an adequate standard of living, including food. It also creates the fundamental right to be free from hunger.
	State Obligations	It creates the duty of States to take steps, individually and through international cooperation, to improve methods of production, conservation and distribution of food, taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need.
	Trade Implications	Transnational trade should encourage international cooperation to improve food production, conservation and distribution, taking into account the problems of both food-importing and food-exporting countries to ensure an equitable distribution of world food supplies in relation to need.
4.	Article 1 UDEHM	It creates the fundamental right to be free from hunger
	State Obligations	The UDEHM establishes hunger eradication as a common objective of all countries of the international community, and international cooperation for higher food production and equitable food distribution as a fundamental responsibility of Governments
	Trade Implications	Trade liberalisation agreements should provide an opportunity for international cooperation to remove obstacles to food production and access. It should assist States to realise food security through adequate food production, distribution and sustainable food supply at reasonable prices irrespective of periodic fluctuations, and free of political and economic pressures.

The legal instruments explained in Table 1 above are used in this study because of their specificity on the RtF, wide coverage, and global applicability. They establish the RtF and the obligation of States to act individually and through international collaboration for the realisation of this right. By virtue of these laws, States are required to prioritise their human rights obligations in international trade negotiations, especially with other UN Member States.

Other soft law instruments used to amplify the discussions and buttress the argument in this study include the UN Charter, which establishes the United Nations Organisation and lays the foundation for international human rights,¹³⁰ and the Vienna Declaration, which reaffirms the commitment of State Parties to the UN Charter and establishes the universality, indivisibility, interdependence and interrelatedness of all human rights.¹³¹ The Vienna Declaration affirms that food should not be used as a tool for political pressure.¹³² It also establishes the need for international cooperation to eliminate obstacles to trade and to facilitate the realisation of human rights.¹³³

This study further reviews the UN DRD and the UN Sustainable Development Goals (SDG) with particular reference to the first two goals of poverty eradication and zero hunger. The DRD was adopted in 1986 by the UN General Assembly. It is characteristic of soft law and has no binding effect on State Parties. *Albeit*, as soft law, it is useful as an interpretative norm to enhance the understanding of hard law, particularly where there is multinational agreement on the soft law, although some countries may disagree. It could also serve as the basic foundation for multinational agreements. In this case, the DRD has formed part of the basis for setting the SDGs. The DRD is particularly relevant to this study and the analysis of RtF in SSA because this right was first recognised in Article 22 of the Banjul Union Charter in 1981 before the UN subsequently proclaimed it in 1984.¹³⁴ Furthermore, almost all SSA countries took part in the adoption of the Goals in 2015 and have taken practical steps towards its implementation.¹³⁵

This study also utilises secondary human rights instruments of the UN and general comments of UN treaty bodies to elucidate the analysis of the RtF further. It refers to the

¹³⁰ Charter of the United Nations was signed on 26 June 1945, entered into force 24 October 1945

¹³¹ Vienna Declaration and Programme of Action (Vienna Declaration) 1993, Article 5

¹³² Ibid Article 31

¹³³ Ibid Article 13

¹³⁴ The Declaration on the Right to Development was adopted by virtue of Resolution 41/128 of the UN General Assembly

¹³⁵ UN, 'Sustainable Development Goals Report 2018'

<<https://unstats.un.org/sdgs/files/report/2018/TheSustainableDevelopmentGoalsReport2018-EN.pdf>> accessed 13 October 2020

interpretation provided by the UN special rapporteur (SR) on the RtF, especially the 2009 report of the SR on the RtF,¹³⁶ because it specifically addressed violations of the RtF resulting from the trade liberalisation rules of the WTO. This study also refers to the interpretation of relevant treaty bodies, such as the General Comments of the Committee on Economic Social and Cultural Rights (CESCR) and the Human Rights Committee (HRC), to explain and further validate the requirements of the RtF. Of particular relevance to this study is General Comment No 12 of the CESCR¹³⁷ because it explicitly explains the RtF pursuant to Article 11 of the ICESCR. These secondary sources of law substantiate the analysis of the legal requirements, core contents and acts of violation of the RtF in SSA and EU.

2.4.2 Analytical Instruments

The analytical framework for evaluating violations of the RtF in this study is based on quantitative and qualitative indicators for monitoring compliance by States under the UN list of illustrative indicators on the right to adequate food (ICESCR, Art. 11).¹³⁸ The UN list of illustrative indicators is preferred in this study because of its universality. The indicators are endorsed by the UN for objective analysis of the implementation of RtF by State Members.¹³⁹ This study adopts the UN list of illustrative indicators¹⁴⁰ to identify and critically analyse the benchmark for compliance with the minimum core requirements of the RtF. Benchmarks (otherwise referred to as minimum thresholds or minimum core) are goals or targets set according to the varying situations of the regions, while indicators refer to the pointers and statistics used to identify and evaluate the fulfilment or violation of the RtF. Indicators are

¹³⁶ OHCHR, 'Report of the Special Rapporteur on the Right to Food Olivier De Schutter - Addendum - Mission to the World Trade Organisation' (2009) (n 88)

¹³⁷ CESCR General Comment No 12 (n 6)

¹³⁸ OHCHR, 'Report on Indicators for Monitoring Compliance with International Human Rights Instruments' (n11)

¹³⁹ Ibid

¹⁴⁰ Ibid

domestic factors used for cross-national comparison. They do not serve to categorise the rights in rank or prioritise any benchmark; rather, they are used in this study to set the required level, which justifies the findings on fulfilment or violation of the RtF. These indicators are also used in this study as a guide for cross-regional comparison on the realisation of RtF.

Table 2 below demonstrates how these indicators are used in this study to measure violations of the RtF

Table 2: Analytical Framework on Indicators of the Right to Food

RtF Indicators	Analysis Carried Out
Structural Indicators	<ul style="list-style-type: none"> • Examination of international human rights instruments on the right to adequate food • Examination of relevant regional and domestic laws on the right to food and agricultural trade
Process Indicators	<ul style="list-style-type: none"> • Comparative analysis of the impact of the AoA on access to food in the EU and SSA. Examination of the regional trade laws and the safety nets guaranteed through incorporating elements of food security in trade
Outcome Indicators	<ul style="list-style-type: none"> • Comparative analysis of the prevalence of poverty, starvation and food insecurity in SSA vis-à-vis the EU using the Global Hunger Index and UN Progress Reports on SGDs 1 and 2 of poverty eradication and hunger elimination, respectively

Explanation:

Table 2 above illustrates the respective indicators of the RtF and the measures that this study takes to analyse the RtF in light of the listed indicators

Analysis of the structural indicators of the RtF, based on the UN list of illustrative indicators,¹⁴¹ involves an examination of international, regional and relevant local legislation on the RtF in the EU and SSA. It involves examining the legal entitlement to food and obligations of the State based on the ICESCR, UDHR and other international conventions discussed in 2.3.1 above. It also involves an analysis of the level of protection accorded to socioeconomic rights and the RtF in the regional laws of the EU and SSA, as well as the constitutions and domestic laws of the respective Member States. Thus, this study analyses the regional human rights regimes of the EU and SSA, including the African Charter on Human

¹⁴¹ Ibid

and Peoples' Rights (Banjul Charter) 1986 and Charter of Fundamental Rights of the European Union (CFR) 2009,¹⁴² to demonstrate the extent to which socioeconomic rights and the RtF are protected in these regions. It also examines the case law of the various regional courts, including the African Court of Human and Peoples' Right, the Court of Justice of the EU, examining the extent to which socioeconomic rights and the RtF is enforced in these regions. It analyses the relevant constitutions and domestic laws of the respective EU and SSA countries to determine the level of protection accorded the RtF and the extent to which this right is enforceable in the States.

Analysis of the outcome indicators in this study involves an examination of the prevalence of poverty and food insecurity in the EU and SSA. This study utilises openly published secondary empirical data, surveys, and information from the World Bank, Global Hunger Index, Food and Agriculture Organisation, the UN report on the Sustainable Development Goals, and official data from other UN agencies to demonstrate and analyse the outcome indicators of the RtF in SSA and EU.¹⁴³ The outcome indicators include the prevalence of poverty, undernourishment and food insecurity.

Examining the prevalence of food insecurity is based on an estimated average number of persons in a place with insufficient access to food. It is an essential metric for tracking national and regional trends in the proportion of people suffering from hunger. However, this tracking metric has been criticised because it does not offer details on access to food at the household or individual levels.¹⁴⁴ It has also been criticised because it does not provide information about the nutritional value of available food or the quality of diets.¹⁴⁵ Therefore, this study

¹⁴² Charter of Fundamental Rights of the European Union (CFR) 2009 2007/C 303/01

¹⁴³ Empirical data could be secondary or primary. See Mike McConville and Wing Hong Chui (eds), *Research Methods for Law* (Edinburgh University Press 2007) 20

¹⁴⁴ Terri J. Ballard, Anne W. Kepple, Carlo Cafiero, 'The Food Insecurity Experience Scale: Development of a Global Standard for Monitoring Hunger Worldwide' (2013) FAO Technical Paper, Version 1.1 <https://www.fao.org/fileadmin/templates/ess/voh/FIES_Technical_Paper_v1.1.pdf> accessed 15 October 2022

¹⁴⁵ FAO, 'The State of Food Security and Nutrition in Europe and Central Asia', <www.fao.org/3/i8194e/i8194e.pdf> accessed 06 November 2021

complements the food insecurity index with the Food Insecurity Experience Scale (FIES), which measures the prevalence of moderate or severe food insecurity per region. The FIES was introduced by the FAO to complement the information provided by the Prevalence of Undernourishment, and it allows access to food to be directly measured at individual and household levels. It is used in this study to identify population groups that are affected by varying degrees of food insecurity, including hunger, stunting, wasting and obesity.¹⁴⁶

Analysing the process indicators involves an analysis of the impact of domestic laws and international trade agreements, such as the AoA and regional trade agreements on the realisation of RtF in SSA and the EU. It involves analysing the WTO Agreement on Agriculture and the Subsidy and Countervailing Measures Agreement to demonstrate their impact on the progressive realisation of the RtF in food exporting and importing countries. This study examines trade policies such as tariffication, competitive advantage, export subsidy and import subsidy regimes, and technical barriers to trade, demonstrating how they impact access to food among WTO Member States. It also examines how these policies and the relevant decisions of the WTO Dispute Settlement Body (DSB) impact the ability of States to progressively realise the RtF, particularly among net food-importing countries. Table 3 below demonstrates the provisions of the AoA to be analysed and their relevance to this study.

Table 3: Analytical Framework on the Agreement on Agriculture

S/N	Relevant Provisions	Relevance to this research
1.	Preamble to the AoA	It sets out the objective of the AoA, which is to establish a fair market system having regard to non-trade concerns, including food security and special and differential (S&D) treatment for developing countries
	Adverse Effect on SSA	The body of the Agreement does not convey the objective as there are no set measures and targets for consideration of non-trade concerns of food security. Its policies are purely trade-oriented, and the proposed S&D treatment is hardly achieved because of the strict conditions for implementation
2.	Articles 4-5 AoA	It incorporates the tariffication system and the schedule of tariff concessions allowed under the AoA

¹⁴⁶ Ibid

	Adverse Effect on SSA	It tends to limit market access in developing countries that had not fully embraced the tariffication base period by the 1986-1988 base period. It also appears to discourage diversification in SSA, thus increasing dependency on the importation of processed goods from developed countries.
3.	Articles 6-7 and Annex 2-5 AoA	It prohibits domestic support with few exceptions, including food stockholding, <i>de minimis</i> standards, government participation guidelines and the Aggregate Measure of Support (AMS).
	Adverse Effect on SSA	The reduction of AMS using 1986-88 as the base period disfavours the developing countries of SSA, who hardly had an established domestic support system at the relevant time.
4.	Articles 8-10 AoA	It requires members to reduce existing export subsidies, and it prohibits the introduction of new export subsidies that were not already in operation in the 1986-1988 base period
	Adverse Effect on SSA	The adopted base period disfavours the developing countries of the SSA as they scarcely had significant export subsidies by the base period. It also leads to subsidized products arriving on the domestic markets of SSA and displacing local production.
5.	Article 15 AoA	It provides S&D treatment in the form of long implementation period for subsidy reductions. For instance, for subsidies in the amber box, 20% reduction in total AMS over six years for developed countries and 13% reduction over ten years for developing countries
	Adverse Effect on SSA	The non-enforceability of this provision, even after the set date of 1995, defeats the S&D treatment
6.	Proposed Reforms	<p>Incorporating elements of food security in trade to facilitate the realisation of RtF through:</p> <ul style="list-style-type: none"> • Periodic assessment of the social impact of the AoA on net food importing countries in line with its stated objectives. • Increased public participation in trade negotiations and a fair hearing process for Member States • Integrating the RtF by reinforcing the accountability of Member States to prioritise food security in trade agreements firstly to protect the vulnerable population within their respective territories, secondly to ensure that State policies do not impede on extra-territorial food security, and thirdly to ensure that global trade policies do not impair but rather build the capacity of the vulnerable States of SSA to progressively realise the RtF. • Incorporating wellbeing considerations in trade, including S&D treatment to achieve food security, especially in net food-importing countries

Table 3 above outlines the relevant sections of the AoA to be analysed in this study and the relevance of these provisions to the discourse on access to food in SSA. The AoA is preferred in this analysis because it is the primary agreement of the WTO, which regulates international terms of trade in agriculture. The AoA is binding on all SSA countries because all 46 SSA countries are members of the WTO except Equatorial Guinea, Ethiopia, South

Sudan, Sudan and Somalia, who are observer countries negotiating ascension.¹⁴⁷ All Member States, acceding members and observer countries are bound to observe the provisions of the AoA pursuant to the Single Undertaken principle.¹⁴⁸ This study also reviews other relevant Agreements of the WTO, including the Anti-Dumping and Countervailing Duties Agreement,¹⁴⁹ which prohibits the exportation of products at a subsidised price to the extent that it threatens or damages the importing country's industry, except subsidies implemented under the AoA. This study also reviews the Subsidies and Countervailing Measures (SCM) Agreement which prohibits trade-distorting subsidies, excluding subsidies implemented under the AoA as well as the Agreement on Technical Barriers to Trade (TBT) which requires States to adopt non-discriminatory standards while implementing technical regulatory measures to achieve legitimate policy objectives such as protecting human health and safety. These Agreements are binding on all WTO Member States, including all SSA countries, by virtue of the Single Undertaking principle of the WTO.¹⁵⁰

In addition to the WTO Agreements, comparative analysis of the process indicators in this study also involves assessing the regional trade laws of the EU and SSA to demonstrate curative measures taken at the regional level to promote agricultural trade and facilitate access to food within the region. It demonstrates the extent to which elements of the RBA to food security are incorporated into the regional trade and political system of the EU and SSA to facilitate the realisation of RtF through trade.

¹⁴⁷ WTO, 'Members and Observer' <www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm> accessed 13 December 2020

¹⁴⁸ By virtue of the Single Undertaking Principle, all members and intending members are bound to observe virtually every item of the negotiation as part of a whole and indivisible package which cannot be agreed separately. See WTO, 'How the Negotiations are Organised', <www.wto.org/english/tratop_e/dda_e/work_organ_e.htm#:~:text=Single%20undertaking%3A%20Virtually%20every%20item,and%20cannot%20be%20agreed%20separately.&text=Participation%3A%20The%20negotiations%20are%20open,or%20intending%20to%20negotiate%20membership> Accessed 28 November 2020

¹⁴⁹ GATT 1996, Article VI

¹⁵⁰ By virtue of the Single Undertaking Principle, all members and intending members are bound to observe virtually every item of the negotiation as part of a whole and indivisible package which cannot be agreed separately. See WTO 'How the Negotiations are Organised' (n 148)

2.5 Research Approach:

The research approach is multidisciplinary, integrating elements of economic analysis into the human rights discourse. This study analyses RtF as access to food in SSA. It analyses the effect of world trade liberalisation on access to food in SSA based on the theory of economic wellbeing and the human rights-based approach to food security.

From the legal perspective, this study examines international, regional and domestic frameworks on the RtF as the substratum for identifying the requirements, core elements and acts of violation of RtF in SSA and EU. It adopts the human rights-based approach to food security, which supports the effective examination of the RtF in light of the provisions of the relevant international treaties listed above. It examines the obligations of the State as duty bearers to respect, protect and fulfil the RtF. This study further highlights the duty of accountability as an essential component of the duty of States to progressively realise the RtF. It analyses the extraterritoriality of these obligations and the impact of international trade laws on the ability of States to take measures to improve the production, conservation and distribution of food, taking into account the problems of both food-importing and food-exporting countries to ensure an equitable distribution of world food supplies in relation to need.

From the economic perspective, this study analyses economic access to food among the target population, evaluating the prevalence of poverty and the effect of the volatilities of world trade liberalisation on SSA. It adopts Sen's theory of economic wellbeing which proposes that development and the efficiency of State policies should be assessed not merely on the basis of GDP but on the basis of the actual wellbeing/satisfaction that it delivers to the people.¹⁵¹ This study assesses the efficiency of the AoA based on its contribution to the general standard of

¹⁵¹ Amartya Sen, *Development as Freedom* (OUP 1999)

living of the research population.¹⁵² It recognises that the wellbeing of the people of SSA ‘largely depends on the adequate production and distribution of food as well as the establishment of a world food security system which would ensure adequate availability and reasonable prices of food at all times, irrespective of periodic fluctuations and vagaries of weather and free of political and economic pressures’.¹⁵³

This study adopts Sen’s capability and entitlement approaches to wellbeing. The capability approach to wellbeing, on the one hand, relates to the functions that a person is performing or is able to perform based on the available resources. It assesses wellbeing based on the substantive freedom to achieve alternative functioning combinations or the freedom to achieve various lifestyles.¹⁵⁴ From the capability approach, this study examines the level of food security in SSA as the ability of the people to access food based on the available resources. On the other hand, the entitlement approach assesses wellbeing in terms of a person’s ability to exchange the value he has to access the food he needs.¹⁵⁵ It posits that widespread hunger and starvation in SSA are not caused by the unavailability of food but by the lack of entitlements which this study examines as access to food. Assessing wellbeing in terms of entitlement in this study involves an examination of the prevalence of poverty and the ability of the people of SSA to exchange their income, products and exports for the food they need. The prevalence of poverty is thus examined as being directly proportional to economic wellbeing. An increase in income increases a person’s ability to satisfy his socioeconomic needs leading to commensurate improved wellbeing and access to food.¹⁵⁶

¹⁵² The RtF is a constituent of the right to an adequate standard of living under UDHR 1948, Article 24

¹⁵³ Preamble to the UDHR 1948, Para g

¹⁵⁴ Sen, *Development as Freedom* (n 151) 75

¹⁵⁵ Sen, *Poverty and Famines: An Essay on Entitlement and Deprivation* (n 9)

¹⁵⁶ Kary Banks Mullis, *The Unusual Origin of the Polymerase Chain Reaction* (Scientific American 1990)

2.6 Conclusion

This study conducts a qualitative analysis using socio-legal and comparative research methodologies. Using the socio-legal methodology, it analyses the ICESCR and other relevant international instruments on the RtF to establish the basic requirements, core elements, obligations, and acts of violation of the RtF. This method also underpins the -analysis of the WTO and regional trade liberalisation laws of the EU and SSA to demonstrate how they impact access to food and overall food security in the respective regions. The comparative methodology is used to compare the prevalence of poverty and food insecurity in SSA and the EU. A comparative analysis is drawn between the EU and SSA to demonstrate the economic inequalities under the WTO system and the remedial policy reforms adopted by both regions. The research scope is limited to the right to access food in SSA vis-à-vis the EU. The research takes a multidisciplinary approach which supports the use of legal and economic principles to analyse violations of RtF in the research areas. The approach is also international, embodying studies in international human rights and trade law. The theoretical framework that underpins the analysis in this study is discussed in the next chapter.

Chapter 3: Theoretical Framework

3.1 Introduction

This chapter establishes the theoretical framework that underpins this study. It introduces the RtF as a multi-faceted concept and narrows down the scope of this study to access to food. It critically examines the RtF as access to food in SSA and EU, to demonstrate the relationship between trade liberalisation and violations of the RtF in SSA. It examines the duty of States as the duty of accountability, highlighting how the States could facilitate the progressive realisation of RtF through the Rights-Based Approach to food security in trade. This chapter also explains Amartya Sen's wellbeing theory and the rights-based Approach to food security as the legal theories and academic concepts underpinning the analysis of RtF in this study. These concepts are discussed below.

3.2 Contextual Framework of the Right to Food

Article 11 ICESCR establishes the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. It also establishes the fundamental right of everyone to be free from hunger. It requires the States to take steps individually and through international cooperation, including specific programmes which are needed to improve methods of production, conservation and distribution of food, taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need.¹⁵⁷ The right to an adequate standard of living, including adequate food, has been identified as part of the broader right of everyone to a standard of

¹⁵⁷ ICESCR 1976, Article 11

living adequate for the health and wellbeing of himself and his family.¹⁵⁸ On this basis, food is adopted as the primary wellbeing indicator in this study.

The Committee on Economic, Social and Cultural Rights (CESCR) has determined that the core content of the RtF includes the following:

Adequacy: This implies that food must be available in sufficient quantity to meet the nutritional needs of individuals.¹⁵⁹ It must be free from adverse substances and acceptable to the individual.¹⁶⁰

Availability: Refers to the ability to feed oneself directly from productive land, other natural resources, or well-functioning distribution and market systems.¹⁶¹ It requires the availability of food in a quantity and quality sufficient to satisfy the dietary needs of individuals, free from adverse substances, and acceptable within a given culture.¹⁶²

Sustainability: Implies that food supply, sufficiency, availability and accessibility should be stable over long periods and in all places for both present and future generations.¹⁶³

Acceptability: Involves consideration of non-nutrient food values, including cultural, personal and religious approval.¹⁶⁴ Food must be culturally and socially acceptable to the people. Measures relating to food ought to go beyond considerations of economic values to prioritise the choices of the people.¹⁶⁵

Accessibility: Refers to food that is both economically and physically reachable. It implies that the cost of acquiring sufficient food for an adequate diet should be affordable and sustainable. It must not compromise the attainment and satisfaction of other basic needs or interfere with the enjoyment of other human rights.¹⁶⁶

¹⁵⁸ UDHR 1948, Article 25

¹⁵⁹ ICESCR 1976, Article 11(1); See also CESCR General Comment No 12 (n 6) para 8

¹⁶⁰ Ibid; See also CESCR Ibid paras 8-10

¹⁶¹ Ibid; See also CESCR Ibid paras 8 and 12

¹⁶² Ibid; See also CESCR Ibid para 8

¹⁶³ Ibid Article 11; See also CESCR Ibid para 7

¹⁶⁴ Ibid; See also CESCR Ibid para 11

¹⁶⁵ Schanbacher (n 5)

¹⁶⁶ ICESCR 1976, Article 11; See also CESCR General Comment No 12 (n 6) paras 8 and 13

The subsections below explain the context in which the RtF is analysed in this study.

3.2.1 The Right to Accessibility to Food

Thus, the RtF involves a number of factors which must be taken into account, including adequacy, nutritional sufficiency, food availability, accessibility, acceptability, and sustainability *inter alia*.¹⁶⁷ However, this study specifically examines access to food as an essential variable of the RtF because it proposes that food must first be accessible to people before other considerations of adequacy and acceptability *inter alia* may be contemplated. Accessibility is rooted in the RtF requirement for States to ensure equitable distribution of world food supplies in relation to need, taking into account the problems of food-importing and food-exporting countries. Interpreting the RtF, the CESCR noted that ‘the right to adequate food is realised when every man, woman and child, alone or in community with others, have physical and economic access at all times to adequate food or means for its procurement’.¹⁶⁸ This implies that the RtF requires that food must be physically and economically accessible to all.¹⁶⁹

3.2.1.1 Physical Accessibility to Food

Physical access to food is rooted in the requirement of the ICESCR for States to improve ‘methods of production, conservation and distribution of food by making full use of technical and scientific knowledge... to ensure an equitable distribution of world food supplies in relation to need’.¹⁷⁰ While the ICESCR does not prescribe a specific model to achieve equitable food distribution and access, it obligates States to take steps individually and through international cooperation to improve methods of production, conservation and distribution of

¹⁶⁷ CESCR General Comment No 12 (n 6) para 20

¹⁶⁸ Ibid para 6

¹⁶⁹ Ibid para 13

¹⁷⁰ ICESCR 1976, Article 11.2

food.¹⁷¹ This implies that it is the duty of the State to ensure that food is reachable to the people at all times.

‘Physical accessibility implies that adequate food must be accessible to everyone, including physically vulnerable individuals, such as infants and young children, elderly people, the physically disabled, the terminally ill and persons with persistent medical problems, including the mentally ill. Victims of natural disasters, people living in disaster-prone areas and other specially disadvantaged groups may need special attention and sometimes priority consideration with respect to accessibility of food....’¹⁷²

The RtF thus creates an obligation on the State to take positive measures to ensure that the available food is accessible to the most vulnerable populations. In *PUCL v Union of India*,¹⁷³ the Supreme Court of India found that the starvation deaths that occurred in Rajasthan while surplus grain was being stored in a nearby facility but not released constituted a violation of the RtF.¹⁷⁴ By this decision, the court accorded constitutional status to the RtF under article 21 of the Indian constitution and established that an effective food measure must guarantee access to food.¹⁷⁵

Human rights protect the vulnerable and require States to promote access to food through local policies and international cooperation.¹⁷⁶ Trade and political measures which tend to limit food production and distribution may be regarded as breaching the RtF. Research into the effect of agricultural trade regimes on the wellbeing of rural populations with particular reference to the iconic immolation of Lee Kyung-Hae (who sacrificed his life in 2003 in protest

¹⁷¹ ICESCR 1976, Article 11(2)(a)

¹⁷² CESCR General Comment No 12 (n 6) para 13

¹⁷³ *PUCL v Union of India* (Interim Order of 02 May 2003) [2001] Petition No. 196/2001

¹⁷⁴ *Ibid*

¹⁷⁵ *Ibid*

¹⁷⁶ ICESCR 1976, Article 11

against the adverse effect of WTO trade liberalisation on peasant farmers),¹⁷⁷ established a direct link between world trade liberalisation and the food crisis/poor wellbeing among rural subsistence farmers.¹⁷⁸ Schanbacher contested that trade liberalisation under the WTO leads to the commercialisation of the agricultural sector. The impact of this commercialisation is that it tends to divert food production to serve economic needs rather than basic nutritional needs, thus limiting the availability and physical accessibility of nutritious food.¹⁷⁹ He suggested that world trade liberalisation alongside fluctuating market forces of demand and supply tends to create market inequalities and pressures for global relevance and economic gains.¹⁸⁰ As a result, the production of exotic foods for export purposes appears to replace the farming of nutritious staple foods; industrial farming seems to overtake subsistent farming, leading to land grabbing, suppression of labour, and over-dependence on the importation of nutritious food.¹⁸¹ He, therefore, submitted that the failures of world trade liberalisation should be viewed as a violation of human rights, and the failure of States to take measures to remedy the adverse effects of trade liberalisation on the vulnerable is as much a violation of human rights as an act in malice.¹⁸² States are obliged to take steps to facilitate, through trade and policy regimes, the access of its citizens to the minimum essential food, which is sufficient, nutritionally adequate and safe, to ensure their freedom from hunger.¹⁸³

3.2.1.2 Economic Accessibility to Food

Economic access also relates to the obligation of States to ensure the equitable distribution of world food supplies in relation to need, taking into account the problems of

¹⁷⁷ Lee Kyung-Hae took his life in a sacrificial gesture to protest the commercialisation of agriculture and its impact on the vulnerable

¹⁷⁸ Schanbacher (n 5) 149

¹⁷⁹ Ibid

¹⁸⁰ Ibid

¹⁸¹ Ibid 35-39

¹⁸² Ibid 11-13

¹⁸³ CESCR General Comment No 12 (n 6) Para 14

food-importing and food-exporting countries.¹⁸⁴ It imposes a duty on the State to ensure that economically food is reachable and affordable to all:

‘Economic accessibility implies that personal or household financial costs associated with acquiring food for an adequate diet should be at a level such that the attainment and satisfaction of other basic needs are not threatened or compromised. Economic accessibility applies to any acquisition pattern or entitlement through which people procure their food and is a measure of the extent to which it is satisfactory for the enjoyment of the right to adequate food. Socially vulnerable groups such as landless persons and other particularly impoverished segments of the population may need attention through special programmes.’¹⁸⁵

Widespread hunger and starvation are not caused by the unavailability of food but by a lack of entitlements—basically, a lack of economic access. Economic access relates to the financial capability of a person to purchase adequate food to meet his daily nutritional needs. It relates to the ability of people to exchange their entitlement for the food they need. A lack of entitlement/purchasing power thus results in a violation of the RtF.¹⁸⁶ The entitlement theory suggests that people access food through two sustainable means: producing the food directly from productive land or other natural resources or obtaining food through well-functioning distribution, processing and market systems.¹⁸⁷ This ability to produce or buy is controlled by economic forces of demand and supply,¹⁸⁸ thus suggesting a direct correlation between trade and access to food.

¹⁸⁴ ICESCR 1976, Article 11(2)(b)

¹⁸⁵ CESCR General Comment No 12 (n 6) para 13

¹⁸⁶ Sen, *Poverty and Famines: An Essay on Entitlement and Deprivation* (n 9) 154

¹⁸⁷ CESCR General Comment No 12 (n 6) para 12

¹⁸⁸ Sen, *Development as Freedom* (n 151) 161

Fundamentally, the root of the problem of hunger and violations of the RtF is not a lack of food but a lack of access to available food, caused *inter alia* by ‘poverty among large segments of the world’s population’.¹⁸⁹ This implies that the problem of widespread hunger is rooted more in impaired economic access than physical access to food. Research reveals that most undernourished populations are small-scale food producers, and an alarming 80% of hungry people globally are directly or indirectly involved in one form of agriculture.¹⁹⁰ Most of the world’s hungry and ill-nourished persons live in developing countries; ironically, about one-third of the world’s food is produced there.¹⁹¹ Figure 1 below demonstrates the general occupation prevalent amongst the undernourished population worldwide in 2005. It lends further credence to the position that widespread hunger in SSA is not caused by a lack of sufficient food/physical access to food but by a lack of entitlements/ economic access to food.¹⁹²

¹⁸⁹ CESCR General Comment No 12 (n 6) Para 5

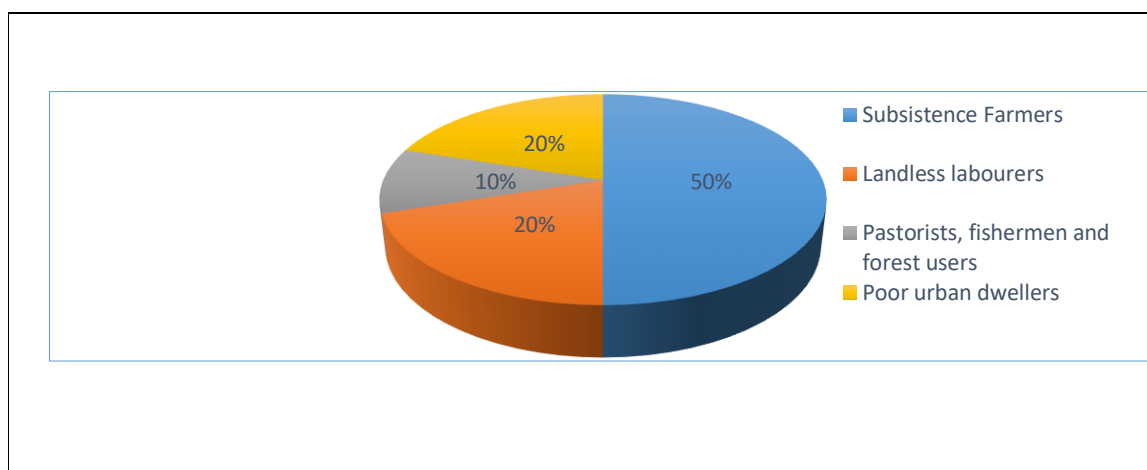
¹⁹⁰ Olivier De Schutter and Kaitlin Y Cordes (eds), *Accounting for Hunger: An Introduction to the Issues* (Hart 2011)

¹⁹¹ Preamble to the UDEHM 1974, para A; See also FAO, IFAD, UNICEF, WFP and WHO, ‘The State of Food Security and Nutrition in the World 2019; Safeguarding against economic slowdowns and downturns’

<https://docs.wfp.org/api/documents/WFP-0000106760/download/?_ga=2.164821436.2073472821.1593507669-1903512177.1593507669> accessed 30 June 2020

¹⁹² Mowbray (n 75) 545-547; See Sen, *Poverty and Famines: An Essay on Entitlement and Deprivation* (n 9) 154

Figure 1: General Occupation of the World's Undernourished Population



Source of data OHCHR¹⁹³

Figure 1 above shows that about 50% of the global hungry population are subsistence farmers; 20% are landless labourers; 10% are pastoralists, fisher folk, and forest users; the remaining 20% are the urban poor.¹⁹⁴ The information in Figure 1 above suggests that the widespread hunger is not caused by unavailability, inadequacy or lack of physical access to food. The CESCR posits that hunger is primarily caused by poverty in large segments of the world's population.¹⁹⁵

Broadly speaking, poverty is the most salient feature among hungry people.¹⁹⁶ In *People's Union for Civil Liberties v Union of India*¹⁹⁷, several starvation deaths were recorded while food stockpiles were located in the neighbouring town. The court identified poverty as the underlying cause of hunger and starvation deaths.¹⁹⁸ In this case, the violation of the right

¹⁹³ OHCHR, 'Report of the Special Rapporteur on the Right to Food Olivier De Schutter - Addendum - Mission to the World Trade Organisation' (2009) (n 88) para 8; See also Pedro Sanchez, M. S. Swaminathan, Philip Dobie and Nalan Yuksel, (n 4)

¹⁹⁴ Ibid; See Olivier De Schutter and Kaitlin Y Cordes (Eds) (n 190); Note also that about 70% of the economically active population in the Least Developed Countries are engaged in agriculture, 52% in other developing countries, and 3% in the developed countries. See OHCHR, 'Report of the Special Rapporteur on the Right to Food Olivier De Schutter - Addendum - Mission to the World Trade Organisation' (2009) (n 88) para 8

¹⁹⁵ CESCR General Comment No 12 (n 6) para 5; See also UNCTAD, 'Least Developed Countries Report' (2006) UNDoc A/HRC/10/5/Add.2 137

¹⁹⁶ See *Prakashmani Sharma and Others v GON, Prime Minister and Council of Ministers and Others* (2008) SCN Writ No 065

¹⁹⁷ Ibid

¹⁹⁸ Ibid

to be free from hunger was not caused by unavailability but by lack of access to available food stockpiles. Through his seminal study of four decades of famine in 1981, Sen¹⁹⁹ established that starvation occurred ‘not from people being deprived of things to which they are entitled, but from people not being entitled to adequate means for survival’.²⁰⁰ As the SR succinctly put it, the majority of hungry people depend on agriculture for their livelihoods, ‘they are hungry because they are poor: they are often net buyers of food, and their incomes, which are on average significantly lower than those of the non-rural populations, are insufficient to buy the food which they do not produce themselves’.²⁰¹

In summary, this section suggests that access to food is an essential component of the RtF, and it is the duty of the State to take all necessary measures to ensure that food is physically and economically accessible to all. The section below contextualises the duty of the State within the scope of this study.

3.2.2 Duty of States to be Accountable

In interpreting the RtF pursuant to the ICESCR,²⁰² the CESCR noted that formulating and implementing strategies for the RtF requires ‘full compliance with the principles of accountability, transparency, and people’s participation, decentralisation, legislative capacity and the independence of the judiciary’.²⁰³ State accountability is essential to realising all human rights, particularly eliminating hunger and poverty and realising a good standard of living for all.²⁰⁴ It requires the State to make decisions in the interest of the people, and it empowers the people to hold the State accountable to fulfil its obligations. The rule of law is fundamental for

¹⁹⁹ Sen ‘The Right not to be Hungry’ (n 74) 69–82.

²⁰⁰ Ibid 73

²⁰¹ OHCHR, ‘Report of the Special Rapporteur on the Right to Food Olivier De Schutter - Addendum - Mission to the World Trade Organisation’ (2009) (n 88) para 8

²⁰² ICESCR 1976, Article 11

²⁰³ CESCR General Comment No 12 (n 6) para 23

²⁰⁴ Preamble to the DRD 1986

the achievement of State accountability: Covenant rights must be recognised in appropriate ways within the domestic legal order, an appropriate means of redress must be available to aggrieved persons, and appropriate means of ensuring State accountability must be put in place.²⁰⁵ The notion of rights becomes elusive without the ability to hold duty-bearers accountable.²⁰⁶

State accountability may be enforced through human rights commissions and public protection boards constitutionally empowered to monitor and report on the measures taken by the State towards the realisation of human rights under the constitution.²⁰⁷ Nongovernmental organisations (NGOs) also play an important role in holding the States accountable and expanding the realm of public inclusion. For instance, in *Centre for Minority Rights Development (Kenya) v Kenya*²⁰⁸, two NGOs filed an action on behalf of the Endorois indigenous pastoralist community who were removed from their lands by the Kenyan government to establish a wildlife reserve. State accountability may also be enforced through access to court. In the above case, the ACHPR found that the removal of the indigenous people to other semi-arid land threatened the food and livelihood of the indigenous people.²⁰⁹ The CESCR noted that the formulation and implementation of strategies for the RtF require ‘full compliance with the principles of accountability, transparency, people’s participation, decentralisation, legislative capacity and the independence of the judiciary’.

The human rights-based approach emphasises a number of core principles, including accountability, transparency, participation, monitoring, assessment, and access to effective

²⁰⁵ CESCR General Comment No 9, ‘The domestic application of the Covenant’, Adopted at the Nineteenth Session of the Committee on Economic, Social and Cultural Rights on 03 December 1998 (Contained in document E/C.12/1998/24) para 2

²⁰⁶ Skogly (n 11)

²⁰⁷ For instance the Human Rights Commission of Nigeria established by the National Human Rights Commission (Amendment) Act of 1996 to promote and protect all human rights in Nigeria. It serves as an extra-judicial mechanism to monitor the implementation of human rights, safeguard human rights and help victims of human rights violations in Nigeria. It also exercises quasi-judicial powers to summon persons, acquire evidence, investigate human rights violations, award compensation and enforce its decisions.

²⁰⁸ *Centre for Minority Rights Development* (n 55)

²⁰⁹ *Ibid*

judicial remedies.²¹⁰ In 2008 the UN Special Rapporteur (SR) on the RtF, De Schutter, reinforced the concept of accountability as a fundamental duty of States for the realisation of RtF. The SR emphasised the duty of States to be accountable during international trade negotiations to ensure that trade is utilised to facilitate the realisation of RtF. He examined the impact of trade liberalisation agreements on the ability of States to fulfil their human rights obligations, noting that accountability through enhanced public participation and periodic impact assessment is essential to check the government and keep the State from taking retrogressive steps which may result in the violation of the RtF. It keeps the State from undertaking trade commitments which undermine its ability to fulfil its socioeconomic rights obligations.²¹¹ Public participation, impact assessment and wellbeing considerations are thus at the core of legal accountability.

3.2.2.1 Accountability Through Public Participation

Public participation refers to the interaction in the decision-making process between organs of public institutions and external actors who are formally independent of any government.²¹² It is the influence that members of the public may exercise on rulemaking, and it may include initiating rules, objecting to existing rules, providing important data, the right to request information relating to legislative proposals, and the right of the masses to influence the contents and purposes of proposed rules.²¹³ It guarantees the right of the people to participate in trade policymaking and to raise concerns about the potential impact of trade agreements on their wellbeing. Public participation is recognised in Article 21 UDHR as the right of each

²¹⁰ Morten Broberg and Hans-Otto Sano, 'Strengths and Weaknesses in a Human Rights-Based Approach to International Development – an Analysis of a Rights-Based Approach to Development Assistance Based on Practical Experiences' (2018) 22(5) *The International Journal of Human Rights* 664

²¹¹ OHCHR, 'Report of the Special Rapporteur on the Right to Food Olivier De Schutter - Addendum - Mission to the World Trade Organisation' (2009) (n 88) para 4

²¹² Yves Bonzon, *Public Participation and Legitimacy in the WTO* (CUP 2014)

²¹³ Theodora Ziamou, *Rulemaking, Participation and the Limits of Public Law in the USA and Europe* (Ashgate 2001)

person to participate in the government of his country through his freely elected representatives in making policies that affect him.²¹⁴ Furthermore, the ICCPR establishes the right of every citizen to take part directly or through their elected representatives in the conduct of public affairs.²¹⁵ Although this is a civil right, it applies to the RtF through the principles of interdependence and indivisibility. This right to public participation goes beyond the right to vote, run for elections, and participate in referendums. It includes the right to participate in decision-making as part of the implementation process of all human rights. It encourages grassroots participation and the involvement of the most vulnerable population in the policymaking process. In *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*,²¹⁶ the ACHPR noted that the realisation of socioeconomic rights requires the active, free and meaningful participation of the public in development processes.

Accountability through public participation requires that ‘the will of the people shall be the basis of the authority in government’.²¹⁷ The duty of accountability through public participation involves transparency in the decision-making process and the engagement of non-State actors in that process (otherwise known as grassroots involvement).²¹⁸ Transparency is about fair access to information which the International Association for Public Participation refers to as information and consultation.²¹⁹ Transparency is a prerequisite for active grassroots involvement. It requires States to make negotiating documents available to the public, providing adequate information to enable the people to participate in a meaningful way. Access to such information should be guaranteed by law, and such laws should ensure that relevant

²¹⁴ UDHR 1948, Article 21(1)

²¹⁵ ICCPR 1976, Article 25

²¹⁶ *Centre for Minority Rights Development* (n 55) para 283; See also DRD 1986, Article 2.3

²¹⁷ UDHR 1948, Article 21(3)

²¹⁸ Bonzon (n 212)

²¹⁹ International Association for Public Participation, ‘Spectrum of Public Participation’

<https://cdn.ymaws.com/www.iap2.org/resource/resmgr/pillars/Spectrum_8.5x11_Print.pdf> accessed 22 September 2022

and timely information is made available in a fair manner to facilitate active and meaningful participation.²²⁰ Grassroots involvement requires the rule-making processes to include a well-defined and structured *modus operandi* to enable the active involvement of the masses.²²¹ It allows for scrutiny of public rule-making and for representatives to be held accountable to the people they represent. This right may also be judicially enforceable.²²²

Public participation in trade policymaking requires that the people be provided adequate information and opportunity to influence the negotiation of trade agreements/policies, which would eventually impact their wellbeing. The policymaking process should incorporate feedback, which communicates to the people how their input influenced the decision/policy.²²³ It thus requires enhanced grassroots involvement through elected representatives to ensure that trade rules are made in the people's interest and that they facilitate the realisation of the RtF.²²⁴ However, third-party participation appears to be limited in the WTO, resulting in what has been described by scholars like Joseph as 'democratic deficits in the WTO'.²²⁵ This study shall, in subsequent chapters, examine the extent to which the State fulfils its RtF duty of accountability through public participation in SSA and the EU and how it could fulfil its RtF obligations by incorporating public participation in trade policymaking.

3.2.2.2 Accountability through Impact Assessment

²²⁰ For instance the Freedom of Information Act of the United Kingdom, 2000

²²¹ Bonzon (n 212)

²²² Francesca Bignami, 'Three Generations of Participation Rights Before the European Commission', (2004) 68 Law and Contemporary Problems 61-84 <<https://scholarship.law.duke.edu/lcp/vol68/iss1/4>> accessed 22 September 2022

²²³ International Association for Public Participation (n 219); see also UN, 'Creating a Seat at the Table for Stakeholder Engagement for the 2030 Agenda', <https://www.unescap.org/sites/default/files/Stakeholder%20Engagement%20Indicator%20Framework%20Brochure_180518_0.pdf> accessed 21 September 2022

²²⁴ OHCHR, 'Report of the Special Rapporteur on the Right to Food Olivier De Schutter - Addendum - Mission to the World Trade Organisation' (2009) (n 88) para 39

²²⁵ Joseph (n 91) 78

State accountability may also be realised through periodic impact assessment of trade policies. As an extra-territorial obligation, accountability would imply taking into consideration the problems of both food-importing and food-exporting countries to ensure an equitable distribution of world food supplies in relation to need.²²⁶ It requires the international trade organisation to conduct a fair assessment and continuous examination of new and ongoing trade principles on food-importing vis-à-vis food-exporting countries. It requires the State to engage in responsible trade negotiations hinged upon human rights impact assessment of trade terms. Through periodic impact assessment, the State stays accountable in articulating and formulating trade rules that facilitate access to food.²²⁷ States are encouraged to conduct periodic assessment of their trade commitments on the standard of living of its people, including the RtF, in order to balance the focus of trade liberalisation, moving it from core economic values to take into account fairness and the social impact of trade on the most vulnerable and food-insecure.²²⁸

Throwing more light on the methodological indicators for monitoring the realisation of RtF,²²⁹ the 2008 Report on Indicators proposed that the Impact assessment of trade agreements should be based on the normative requirements of the RtF and the corresponding indicators.²³⁰ This will enable States to assess the compatibility of their trade commitments and the extent to which proposed trade measures facilitate the realisation of RtF.²³¹ Impact assessment may be carried out by obtaining data directly from the masses or through their elected representatives. Thus, it creates an opportunity for the parliament and civil society to participate in evaluating

²²⁶ ICESCR 1976, Article 11.2(b)

²²⁷ UDEHM 1974, Article 3

²²⁸ CESCR General Comment No 12 (n 6) para 40

²²⁹ OHCHR, 'Report on Indicators for Monitoring Compliance with International Human Rights Instruments' (n11)

²³⁰ OHCHR, Report on Indicators for Monitoring Compliance with International Human Rights Instruments' This report was prepared by the OHCHR in response to a request from the inter-committee meeting of treaty bodies (ICM) in June 2006 asking the Secretariat to undertake validation of the approach on the use of statistical information in States parties' reports HRI/MC/2006/7 on 16 May 2008 (Contained in Document HRI/MC/2008/3)

²³¹ Ibid

trade policies and monitor the position adopted by governments in trade negotiations.²³² In his report on the impact of trade on the RtF, the SR encouraged States to undertake time-bound trade agreements rather than long-term trade agreements.²³³ This way, it may be able to monitor the implementation of the human rights instruments and assess the human rights impact of trade agreements over the period. Any extension or revalidation of trade agreements will then be based on the outcome of the impact assessment.²³⁴ Impact assessment thus tends to strengthen the legitimacy of trade policies as the State is placed in a better position to assess the social impact of its policies and make decisions which enhance the welfare of the people.²³⁵ Impact assessment also reinforces State accountability, increases grassroots participation in food administrative systems and secures public trust in the State.²³⁶

Under the WTO, the Principle of Single Undertaken requires Member States to adhere to all WTO Agreements as a single undertaking.²³⁷ Thus Member States tend to have limited control over their trade commitments, and no Member can exercise the right of selective ratification of favourable agreements.²³⁸ Furthermore, acceding members are required to sign up for the whole package of trade agreements, often with extra obligations.²³⁹ Article XIII of the WTO Marrakesh Agreement, 1994 is the basic provision governing accession to the WTO. It simply provides that intending members may ‘accede to this Agreement on terms to be agreed

²³² OHCHR, ‘Report of the Special Rapporteur on the Right to Food Olivier De Schutter - Addendum - Mission to the World Trade Organisation’ (2009) (n 88) para 40

²³³ Ibid para 37

²³⁴ Ibid

²³⁵ CESCR General Comment No 12 (n 6) paras 19 and 36

²³⁶ OHCHR, ‘Report of the Special Rapporteur on the Right to Food Olivier De Schutter - Addendum - Mission to the World Trade Organisation’ (2009) (n 88) para 37

²³⁷ Joseph (n 91); See also WTO, ‘Handbook on Ascension to the WTO’

<www.wto.org/english/thewto_e/acc_e/cbt_course_e/intro_e.htm> accessed 03 July 2020

²³⁸ Ibid

²³⁹ Some pre-conditions for acceding members often include additional obligations not imposed under existing WTO rules, WTO plus conditions Example of a ‘WTO plus’ requirement: Tonga, which acceded to the WTO in 2007, had to commit to liberalising a large number of services, even though GATS generally permits States to choose which services they will open up to foreign competition. However, these conditions must not contravene the Most Favoured Nation and Nationality principles of the WTO to bestow trade preferences to select trade partners, See Jane Kelsey (n 237) 248 See also Joseph (n 91) 9

between it and the WTO'.²⁴⁰ Thus the terms of accession are decided on a case-by-case basis and are different for each acceding state. The most vulnerable participants are intending members who are compelled to accept stringent terms as pre-conditions for joining the WTO. An acceding State is to satisfy the demands of each WTO member who chooses to join the working party established for its accession; any WTO member can join such a working party.²⁴¹ Incumbent members may propose burdensome conditions for acceding members with no mutuality or reciprocity.²⁴² Some pre-conditions for new members often include additional obligations not imposed under existing WTO rules, WTO plus conditions.²⁴³ Some others require a loss of concessions that a State would ordinarily be entitled to under WTO rules, WTO minus conditions.²⁴⁴ Notably, acceding States are mostly developing States, including SSA countries. For instance, Equatorial Guinea, Ethiopia, South Sudan, Sudan and Somalia are currently negotiating ascension into the WTO.²⁴⁵ Whilst most countries would prefer to accede to WTO agreements to avoid being shut out of effective global competition, accountability requires that the States do not short-change socioeconomic wellbeing for economic gains. Thus, this study shall, in the latter chapters, explore how States could undertake periodic impact assessments of international trade agreements to ensure that the

²⁴⁰ WTO Agreement (Marrakesh Agreement) Establishing the World Trade Organization (WTO) 1994, 1867 U.N.T.S. 154, 33 I.L.M. 1144, Article XIII

²⁴¹ Jane Kelsey, 'World Trade and Small Nations in the South Pacific Region' (2004–05) 14 *Kansas Journal of Law and Public Policy* 248, 265.

²⁴² These conditions have reportedly grown more onerous over time. For instance, the conditions imposed on Samoa in 2019 were more onerous than the 'bad deal' received by Cambodia, which acceded in 2004. See Joseph (n 91) 157; See also UNDP, *Asia Pacific Human Development Report 2006: Trade on Human Terms* (UNDP, Colombo 2006) 131

²⁴³ Example of a 'WTO plus' requirement: Tonga, which acceded to the WTO in 2007, had to commit to liberalising a large number of services, even though GATS generally permits States to choose which services they will open up to foreign competition. See Jane Kelsey (n 241) 248

²⁴⁴ Example of a 'WTO minus' requirement: Tonga became immediately bound by TRIPS upon ascension in January 2008 and was not accorded the cooling off period which incumbent States enjoyed at ascension. Ibid

²⁴⁵ As of September 2022, all SSA Countries have signed up as members of the WTO except Equatorial Guinea, Ethiopia, South Sudan, Sudan and Somalia who are observer countries negotiating ascension. See WTO, 'Members and Observer' (n 147)

ratification and extension of trade agreements are made pursuant to impact assessment reports, reciprocity and wellbeing considerations to facilitate the realisation of RtF.²⁴⁶

3.2.2.3 Accountability Through Wellbeing Considerations

State accountability also involves prioritising human rights obligations and socioeconomic wellbeing in trade negotiations. It requires the State to regard the people as the end in themselves and trade policies as a means of improving the wellbeing of the people, thus prioritising the wellbeing of the people in trade negotiations and policymaking.²⁴⁷ States have the duty to formulate appropriate national development policies to progressively improve the wellbeing of the entire people and ensure equitable distribution of world food supplies in relation to need.²⁴⁸ Accountability is needed in market competition systems to ensure that commodity buyers, food processors, and global retailers abstain from measures which could threaten the enjoyment of RtF.²⁴⁹

State accountability through wellbeing considerations requires that human rights considerations are given higher priority in areas of conflict with trade.²⁵⁰ Wellbeing considerations for the fulfilment of the RtF under Article 11 ICESCR require State action to improve systems of production, conservation and distribution of food.²⁵¹ The UDEHM encourages States to strive to adjust their agricultural policies to prioritise food production and distribution, recognising the interrelationship between the world food problem and international trade.²⁵² Wellbeing consideration in trade thus requires that trade agreements be channelled to satisfy human rights concerns and ensure that participating States retain the

²⁴⁶ Joseph (n 91) 157

²⁴⁷ Preamble to the DRD 1986

²⁴⁸ DRD 1986, Article 2.3

²⁴⁹ OHCHR, 'Report of the Special Rapporteur on the Right to Food Olivier De Schutter - Addendum - Mission to the World Trade Organisation' (2009) (n 88) para 46

²⁵⁰ Charter of the United Nations and Statute of the International Court of Justice (UN Charter) 1945, Article 103

²⁵¹ ICESCR 1976, Article 11.2(b)

²⁵² UDEHM 1974, Article 11

required policy space for the progressive realisation of the RtF.²⁵³ Hence international trade laws should be interpreted to the fullest extent possible to be compatible with general international law and to prioritise the international human rights obligations of State Parties, including the RtF.²⁵⁴

Violations of the RtF through trade liberalisation may take various forms. It may occur in the form of third-party activities which interfere with the enjoyment of RtF, such as dumping.²⁵⁵ The Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement) 1995 prohibits dumping.²⁵⁶ Dumping occurs when a product is introduced into the market of another country at less than its normal value, where the export price of the product is less than the comparable price for the like product in the exporting country.²⁵⁷ The impact of dumping on the RtF is that when the products are continually exported into the vulnerable country below the market price, it stifles competition and destroys the local industry of the importing countries. Over time, it increases overdependence on imports, thus depriving the local farmers of their livelihood and exposing the local consumers to the vagaries of the international market.

Violations of the RtF through trade liberalisation may also occur through the failure of States to consider their human rights obligations when negotiating international agreements.²⁵⁸ For instance, the comparative advantage principle of the AoA encourages countries to specialise in the production of goods in which they have a comparative advantage and to open up their borders to import other products. Thus, SSA countries that mostly produce primary agricultural products are thus encouraged to specialise in the export of unprocessed agricultural

²⁵³ CESCR General Comment No 12 (n 6) para 9

²⁵⁴ OHCHR, 'Report of the Special Rapporteur on the Right to Food Olivier De Schutter - Addendum - Mission to the World Trade Organisation' (2009) (n 88)

²⁵⁵ *SERAC* (n 34)

²⁵⁶ Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement) 1995

²⁵⁷ *Ibid* Article 2

²⁵⁸ *Kadi and Al Barakaat International Foundation v Council of the EU and Commission* (2008) C-402/05. See also CESCR General Comment No 12 (n 6) para 13

such as cocoa in Ghana, cotton in Burkina Faso, or bananas in Ecuador.²⁵⁹ These countries are then required to open up their markets to import processed foods and other agricultural products in which they do not have comparative advantage. Where these processed goods are imported at very high prices compared to the price of exported unprocessed goods, the importing SSA countries are unable to exchange the income from their exports to purchase the imported goods because of the cost. The impact is that peasant farmers cannot exchange their entitlement to procure the food they need. Thus, their economic access to food is impaired. Occasionally, these farmers try to mitigate the hardship by diverting to the production of more economically viable plants within the limits of comparative advantage, such as green beans in Kenya and cut-flowers in Uganda, to increase their income.²⁶⁰ Whilst such diversification may not improve their global competitiveness, it diverts the focus of local farming from the production of staple foods for local consumption to export-oriented production, further limiting the availability of nutritious food within the State and impacting physical access to food.²⁶¹ Trade liberalisation thus tends to threaten local industries, increase dependency on importation and increase the vulnerability of the State to import surges and to volatilities of the international market.²⁶² As propounded in this study, accountability through wellbeing consideration encourages the State to prevent adverse external influence by supporting its local markets, instituting measures which fulfil the RtF and prioritising domestic access to food in its international trade negotiations.

Wellbeing considerations in trade are necessary to create balance because trade liberalisation on its own tends to focus on economic principles to the exclusion of human rights.

²⁵⁹ Carin Smaller and Sophia Murphy, 'Bridging the Divide: a human rights vision for global food trade', *Confronting Global Food Challenge* (Institute of Agriculture and Trade Policy, Geneva 2008)

²⁶⁰ Ibid

²⁶¹ Oliver Morrissey and Alexander Sarris (eds), *WTO rules for Agriculture Compatible with Development*, (FAO 2007) <www.fao.org/3/a0913e/a0913e.pdf> accessed 22 August 2020

²⁶² OHCHR, 'Report of the Special Rapporteur on the Right to Food Olivier De Schutter - Addendum - Mission to the World Trade Organisation' (2009) (n 88) para 18

The AoA, for instance, deals with trade in food and agriculture. It makes reference to food security but does not define the term; rather, it classifies food security as a non-trade concern.²⁶³ Accordingly, the AoA encourages export-oriented production for its economic values rather than the equitable distribution of adequate/nutritious food. Export-oriented farming encourages the diversion of food production from servicing local nutritional needs to servicing the economic needs of the State. The long-term effect is that it discourages staple food production, destroys the local industry, encourages unwholesome competitive practices and ultimately impairs access to food, particularly for peasant farmers and vulnerable consumers. This long-term effect falls short of the requirement for international cooperation under the ICESCR for the progressive realisation of the RtF.²⁶⁴ Article 1 ICESCR requires international cooperation to stabilise world markets, promote equitable food distribution, improve access to food, encourage export diversification and eliminate tariff and non-tariff barriers to agricultural trade, taking into account the interest of food-importing developing countries. Where necessary, such measures may include non-reciprocal trade terms as well as special and differential (S&D) treatment.²⁶⁵

Accountability for the realisation of RtF thus requires States to include wellbeing concerns and prioritise their socioeconomic rights obligations when concluding trade agreements. Article 28 of UDHR encourages States to cooperate (through international trade) to facilitate the ability of Member States to fulfil their socioeconomic rights obligations and create an atmosphere where human rights may be realised.²⁶⁶ While States commit to trade liberalisation as a means of satisfying immediate economic needs, the possible long-term effects of trade measures, particularly on the most vulnerable, ought to be of paramount consideration. The

²⁶³ Preamble to the AoA 1994

²⁶⁴ ICESCR 1976, Article 11(2)

²⁶⁵ UDEHM 1974, Article 11

²⁶⁶ UDHR 1948, Article 28

State should remain accountable to respect, protect and fulfil the RtF by incorporating public participation, impact assessment and wellbeing considerations into its trade negotiations.

3.3 Analytical Concepts

This section reviews the theories which underpin the analysis of the impact of trade liberalisation agreements and policies on access to food in this study. These theories are the wellbeing theory and the rights-based approach (RBA) to food security in trade.

3.3.1 The Wellbeing Theory

The wellbeing theory in this study is based on the provisions of Article 25 UDHR, Article 11 ICESCR and Amartya Sen's concepts of wellbeing as capability and entitlement.²⁶⁷ Article 25 of UDHR establishes the right to an adequate standard of living for every individual's health and wellbeing, including food.²⁶⁸ This provision recognises food as a variable for the assessment of a person's standard of living and wellbeing. Likewise, Article 11 ICESCR further recognises the right to an adequate standard of living, including adequate food,²⁶⁹ and Article 1(2) ICESCR prohibits the deprivation of a person's means of subsistence.²⁷⁰ The preamble to the DRD also reinforces the wellbeing theory, presenting human beings as the end in themselves and commodities/income as a means to an end.²⁷¹ It recognises that 'the human person is the central subject of the development process and that development policies should therefore make the human being the main participant and beneficiary of development'.²⁷² Sen further theorises that wellbeing involves a 'relatively small number of centrally important human activities/choices and the corresponding capabilities such as the ability to be well-

²⁶⁷ Amartya Sen, *Development as Capability Expansion* (OUP 2003) 46

²⁶⁸ Ibid Article 25

²⁶⁹ ICESCR 1976, Article 11

²⁷⁰ Ibid Article 1(2)

²⁷¹ Preamble to the DRD 1986

²⁷² Ibid

nourished and the capability of escaping avoidable morbidity and premature mortality'.²⁷³ In this study, therefore, wellbeing relates to a person's standard of living, which could be assessed in terms of food security, and the analysis of wellbeing is limited to the actualisation of food security in SSA vis-à-vis the EU.

Amartya Sen's wellbeing theory, as adopted in this study involves the subjective assessment of an individual's state of happiness and general satisfaction.²⁷⁴ It is not necessarily concerned with a person's earnings or material possessions; rather, it relates to the quality of life a person is living and what the person is succeeding in doing or being.²⁷⁵ It is concerned with a person's achievement- how 'well' is his/her 'being'?²⁷⁶ Sen's wellbeing theory also evaluates economic development on the basis of the quality of life provided to the people. It suggests that economic development should not be assessed solely on the basis of Gross Domestic Product (GDP) or per capita income but rather on the basis of the wellbeing and actual happiness delivered to the people.²⁷⁷ Thus, economic development is not an independent aim of State policies but a means of enriching the people's quality of life.²⁷⁸ Wellbeing in relation to trade liberalisation in this study, therefore, relates to the ability of the State to maximise international trade relations to enrich the people's quality of life through enhanced access to food.

Sen also reviews wellbeing as capability and entitlement. Capability refers to the functions that a person is performing or is able to perform based on the resources available.²⁷⁹ It refers to the substantive freedom to achieve alternative functioning combinations. Thus, wellbeing reflects a person's freedom to choose between different ways of living.²⁸⁰ This

²⁷³ Amartya Sen, *Development as Capability Expansion* (n 267) 46

²⁷⁴ Ibid

²⁷⁵ Ibid

²⁷⁶ Amartya Sen, *Commodities and Capabilities* (8th impression, OUP 2004) 3

²⁷⁷ Ibid

²⁷⁸ Ibid 41-43

²⁷⁹ Amartya Sen, *Development as Freedom* (n 151) P 87

²⁸⁰ Amartya Sen, *Development as Capability Expansion* (n 267)

freedom to choose connotes a person's domination over chance and circumstances. However, freedom can only be enforced where the individual possesses the financial capability to acquire what is desired, thus implying the absence of poverty.²⁸¹ Poverty and the resultant widespread starvation occur when a person is bereft of the capability/freedom to choose between different ways of living, which Sen refers to in another treatise as entitlement.²⁸² Where poverty prevails, there is a lack of entitlement, and the people lack the capability to access food and to live a good quality life. This amounts to the domination of chances and circumstances over the individual, which is indicative of low wellbeing. In analysing wellbeing, therefore, this study assesses the prevalence of poverty in developing countries of SSA and how it constrains the capability of the people to access food and to choose between sources and opportunities.

This study thus examines wellbeing as the expansion of capacities that contribute to the realisation of an adequate standard of living through enhanced access to food.²⁸³ It reviews wellbeing as opportunities which a person has to achieve the desired satisfaction. This opportunity could be described as "advantage"²⁸⁴. Advantage is "the real opportunities a person has, especially compared with others".²⁸⁵ Advantage in this study is assessed based on the opportunities or freedom available to developing countries of SSA to access adequate food compared to developed countries of the EU.

It is submitted that GDP may be a good indicator of economic development, but GDP does not automatically translate to an adequate standard of living. GDP relates to a country's economic output per person, and this output does not guarantee access to or availability of adequate food, nor does it imply improved health or life expectancy. Per capita income relates

²⁸¹ Amartya Sen, *Poverty and Entitlement: An Essay on Entitlement and Deprivation* (OUP 1990)

²⁸² *Ibid*

²⁸³ Maryann Feldman, Theodora Hadjimichael, Lauren Lanahan, and Tom Kemeny, 'The Logic of Economic Development: A Definition and Model for Investment' (2016) 34 (1) *Environment and Planning C: Government and Policy* 5, 8

²⁸⁴ Amartya Sen, *Commodities and Capabilities* (n 276) 3

²⁸⁵ *Ibid*

to the amount of money earned per person in a nation. This study recognises that starvation often occurs as a result of a decline in a person's income or entitlement or a lack of endowments to give in exchange for food. Therefore, it appreciates the importance of per capita income in analysing subjective wellbeing because per capita income has been found to be directly proportional to economic wellbeing.²⁸⁶ Thus an increase in income increases a person's entitlement and ability to satisfy his socio-economic needs hence a commensurate increase in wellbeing.²⁸⁷ As in this study, assessment of per capita income is particularly important when conducting an inter-country comparative analysis of wellbeing. Assessment of income and poverty levels is therefore relevant to this study as it compares the levels of wellbeing in terms of access to food in the EU and SSA.

Taking a shift from the ideology of "too many people = too little food", this study submits that famine and starvation in the face of improved agricultural practices and mechanised farming is largely a result of external political and economic influences.²⁸⁸ It thus examines the socioeconomic impact of trade liberalisation on wellbeing in SSA vis-à-vis the EU. This study examines economic development in terms of wellbeing, using food security as a preferred indicator of wellbeing. And it examines food security in terms of the ability of an individual to exchange his economic endowments for food. It demonstrates how wellbeing considerations could be incorporated into agricultural trade liberalisation, thus considering the problems of both food-importing and food-exporting countries to ensure an equitable distribution of world food supplies in relation to need.

Criticism of the Wellbeing Theory:

²⁸⁶ Kary Banks Mullis (n 156)

²⁸⁷ Ibid

²⁸⁸ Schanbacher (n 5)16-17

Some scholars have criticised the wellbeing theory for its subjectivity. Gaertner criticised the wellbeing theory because of its lack of measurability and the difficulty in evaluating the set of basic functionings in different cultural contexts.²⁸⁹ Gaertner contends that the wellbeing theory is too subjective to anchor a global analysis.²⁹⁰ He noted the wellbeing theory does not specify a clear method of assessment; rather, it allows several approaches to an assessment of wellbeing.²⁹¹ He contends that the wellbeing theory has an infinite number of assessment systems and no agreed metatheory; one system may consider the other arbitrary.²⁹²

Proponents of the social comparison and relative deprivation theory, like Runciman, have also criticised the wellbeing theory because it is too relative. These theorists contend that people tend to judge their own wellbeing relative to others by comparing their own situation with their peers, as in social comparison and relative deprivation theory.²⁹³ Thus Runciman contends that the wellbeing theory is inadequate to anchor research because people may not be able to assess their wellbeing given that they cannot tell what functionings are most important to them.²⁹⁴ Other researchers contend that despite the increasing discussions on wellbeing in recent years, it remains too relative, and there is no consensus on what indicators to use when analysing levels of wellbeing.²⁹⁵ As there is no universal wellbeing indicator, one researcher's chosen indicator may differ from another researcher's notion of wellbeing and may also differ

²⁸⁹ Wulf Gaertner, 'Amartya Sen: Capability and Well-being' in Martha Nassbaum and Amartya Sen, *The Quality of Life* (OUP 1993) 62 - 66

²⁹⁰ Ibid

²⁹¹ Ibid. Approaches to wellbeing include the utility approach, the opulence approach/fulfilment of basic needs, the capability approach, the entitlement approach, the opportunities approach *inter alia* Amartya Sen, *Commodities and Capabilities* (n 276)

²⁹² Wulf Gaertner (n 289)

²⁹³ Gari Runciman, *Relative deprivation and social justice* (Routledge and Kegan Paul, 1966); See also Rudd Muffels and Hedy Bruce, 'Capabilities and Choices: Do They Make Sense for Understanding Objective and Subjective Well-Being? An Empirical Test of Sen's Capability Framework on German and British Panel Data' (2013) *Soc Indic Res* 110, 1159–1185

²⁹⁴ Ibid

²⁹⁵ Ananta Kumar Giri, 'Rethinking Human Well-Being: A dialogue With Amartya Sen' (2000) 12 *Journal of International Development* 1003; See also WHO, 'Measurement of and target-setting for well-being: an initiative by the WHO Regional Office for Europe' <www.euro.who.int/data/assets/pdf_file/0003/180048/E96732.pdf> accessed 08 February 2021

from the research target's notion of wellbeing.²⁹⁶ Thus the uncertainties around the wellbeing theory make it inadequate to anchor effective legal research.

Whilst canvassing in support of the wellbeing theory, Sen admitted that the wellbeing theory is subjective because wellbeing relates to interest, and interest is subjective.²⁹⁷ Wellbeing relates to the things a person values and the opportunities he chooses to maximise. All these are subjective because an individual's wellbeing and use of advantage depend on his personal interests.²⁹⁸ There is no universally accepted measure of interest which may be applied in every context and to every individual. Interest may be regarded as a subjective notion to be determined from the facts of each case. Identifying the interest or needs of the research target is, therefore, key in assessing wellbeing and advantage in relation to that group.

This study mitigates this challenge of subjectivity by adopting a more objective wellbeing indicator- food, based on Article 25 UDHR and Article 11 ICESCR, which provide for an adequate standard of living, including food.²⁹⁹ It also relies on the provisions of the Preamble to the UDEHM, which states that:

‘The wellbeing of the peoples of the world largely depends on the adequate production and distribution of food as well as the establishment of a world food security system which would ensure adequate availability of, and reasonable prices for food at all times, irrespective of periodic fluctuations and vagaries of weather and free of political and economic pressures, and should thus facilitate, amongst other things, the development process of developing countries’.³⁰⁰

Without prejudice to other approaches to the assessment of wellbeing, this study examines wellbeing in terms of entitlement and opportunities because these approaches provide

²⁹⁶ Amartya Sen, *Commodities and Capabilities* (n 276)

²⁹⁷ Ibid

²⁹⁸ Ibid

²⁹⁹ ICESCR 1976, Article 11

³⁰⁰ Preamble to the UDEHM 1974, Para g

a reasonable level of objectivity. Wellbeing in this study primarily examines the quality of life in SSA based on the people's ability to exchange their entitlement for the food they need, which is synonymous with access to food.³⁰¹ Wellbeing is also assessed as opportunity which is the available freedom to choose between various functionings in contrast to the actual choices made or one's ability to maximise the freedom. Therefore, this study does not merely consider the adequacy of food in SSA; rather, it queries the level of poverty/entitlement and the capability to choose/access food in SSA vis-à-vis the EU.

The wellbeing theory has been criticised for its inability to solve the problem of inequality, poverty and deprivation, which it originally set out to address.³⁰² Offenhiser contends that the wellbeing theory has failed to solve the problem of poverty and the widening gap between the rich and poor, as nearly half of the world's population live on less than \$2 a day³⁰³. He argued that the wellbeing model does not hold the government accountable for its actions or inactions; therefore, it does not address the actual problem of economic deprivation and inequalities.³⁰⁴ It simply reviews the economic situation of the people, presenting them as objects of charity. On this basis, several NGOs diverted from wellbeing to the rights-based approach (RBA). Therefore, this research adopts the RBA to create a balanced analysis of the economic impact of trade liberalisation on the realisation of the RtF in SSA.

3.3.2 The Rights-Based Approach to Food

The human rights-based approach (RBA) is founded on the human rights values derived from the International Bill of Rights and other international human rights instruments.³⁰⁵ The

³⁰¹ See Kary Banks Mullis (n 156); exchange of entitlement for food refers to one's ability to utilise his available financial, human and other resources to purchase food.

³⁰² Raymond Offenhiser and Susan Holcombe, 'Challenges and Opportunities in Implementing a Rights-Based Approach to Development: An Oxfam America Perspective' (2003) 32(2) *Nonprofit and Voluntary Sector Quarterly* 268

³⁰³ *Ibid*

³⁰⁴ *Ibid*

³⁰⁵ The International Bill of Rights basically consists of the IDHR, ICESCR 1976 and the ICCPR 1976; See also Amartya Sen, 'Elements of a Theory of Human Rights' (2004) 32(4) *Philosophy and Public Affairs* 315

UN signed a Memorandum of Understanding in 2003 endorsing the RBA, whereby human rights are secured through a system of duties and responsibilities.³⁰⁶ Thus the RBA is used in this study to analyse the inalienable duty of States acting alone or through international cooperation to progressively realise the RtF.³⁰⁷ This study adopts the RBA because it provides a suitable framework for analysing widespread hunger, global food security and sustainable economic development.³⁰⁸ Further to the wellbeing theory, which regards the people as the end in themselves, RBA regards the people as rights-holders and the State as duty-bearers.³⁰⁹ The State, as duty-bearers, ought to respect, protect, and fulfil human rights while the rights holders may assert their rights and defend their freedoms by holding the State accountable.³¹⁰

The UN Sustainable Development Group provided six basic principles of the RBA under its “Common Understanding” of 2003.³¹¹ These principles are universality and inalienability, indivisibility, inter-dependence and inter-relatedness, equality and non-discrimination, participation and inclusion, accountability and the rule of law.³¹² These principles reinforce the inalienable obligations of the State as duty bearers and the need for a developmental system to support the State in carrying out these obligations.³¹³ The RBA also reinforces capacity building in States to facilitate the realisation of protected rights, sustainable development and poverty eradication.³¹⁴ Capacity building involves international cooperation

³⁰⁶ UN Sustainable Development Group, ‘The Human Rights-Based Approach to Development Cooperation Towards a Common Understanding Among UN Agencies’ <https://unsdg.un.org/sites/default/files/6959-The_Human_Rights_Based_Approach_to_Development_Cooperation_Towards_a_Common_Understanding_a_mong_UN.pdf> accessed 13 February 2022

³⁰⁷ ICESCR 1976, Article 11

³⁰⁸ FAO, ‘Voluntary Guidelines to Support the Progressive Realisation of the Right to Food in the Context of Food Security’ (n 100) Para 19

³⁰⁹ Paul Nelson and Ellen Dorsey, ‘At the Nexus of Human Rights and Development: New Methods and Strategies of Global NGOs’ (2003) 31(12) World Development 2013

³¹⁰ Amartya Sen, ‘Elements of a Theory of Human Rights’ (n 305); See also Martha Nussbaum, ‘Capabilities and Human Rights’ (1998) 66(2) Fordham Law Review 273

³¹¹ UN Sustainable Development Group, ‘The Human Rights-Based Approach to Development Cooperation - Towards a Common Understanding Among UN Agencies’ (n 300)

³¹² Ibid

³¹³ Thomas Pogge, ‘World Poverty and Human Rights’ (2005) 19(1) Ethics and International Affairs 1

³¹⁴ UN, ‘Human Rights-Based Approach to Development Programming’ (2012) <<https://unsdg.un.org/resources/human-rights-based-approach-development-programming-note-prepared-undgdoco>> accessed 29 September 2020

to contribute towards the development of the capacities of States as duty-bearers to meet their obligations.³¹⁵ It also involves inclusivity and adequate public awareness, which arms the rights-holders to participate in the political process and assert their rights.³¹⁶ These basic principles are adopted in this study with particular emphasis on public participation/inclusion and accountability, as previously discussed. The analysis in this study also relies on the universality, indivisibility, inter-dependence and inter-relatedness of all human rights, as will be discussed in the subsequent chapter.

Criticism of the Rights-Based Approach:

The rights-based approach to development has been criticised because it is ineffective and impracticable. Scholars like Nelson contend that the RBA only introduces a change in semantics by incorporating the language of human rights into economics and development without adding value to the possible implementation process.³¹⁷ Some economists like Tsikata contend that simply stating that the government should be responsible for developing and fulfilling human rights does not automatically secure the desired changes.³¹⁸ Implementing and monitoring development programs and practices are more effective if they are left purely in the field of economics without human rights interference.³¹⁹ They thus argue that incorporating socioeconomic rights into international trade inhibits the ability of States to implement public policy and achieve development.³²⁰

³¹⁵ FAO, 'Fifteen years implementing the Right to Food Guidelines; Reviewing Progress to Achieve the 2030 Agenda' (2019) <www.fao.org/3/ca6140en/ca6140en.pdf> accessed 22 March 2020

³¹⁶ Ibid

³¹⁷ Paul J. Nelson, 'Human Rights, the Millennium Development Goals, and the Future of Development Cooperation' (2007) 35(12) World Development 2041

³¹⁸ Dzodzi Tsikata, 'The Rights-Based Approach to Development: Potential for Change or More of the Same' (2009) 35(4) Institute of Development Studies Bulletin 130 - 133.

³¹⁹ Paul J Nelson, 'Human Rights, the Millennium Development Goals, and the Future of Development Cooperation' (n 317)

³²⁰ Jagdish Bhagwati 'Trade Liberalization and "Fair Trade" Demands: Addressing the Environmental and Labour Standards Issues' (1995) 18 World Economy (Blackwell Publishers 1995) 745

RBA is also criticised because it is too fluid and imprecise in its presentation and could easily be conscripted to justify human rights violations in world trade. Patel, for instance, researched the global food system and the political/economic structures which anchor this food system.³²¹ He found that the problem of global hunger is founded on a complex multi-level economic, political and cultural structure fuelled by widespread poverty and distributive inequalities.³²² He recommended alternative protectionist practices, contending that the fluid wording of the human rights-based approach (RBA)³²³ cannot effectively proffer remedies in complex cases of global economic inequalities and food injustice.³²⁴

However, some other scholars like Raponi endorse the RBA because of the successes it has had so far achieved.³²⁵ These achievements include the fact that the RBA encourages public awareness. RBA encourages public awareness, which equips the right-holder to demand change and accountability from the State. Raponi contends that the realisation of RtF begins with a rudimentary understanding of the very concept of human rights.³²⁶ International human rights and abstract legal principles must first gain traction within particular historical, social, cultural and political contexts.³²⁷

Furthermore, the deep-rooted and multifaceted nature of the global food crisis demands a dynamic, well-structured framework that addresses each offshoot and each rootlet of global hunger. An analysis of food systems ought to incorporate a wide range of research and debates about human rights and trade. Since the RBA is a universally recognised fundamental right system, it provides a suitable framework for analysing global hunger in this study. It sets a standard which may be achieved by applying the elements of the RBA and assessed in terms

³²¹ Raj Patel, *Stuffed and Starved: The Hidden Battle for the World Food System* (n 84)

³²² Ibid

³²³ FAO, 'Voluntary Guidelines to Support the Progressive Realisation of the Right to Food in the Context of Food Security' (n 100) Guidelines 2.5, 8.5 and 8.10

³²⁴ Raj Patel, *Stuffed and Starved: The Hidden Battle for the World Food System* (n 84)

³²⁵ Raponi (n 59)

³²⁶ Naomi Hossain and Dolf te Lintelo 'Common Sense Approach to the Right to Food' (2018) 10(2) *Journal of Human Rights Practice* (OUP 2018) 367

³²⁷ Ibid

of global food security. Thus the food security concept discussed below is adopted in this study to support the RBA.

3.3.3 The Concept of Food Security

Food security is an essential indicator that the RtF is effectively realised. According to FAO, food security exists ‘when all people, at all times, have physical, social and economic access to sufficient, safe and nutritious food that meets their dietary needs and food preferences for an active and healthy life.’³²⁸ While the RBA aims to achieve food security for all by establishing State obligations and demanding accountability of duty-bearers at the national and international levels, food security advocates for the realisation of the RtF through integrated national measures and international cooperation. Such international cooperation involves sustaining the current trade liberalisation regimes and incorporating RtF considerations into the trading system to ensure that agricultural trade liberalisation fosters food security through participatory and inclusive world trade measures.³²⁹

The food security concept was endorsed by the Food and Agriculture Organisation (FAO) in 2004 when it adopted the Voluntary Guidelines to support the progressive realisation of the Right to Adequate Food in the context of national food security, providing practical guidance to States to guide the implementation of the right to adequate food.³³⁰ The Voluntary Guidelines is not a legal instrument but a credible attempt by the States to reaffirm the fundamental right to be free from hunger and to draw attention to the progressive realisation of this right as a means of achieving food security for all. It does not impose legal obligations on

³²⁸ FAO, ‘The State of Food Insecurity in the World 2001’ <www.fao.org/3/y1500e/y1500e00.htm> accessed 18 June 2020

³²⁹ FAO, ‘Voluntary Guidelines to Support the Progressive Realisation of the Right to Food in the Context of Food Security’ (n 100) Guidelines 4.7

³³⁰ OHCHR, ‘The Right to Adequate Food’, Fact sheet no. 34 <www.ohchr.org/Documents/Publications/FactSheet34en.pdf> accessed 25 June 2020

duty-bearers. However, it has gained wide acceptance as an essential factor for the full enjoyment of the RtF.³³¹

The Voluntary Guidelines reinforce *inter alia* democracy, good governance, human rights and international cooperation as essential components for achieving food security.³³² This study demonstrates how these elements of food security may be incorporated into trade regimes to facilitate the realisation of RtF in trade. This concept is herein referred to as the human rights-based approach (RBA) to food security in trade. The RBA to food security encourages States to make policies which promote the progressive realisation of RtF and to engage in international relations, which empowers the State to progressively realise this right.³³³ The RBA may be achieved through greater State accountability, prioritising human rights obligations and wellbeing considerations in international trade negotiations.

Criticism of the Food Security Concept:

Food security has been widely criticised for its endorsement of international cooperation for the progressive realisation of the RtF. It is particularly opposed by proponents of the food sovereignty concept. Schanbacher, for instance, contends that food security indulges trade liberalisation, which tends to exacerbate widespread violation of the RtF; therefore, States should be allowed greater control over their food systems because self-reliance is necessary to stimulate local production, which in turn facilitates sustainable access to food.³³⁴ These critics believe that by encouraging international cooperation for the realisation of RtF, food security short-changes the centrality of the State and its sovereignty over domestic macroeconomic policies to choose policies that suit its peculiar dietary needs.³³⁵

³³¹ Ibid

³³² See FAO, 'Voluntary Guidelines to Support the Progressive Realisation of the Right to Food in the Context of Food Security' (n 100)

³³³ Morten Broberg and Hans-Otto Sano (n 210) 668

³³⁴ Schanbacher (n 5)

³³⁵ Mowbray (n 75)

Proponents of food sovereignty directly oppose the concept of food security. Food sovereignty emerged as a result of widespread disappointment in the global food system and the food security concept. It was made popular by the first SR on the RtF³³⁶ when he openly discredited the present economic regime, calling for alternative means to better achieve the RtF.³³⁷ Food sovereignty questions the objectivity of food security for encouraging international cooperation despite the hardships occasioned by trade liberalisation.³³⁸ It proposes increased national policy space to enable States to regulate their food systems to suit their nutritional, cultural and economic needs.³³⁹ Food sovereignty thus canvases an alternative model for agriculture that enables a State to dictate its food production, conservation, distribution and trade systems with minimal extra-territorial influence.

However, proponents of food security contend that dispelling the RBA to food security based on alleged technicality and impracticability does not establish the viability of the food sovereignty concept.³⁴⁰ The RtF is better secured, not by the boycott of international trade but with the joint effort of all, incorporating good practice from both human rights and trade at the national and international levels and prioritising the wellbeing of the people above economic and political concerns. The former Director General of the WTO rightly noted that:

‘For trade to act as a positive vector for the reinforcement of human rights, a coordinated international effort is needed. A coherent approach which integrates trade and human rights policy goals should be developed. Progress can no longer be achieved by acting in an isolated manner. Coherence should become our guiding principle in fostering development and human rights: coherence between the local and the global, between the world of trade and the world of human rights, between

³³⁶ OHCHR ‘Report of the Special Rapporteur on the Right to Food, Jean Ziegler’ (2004) para 33 UN Doc E/CN.4/2004/10

³³⁷ Ibid

³³⁸ Ferguson (n 19) 135-137

³³⁹ Raj Patel, ‘Food Sovereignty’ (2009) 36/3 Journal of Peasant Studies 663, 665

³⁴⁰ Mowbray (n 75) 561

the WTO as an institution and the various organisations active in the field of human rights...'³⁴¹

Food security is preferred for the analysis in this study because it supports a multidimensional and international approach to the problem of widespread hunger. The food sovereignty concept may not suit the analysis in this study because food sovereignty appears idealistic, suggesting systems which have not been practically proven. Food sovereignty findings tend to involve unfounded assumptions, and its proposed reforms involve too many unknowns.³⁴² Its findings appear to be based on a theoretical analysis, while the RBA is based on practical application, *albeit* imperfect. However, this study suggests that these identified lapses of the RBA are not because the RBA went too far but because it did not go far enough.³⁴³ At its zenith, the RBA to food security in trade will spark sustainable development, eliminate poverty and facilitate access to food among vulnerable populations of SSA.³⁴⁴ Therefore the RBA to food security in international trade is the most suitable approach to the analysis in this study of the ICESCR requirement for international cooperation to facilitate the progressive realisation of RtF in SSA.³⁴⁵

3.4 Conclusion

This chapter set out the theoretical framework which underpins the discussion and analysis in this study. Whilst recognising the various components of the RtF, this chapter introduces access to food as an aspect of the RtF and the fundamental focus of this study. It introduces the discourse on trade, poverty, and physical/economic access to food which shall be examined in greater detail in subsequent chapters. It also sets the background for examining

³⁴¹ Lamy (n 102)

³⁴² Gonzalez-Pelaez (77) xi

³⁴³ See Pierre-Richard Agénor, 'Does Globalization Hurt the Poor?' (2004) 1 *International Economics and Economic Policy* 21

³⁴⁴ *Ibid*

³⁴⁵ ICESCR 1976, Article 11

the obligations of duty-bearers in this study as the duty of accountability. At all levels of responsibilities, national and international, the obligation of the duty-bearer demands accountability, which would necessarily involve openness, transparency, enhanced public participation, periodic impact assessment of State policies on the people, and prioritisation of wellbeing and human rights concerns in trade. It further reviews the academic theories which form the basis of the analysis of the progressive realisation of RtF through international trade in subsequent chapters. These include the wellbeing theory and the rights-based approach to food security in trade. This chapter explains the wellbeing theory in light of the provisions of the UDHR, ICESCR, and Sen's theory of wellbeing as capability, opportunity and entitlement. It also sets out the tenets of the rights-based approach to food security as adopted in this study, setting out its connection with the wellbeing theory, economic access to food and the duty of accountability, and thus establishing why it is the most appropriate approach for the analysis in this study.³⁴⁶ It also lays the foundation for the analysis of the legal framework and requirements of the RtF in Chapter Four.

³⁴⁶ See FAO, 'Voluntary Guidelines to Support the Progressive Realisation of the Right to Food in the Context of Food Security' (n 100) Section III, para 7 and Guidelines 4.4 and 8.5

Chapter 4: Food as a Fundamental Human Right in Instruments Under International Law

4.1 Introduction

Having discussed the theoretical framework for the analysis of RtF in Chapter Three, this chapter critically examines the RtF as a socioeconomic right in international law, reinforcing its justiciability and enforceability as a legal right. It examines the legal framework of the RtF and its core contents which are the scope of the rights it creates, the obligations of the duty bearer and what constitutes an act of violation of the RtF. It also examines the legality and justiciability of this right as a fundamental human right. It establishes the nexus between the RtF, the right to development and the UN Sustainable Development Goals.

4.2 Legal Framework

The RtF, as a basic human right, accrues to every human being by virtue of being born human. Article 11 ICESCR describes it as the right of everyone to an adequate standard of living and the right of everyone to be free from hunger.³⁴⁷ Under the treaty establishing the United Nations, UN Charter of 1945, Member States commit to joint and separate action to create conditions of stability and wellbeing across the world, including the promotion of ‘universal respect for, and observance of human rights and fundamental freedoms for all without distinction’.³⁴⁸ Although the Charter did not define the concept of ‘human rights’, a compendium of human rights was recognised in 1948 by the UDHR of the UN. Given that the UDHR is soft law and it did not have the legal status of a treaty, these rights were re-enacted in 1966 to be implemented through two covenants that are legally binding on ratifying States- ICCPR 1976 and the ICESCR 1976.³⁴⁹ These two covenants, together with the UDHR,

³⁴⁷ ICESCR, Article 11(1) and (2) respectively

³⁴⁸ UN Charter 1945, Article 55 and 56

³⁴⁹ See Dominic McGoldrick, *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights* (2nd edn, OUP 1994). The ICCPR entered into force on 23 March 1976

constitute the International Bill of Rights.³⁵⁰ The body of international human rights has continued to grow over time. There are over 80 international human rights treaties and declarations³⁵¹, including the UDEHM 1974 and the DRD 1986 *inter alia*.

At the regional level, the African Charter on Human and Peoples' Rights (Banjul Charter) 1986 would apply to all SSA countries. In the EU, the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 and the Charter of Fundamental Rights of the European Union (CFR) 2009 would apply. These are discussed in greater details in Chapters 6 and 7 respectively.

In addition to the regional laws listed above, the key instrument for the purposes of this study is the ICESCR. The ICESCR is of particular relevance to this study because of its legality as a hard law instrument, as well as its broad scope and universal coverage. All EU countries and the EU itself have ratified the ICESCR. All SSA countries have also ratified it except Botswana, South Sudan and Mozambique.³⁵² It is thus binding on over 90% of the research population in this study. Reference is also made in this study to ICCPR 1976 and some soft law instruments, including the UDHR, the UDEHM and the DRD. These instruments are relevant to this study on the RtF due to the universality, indivisibility and interdependence of socioeconomic and civil rights.

Universality: implies that human rights apply to all people without limitations of race, colour, sex, language, religion, birth or any other social condition. This obligation not to discriminate is a fundamental element of socioeconomic and civil rights, including the RtF and is

by virtue of General Assembly Resolution A/RES/2200A(XXI) of 16 December 1966. The ICESCR entered into force on 3 January 1976 in accordance with ICESCR 1976, Article 27

³⁵⁰ Ibid

³⁵¹ UN, 'Human Rights Law' <www.un.org/en/sections/universal-declaration/human-rights-law/> accessed 07 December 2019

³⁵² See OHCHR 'Status of Ratification' (n 127)

‘immediately applicable’. Therefore, this aspect of the RtF obligation is not subject to progressive implementation.³⁵³

Indivisibility: implies that all human rights are unambiguously linked and cannot be separated into parts. The principle of indivisibility accords all human rights the same legal status. The preamble to the ICESCR 1976 and the ICCPR 1976 establish the indivisibility of socioeconomic, and civil and political rights. Hence, the RtF is accorded the same legal status as other human rights, including civil and political rights.³⁵⁴

Interdependence: implies that all human rights are inter-connected and rely on each other for completeness. The interdependence of all human rights are established in the preambles to the ICESCR and ICCPR and are reinforced in the preamble to the Vienna Declaration.³⁵⁵ The RtF is also linked to the right to life, health and an adequate standard of living,³⁵⁶ and is necessary for the fulfilment of other human rights enshrined in the International Bill of Rights.³⁵⁷ The primary instruments which form the legal framework of the RtF in this study are discussed below

4.2.1 Article 55 - 57 of UN Charter 1945

The UN Charter is the foundational treaty of the United Nations.³⁵⁸ It was the first international instrument to encourage the protection and respect of human rights.³⁵⁹ It is the source of obligation for international cooperation towards the realisation of human rights.³⁶⁰ Articles 55 and 56 of the Charter set the tone for international cooperation to realise human

³⁵³ See ICCPR 1976, Article 27 and ICESCR 1976, Article 15.

³⁵⁴ See Preamble to ICESCR 1976 and the Preamble to ICCPR 1976

³⁵⁵ Preamble to the Vienna Declaration 1993

³⁵⁶ *G v An Bord Uchtala and Others* [1980] IR 32; See also ICESCR 1976, Article 11

³⁵⁷ CESCR, General Comment No 12 (n 6) para 4

³⁵⁸ Charter of the United Nations was signed on 26 June 1945, entered into force 24 October 1945

³⁵⁹ See UN Charter 1945, Article 1(3). See also Articles 55 and 56 of the UN Charter which commits Member States to ‘joint and separate action’ *inter alia* for ‘universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion’.

³⁶⁰ CESCR General Comment No 12 (n 6)

rights.³⁶¹ Members States commit to taking joint and separate actions to create conditions of stability and wellbeing, promote higher standards of living and solutions to socioeconomic and related problems, and promote universal respect for and observance of all human rights and fundamental freedoms without discrimination.³⁶² These articles of the Charter are universally accepted as the source of obligation for human rights, and other Conventions reinforce the obligations established in the Charter.

Article 57 of the Charter lays the foundation for the relationship between the UN and the WTO:

(1) “The various specialised agencies, established by intergovernmental agreement and having wide international responsibilities, as defined in their basic instruments, in economic, social, cultural, educational, health, and related fields, shall be brought into relationship with the United Nations in accordance with the provisions of Article 63.

(2) Such agencies thus brought into relationship with the United Nations are hereinafter referred to as specialised agencies.³⁶³

The Charter does not specifically provide a list of specialised agencies.³⁶⁴ However, it has been suggested that the WTO, as an intergovernmental organisation with vast international responsibilities in economic fields, could be brought into relationship with the UN pursuant to this provision.³⁶⁵

Furthermore, there is an established legal relationship between the UN and the WTO, which is not necessarily one of hierarchy but of cohesion and interdependency. This

³⁶¹ Ben Saul, David Kinley and Jaqueline Mowbray, *The International Covenant on Economic, Social and Cultural Rights Commentary, Cases, and Materials* (OUP 2014) 139

³⁶² UN Charter 1945, Article 55 and 56

³⁶³ Ibid Article 57

³⁶⁴ It is noteworthy that most specialised agencies, including the WTO, had not been established at the relevant time.

³⁶⁵ Joseph (n 91)

relationship is governed by the *Arrangements for Effective Cooperation with other Intergovernmental Organizations- Relations Between the WTO and the United Nations*³⁶⁶ (hereinafter The Arrangement). The Arrangement came into effect in 1995.³⁶⁷ It provides for inter-correspondence and inter-representation at the governing meetings of the WTO and the UN, as well as their respective agencies. The Arrangement provides for collaboration between the WTO and the UN (working through the ECOSOC) to regulate the UN Conference on Trade and Development (UNCTAD).³⁶⁸ Although the WTO is not an agency of the UN, it allows the WTO to participate in the policymaking process of the UN. Consequently, the Director General of the WTO is recognised as a member of the Chief Executive Board of the UN and of the ECOSOC, where the sustainable development goals of poverty, hunger, and child mortality, inter alia are reviewed.³⁶⁹

The WTO may, within the limits of its framework, create an enabling environment to facilitate the realisation of international human rights through international trade cooperation to improve methods of production, conservation and distribution of food, taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need.³⁷⁰ By doing so, it incorporates respect for socioeconomic rights into international trade liberalisation systems. It may be inferred,

³⁶⁶ WTO, *Arrangements for Effective Cooperation with Other Intergovernmental Organizations – Relations Between the WTO and the United Nations* <https://docs.wto.org/dol2fe/Pages/FE_Search/DDFDDocuments/24645/Q/WT/GC/W10.pdf> accessed 27 July 2019

³⁶⁷ Ibid

³⁶⁸ The UNCTAD is primarily aimed at supporting developing countries to access the benefits of a globalised economy. See UNCTAD, 'About UNCTAD' <<https://unctad.org/en/Pages/aboutus.aspx>> accessed 29 July 2019. The WTO relationship with the UNCTAD is regulated by a Memorandum of Understanding. See WTO, *Memorandum of Understanding Between the WTO and UNCTAD* (2002) <https://www.wto.org/english/news_e/pres03_e/mou_16apr03_e.doc> accessed 16 October 2022

³⁶⁹ Ibid. The UNCTAD is primarily aimed at supporting developing countries to access the benefits of a globalised economy. The WTO relationship with the UNCTAD is regulated by a Memorandum of Understanding

³⁷⁰ ICESCR 1976, Article 11(2)

therefore, that the WTO is conversant with the UN human rights and economic development provisions.

4.2.2 Articles 25 and 28 of the Universal Declaration on Human Rights 1948

The UDHR was adopted in 1948 by the UN General Assembly Resolution 217A (III) by a popular vote of 48-0-8. It is universally recognised as the fundamental convention on global human rights values.³⁷¹ It was originally formulated as soft law and had no legally binding effect on Member States. However, no State has been recorded as having denounced membership thereto. The UDHR is regarded as the key expression of global human rights values, and its norms have now crystallised into customary international law.³⁷² The UDHR has inspired over 80 international human rights treaties and declarations in addition to domestic human rights bills and constitutional provisions, which together constitute a comprehensive, legally binding system for promoting and protecting human rights.³⁷³

Article 25(1) UDHR provides that 'Everyone has the right to a standard of living adequate for the health and wellbeing of himself and his family, including food, clothing, housing and medical care and necessary social services...' The RtF as a basic human right was first recognised under this article as part of the right to an adequate standard of living for health and wellbeing, including food.³⁷⁴ It establishes the duty of the State to realise food security through the promotion of an adequate standard of living and the general wellbeing of the people. Article 28 of UDHR further establishes the right of everyone to a social and international order which promotes the realisation of protected rights.³⁷⁵ By implication, Article

³⁷¹ See Joseph (n 91); See also Louis B Sohn, 'The New International Law: Protection of the Rights of Individuals Rather Than States' (1982) 32(1) American University Law Review 15

³⁷² Ibid. Customary international law is that core of international law that binds all States regardless of the treaties they have ratified. States generate customary international law through State practice and *opinio juris*. See also Joseph (n 91) 29-30

³⁷³ UN, 'Human Rights Law' (n 351)

³⁷⁴ UDHR 1948, Article 25

³⁷⁵ Ibid Article 28

28 of UDHR places on the international society of sovereign States the duty to cooperate to create an international order that ensures that no one suffers from hunger.³⁷⁶ Likewise, international trade liberalisation systems ought to create an international economic environment which enables Member States to fulfil their human rights obligations while promoting improved production and equitable distribution of world food supplies in relation to need.

4.2.3 Articles 2 and 11 of the International Covenant on Economic, Social and Cultural Rights 1976

The ICESCR came into force in 1976 as a binding international instrument, imposing legal obligations on ratifying states.³⁷⁷ 171 countries have ratified the ICESCR, including all SSA countries save Botswana, South Sudan and Mozambique.³⁷⁸ The ICESCR is, therefore, binding on almost all SSA countries.

Article 2 ICESCR establishes the extraterritoriality, progressivity and non-discriminatory nature of socioeconomic rights. Article 2.1 provides that:

‘Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, to achieve progressively the full realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures’.³⁷⁹

³⁷⁶ John R Vincent (ed), *Foreign Policy and Human Rights: Issues and Responses* (CUP 1986)

³⁷⁷ The ICESCR 1976 was adopted by the UN General Assembly on 16 December 1966 by virtue of Resolution 2200A (XXI)

³⁷⁸ See OHCHR ‘Status of Ratification’ (n 127)

³⁷⁹ ICESCR 1976, Article 2.1

Article 2 ICESCR thus requires State Parties to adopt deliberate and concrete measures, subject to their maximum available resources, to progressively realise the protected rights. It also imposes an obligation on States to act through international cooperation and assistance, thus widening the scope of the ‘available resources’ and providing direction for international assistance. Pursuant to Article 2.2 ICESCR, State Parties undertake to guarantee that the protected rights ‘will be exercised without discrimination of any kind’. The principle of non-discrimination has acquired the nature of *jus cogens*, thus imposing obligations on States not to violate this principle of non-discrimination, ‘States are obliged ... to eliminate regulations of a discriminatory nature, to combat practices of this nature, and to establish norms and other measures that recognise and ensure the effective equality before the law of each individual’.³⁸⁰ Scholars have suggested that both the obligation to take steps progressively and the obligation to realise human rights without discrimination are absolute and immediately binding on States Parties.³⁸¹

Article 11 ICESCR expressly establishes the right to adequate food, which forms the central focus of this study. It provides that:

1. The States Parties to the present Covenant recognise the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realisation of this right, recognising to this effect the essential importance of international cooperation based on free consent.
2. The States Parties to the present Covenant, recognising the fundamental right of everyone to be free from hunger, shall take, individually and through

³⁸⁰ *YATAMA v Nicaragua* (2005) Inter-American Court of Human Rights (Preliminary objections, Merits, Reparations and costs) Ser C No 127, para. 185

³⁸¹ See Joseph (n 91)

international cooperation, the measures, including specific programmes, which are needed:

- (a) To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilisation of natural resources;
- (b) Taking into account the problems of both food-importing and food-exporting countries to ensure an equitable distribution of world food supplies in relation to need.

Art 11 ICESCR sets out two essential parts to the RtF: the right to an adequate standard of living, including adequate food and the fundamental right to be free from hunger. The first part- the right to an adequate standard of living, including adequate food- has been identified as part of the broader right of everyone to a standard of living adequate for the health and wellbeing of himself and his family, including food.³⁸² The second part- the fundamental right to be free from hunger- sets the minimum standard for the realisation of RtF. This minimum standard proscribes undernourishment in all its forms, and it applies to every human irrespective of the level of development of the State. It imposes an obligation on States to ensure that everyone in its jurisdiction has access to the minimum essential food which is adequate and sufficient to stay free from hunger.³⁸³ It requires the State to provide access to food for those who are unable to secure such access by themselves.³⁸⁴ This right is said to be violated where there are significant levels of widespread hunger and food insecurity.³⁸⁵ Article 11 ICESCR sets out the components and fundamental elements of the RtF, and informs the analysis of the realisation

³⁸² UDHR 1948, Article 25

³⁸³ CESCR, General Comment No 12 (n 6) para 14

³⁸⁴ *Ibid* para 17

³⁸⁵ *Ibid*

of RtF in the latter chapters of this study based on the prevalence of undernourishment in SSA and EU. These elements are discussed in greater detail in section 4.3 below.

In 1985 the Committee on Economic Social and Cultural Rights (CESCR) was established to administer the ICESCR.³⁸⁶ The Committee issues General Comments which interpret and give life to the ICESCR rights. It has issued 21 General Comments, including General Comment No 12 on the right to adequate food.³⁸⁷ General Comment No 12 interprets the RtF under Article 11 ICESCR, setting out the scope, the basic elements and the requirements for fulfilling the right. It broadens the scope of this right to include the right to access the resources necessary to produce or purchase adequate food for the health and wellbeing of each individual.³⁸⁸ The General Comments of the CESCR are not binding instruments; however, they are utilised in this study as a persuasive interpretation of the RtF.

4.2.4 The Universal Declaration on the Eradication of Hunger and Malnutrition 1974

Unlike the ICESCR, the UDEHM was originally formulated as soft law and has no legally binding effect on State Parties.³⁸⁹ It was adopted at the World Food Conference in 1974 and endorsed by General Assembly Resolution 3348 (XXIX) of 1974, with 30 out of the 49 SSA countries voting in support of its adoption.³⁹⁰ It is thus persuasive in over 60 percent of SSA countries. The primary objective is to increase food production and equal distribution to combat hunger as a common responsibility of the international community.³⁹¹

³⁸⁶ The Committee was established by virtue of ICESCR 1976, Part IV which requires Member States to submit reports to the Committee on the measures adopted and progress made in achieving the observance of the ICESCR

³⁸⁷ CESCR, General Comment No 12 (n 6)

³⁸⁸ Rhonda Fergusson (n 18)

³⁸⁹ Alan Boyle, 'Soft Law in International Law-Making' in Malcolm Evans (ed) *International Law* (5th Edn, OUP 2018); See also FAO, 'The Right to Food Within the International Framework of Human Rights and Country Constitutions' <www.fao.org/3/a-i3448e.pdf> accessed 22 September 2020

³⁹⁰ The Universal declaration on the eradication of hunger and malnutrition (UDEHM) 1974 was adopted on 16 November 1974 by the World Food Conference convened under General Assembly resolution A/RES/3180 (XXVIII) of 17 December 1973; endorsed by General Assembly resolution A/RES/3348 (XXIX) of 17 December 1974

³⁹¹ UDEHM 1974

Article 1 of the Declaration reinforces the inalienable right of everyone to be free from hunger and malnutrition.³⁹² It recognises that inequalities in world food supplies and the chronic food crisis in developing countries are fuelled in recent times by discrimination and global economic politics.³⁹³ It acknowledges the various economic and political issues that can affect food production and distribution, highlighting that the common objective of international society should be to work together towards eradicating hunger and malnutrition.³⁹⁴

The UDEHM also reinforces the inalienable obligation of each State to realise the RtF within its jurisdiction. It recognises that the primary duty to ensure an adequate standard of living lies with each State; developing countries are primarily responsible for their own development.³⁹⁵ According to its sovereign judgement and internal legislation, it requires each State to remove the obstacles to food production and adopt measures that incentivise local producers.³⁹⁶ It encourages appropriate food and economic policies to enhance overall socioeconomic and agricultural development. Food problems must be tackled through effective national plans and economic and social development programmes, focusing on improving general wellbeing.³⁹⁷ Thus, it reiterates the elements of the RtF as the entitlement of the individual, the duty of States and progressive measures for the realisation of RtF.

Furthermore, the UDEHM reinforces the extra-territorial obligation of States to realise the RtF through cooperation and assistance, including ‘the fundamental duty of States to work together for higher food production and equitable distribution of food among countries.’³⁹⁸ It recognises that all countries share a common objective of eradicating hunger in all its forms.³⁹⁹ It thus reinforces the need for ‘urgent and effective international action’, including effective

³⁹² Ibid Article 1

³⁹³ Preamble to the UDEHM 1974, Para (c) and (d)

³⁹⁴ UDEHM 1974 Article 1

³⁹⁵ Para (j) preamble to the UDEHM 1974

³⁹⁶ UDEHM 1974, Article 4

³⁹⁷ Ibid Article 3

³⁹⁸ Ibid Article 2

³⁹⁹ Ibid Article 1

technical and financial assistance by developed countries to improve agricultural production and to ensure equitable access to food.⁴⁰⁰ Although the primary duty to realise food security lies with each state, increased international cooperation is essential to eradicate chronic hunger and mortality among vulnerable populations.⁴⁰¹ States are thus required to cooperate to ensure sustainable access to food and establish an effective system of world food security.⁴⁰²

4.3 Core Contents of the Right to Food

The core contents of the RtF refer to the scope of the prerogative, which the RtF accords to the right-holders. It includes the various components of the RtF as established in the ICESCR and interpreted by the CESCR. Pursuant to the provisions of Article 11 ICESCR,⁴⁰³ the Committee determined that the core content of the RtF includes adequacy, availability, sustainability, acceptability and accessibility:

Adequacy implies that food must be available in sufficient quantity to meet the nutritional needs of individuals.⁴⁰⁴ It must be free from adverse substances, and acceptable to the individual.⁴⁰⁵

Availability: refers to the ability to feed oneself directly from productive land, other natural resources, or well-functioning distribution and market systems.⁴⁰⁶

Sustainability: implies that food supply, sufficiency, availability and accessibility should be stable over long periods and in all places for both present and future generations.⁴⁰⁷

Acceptability: involves consideration of non-nutrient food values, including cultural, personal and religious approval.⁴⁰⁸ Food must be culturally and socially acceptable to the people.

⁴⁰⁰ Ibid Article 7 and 10

⁴⁰¹ Preamble to the UDEHM 1974, Para (j)

⁴⁰² UDEHM 1974, Article 12

⁴⁰³ ICESCR 1976, Article 11

⁴⁰⁴ Ibid Article 11(1); See also CESCR, General Comment No 12 (n 6) paras 8

⁴⁰⁵ Ibid; See also CESCR Ibid paras 8-10

⁴⁰⁶ Ibid; See also CESCR Ibid paras 8 and 12

⁴⁰⁷ Ibid; See also CESCR Ibid para 7

⁴⁰⁸ Ibid; See also CESCR Ibid para 11

Measures relating to food ought to go beyond considerations of economic and nutritional values to prioritise the choices of the people.⁴⁰⁹

Accessibility: refers to food that is both economically and physically reachable. It implies that the cost of acquiring sufficient food for an adequate diet should be affordable and sustainable. It must not compromise the attainment and satisfaction of other basic needs.⁴¹⁰

In addition to the core contents which establish the scope of the right-holder's rights, the RtF also establishes the obligations of the duty-bearer. These obligations are discussed in 4.4 below.

4.4 Fundamental Obligations Pertaining to the Right to Food

Further to the core contents of the RtF, this section examines the obligations of the State as the duty-bearer under the RtF. These obligations may be classed as the normative obligations of the state- duties to respect, protect and fulfil the RtF. They may be classed as duties that are absolute/immediate realisation and duties that are of progressive realisation. This section also examines the minimum core/fundamental obligations of the RtF and the extraterritorial nature of these obligations.

4.4.1 Normative Obligations

Like every other human right, the RtF under the ICESCR imposes three levels of obligations on State Parties- the duty to respect, protect and fulfil the rights.⁴¹¹

Duty to respect: This implies an obligation not to interfere with existing rights.⁴¹² It is a negative duty and of immediate realisation. It requires the State to refrain from activities that

⁴⁰⁹ Schanbacher (n 5)

⁴¹⁰ ICESCR 1976, Article 11; See also CESCR, General Comment No 12 (n 6) para 13

⁴¹¹ Ibid para 15

⁴¹² CESCR 'An Evaluation of the Obligation to Take Steps to the "Maximum of Available Resources" Under an Optional Protocol to the Covenant' (2007) [UNDoc./E/C.12/2007/1](#) Para 7

could prevent, restrict or violate RtF.⁴¹³ In *R. v Cote*,⁴¹⁴ the Supreme Court of Canada held that a policy which charged an individual for fishing without a requisite license in a natural reserve infringes the aboriginal right to fish and, invariably, the RtF. The duty to respect thus requires the State to avoid making policies or laws which undermine the enjoyment of the RtF.

Duty to protect: This is a negative duty to safeguard people from harm to their human rights caused by other persons or legal personalities.⁴¹⁵ As a negative duty, it is also of immediate realisation. It is the duty of the State to make laws and policies to safeguard the RtF. In *Amrita Thapa Magar and Others v Office of the Prime Minister and Council of Ministers and Others*,⁴¹⁶ the Supreme Court of Nepal ordered the Government to enact necessary laws to effect the realisation of constitutional guarantees related to the RtF amongst other socioeconomic rights.⁴¹⁷ Such laws may involve adopting specific regulatory measures to control the activities of third parties in order to ensure that they do not interfere with the exercise of the rights of another. In *SERAC and Another v Nigeria*,⁴¹⁸ the African Court of Human and Peoples' Rights found that in pursuance of the RtF, the State has an obligation to deter oil exploration companies from contaminating water resources and destroying food sources through their mining activities.⁴¹⁹ Therefore, the court held the respondent liable under the Banjul Charter 1986 and international law to protect and improve existing food sources and ensure access to adequate food for all citizens. The duty to protect thus requires the State to take all necessary measures to prevent any interference with the enjoyment of RtF within its jurisdiction.

⁴¹³ Joseph (n 91) 22

⁴¹⁴ *R v Cote* (1996) Supreme Court of Canada, 138 DLR (4) 385 of 03 October 1996

⁴¹⁵ CESCR 'An Evaluation of the Obligation to Take Steps to the "Maximum of Available Resources" Under an Optional Protocol to the Covenant' (n 412) para 7

⁴¹⁶ *Amrita Thapa Magar and Others v Office of the Prime Minister and Council of Ministers and Others* Writ no. 0139 [2008] 2065/1/4. Note that this order is yet to be implemented.

⁴¹⁷ Ibid

⁴¹⁸ *SERAC* (n 34)

⁴¹⁹ Ibid

Duty to fulfil: this is a positive obligation to provide an enabling environment to facilitate the realisation of RtF. It often requires the performance of a direct act by the State or the strengthening of the private sector through direct/indirect funding and programmes which improve the ability of people to feed themselves. For instance, in *Prakashmani Sharma and Others v GON, Prime Minister and Council of Ministers and Others*,⁴²⁰ the Supreme Court ordered the government to immediately supply food to communities where mass starvation was reported. The Government went further to increase the budget of the State food corporation to supply food to vulnerable communities. The duty to fulfil the RtF thus involves an obligation to facilitate the establishment of necessary structures that support access to food and utilisation of food security resources, promote public awareness and involvement, and provide material supplies to the vulnerable.⁴²¹ This latter duty to provide material resources only arises when the duties to respect and protect have failed.⁴²² The normative obligation to respect, protect and fulfil minimum essential levels of the RtF is non-derogable, absolute and subject to no exceptions.⁴²³ The section below examines the absoluteness of these obligations.

4.4.2 Absolute Obligations

In addition to the normative duties to respect, protect and fulfil the RtF, the obligations created under the ICESCR may be of progressive realisation or immediate effect. Firstly, the ICESCR places on the State the duty to take steps, and this duty is of immediate effect.⁴²⁴ It involves the fundamental obligation of States to take steps to achieve ‘progressively’ towards the full realisation of the RtF. This obligation forbids a State from taking regressive steps, taking no steps at all or failing to take adequate steps to satisfy the minimum essential levels

⁴²⁰ *Prakashmani Sharma* (n 196)

⁴²¹ CESCR General Comment No 12 (n 6) para 15; See also Joseph (n 91) 22

⁴²² Henry Shue, *Basic Rights* (Princeton University Press 1980) 35

⁴²³ CESCR General Comment No 15 (n 34) para 40

⁴²⁴ ICESCR 1976, Article 2 and 11

for the realisation of RtF.⁴²⁵ It thus requires a State to take ‘deliberate, concrete and targeted measures’ to achieve the progressive realisation of RtF.⁴²⁶ This duty to take steps progressively is of immediate realisation,⁴²⁷ and cannot be alienated by the State.⁴²⁸ Although this obligation is subject to the resources available to a state, there is a presumption that the State has the necessary resources and must take steps to utilise these resources to achieve the RtF.⁴²⁹ The onus lies on the State to demonstrate a lack of resources which genuinely constrains it from taking progressive steps.

Secondly, Article 11 ICESCR imposes an obligation on States to ensure that the RtF is realised without discrimination of any kind as to race, colour, sex, language, religion, political opinion, national or social origin, property, birth or other status.⁴³⁰ As earlier discussed, the duty to not discriminate has acquired the status of *jus cogens*; States are therefore required to avoid discriminatory regulations and to establish laws and other measures that recognise the equality of everyone before the law.⁴³¹ The CESCR interpreted the State obligations under the ICESCR and set out the minimum core obligations that States must observe. This minimum core is discussed below.

4.4.3 Minimum Core Obligation

States are obligated, regardless of their level of economic status, to guarantee the minimum threshold of socioeconomic rights.⁴³² The CESCR introduced the concept of minimum core in

⁴²⁵ See also CESCR, General Comment No 12 (n 6) para 17

⁴²⁶ UN Economic and Social Council (n 48) para 54

⁴²⁷ Ibid para 46

⁴²⁸ Joseph (n 91) 24-25

⁴²⁹ ICESCR Article 2(1); See also CESCR, General Comment No 12 (n 6) para 17 and CESCR General Comment No 3 (n 48) para 10

⁴³⁰ ICESCR Article 2(2)

⁴³¹ YATAMA (n 380)

⁴³² International Commission of Jurists, ‘Maastricht Guidelines on Violations of Economic, Social and Cultural Rights’ (Maastricht Guidelines 1997) Adopted by a group of more than thirty experts at the invitation of the International Commission of Jurists on the occasion of the 10th anniversary of the Limburg Principles on the Implementation of the ICESCR (Limburg Principles) on 22-26 January 1997 to elaborate on the Limburg Principles as regards the nature and scope of violations of economic, social and cultural rights and appropriate

General Comment 3.⁴³³ It sets out the minimum legal content for claims of all socioeconomic rights. It establishes the duty of States at the national and international levels to ensure the satisfaction of, at the very least, minimum essential levels of the RtF.⁴³⁴ It establishes an international minimum threshold requiring State policies to satisfy, at the very least, minimum essential levels of the protected rights.⁴³⁵ The core obligation to respect, protect and fulfil the minimum essential levels of the RtF is non-derogable, absolute and subject to no exceptions.⁴³⁶

Soft law tends to establish broad principles on which multinational agreements are founded, although some countries disagree. As the CESCR established the minimum core concept, it is not legally binding on State Parties. However, the fact that it was founded on the provisions of the ICESCR lends greater validity to the concept.⁴³⁷ The minimum core concept has gained traction in various jurisdictions, and the CESCR uses the "minimum core" to give substance to various Covenant rights, including the RtF. The wide acceptance of this concept illustrates the importance of soft law and voluntary agreements towards the full realisation of RtF. These minimum core are absolute, and a derogation therefrom is indicative of violation of the RtF.⁴³⁸ Some minimum core thresholds for the realisation of RtF include the following:

Prevention of hunger: States have a core obligation to take necessary action to prevent hunger, even in times of natural or other disasters.⁴³⁹ Widespread hunger in any State is *prima facie* proof of violation of the RtF, and it creates a rebuttable presumption of the failure of the State to discharge its obligations under the Covenant.⁴⁴⁰

responses and remedies (reissued in 2000 by the CESCR as UN Doc E/C.12/2000/13) Para 9; See also Manisuli Ssenyonjo, *Economic, Social and Cultural Rights in International Law* (Hart Publishing; 2009) 66; See also Ferguson (n 19)111

⁴³³ CESCR General Comment No 3 (n 48)

⁴³⁴ Ibid para 10

⁴³⁵ CESCR General Comment No 14 (n 34) para 15

⁴³⁶ CESCR General Comment No 15 (n 34) para 40

⁴³⁷ For instance the UDHR as soft law has served as the basis for a number of hard law and agreements including the ICESCR

⁴³⁸ Katharine G Young (n 38)

⁴³⁹ ICESCR Article 11.2; See also CESCR, General Comment No 12 (n 6) para 6

⁴⁴⁰ CESCR General Comment No 3 (n 48) para10

Access to food: The State has an obligation to ensure improved food production and effective distribution of food, especially to the most vulnerable and physically impaired population in times of scarcity.⁴⁴¹ Widespread starvation while the State maintained food stockpiles that could not be accessed by the masses has been construed by the Courts as a violation of the RtF.⁴⁴²

Well-maintained food sources: In addition to the duty to improve food production and to guarantee access, the minimum core of the RtF requires that a State should not destroy or contaminate food sources”.⁴⁴³ A situation where mining activities of petroleum companies resulted in wide pollution of agricultural reserves was construed by the court as a violation of the RtF.⁴⁴⁴

Progressivity: The minimum core of socioeconomic rights requires the duty bearer to progressively achieve the minimum thresholds of the RtF.⁴⁴⁵ Thus it places a continuing responsibility on States to continue to advance expeditiously and effectively towards eradicating poverty and hunger in the State.⁴⁴⁶ Subject to this requirement, any domestic or international measure which tends to impose regressive measures may be construed as a violation of the RtF.

Duties to respect, protect and fulfil: the Committee designated the duties to respect, protect and fulfil the RtF as "core", provided they impact the substantive content of the right. On this basis, the duty to fulfil the RtF, for instance, becomes more precise and may be enforceable where the core contents of the RtF are affected.⁴⁴⁷ As the thresholds for the minimum core of

⁴⁴¹ *PUCL* (n 173)

⁴⁴² *Ibid*

⁴⁴³ *SERAC* (n 34)

⁴⁴⁴ *Ibid*

⁴⁴⁵ CESCR General Comment No 14 (n 34), para 16-18

⁴⁴⁶ CESCR, ‘Substantive Issues Arising in the Implementation of the ICESCR: Poverty and the International Covenant on Economic Social and Cultural Rights’, Statement Adopted at the Twenty-fifth session of the CESCR on 04 May 2001 (Contained in Document E/C.12/2001/10)

⁴⁴⁷ See Craig Scott and Patrick Macklem, ‘Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution’, (1992) 141 U PL Rev. 1, 77-97; See also Matthew Craven, *The*

socioeconomic rights were set by a consensus vote of the CESC, this unanimity tends to affirm the legitimacy of the duty of States to respect, protect and fulfil the RtF.⁴⁴⁸

Justiciability: The minimum core concept reinforces the legitimacy of the normative obligation of the State by tracing the cause and effect of an act where there is a claim of violation of the RtF. It has been contended that where the justiciability of socioeconomic rights is not reinforced, the concept of rights is rendered void.⁴⁴⁹ Thus the minimum core concept reinforces the justiciability of socioeconomic rights by reinforcing the obligations of the State as duty-bearer, tracing the cause and effect of the affected State policies, and reversing the burden of proof so that the burden lies on the State to show that it did not have adequate resources to fulfil the relevant obligation.⁴⁵⁰ This principle has been utilised in several cases involving the violation of socioeconomic rights. For instance, in *South Africa v Grootboom*,⁴⁵¹ the Amicus Curiae relied on the minimum core to argue its case on the right to access housing.⁴⁵² Some domestic laws have also re-enacted the minimum core concept such that petitioners only have to show that their minimum core has been violated, and the onus then passes to the State to prove that it has taken reasonable steps within its available resources to achieve the progressive realisation of the right, or that any limitation is reasonable and justifiable.⁴⁵³ Given the ambiguities around the construction of the ICESCR, the domestication of this reversal concept has been useful for the justiciability of socioeconomic rights and the RtF in these jurisdictions.

International Covenant On Economic, Social, And Cultural Rights: A Perspective On Its Development (Clarendon Press 1995) 143-44, 152

⁴⁴⁸ As the Committee is not a judicial body, its pronouncements derive legitimacy from the consensus approach which the Committee adopts in determining what constitutes the minimum core of socioeconomic rights. It relies openly on the reports of State Parties to clarify the developing contents of the minimum core. See Katharine G Young (n 38) 140-145; See also Philip Alston and Frédéric Mégret (eds), 'The Committee on Economic, Social and Cultural Rights' in *The United Nations And Human Rights: A Critical Appraisal* 2nd edn (OUP 1992) 473, 491

⁴⁴⁹ Katharine G Young Ibid 158

⁴⁵⁰ Sandra Liebenberg, *The Value of Human Dignity in Interpreting Socio-Economic Rights*, (2005) 21 (1, 18) S. Afr. J. Hum. RTS 22-26

⁴⁵¹ See *South Africa v Grootboom and others* [2000] (CCT11/00) ZACC 192001; (1) SA 46 (CC) 66 (S. Afr.) (CCT 11/00) South African Constitutional Court, where the Amicus Curiae relied on the minimum core to substantiate the right of access to housing

⁴⁵² Ibid

⁴⁵³ Constitution of the Republic of South Africa 1996, S 36

4.4.4 Extraterritorial Obligations of the Right to Food

Having examined the obligations of the State in the preceding subsection, this section examines the extraterritoriality of these obligations, the role of non-State Parties, and the need for international cooperation for the progressive realisation of RtF. The current global food crisis is particularly indicative of a failure by non-State Parties to achieve equitable distribution of world food supplies in relation to need.⁴⁵⁴ For instance, international trade liberalisation systems tend to give minimal attention to the impact of global agricultural trade rules on the right to adequate food.⁴⁵⁵ The extraterritorial obligations of the RtF require States to abstain from local and international measures that could interfere with the rights of individuals in other states. It implies that States cannot do abroad what they are prohibited from doing at home, including interfering with an individual's access to food. States Parties should refrain from measures which endanger production, distribution and access to food in other countries⁴⁵⁶ Food should never be used as an instrument of political or economic pressure.⁴⁵⁷

The legal basis for the extraterritorial obligation of socioeconomic rights stems from the provisions of Articles 55 and 56 of the UN Charter and Articles 2.1, 11 and 23 of the ICESCR.⁴⁵⁸ Pursuant to Articles 55 and 56 of the UN Charter, Member States commit to joint and separate action to promote higher standards of living and international economic cooperation for the universal respect and observance of human rights. Article 2(1) ICESCR requires State Parties to take steps, individually and through international assistance and cooperation, especially economic and technical, to progressively achieve the full realisation of

⁴⁵⁴ OHCHR, 'Statement on the World Food Crisis' Adopted at the Fortieth Session of the CESCR on 19 May 2008 (Contained in document E/C.12/2008/1)

⁴⁵⁵ Ibid para 13

⁴⁵⁶ CESCR, General Comment No 12 (n 6) Paras 36 and 37

⁴⁵⁷ Ibid

⁴⁵⁸ See also FAO, Rome Declaration of the World Food Summit 1966

the recognised rights.⁴⁵⁹ Article 11 ICESCR further reinforces the importance of international assistance and cooperation to progressively realise the RtF. It provides that ‘State Parties agree to take appropriate steps to ensure the realisation of the RtF, recognising to this effect the essential importance of international cooperation based on free consent’.⁴⁶⁰ The UDEHM also establishes the fundamental duty of States to work together for higher food production and a more equitable and efficient distribution of food between countries and within countries.⁴⁶¹ Likewise, the DRD requires international cooperation in eliminating obstacles to development and for the realisation of human rights.⁴⁶² International cooperation for the achievement of the RtF might involve the exchange of farming technologies, access to seeds, climate change know-how, financial investments, international trade and amicable dispute settlement.⁴⁶³

The essential role of international cooperation is such that it expands the opportunities and responsibilities to realise the protected rights where States undertake “to take steps, individually and through international assistance and cooperation, especially economic and technical ...”⁴⁶⁴ It expands the scope of the ‘maximum available resources’ of a State to include resources existing within a State as well as resources available from the international community which is made available through international cooperation and assistance.⁴⁶⁵ Richer economies undertake to furnish economic and technical assistance to developing countries, and the latter undertakes to cooperate with the former to establish strategies, including programs ‘to improve methods of production, conservation and distribution of food... to ensure an equitable distribution of world food supplies in relation to need’.⁴⁶⁶ Thus the duty of

⁴⁵⁹ ICESCR 1976, Article 2(1)

⁴⁶⁰ Ibid Article 11.1; See also CESCR, General Comment No 12 (n 6) para 36 and CESCR General Comment No 3 (n 48) para 14

⁴⁶¹ UDEHM 1974, Article 2

⁴⁶² DRD 1986, Article 3(3)

⁴⁶³ Ferguson (n 19) 119

⁴⁶⁴ ICESCR Article 2 (1)

⁴⁶⁵ CESCR General Comment No 3 (n 48) para 13

⁴⁶⁶ ICESCR Article 11; See also Article 2(1)

international cooperation is incumbent on food-exporting and food-importing countries alike.⁴⁶⁷

Although the ICESCR provides that the essential importance of international cooperation shall be ‘based on free consent’, it does not imply that international cooperation is optional.⁴⁶⁸ On the part of the benefactors, it is suggested that whereas there is no explicit legal duty to assist, any unjustified regression in the level of Overseas Development Assistance (ODA) should be treated as a violation of the State's obligations under international law.⁴⁶⁹ The CESCR directly addressed this extraterritorial obligation when it called upon States to allocate 0.7% of their Gross National Product (GNP) to development cooperation to alleviate human suffering and eliminate worldwide poverty.⁴⁷⁰ And in 2002, it urged Japan, Germany and France to ensure that the amount it spends on annual international development cooperation increases “as quickly as possible” to the recommended target of 0.7%.⁴⁷¹ Furthermore, observing the impact of the EU Economic Partnership Agreement on Kenya, particularly on the livelihood of small-scale farmers and on the RtF, the CESCR recommended that international investors ought to undertake periodic assessment of the impact of their investment measures in SSA to ensure that socioeconomic rights are not adversely affected.⁴⁷² Thus reinforcing the duty of States to take measures to respect the enjoyment of the RtF in other countries and to facilitate international access to food by providing aid when required. Alston contests that the concept of ‘free consent’ is not intended to create a leeway for States to neglect

⁴⁶⁷ CESCR General Comment No 3 (n 48) para 13

⁴⁶⁸ Philip Alston, ‘Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann’ (2002) 13 *European Journal of International Law* 815

⁴⁶⁹ OHCHR, ‘Report of the Special Rapporteur on the Right to Food Olivier De Schutter - Addendum - Mission to the World Trade Organisation’ (2009) (n 88) para 9

⁴⁷⁰ Thomas Pogge, ‘Severe Poverty as a Human Rights Violation’, in Pogge (ed), *Freedom from Poverty as a Human Right* (OUP and UNESCO 2007) 11.

⁴⁷¹ CESCR, ‘Consideration of Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant, Concluding observations of the Committee on Economic, Social and Cultural Rights’ (2002) Report of the 25th, 26 and 27 Sessions of the CESCR (Contained in document E/2002/22 E/C.12/2001/17) Paras 616, 657, 873

⁴⁷² CESCR, ‘Consideration of reports submitted by States parties under articles 16 and 17 of the ICESCR regarding Kenya (Concluding Observations adopted on 19 November 2008 after consideration of the Initial Report of Kenya E/C.12/KEN/1 (Contained in document E/C.12/KEN/CO/1) Para 11

their obligations; rather, it helps vulnerable countries avoid adverse international relations such as dumping, which may come under the guise of international assistance.⁴⁷³ The ‘free consent’ element allows beneficiary States to respect and protect the livelihoods of local food producers by mitigating the effects of excessive aid on local production. Thus international cooperation and assistance should facilitate the realisation of RtF in the medium and long term.⁴⁷⁴

Another aspect of the extraterritorial obligation of States relates to the role of States when acting as members of international organisations. States Parties should recognise the essential role of international cooperation through organised international bodies in achieving the full realisation of the RtF. They have an implied obligation to ensure that their actions as members of international organisations promote the progressive realisation of socioeconomic rights.⁴⁷⁵ The CESCR encourages States to prioritise their ICESCR obligations when engaging in international trade negotiations: States Parties should ‘take steps to respect the enjoyment of the right to food in other countries, to protect that right, to facilitate access to food and to provide the necessary aid when required. States Parties should, in international agreements whenever relevant, ensure that the right to adequate food is given due attention’.⁴⁷⁶ They should also consider the development of further international legal instruments to facilitate the realisation of RtF through trade.⁴⁷⁷ The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights further encourages contracting members of specialised international organisations (such as the WTO) to prioritise socioeconomic rights in policymaking, especially where its policies and programmes are implemented in countries with inadequate safety nets to withstand the volatilities of international trade and its impact on their domestic markets.⁴⁷⁸

⁴⁷³ Philip Alston, ‘Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann’ (n 468) 815

⁴⁷⁴ CESCR, General Comment No 12 (n 6) para 36

⁴⁷⁵ CESCR General Comment No 14 (n 34) para 39

⁴⁷⁶ CESCR General Comment No 12 (n 6) par 36

⁴⁷⁷ Ibid

⁴⁷⁸ International Commission of Jurists (n 432) Para 9

States are to ensure that human rights violations do not result from the agreements and policies of the organisations to which they belong.⁴⁷⁹ This duty requires States Parties to refrain at all times from tariff and non-tariff measures ‘which endanger conditions for food production and access to food in other countries.’⁴⁸⁰ Food should never be used as an instrument of political and economic pressure’.⁴⁸¹

The extraterritorial obligation of RtF requires UN Member States to respect socioeconomic rights and the RtF through their activities as members of other international organisations.⁴⁸² The SR on RtF encouraged international organisations such as the WTO to promote policies and projects that have a positive impact on the RtF, to ensure that Members respect this right in the implementation of joint projects, to support strategies which support the fulfilment of this right, and to avoid actions that could have a negative impact on the realisation of the RtF.⁴⁸³ The CESCR also encourages coordinated efforts among non-State actors, encouraging them to pay greater attention to protecting the RtF in their policies and agreements.⁴⁸⁴ The extraterritorial obligation of socioeconomic rights requires that trade liberalisation agreements should not inhibit the capacity of any State to fulfil its socioeconomic rights obligations.⁴⁸⁵ Therefore trade liberalisation organisations are encouraged to set up appropriate measures for periodic assessment of the impact of trade policies on human rights.⁴⁸⁶ Trade liberalisation laws and agreements ought to facilitate the equitable distribution of world food supplies having regard to non-trade concerns, including food security and S&D treatment

⁴⁷⁹ Ibid

⁴⁸⁰ CESCR, General Comment No 12 (n 6) para 37

⁴⁸¹ Ibid

⁴⁸² UNGA, ‘The Right to Food’ Resolution adopted by the General Assembly at the Sixtieth Session 02 March 2006 (Contained in document A/RES/60/165)

⁴⁸³ Ibid Para 16

⁴⁸⁴ See CESCR General Comment No 12 (n 6) para 41

⁴⁸⁵ CESCR General Comment No 15 (n 34) para 35

⁴⁸⁶ CESCR, Statement Adopted at the Eighteenth Session of the CESCR on Globalisation and its Impact on the Enjoyment of Economic, Social and Cultural Rights on 15 May 1998 (Contained in document E/C.12/1998/26) Para 515(7)

of developing countries, taking into account the possible adverse effects of trade on net food-importing developing countries.⁴⁸⁷

4.5 Right to Food as a Principle to Achieve

Having established the legality of the RtF and its ensuing obligations, this section reviews the impact of the positive and progressive nature of the RtF obligations on its legality. It reinforces the legality of the RtF by addressing the following contentious queries on the legality of socioeconomic rights and the RtF:

a) Does the progressive realisation of the right to food reduce it to a mere aspiration?

The ICESCR has been criticised for its seemingly weak wording.⁴⁸⁸ Unlike the ICCPR, it does not impose direct obligations on States Parties. Rather it tends to express the aspirations of the parties to ‘progressively achieve’ the RtF within the undefined limits of their available resources: ‘State Parties to the ICESCR agree to take steps to the maximum of their available resources, with a view to achieving progressively the full realisation of the protected rights’.⁴⁸⁹ Furthermore, ‘State Parties agree to take appropriate steps to ensure the realisation of the RtF, recognising the essential importance of international cooperation based on free consent’.⁴⁹⁰ In addition to the non-immediate nature of the obligations, it may be difficult to determine a breach of an obligation because obligations are conditional upon the ‘maximum available resources’ of the State.⁴⁹¹ A State may fail to meet the objectives but may provide remedies *a posteriori*, which may enable it to avoid responsibility.⁴⁹² Thus the concept of progressive realisation tends to create a leeway whereby States may avoid or delay the full realisation of

⁴⁸⁷ See ICECSR Article 11 and Preamble to the Agreement on Agriculture

⁴⁸⁸ Manisuli Ssenyonho (n 427) 51

⁴⁸⁹ ICESCR 1976, Article 2(1)

⁴⁹⁰ Ibid Article 11.1

⁴⁹¹ ICESCR 1976, Article 2

⁴⁹² Ferguson (n 19) 115

socioeconomic rights. This tends to further defeat the claims on the enforceability of the RtF, making the obligations appear muddy and merely aspirational.⁴⁹³

Furthermore, the ICESCR appears to produce obligations of result in that it requires State Parties to meet the objectives of the Covenant, but the means by which they accomplish these objectives are left to the individual States to determine.⁴⁹⁴ It requires States to take appropriate steps but provides no clear guide as to what steps may be appropriate. Thus the measure of the appropriateness and what steps may be taken is left to the discretion of the States. Based on this requirement on States to take steps, socioeconomic rights have been categorised as positive rights, which require States to take actions for the fulfilment of the rights, while civil and political rights as negative rights, which are absolute and only require States to refrain from taking actions that may infringe the rights.⁴⁹⁵ Thus socioeconomic rights, including the RtF, are often perceived as aspirational and inferior to the negative right.⁴⁹⁶

However, progressiveness in the ICESCR is not synonymous with inactivity; rather, it connotes adequacy and reasonableness.⁴⁹⁷ The Limburg Principles advise that ‘progressive realisation’ should not be interpreted to imply that States could ‘indefinitely deter efforts to ensure full realisation’.⁴⁹⁸ Similarly, the International Commission of Jurists articulated through the Maastricht Guidelines that State Parties cannot use the progressive realisation provisions as a pretext for non-compliance.⁴⁹⁹ The seemingly open-ended requirement to take steps does not connote weakness. Rather it offers a realistic approach for States to implement

⁴⁹³ Joseph (n 91) 21

⁴⁹⁴ See UN, ‘Yearbook of the International Law Commission’ (Part 2/1; 1977) UNDoc. A/CN.4/SER.A/1977/Add.1 Para 2

⁴⁹⁵ Joseph (n 91)

⁴⁹⁶ Raponi (n 59)

⁴⁹⁷ CESCR, An Evaluation of the Obligation to Take Steps to the “Maximum of Available Resources” Under an Optional Protocol to the Covenant (n 412) Para 8

⁴⁹⁸ OHCHR, ‘Note verbale’ dated 06 December 2005 from the Permanent Mission of the Netherlands to the United Nations Office at Geneva addressed to the Centre for Human Rights (Limburg Principles) 1987 (Contained in document E/CN.4/1987/17) Para 19

⁴⁹⁹ International Commission of Jurists (n 432) Para 8

the RtF according to their different levels of development.⁵⁰⁰ In *Acevedo Buendía et al. (Discharged and Retired Employees of the Comptroller) v Peru*,⁵⁰¹ the Court held that progressive realisation ‘is a necessary flexibility device, reflecting the realities of the real world... and the difficulties involved for any country in ensuring full realisation of economic, social and cultural rights’.⁵⁰² This approach is particularly helpful in realising the RtF, provided it is implemented without discrimination. Thus the requirement to take steps does not abdicate the obligation of States to realise the RtF; rather, it creates an obligation for States to realise the RtF through every possible means.

Additionally, the ICESCR requires States not only to take steps but to take ‘appropriate steps’ for the progressive realisation of RtF.⁵⁰³ The obligation to take appropriate steps is a progressive obligation that sets the minimum standard as ‘appropriate’ and further confers on States the obligation of progressivity. The obligation to take appropriate progressive measures implies an obligation of non-regressivity, meaning that regression is prohibited. Regressive measures demonstrate a failure to achieve progressive realisation and perhaps a violation of the RtF. Thus a failure by the State to take appropriate measures and where the measures taken by State are not progressive, it may result in a violation of the RtF. In General Comment 14,⁵⁰⁴ the CESCR highlighted the obligation not to take ‘deliberately retrogressive’ action in relation to the right to health as well as all other socioeconomic rights. Progressive measures must be deliberate, concrete and targeted towards fulfilling the protected rights; they must be exercised in a non-discriminatory manner. States are required to prioritise the vulnerable while implementing these measures.⁵⁰⁵ Any measures which fall short of the standard of

⁵⁰⁰ CESCR General Comment No 3 (n 48) Para 9

⁵⁰¹ *Acevedo Buendía et al. (“Discharged and Retired Employees of the Comptroller”) v Peru*, Judgment, Inter-American Court of Human Rights Series C No. 198 (1 July 2009) [102]

⁵⁰² ICESCR 1976, Article 2.2, and CESCR General Comment No 3 (n 48) para 9

⁵⁰³ *Ibid* Article 2

⁵⁰⁴ CESCR General Comment No 14 (n 34)

⁵⁰⁵ *Ibid*

‘appropriateness’, having regard to the available resources, are deemed as retrogressive and may constitute a violation of RtF if it is not justifiable. Thus the progressive realisation of the RtF does not reduce it to a mere aspiration; rather, it sets clear goals for States to take adequate-planned and effective- measures towards the progressive realisation of RtF.⁵⁰⁶

Progressive/regressive measures are weighed against the maximum available resources vis-à-vis the totality of the rights enjoyable in the State.⁵⁰⁷ Thus in determining progressivity/regressivity, it may be necessary to consider the totality of available resources and the manner of allocation of State resources in light of international human rights standards.⁵⁰⁸ It may be necessary to consider the percentage of the State budget allocated to the RtF and how the budget is implemented vis-à-vis other policies and programmes.⁵⁰⁹ It may also be necessary to consider whether the State adopts the option that least restricts the RtF, the time frame in which the steps were taken, and whether the State considered the possible impact of its measures on vulnerable groups before taking the steps.⁵¹⁰ Where deliberate regressive measures are taken, the burden lies on the State to show that these measures were introduced after careful consideration of all alternatives and that they are justifiable in light of the totality of the resources available to the State.⁵¹¹ Thus the progressive nature of the RtF does not wither the legal status of the RtF as a socioeconomic right. Rather it serves to qualify the standard of appropriateness and preclude regression. Progress/regression is monitored using a wide range of qualitative and quantitative benchmarks, which help ensure States accountability.⁵¹² The RtF

⁵⁰⁶ Manisuli Ssenyonjo (n 427) 337–8

⁵⁰⁷ CESCR General Comment No 12 (n 6); CESCR General Comment No 3 (n 48) para 3; See also CESCR ‘An Evaluation of the Obligation to Take Steps to the “Maximum of Available Resources” Under an Optional Protocol to the Covenant’ (n 412)

⁵⁰⁸ Ibid Para 8

⁵⁰⁹ Ibid; See also Philip Alston and Gerard Quinn, ‘The Nature and Scope of States Parties’ Obligations under the International Covenant on Economic, Social and Cultural Rights’ (1987) 9 Human Rights Quarterly 156, 180

⁵¹⁰ Ibid

⁵¹¹ CESCR General Comment No 14 (n 34) para 32

⁵¹² OHCHR ‘Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest Attainable standard of physical and mental health (2006) para 35 UN Doc. E/CN4/2006/48; See also OHCHR,

is, therefore, more than a mere expression of aspirations. It creates legal obligations to be reasonably and increasingly observed in the light of the capabilities of the State Parties.

b) Do the positive obligations and the cost of enforcement vitiate the Right to Food?

Prima facie, the positive nature of the RtF obligations and the cost of fulfilling them tend to reduce socioeconomic rights and the RtF from the realm of legality to a desirable objective. The obligations that the RtF imposes, including adequate production, storage and distribution of foods, are often expensive and may require some financial and technological input which some developing countries may not afford.⁵¹³ A major deterrent in developing economies is the level of poverty, poor infrastructural development and lack of education prevalent in the area. Under these circumstances, some developing States find it difficult to effectively fulfil their RtF obligations irrespective of the legality of the obligation.⁵¹⁴ For instance, claims on the RtF appear elusive, where large percentages of post-harvest crops are lost in developing States due to lack of storage facilities and poor means of transportation.⁵¹⁵ In *People's Union for Civil Liberties v Union of India*,⁵¹⁶ innumerable starvation deaths were recorded while nearly 50 million tonnes of grain were piled up in public storehouses. The Supreme Court of India identified poverty and inadequate distributive systems as the underlying causes of hunger, holding that any effective food policy/measure must guarantee access to food.⁵¹⁷ Thus where a State is unable to afford advanced technological measures for the preservation and distribution of food, its RtF obligations appear illusory.

'Report on Indicators for Monitoring Compliance with International Human Rights Instruments' (n11); and Limburg Principles (n 492) para 19

⁵¹³ Marc Agi, *René Cassin: Father of the Universal Declaration of Human Rights* (Fenixx digital re-edition, 1997) 255–62, 358–65

⁵¹⁴ Kirkpatrick (n 14)

⁵¹⁵ See Peggy Oti-Boateng, *Losses and Wastes in the Food Chain* (FAO, Rome, 2001). See also Carin Smaller and Sophia Murphy (n 259) 5.

⁵¹⁶ *PUCL* (n 173)

⁵¹⁷ *Ibid*

However, relegating the RtF because of the positive obligations and cost of enforcement of socioeconomic rights may be unwarranted as all human rights seem to entail a form of positive as well as negative characteristics. Certain aspects of some civil and political rights are positive and require a level of financial involvement for their fulfilment.⁵¹⁸ For instance, the right to a fair trial requires establishing adequate judicial infrastructure, which is often capital-intensive.⁵¹⁹ The right to vote also entails establishing the necessary outfits, technology and workforce to run fair elections.⁵²⁰ Even the right to life requires the State to establish adequate security systems to secure lives in situations of insecurity.⁵²¹ The right to life has also been linked to the need for States to ‘take all possible measures to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics’.⁵²²

On the contrary, certain aspects of the RtF entail negative obligations that are immediately realisable. For instance, the negative obligation to respect the RtF requires States to refrain from measures and policies that may impair access to food.⁵²³ The obligation to ‘take steps’ toward the full realisation of socioeconomic rights is a negative obligation to be exercised without discrimination and is of immediate effect. It is, therefore, erroneous to conflate the RtF with positive duties to provide goods and services because the RtF is not solely about providing food or money for food.⁵²⁴ To this extent, the positive nature of the obligations and the cost of implementation do not vitiate the legality of the RtF.

⁵¹⁸ HRC, General Comment No 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant (2004) (contained in document CCPR/C/21/Rev.1/Add.1326) Para 6

⁵¹⁹ ICCPR 1976, Article 14

⁵²⁰ Ibid Article 25

⁵²¹ Ibid Article 6

⁵²² UN Human Rights Committee (HRC), ‘General Comment No 36: Article 6 ICCPR (Right to Life)’ Replaces General Comments No. 6 (16th session) and 14 (23rd session) adopted by the Committee in 1982 and 1984, respectively at the Sixteenth Session of the HRC on 30 April 1982 and 1984, respectively (Contained in document CCPR/C/CG/36) Para 26

⁵²³ CESCR ‘An Evaluation of the Obligation to Take Steps to the “Maximum of Available Resources” Under an Optional Protocol to the Covenant’ Covenant’ (n 412) Para 7

⁵²⁴ Schanbacher (n 5) 101

Additionally, given that all human rights are universal, indivisible and interdependent,⁵²⁵ the traditional distinction of civil and political rights as negative and socioeconomic rights as positive appears misguided.⁵²⁶ Indivisibility means that all human rights are interlinked and should not be separated into parts. The principle of indivisibility accords all human rights, socioeconomic or civil and political alike, the same legal status. The preamble to both the ICESCR and the ICCPR establish the indivisibility of human rights, thus giving socioeconomic rights legal status just like civil and political rights.⁵²⁷ Both Conventions emphasise that human rights ‘can only be achieved if conditions are created (by the State) whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights’.⁵²⁸ All human rights thus require a level of positive obligations and the intervention of States to provide the fundamental public structure for their fulfilment.⁵²⁹ Thus the positive obligations associated with socioeconomic rights do not vitiate its legality.

4.6 Enforceability of The Right to Food

Unlike civil and political rights, which are traditionally regarded as enforceable negative rights, socioeconomic rights are often associated with political commitments and developmental ideas rather than norms which impose determinate obligations on States. However, the traditional tendency to approach socioeconomic rights and the RtF, in particular from a public policy perspective, does not necessarily vitiate its legality because its legality is founded on hard law such as the ICESCR and its domestication in the local laws of the Member States.⁵³⁰ The circumstances where the RtF may be justiciable are discussed below.

⁵²⁵ Vienna Declaration 1993, Article 5; Preamble to ICESCR and the Preamble to ICCPR 1976

⁵²⁶ Raponi (n 59)

⁵²⁷ See Preamble to ICESCR 1976 and the Preamble to ICCPR 1976. See also *SERAC* (n 34)

⁵²⁸ *Ibid*

⁵²⁹ Schanbacher (n 5)

⁵³⁰ See Berger Jonathan, ‘Litigating for Social Justice in Post-Apartheid South Africa: A Focus on Health and Education’ in Varun Gauri and Daniel Brinks (eds), *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World* (CUP 2008) 38-99

a) Domestication of the Right to Food

An explicit recognition or incorporation of the RtF in the substantive laws of a country guarantees that the RtF may be enforceable in that State.⁵³¹ It may, *albeit*, require a proper understanding of the rudiments and requirements of the relevant law and its enforceability by the right-holders.⁵³² Some States have recognised the RtF as an individual human right. For instance, the Constitution of Kenya 2010 explicitly provides for the right ‘to be free from hunger, and to have adequate food of acceptable quality’.⁵³³ The Constitution of South Africa provides that ‘everyone has the right to have access to sufficient food and water’⁵³⁴. It further provides that ‘the State must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights’.⁵³⁵ Some other States have included the RtF as a part of other basic rights. For instance, the Democratic Republic of Congo guarantees the right to health and a secure food supply.⁵³⁶ Malawi recognises it as the right to development, including access to food.⁵³⁷ In such jurisdictions, the enforceability of the RtF depends on its general understanding, the country’s judicial system and the citizens’ knowledge and ability to seek legal redress. In such circumstances, the duty to take appropriate steps under Article 11 ICESCR requires the State to raise public awareness of the right and its enforceability. The remedies and penalties may also depend on the willingness of courts to enforce the RtF as a legal right. However, some countries like the Federal Republic of Nigeria include the RtF in their guiding principles, which are declarations of principles that define the goals or main aims of State policy.⁵³⁸ The effect is that its legal force pales in comparison with

⁵³¹ International Commission of Jurists (n 432) Para 26

⁵³² Bart Wenaart, ‘Enforceability of the Human Right to Adequate Food; a Comparative Study’ (2013) 8 European Institute for Food Law Series

⁵³³ Constitution of Kenya 2010, S 43.1(c); See also Article 24 of the Constitution of Kenya which provides that ‘a right of fundamental freedom in the Bill of Rights shall not be limited except by law’

⁵³⁴ Constitution of the Federal Republic of South Africa 1996, S 27.1(b)

⁵³⁵ *Ibid* S 27.2

⁵³⁶ Democratic Republic of the Congo Constitution of 2005 with Amendments through 2011, Article 47

⁵³⁷ Malawi’s Constitution of 1994 with Amendments through 2017, Article 30.2

⁵³⁸ Constitution of the Federal Republic of Nigeria 1999, S 16.2(d)

other jurisdictions where it is considered an individual right that must be respected and where the courts are empowered to take a more active role in its defence. However, despite the explicit inclusion of the RtF in these domestic laws, there is rarely any case law on the RtF in these SSA countries.

Nevertheless, some jurisdictions do not expressly protect the RtF in the substantive part of their constitution or the guiding principles, but it is implicitly recognised by the courts through a wide interpretation of other recognised human rights, such as the right to life and the right to an adequate standard of living *inter alia*. Enforceability in these jurisdictions is dependent on the judicial interpretation of the constitution and the human rights set out therein. For Instance, in Ireland, where there is no explicit domestic provision for the RtF, the Irish Supreme Court held in *G v An Bord Uchtala and Others*⁵³⁹ that the right to life⁵⁴⁰ necessarily implies ‘the right to preserve and defend that life and the right to maintain that life at a proper human standard in matters of food, clothing and habitation’.⁵⁴¹ A similar decision was made in *SERAC and Another v Nigeria*⁵⁴² where the RtF is not expressly protected in the Banjul Charter, the ACHPR held that the RtF is implicit in the Charter, in such provisions as the right to life,⁵⁴³ the right to health⁵⁴⁴ and the right to economic, social and cultural development.⁵⁴⁵ The RtF is inseparably linked to the dignity of human beings and is therefore essential for the enjoyment and fulfilment of such other rights as health, education, work and political participation.⁵⁴⁶ In every jurisdiction, the legislative protection of the RtF is fundamental to its enforceability as a legal right.

⁵³⁹ *G v An Bord Uchtala* (n 356)

⁵⁴⁰ Article 40 of the Constitution of Ireland 1937

⁵⁴¹ *G v An Bord Uchtala* (n 356) at 16

⁵⁴² *SERAC* (n 34) para 64

⁵⁴³ The African Charter on Human and Peoples’ Rights (Banjul Charter) 1986, Article 4

⁵⁴⁴ *Ibid* Article 16

⁵⁴⁵ *Ibid* Article 22

⁵⁴⁶ *SERAC* (n 34) para 65; See also CESCR General Comment No 12 (n 6) para 4

b) Standard of Reasonableness

In May 2013, the UN Optional Protocol to ICESCR came into force.⁵⁴⁷ It currently has 46 signatories, thirteen of which are SSA countries and 24 State Parties, three of which are SSA countries.⁵⁴⁸ The Optional Protocol sets the standard of reasonableness as the touchstone for assessing whether a State has taken sufficient steps in implementing a particular right. It provides that when examining a complaint for violation of socioeconomic rights, the adjudicating body shall ‘consider the reasonableness of the steps taken by the State... bearing in mind that the State Party may adopt a range of possible policy measures for the implementation of the rights set forth in the Covenant.’⁵⁴⁹ Regressivity is then weighed against the maximum available resources vis-à-vis the totality of the rights enjoyable in the State.⁵⁵⁰ Available resources may include financial, information, technological, human, and natural resources *inter alia*.⁵⁵¹ It may also include resources offered by the international community.⁵⁵² Whereas it has been argued that the courts lack the institutional capacity and democratic legitimacy to probe into budgetary issues to ascertain the resources available to a State.⁵⁵³ States might be required under the Optional Protocols to show how the totality of its available resources was allocated to achieve the Covenant rights. Thus, the Optional Protocols assess the progressive realisation of the RtF based on the efficient use of the available resources regardless of the success or failure of any scheme employed by the State to realise the protected right.⁵⁵⁴

⁵⁴⁷ UN, Optional Protocol to the ICESCR, adopted at the Sixty-Third Session of the UN General Assembly on 10 December 2008 (Contained in Document A/RES/63/117)

⁵⁴⁸ These records are correct to date- January 2023. See OHCHR, ‘Status of Ratification: Optional Protocol to the ICESCR’ <<https://indicators.ohchr.org/>> accessed 17 October 2022

⁵⁴⁹ UN, Optional Protocol to the ICESCR (n 547), Article 8(4)

⁵⁵⁰ CESCR General Comment No 3 (n 48) para 10

⁵⁵¹ Robert E Robertson, ‘Measuring State Compliance with the Obligation to Devote the “Maximum Available Resources” to Realizing Economic, Social, and Cultural Rights’ (1994) 16 Human Rights Quarterly 693, 694.

⁵⁵² CESCR General Comment No 3 (n 48) Para 10

⁵⁵³ Aryeh Neier, ‘Social and Economic Rights: A Critique’ (2006) 13/2 Human Rights Brief 1–3.

⁵⁵⁴ Philip Alston and Gerard Quinn, ‘The Nature and Scope of States Parties’ Obligations under the International Covenant on Economic, Social and Cultural Rights’ (n 509) 180

The Optional Protocol further requires States to provide judicial remedies for socioeconomic rights violations where it is reasonable to do so.⁵⁵⁵ Where all available domestic remedies have been exhausted, a victim of RtF violation may petition the CESCR for violations of the rights. The courts adopted the standard of reasonableness to assume jurisdiction over RtF claims. Applying the standard of reasonableness, the courts may hear claims of violation of RtF and determine when the government is not doing enough to secure this right, given its available resources.⁵⁵⁶ The courts can also set the minimum standards, giving specific guidelines for the realisation of the RtF.⁵⁵⁷ For example, in India, the Supreme Court appointed commissioners to monitor the implementation of its interim orders leading to improved State programs for mid-day meals for school children, food entitlements in childcare centres and subsidised food for specific vulnerable groups.⁵⁵⁸ Furthermore, the court may order the State to directly provide food to the starving population in twelve local districts.⁵⁵⁹ Thus the standard of reasonableness empowers the Court to assess the rationality of administrative measures and identify possible interference with the RtF.⁵⁶⁰

c) Indivisibility of Human Rights

The principle of the indivisibility of human rights supports the justiciability of socioeconomic rights and the RtF. This principle states that all international human rights are universal, indivisible and interdependent.⁵⁶¹ The principle of indivisibility has been applied in some cases where the courts have assumed jurisdiction over the implementation of the RtF.⁵⁶²

⁵⁵⁵ UN, Optional Protocol to the ICESCR (n 547) Article 3(1)

⁵⁵⁶ See *Government of the Republic of South Africa v Grootboom* (n 451) Para 23

⁵⁵⁷ Raponi (n 59) 110

⁵⁵⁸ *PUCL* (n 173)

⁵⁵⁹ *Prakashmani Sharma* (n 196)

⁵⁶⁰ Raponi (n 59)

⁵⁶¹ Vienna Declaration 1993, Article 5; Preamble to ICESCR 1976 and the Preamble to ICCPR 1976

⁵⁶² See for example *Minister for Health v Treatment Action Campaign* (2002) 10 BCLR 1033 (South Africa Constitutional Court) where the court ordered the State to expedite the availability of nevirapine for the treatment of HIV/AIDS in securing the right to Health as a component of the right to life. See also *Osman v UK*,

The ACHPR held in *SERAC & Anor v Nigeria*⁵⁶³ that ‘the RtF is implicit in such provisions as the right to life,⁵⁶⁴ the right to health⁵⁶⁵ and the right to economic, social and cultural development⁵⁶⁶ ... the right to food is inseparably linked to the dignity of human beings and is therefore essential for the enjoyment and fulfilment of such other rights as health, education, work and political participation’.⁵⁶⁷ In some EU States, the ‘integrity of a person’ being a socioeconomic right is protected as a component of the right to life which is a civil right. For instance, the Basic Law of the Federal Republic of Germany provides that ‘everyone has the right to life and physical integrity’.⁵⁶⁸ Article 15, Constitution of the Kingdom of Spain, provides that ‘everyone has a right to life and physical and moral integrity’.⁵⁶⁹ Thus signifying that socioeconomic rights are not completely separated from civil and political rights.

Nevertheless, although judicial remedies may enhance the value of a right to a right-holder, it does not exhaust the essential functions of rights because justiciable rights are not the only kind of rights, and the enforceability or otherwise of socioeconomic rights does not negate its legality.⁵⁷⁰ Civil rights and, indeed, constitutional rights have been found in some cases to be non-justiciable yet fundamental. National defence, for instance, is a supreme duty of the State, but no country permits individuals to sue the State where it fails to meet these obligations.⁵⁷¹ On the contrary, some socioeconomic rights are immediately enforceable and are regarded as fundamental rights in some jurisdictions.⁵⁷² For instance, freedom from discrimination⁵⁷³ is

no. 23452/94, ECHR 1998-VIII; *Scialacqua v Italy* [1998] ECHR App no. 34151/96 where the right to life (Article 2 ECHR 1950) was applied in a case of resource allocation in healthcare systems

⁵⁶³ *SERAC* (n 34) para 96

⁵⁶⁴ Banjul Charter 1986, Article 4

⁵⁶⁵ *Ibid* Article 16

⁵⁶⁶ *Ibid* Article 22

⁵⁶⁷ *SERAC* (n 34) para 64-66

⁵⁶⁸ Basic Law of the Federal Republic of Germany 1949, Article 2

⁵⁶⁹ Constitution of the Kingdom of Spain 1978 (with amendments through 2011) Article 15

⁵⁷⁰ Alistair Macleod, ‘Rights and Recognition: The case of human rights’ (2013) 44/1 *Journal of Social Philosophy* 51

⁵⁷¹ Daniel J. Whelan and Jack Donnelly (n 43)

⁵⁷² ICESCR 1976, Article 10.3

⁵⁷³ *Ibid* Article 3

enforceable and has gained ascendancy as a fundamental right protected under various domestic laws⁵⁷⁴ and regional conventions.⁵⁷⁵ Protecting children from forced labour and exploitation is also immediately enforceable and punishable by law.⁵⁷⁶ And labour rights, which include freedom from discrimination, the right to wages and the right to participate in trade unions *inter alia*, are equally enforceable and have been domesticated in several jurisdictions.⁵⁷⁷ Irrespective of its socioeconomic rights status, some jurisdictions have established specialised courts to enforce labour rights and provide adequate remedies to aggrieved employees.⁵⁷⁸ Thus, justiciability is not associated with civil and political rights alone. Socioeconomic rights may, in appropriate cases, be justiciable and immediately enforceable, while some civil rights are not justiciable. Thus the non-justiciability of a right does not erode the legality of the said right.

On the converse side, despite the differences in domestic legislations and systems, all ICESCR rights may be considered to possess at least some elements of justiciability.⁵⁷⁹ For instance, the obligation to take steps to achieve *progressively* the full realisation of the RtF also creates an obligation to move as expeditiously as possible towards that goal.⁵⁸⁰ In *Prakashmani Sharma and Others v GON, Prime Minister and Council of Ministers and Others*,⁵⁸¹ the Court ordered an urgent intervention of the State in a case of mass starvation. The court found immediate action necessary because about three million people were suffering from food

⁵⁷⁴ See for instance Constitution of the Federal Republic of Nigeria, S 42; see also Equality Act of the United Kingdom 2010

⁵⁷⁵ See for example European Convention for the Protection of Human Rights and Fundamental (ECHR) 1950, Article 14

⁵⁷⁶ ICESCR 1976, Article 10.3

⁵⁷⁷ See for instance Labour Act, Cap L1, Laws of the Federation of Nigeria 2004 and Employment Rights Act of the United Kingdom 1996

⁵⁷⁸ See for instance the Employment Tribunal established under the Employment Tribunal Act of the United Kingdom 1996; See also the National Industrial Court established under the National Industrial Court Act of Nigeria, 2006

⁵⁷⁹ CESCR, General Comment No 9 (n 201) para 10

⁵⁸⁰ CESCR, General Comment No 12 (n 6) para 14

⁵⁸¹ *Prakashmani Sharma* (n 196)

scarcity due to high prices.⁵⁸² It held that any failure to act expeditiously amounts to a violation of the RtF.⁵⁸³ Thus despite the passive wordings of the ICESCR, the duty to take progressive steps and to act expeditiously subject to the resources available to a State is of immediate realisation and may be justiciable in appropriate measures.

It may be argued that as a legal right, the RtF ought to carry with it the implication of the opportunity to demand enforcement with adequate remedies for aggrieved parties. However, the RtF seems to lack an effective complaints mechanism which is the *sine qua non* of an effective system for protecting and promoting socioeconomic rights.⁵⁸⁴ The issue of justiciability goes beyond the ability of the court to hear a petition regarding violations of any right. It relates to the impact of the court's decision and whether an adjudication contributes to a practical resolution and an enforceable remedy.⁵⁸⁵ For instance, in 2008, the Supreme Court of Nepal ordered the government to make necessary laws to effectively realise the RtF, amongst other socioeconomic rights.⁵⁸⁶ Over ten years later, this order is yet to be complied with. State compliance with international human rights obligations ought to be subject to the possibility of formal third-party adjudication, with remedies for findings of noncompliance.⁵⁸⁷ To this extent, the RtF may be said to lack an authoritative definition of terms, a structured adjudicative mechanism, and a body of interpretative 'jurisprudence' to uphold and enforce the rights.⁵⁸⁸

Despite the lapses in its form, the absence of a strong enforcement mechanism does not negate its status as a legal right under Article 11 ICESCR. As earlier discussed, certain civil and political rights are not enforceable, yet they are legally recognised as fundamental rights. The RtF also forms a basic aspect of the right to life as the right to life creates an entitlement

⁵⁸² Schanbacher (n 5) 11-13. See also *PUCL* (n 173)

⁵⁸³ *Ibid*

⁵⁸⁴ See Asbjorn Eide and Jan Helgesen, *The Future of Human Rights Protection in a Changing World: Fifty Years Since the Four Freedoms Address: Essays in Honour of Torkel Opsahl* (Norwegian University Press in association with the Norwegian Institute of Human Rights 1991)

⁵⁸⁵ *Ibid* 475

⁵⁸⁶ *Amrita Thapa Magar* (n 416)

⁵⁸⁷ *Ibid*

⁵⁸⁸ Asbjorn Eide and Jan Helgesen (n 584) 462

for every person to be ‘free from acts and omissions that are intended or may be expected to cause their unnatural or premature death, as well as to enjoy a life with dignity, including hunger’.⁵⁸⁹ The non-enforceability of this aspect of the right to life does not vitiate its legality. Furthermore, the RtF creates certain enforceable obligations, including the duty to take action and the duty not to discriminate.⁵⁹⁰ The non-enforceability of certain other aspects of the RtF does not vitiate the validity of the right.

4.7 Violation of the Right to Food

Having examined the justiciability and enforceability of the RtF, this section examines the acts that constitute a violation of the RtF under Articles 2 and 11 ICESCR and the interpretation provided in the General Comments of the CESCR. The acts of violation are discussed in greater detail below.

Violations of the RtF may occur as a result of the failure of the State to take steps.⁵⁹¹ Article 2 and 11 ICESCR places an obligation on States to adopt deliberate, concrete measures to secure at least minimum essential levels for the progressive realisation of the RtF. Any failure by the State to take steps is as much a violation of the RtF as acting in malice.⁵⁹² In *Government of the Republic of South Africa v Grootboom*,⁵⁹³ the Constitutional Court held that the failure of the State to provide accessible humanitarian food aid during internal conflicts or other emergency situations amounts to a violation of the RtF.⁵⁹⁴ The failure of the State to release grain from the stockpile in *People’s Union for Civil Liberties v Union of India* while a great number of starvation deaths occurred in a nearby town was found to be a violation of the

⁵⁸⁹ UN HRC, ‘General Comment No 36’ (n 522) para 3.

⁵⁹⁰ Article 2 ICESCR; See also *SERAC* (n 34) para 64-66

⁵⁹¹ ICESCR 1976, Arts 2 and 11; See CESCR General Comment No 12 (n 6) para 15; See also CESCR ‘An Evaluation of the Obligation to Take Steps to the “Maximum of Available Resources” Under an Optional Protocol to the Covenant’ (n 412)

⁵⁹² *Schanbacher* (n 5) 11-13

⁵⁹³ See *Government of the Republic of South Africa v Grootboom* (n 451)

⁵⁹⁴ *Ibid*

RtF.⁵⁹⁵ In *SERAC v Nigeria*,⁵⁹⁶ the ACHPR held *inter alia* that the failure of the State to protect citizens against the adverse effects of oil exploration activities on the local indigenes was construed as a violation of the RtF. Thus the failure of the State to take positive steps to prevent an imminent breach of the RtF amounts to a violation of the RtF.

Violations of RtF may also occur where the State makes or allows measures that are incompatible with the provisions of the ICESCR.⁵⁹⁷ Where the State takes steps, but the steps fall short of the standard of ‘appropriateness’ under Article 11 ICESCR, it could amount to a violation of the RtF as regressive steps create *prima facie* evidence of violations.⁵⁹⁸ For instance, the ICESCR encourages international cooperation for the progressive realisation of RtF; however, a State must not ratify agreements or policies that are manifestly incompatible with its human rights obligations.⁵⁹⁹ The CESCR also suggested that the failure of the State to consider its international human rights obligations when negotiating international agreements could result in a violation of the RtF.⁶⁰⁰ And pursuant to the UN Charter, in the event of a conflict between human rights and trade obligations, the human rights obligations should prevail. Thus a State violates its human rights obligations if it takes measures to comply with trade obligations in contravention of its socioeconomic rights obligations or the human rights obligations of another state.⁶⁰¹

⁵⁹⁵ *PUCL* (n 173)

⁵⁹⁶ *SERAC* (n 34)

⁵⁹⁷ ICESCR 1976 Articles 2 and 11; See CESCR General Comment No 12 (n 6) para 15; See also CESCR ‘An Evaluation of the Obligation to Take Steps to the “Maximum of Available Resources” Under an Optional Protocol to the Covenant’ (n 412)

⁵⁹⁸ *Joseph* (n 91) 26-27

⁵⁹⁹ UN Charter 1945, Article 103; See also *R v Cote* (n 414)

⁶⁰⁰ CESCR General Comment No 12 (n 6) para 19; See also Maastricht Guidelines 1997 (n 431) Para 15(j); See also Robert Howse and Ruti Teitel, ‘Beyond the Divide: the International Covenant on Economic Social and Cultural Rights and the World Trade Organization’ in Sarah Joseph, David Kinley and Jeff Waincymer (eds), *The World Trade Organization and Human Rights* (Edward Elgar Publishing 2009)

⁶⁰¹ A situation similar to the position in *Kadi* (n 258) where the European Court of Justice (ECJ) annulled Sweden’s unlawful seizure of the Petitioner’s assets. Though the seizure was in compliance with an international commitment under the Resolution of the UN Security Council, the ECJ found that it constituted a breach of Petitioner’s human rights under the TFEU

A State may not be liable for the violation of RtF in circumstances where its inability to take appropriate steps is due to a genuine lack of adequate resources.⁶⁰² Genuine lack of resources is decided on a case-by-case basis, and the onus lies on the State to show that its inability to take appropriate steps results from a genuine lack of resources.⁶⁰³ For instance, situations where a State lacks the technical or financial resources to contribute to the realisation of socioeconomic rights in another country are contrasted with situations where a State is able but unwilling to facilitate the realisation of RtF, including using food as an instrument of political and economic pressure.⁶⁰⁴ Thus the SR criticised the imposition of food embargoes by the US on Zimbabwe, which worsened the dire situation of food insecurity in Zimbabwe, as an act of violation of the RtF.⁶⁰⁵ The reactions of the Sudanese government to the arrest warrant issued by the ICC against Omar Hassan Ahmad Al Bashir in April 2008, which resulted in the government expelling dozens of humanitarian aid organisations and leaving over a million persons without access to food and water was also criticised as a wilful violation of the RtF.⁶⁰⁶ It is suggested that the reactions of the Sudanese government amounted to exploiting access to food as a manipulative tool of political control.⁶⁰⁷ Thus where the measures adopted by a State result in regressive measures or a wilful refusal to utilise available resources for the progressive realisation of the RtF, it could be construed as a violation of the said right.

The UN endorsed a list of illustrative indicators for objective analysis of the implementation of RtF by Member States.⁶⁰⁸ Pursuant to this UN list, where a State fails to make adequate provision to protect the RtF in its domestic laws, it falls short of the structural indicators of RtF. Where the State fails to incorporate the RtF into its political, economic and

⁶⁰² Maastricht Guidelines 1997 (n 431) Para 13; See also CESCR General Comment No 14 (n 34) para 47

⁶⁰³ Joseph (n 91) 26-27

⁶⁰⁴ See CESCR General Comment No 12 (n 6) para 37

⁶⁰⁵ OHCHR (n 1)

⁶⁰⁶ Charles C Jalloh, Kamari M Clarke and Vincent O Nmeihille (eds), *The African Court of Justice and Human and Peoples' Rights in Context: Development and Challenges* (1st edn, CUP 2019)

⁶⁰⁷ Ibid

⁶⁰⁸ OHCHR, 'Report on Indicators for Monitoring Compliance with International Human Rights Instruments' (n11)

governing policies, it falls short of the process indicators of RtF. And where there is widespread poverty, hunger and malnutrition, it falls short of the outcome indicators. Any shortfall in these indicators is regarded as *prima facie* evidence of violation of RtF. In the subsequent chapters, these indicators are used to analyse the extent of the realisation of RtF in SSA and the EU.

4.8 Food as a Component of the Right to Development

Having examined the components of the RtF and what constitutes acts of violation of the right, this section examines the RtD to establish the correlation between the RtF and the RtD and why an analysis of the UN Sustainable Development Goals (SDGs) is relevant to this study on the RtF.

4.8.1 Access to Food Under the Declaration on the Right to Development (DRD) 1986

The DRD was adopted in 1986 by the UN General Assembly. It is characteristic of soft law and has no binding effect on State Parties. Pursuant to the provisions of the DRD, the RtD is an 'inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realised'.⁶⁰⁹ It involves 'a comprehensive economic, social, cultural and political process which aims at constantly improving the wellbeing of the entire population and all individuals on the basis of their active, free and meaningful participation in development and the fair distribution of benefits resulting therefrom.'⁶¹⁰ The RtD is classified into two- the personal/individual right and the group right.

⁶⁰⁹ DRD 1986, Article 1

⁶¹⁰ Preamble to the DRD 1986, Para 2

The RtD as a personal right establishes the inalienable right of every person to enjoy economic, social, cultural and political development and the full realisation of all human rights, including the RtF.⁶¹¹ It measures development in terms of wellbeing rather than the assessment of GNP. It focuses on expanding the choices open to a person to live the type of life they desire.⁶¹² Thus development is reviewed as a process of expanding the real freedom that a person enjoys.⁶¹³ Development, in this sense, is assessed in terms of the freedom it promotes. It is said to be achieved where people have meaningful freedom in economic, social and political spheres of life. This concept of development as a personal right supports Sen's capability approach to wellbeing and the analysis of the functionings achievable in SSA vis-à-vis the available resources.⁶¹⁴ In examining the substantive freedom to achieve alternative functioning combinations, this study examines the prevalence of poverty and the financial capability of vulnerable populations of SSA to access adequate food without having to sacrifice alternative needs.⁶¹⁵ The DRD recognises the individual as the end in himself and the object of development,⁶¹⁶ and that development must relate to the development of the individual too.⁶¹⁷

As a group right, the RtD establishes the inalienable right of peoples to claim full sovereignty over all their natural wealth and resources.⁶¹⁸ It promotes the comprehensive development of developing countries.⁶¹⁹ It protects the right and duty of States to formulate appropriate national development policies to improve general wellbeing and equitable

⁶¹¹ Ibid 1986, Article 1(1)

⁶¹² Although one may argue that per capita income is an essential element in the fulfilment of these personal choices. See Kary Banks Mullis (n 156)

⁶¹³ Sen, *Development as Freedom* (n 151) 161

⁶¹⁴ Ibid 87

⁶¹⁵ Amartya Sen, *Poverty and Entitlement: An Essay on Entitlement and Deprivation* (n 281)

⁶¹⁶ Preamble to the DRD

⁶¹⁷ Ibid; See also Mohammed Bedjaoui, 'The Right to Development' in Mohammed Bedjaoui (eds), *International Law: Achievements and Prospects*, (UNESCO 1991) 117

⁶¹⁸ DRD 1986, Article 1(2)

⁶¹⁹ Ibid Article 4(2)

distribution of food.⁶²⁰ States are thus encouraged to make policies which protect the socioeconomic rights of the people and the general development of the State.

A major contribution of the DRD is its international dimension which establishes the duty of international cooperation or solidarity to eliminate obstacles to development and realise human rights.⁶²¹ It encourages international cooperation among States to facilitate the participation of developing countries in international trade. The DRD thus encourages increased market access for developing countries in the global market. It establishes the duty of States to take steps, individually and collectively, to formulate international development policies to facilitate the full realisation of the right to development and respect for human rights and fundamental freedoms of all, including the RtF.⁶²² Through this, the DRD supports States to take steps individually and through international cooperation to improve methods of production, conservation and distribution of food and to ensure an equitable distribution of world food supplies in relation to need.⁶²³

However, similar to the RtF, it has been suggested that the RtD is not a legal right, does not impose legal obligations on the duty-bearers, and is not enforceable.⁶²⁴ It is also contested that the extraterritoriality of the right does not impose a legal obligation on developed countries to assist developing countries in achieving economic development.⁶²⁵ On the contrary, this study suggests that in light of the consensus endorsement of the DRD at the Vienna Conference of 1993, the RtD may be recognised as a legal right mirroring the general acceptance of the nations. Although the DRD is soft law, it establishes the wider principles on which other multinational agreements, including the SDGs, are founded. Furthermore, in light of the

⁶²⁰ Ibid Article 2(3)

⁶²¹ Ibid Article 3(3)

⁶²² Ibid Article 4(1)

⁶²³ ECSCR 1976, Article 11(2); Ibid Article 2(3)

⁶²⁴ Khurshid Iqbal, 'The Declaration on the Right to Development and Implementation' (2007) 1/1 Political 2

⁶²⁵ Stephen Marks, 'The Human Right to Development: Between Rhetoric and Reality' (2004) 17 Harvard Human Rights Law Journal 137-168

principles of interdependence and indivisibility of all human rights, the RtF is recognised as a legal right, just like other socioeconomic or civil rights, and where States take steps to achieve the progressive realisation of all human rights, it will invariably result in the progressive realisation of the RtD.⁶²⁶

Furthermore, poverty has been identified as a major deterrent to access to food in SSA. The DRD suggests that poverty is one of the major causes of violations of human rights.⁶²⁷ States are thus encouraged to take steps to eliminate poverty as a fundamental step towards achieving the realisation of the RtF and RtD. Upholding the international obligation for the realisation of human rights requires that we critically examine the factors that prevent the poor from gaining access to resources and opportunities for the progressive realisation of RtF. Realising the RtD requires a fundamental understanding of how poverty occurs, why it persists, its impact on RtF and human rights violations, and how it can be alleviated. Thus in 2015, the UN established a set of goals- Sustainable Development Goals (SDGs) to provide the blueprint for global development by 2030.⁶²⁸ The first two goals of poverty elimination and hunger eradication are examined below.

4.8.2 Access to Food Through the Sustainable Development Goals (SDG) 2015

In 2015, the UN established a set of goals- Sustainable Development Goals (SDGs) to provide the blueprint for global development by 2030.⁶²⁹ Further to the role of development in achieving access to food, the UN's Sustainable Development Goals include 17 set goals- indivisible in nature and universally.⁶³⁰ The first goal (SDG1) is to 'end poverty in all its forms

⁶²⁶ DRD 1986, Article 6

⁶²⁷ Ibid Article 5

⁶²⁸ See UN, 'Sustainable Development Goals' <www.un.org/sustainabledevelopment/sustainable-development-goals/> accessed 29 April 2022. They were initially reached in 2005 as the Millennium Development Goals (MDG) but in 2015 these Millennium Development Goals were replaced with the SDGs.

⁶²⁹ Ibid

⁶³⁰ UN SDG, 'Transforming our World: The 2030 Agenda for Sustainable Development' (n 12)

everywhere’, and the second goal (SDG2) is to ‘end hunger, achieve food security and improved nutrition, and promote sustainable agriculture’.⁶³¹ These first two SDGs are examined in this section to highlight their interrelatedness and importance in achieving food access. They are also utilised in the latter chapters to assess the extent of realisation of the RtF in SSA and the EU.

SDG1 aims to ‘end poverty in all its forms everywhere’.⁶³² Poverty is routinely defined as the lack of what is necessary for material wellbeing, especially food, housing and other basic assets.⁶³³ The CESCR defined poverty as ‘a human condition characterised by sustained or chronic deprivation of the resources, capabilities, choices, security and power necessary for the enjoyment of an adequate standard of living and other civil, cultural, economic, political and social rights’.⁶³⁴ Poverty is not limited to the absence of financial resources; it cuts across different aspects of a person’s life, including personal dignity, socioeconomic safety and wellbeing.⁶³⁵ It relates to the absence of various factors and resources that lead to physical and economic deprivations, including hunger. Sen describes poverty as the deprivation of basic capabilities rather than a mere lowness of income, which is the standard criterion for identifying poverty.⁶³⁶

In 2015, the World Bank set the International Poverty Line at \$1.90 and \$3.20 per person per day for low-income and middle-income countries, respectively, using the 2011 Purchasing Power Parity (PPP) conversion factors.⁶³⁷ In September 2022, the International Poverty Line was reviewed to \$2.15 and \$3.65 to reflect the national poverty lines of low-

⁶³¹ Ibid

⁶³² Ibid

⁶³³ Deepa Narayan and Michael Walton (eds) (n 105) 31

⁶³⁴ CESCR, ‘Substantive Issues Arising in the Implementation of the ICESCR: Poverty and the International Covenant on Economic Social and Cultural Rights’ (n 446) Para 8

⁶³⁵ Skogly (n 11)

⁶³⁶ Sen, *Development as Freedom* (n 151) 87

⁶³⁷ See World Bank, ‘Measuring Poverty’ (16 April 2021) <www.worldbank.org/en/topic/measuringpoverty> accessed 14 September 2021

income and middle-income countries, respectively, using the 2017 PPP rates.⁶³⁸ Thus a household with per capita income/expenditure below the standard poverty line is regarded as poor.⁶³⁹ Although the tendency is to regard income level as the primary indicator for poverty, poverty may be conceptualised as a more complex and multifaceted issue than low income. It relates to a lack of entitlement to food access, which is the fundamental cause of all deprivations, especially food insecurity.⁶⁴⁰

It is suggested that poverty is the primary cause of hunger because people living in poverty cannot access necessities for an adequate standard of living, including food.⁶⁴¹ Higher rates of malnutrition were found in areas with chronic poverty⁶⁴² leading to the conclusion that people living in poverty face a higher burden of starvation than others.⁶⁴³ The impact of poverty is seen through multiple manifestations, including chronic hunger, food insecurity, poor nutritional status, stunting and wasting in children, vulnerability to disease, reduced productivity levels, and compromised physical and intellectual development.

SDG2 is to end hunger and achieve food security. It is consistent with the provisions of the ICESCR, which establishes the fundamental right of every individual to be free from hunger.⁶⁴⁴ Hunger is a routine problem that arises and persists primarily because of poverty. This definition reiterates the relationship between widespread hunger and poverty because poverty primarily impairs economic access to food. Thus, the hunger crisis in SSA in the face of economic and technological advancement is not a problem of food scarcity but of impaired access to food brought about by poverty.

⁶³⁸ See World Bank, 'Poverty' <www.worldbank.org/en/topic/poverty> accessed 13 October 2022

⁶³⁹ Rasmus Heltberg, 'Malnutrition, poverty, and economic growth' (2009) 18(1) *Health Econ* 77–88

⁶⁴⁰ Skogly (n 11)

⁶⁴¹ Jorge Peña and Jorge Bacallao, 'Malnutrition and poverty' (2002) 22 *Annul review of Nutrition* 241

⁶⁴² Sununtar Setboonsarng 'Child Malnutrition as a Poverty Indicator: An Evaluation in the Context of Different Development Interventions in Indonesia' (2005) 21 ADB Institute Discussion Paper <www.adb.org/sites/default/files/publication/156773/adb-dp21.pdf> accessed 17 October 2022

⁶⁴³ Faareha Siddiqui, Rehana Siddiqui, Zohra Lassi and Jai Das, 'The Intertwined Relationship Between Malnutrition and Poverty' (2020) 8 *Frontiers in Public Health* 453

<www.ncbi.nlm.nih.gov/pmc/articles/PMC7485412/#B6> accessed 17 October 2022

⁶⁴⁴ ICESCR 1976, Article 11(2)

It is submitted that poverty is both a primary cause of hunger and a consequence of hunger. This is because whilst poverty impairs access to food resulting in hunger, hunger and malnutrition adversely affect a person's physiological and mental capacity, which in turn hampers productivity levels resulting in low income and susceptibility to poverty.⁶⁴⁵ Thus a direct link exists between malnutrition and poverty, creating a vicious cycle with each engendering the other. Simply put, hunger produces conditions of poverty by reducing a person's economic potential; likewise, poverty reinforces malnutrition by increasing the risk of food insecurity, and the cycle continues. Figure 2 below demonstrates this cycle of poverty and how it causes and is caused by hunger.

*Figure 2: Cycle of Poverty*⁶⁴⁶

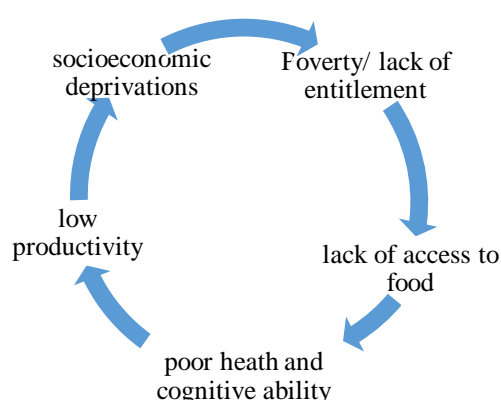


Figure 2 above demonstrates the vital relationship between malnutrition and poverty. It shows that poverty/lack of entitlement causes lack of access to food and the resultant hunger. Hunger and malnutrition due to lack of access to food affect a person's health and cognitive ability leading to low productivity. Where productivity is low, the ability to generate income is affected, thus leading to socioeconomic deprivations, including an inability to secure jobs, lack of entitlement to basic amenities and poverty, which again impairs access to food, leading

⁶⁴⁵ Faareha Siddiqui, Rehana Siddiqui, Zohra Lassi and Jai Das (n 643)

⁶⁴⁶ Figure 2 represents the researcher's understanding of the cycle of poverty

to an unending vicious cycle.⁶⁴⁷ As the cycle continues, more people are affected, leading to hunger which causes poor health and loss of manpower which in turn leads to poor national income, low GDP levels and widespread poverty, which again impairs access to food. This eventually degenerates into a vicious cycle leading to the conclusion that living in a state of poverty is a human right abuse in itself.⁶⁴⁸

According to the SR on extreme poverty,⁶⁴⁹ one person in five adults lives in poverty, and one in eight live in extreme poverty.⁶⁵⁰ Child poverty rates are especially problematic, with 3.65 million, or 28.3 per cent of all children, living in poverty. Ten percent of children live in extreme poverty, implying that 1.2 million children live in households that are unable to access adequate food.⁶⁵¹ Poverty levels are especially high in rural and agricultural settlements, which show significantly slower growth than other sectors and are often accorded a low priority by the States.⁶⁵² Bearing in mind that about 80% of the global hungry population is engaged in some form of agricultural practice.⁶⁵³ And most of these hungry people live in developing countries⁶⁵⁴ where about one-third of the world's food is produced.⁶⁵⁵ A major effect then is the poor quality of life predominant among these subsistent farmers, evident in a poor state of housing, health and education, as well as chronic undernutrition.⁶⁵⁶ This

⁶⁴⁷ Abhijit Banerjee and Esther Duflo 'More than 1 billion people are hungry in the world' (2011) Foreign Policy 66

⁶⁴⁸ See UNDP, 'Poverty Reduction and Human Rights: A Practice Note' (UNDP 2003) iv; See also Thomas Pogge, 'Recognized and Violated: the Human Rights of the Global Poor' (2005) 18 Leiden Journal of International Law 717.

⁶⁴⁹ OHCHR 'Report of the Special Rapporteur on Extreme Poverty, Philip Alston, on his Mission to Ghana in 2018 (Contained in document A/HRC/38/33/Add.2) Para 14

⁶⁵⁰ A person is deemed to be "poor" in Ghana if their income is less than 1,314 Cedis per adult per year (which was the equivalent of 80 cents per day in April 2018), while the "extreme poor" live on less than 792 cedis per adult per year (equivalent to 48 cents per day in April 2018) when the report was published.

⁶⁵¹ OHCHR 'Report of the Special Rapporteur on Extreme Poverty' (n 649) para 15

⁶⁵² Ibid para 16

⁶⁵³ Olivier De Schutter and Kaitlin Y Cordes (Eds) (n 190); See also Pedro Sanchez, M. S. Swaminathan, Philip Dobie and Nalan Yuksel (n 4); Note also that about 70% of the economically active population in the Least Developed Countries are engaged in agriculture, 52% in other developing countries, and 3% in the developed countries. See also OHCHR, 'Report of the Special Rapporteur on the Right to Food Olivier De Schutter - Addendum - Mission to the World Trade Organisation' (2009) (n 88) para 8

⁶⁵⁴ Over 31% of this population are from SSA. See FAO, IFAD, UNICEF, WFP and WHO, 'The State of Food Security and Nutrition in the World 2019' (n 191)

⁶⁵⁵ Preamble to the UDEHM 1974, par A

⁶⁵⁶ OHCHR 'Report of the Special Rapporteur on Extreme Poverty' (n 649) para 23-25

indicates that the food insecurity problem in SSA is rooted more in limited economic access than physical access. Therefore, policy reforms to achieve the realisation of RtF should be all-rounded, including measures to eradicate poverty and enhance public involvement, economic development and general wellbeing.

4.9 Conclusion

Having examined the legal framework of the RtF, its core elements, core obligations and what constitutes a violation of the RtF, this chapter concludes that the RtF is a legal right and the ICESCR places a legal obligation on the State, acting alone or through international cooperation, to ensure the progressive realisation of the RtF. The State has a responsibility to protect socioeconomic rights by ensuring that economic policies address the variety of factors that contribute to human rights violations, especially poverty.⁶⁵⁷ This chapter also established the relevance of the RtD and the SDGs to realising RtF. In light of these analyses, this Chapter concludes that ‘appropriate steps’ for the realisation of RtF will necessarily involve a holistic approach to enhance public participation and improve access to food by eradicating poverty and promoting economic wellbeing.⁶⁵⁸ It should involve coordinated international effort which integrates trade and human rights regimes, establishing coherence between the world of trade and the world of human rights, between the WTO and human rights institutions.⁶⁵⁹ Thus the next chapter examines the impact of trade liberalisation on the realisation of RtF.

⁶⁵⁷ Skogly (n 11)

⁶⁵⁸ Ibid 69; See also FAO, ‘Voluntary Guidelines to Support the Progressive Realisation of the Right to Food in the Context of Food Security’ (n 100)

⁶⁵⁹ Lamy (n 102)

Chapter 5: A Critical Analysis of the Impact of World Trade Liberalisation on the Right to Food

5.1. Introduction

Having explored the international legal context, norms and requirements of the RtF in the preceding chapters, this chapter critically examines trade and human rights in light of their overlapping interest, consistencies and incongruity, and to demonstrate how these overlaps could be leveraged to facilitate the realisation of RtF by integrating socioeconomic rights in trade. It critically examines agricultural trade liberalisation under the WTO and its comparative impact on the realisation of RtF in SSA vis-à-vis the EU. Trade liberalisation refers to the removal of tariff and non-tariff barriers to trade to facilitate free international trade. This chapter examines the relationship between trade liberalisation under the AoA and the human right system under the ICESCR to establish the congruity, incongruence and possible entry points of socioeconomic rights into world trade. By analysing the contradictions between human rights and trade regimes, this chapter demonstrates that whilst trade liberalisation may not oust the realisation of RtF; it tends to limit the ability of States to take ‘appropriate measures’ to fulfil their RtF obligations among developing countries. It critically examines market access and subsidy regimes in the AoA and how they impact access to food, particularly among developing countries, taking cognisance of the fact that all SSA countries are classed as developing and least developed countries. It also establishes possible entryways through which socioeconomic rights could be integrated into the WTO trade regime to facilitate access to food in SSA.

5.2 Human Rights and World Trade; Compatible or Conflicting?

The fundamental objectives of the WTO, as set out in the Marrakesh Agreement, include raising standards of living, ensuring full employment, expanding production and trade, and

allowing optimal use of the world's resources in accordance with the objective of sustainable development.⁶⁶⁰ *Prima facie*, these trade objectives of trade liberalisation appear consistent with the promotion, protection and enjoyment of socioeconomic rights as set out in the ICESCR and discussed in previous chapters of this study.⁶⁶¹ Agricultural trade liberalisation under the AoA commits to raising the standard of living and enhancing food security, taking into account the possible negative effects of implementing the reform programme on least-developed and net food-importing developing countries.⁶⁶² This is similar to the ICESCR, which promotes the realisation of RtF, taking into account the problems of both food-importing and food-exporting countries to ensure an equitable distribution of world food supplies in relation to need.⁶⁶³ The former Director-General of the WTO, Pascal Lamy, stated in 2010 that trade rules are based on the same values as human rights such as individual freedom, non-discrimination, the rule of law, and welfare through peaceful cooperation.⁶⁶⁴ These similarities between trade liberalisation and socioeconomic rights objectives present the possibility for overlapping interests which is necessary for identifying conflicts between the respective legal principles. Identifying these overlaps would also help to determine which rules apply in resolving any conflicting laws.

Despite the seemingly overlapping objectives, some trade liberalisation policies tend to negate human rights principles because they do not take cognisance of the social impact of trade policies on the wellbeing of the people. It is contested that, in practice, the market-based system neither reflects this commitment to food security nor adequately protects the demand for food.⁶⁶⁵ This is because trade policies like comparative advantage, which encourage

⁶⁶⁰ Preamble to the WTO Agreement 1994

⁶⁶¹ Frank Garcia, 'The Global Market and Human Rights: Trading Away the Human Rights Principle' (1999) 7 Brooklyn Journal of International Law 51, 59; See also Adam McBeth, *International Economic Actors and Human Rights* (Routledge, 2010) 87–8. See also ICESCR 1976, Article 11

⁶⁶² Preamble to the AoA 1994, para 6

⁶⁶³ ICESCR 1976, Art. 11

⁶⁶⁴ Lamy (n 102)

⁶⁶⁵ FAO, 'Trade Reforms and Food Security: Conceptualizing the Linkages' (2003) <<http://www.fao.org/3/a-y4671e.pdf>> 118 accessed 15 July 2020; See also Joseph (n 91)

specialisation in agricultural production, appear to focus on global wealth creation through trade liberalisation rather than the equitable distribution of the same, thus creating inequality in the global market.⁶⁶⁶ Trade policies which prohibit domestic support in agricultural trade also appear blind to the social costs of economic transactions and expose the vulnerable to inequitable market conditions.⁶⁶⁷ These inequalities adversely affect the ability of import-reliant countries to access food. According to De Schutter, the former SR on the RtF, trade liberalisation tends to jeopardise the ability of low-income market participants in developing countries to access food because it focuses on competitive measures to promote export-oriented agriculture and increase economic gains.⁶⁶⁸

Although trade liberalisation promotes certain human rights tenets such as fairness, non-discrimination, international cooperation and food security, the context in which they are applied is exclusive of the human rights context.⁶⁶⁹ For instance, international trade promotes freedom in a different manner from freedom in human rights.⁶⁷⁰ For instance, freedom under the AoA refers to the free trade of agricultural products through the elimination of all forms of trade barriers,⁶⁷¹ while freedom in human rights refers to the ability to act without fear or constraints, for instance, the freedom from hunger.⁶⁷² Article V of the GATT specifically provides for the ‘freedom of trade’, and Article XXIV of GATT 1994 provides for the ‘freedom of transit’. These concepts are foreign to international human rights as no human right covenant recognises any right to trade. Furthermore, non-discrimination in international trade aims to

⁶⁶⁶ These concepts are discussed in greater details in subsequent sections

⁶⁶⁷ AoA 1994, Article 6; See also Jacqueline Mowbray (n 75) 545–569

⁶⁶⁸ OHCHR, ‘Report of the Special Rapporteur on the Right to Food Olivier De Schutter - Addendum - Mission to the World Trade Organisation’ (2009) (n 88)

⁶⁶⁹ Gabrielle Marceau, ‘WTO Dispute Settlement and Human Rights’ (2002) 13 *European Journal of International Law* 753, 767

⁶⁷⁰ Joseph (n 91)

⁶⁷¹ For instance, Article 11.2(b) requires States to take into consideration the problems of net food importing countries; See also James Thuo Gathii, ‘Re-Characterizing the Social in the Constitutionalization of the WTO: A Preliminary Analysis’ (2001) 7 *Widener Law Symposium Journal* 148.

⁶⁷² ICESCR1976, Article 11

eliminate barriers to global trade,⁶⁷³ while non-discrimination in human rights aims to protect the vulnerable against unequal treatment.⁶⁷⁴ Thus, human rights preserve the dignity of the human person, while trade-related rights are granted for economic reasons without express safeguards for the vulnerable.

Furthermore, the apportionment of rights and obligations in international trade differs from the apportionment of the same in human rights. International trade accords rights and obligations to the State, while socioeconomic rights accord rights to individuals with an obligation on the State to progressively achieve the protected rights.⁶⁷⁵ For instance, Article 11 establishes ‘the right of ‘everyone’ to an adequate standard of living for himself and his family’ as well as ‘the fundamental right of ‘everyone’ to be free from hunger’⁶⁷⁶ While the AoA establishes the right of State Parties to trade with little or no limitations. While aggrieved individuals may access the courts to enforce their human rights, only aggrieved States may seek redress to enforce their right against trade barriers under world trade⁶⁷⁷ While Courts may direct the State to take specific measures to remedy any violations of RtF,⁶⁷⁸ the DSB may authorise a successful State Party to implement countermeasures following the successful conclusion of a case.⁶⁷⁹ Where the trade-restrictive measure in question directly impacts the local traders of any State, the State may exercise its right to seek redress on behalf of the

⁶⁷³ Preamble to the WTO Agreement 1994, Para 3; See also Joseph E Stiglitz and Andrew Charlton, *Fair Trade for All* (OUP 2005) 79

⁶⁷⁴ Ibid; See also OHCHR, ‘Analytical study of the High Commissioner for Human Rights on the Fundamental Principle of Non-Discrimination in the Context of Globalization’ Report provided by the UN Commissioner on Human Rights at the Sixtieth Session on 15 January 2004 (Contained in document E/CN.4/2004/40) accessed 15 April 2021

⁶⁷⁵ Ferguson (n 19) 140

⁶⁷⁶ See ICESCR 1976, Arts 2 and 11

⁶⁷⁷ Dispute Settlement Rules: Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, (DSU) 1994 (Contained in document 1869 U.N.T.S. 401, 33 I.L.M. 1226) Article 3; See also Agreement on Subsidies and Countervailing Measures of the Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, (SCM Agreement) 1994 (Contained in document 1869 U.N.T.S. 14) Article 4

⁶⁷⁸ For instance in *Prakashmani Sharma* (n 196), the Supreme Court ordered the government to immediately supply food to communities where mass starvation was reported

⁶⁷⁹ *EC: Regime for the Importation, Sale and Distribution of Bananas, Complaint by Ecuador (EC Bananas)* — Report of the Panel (22 May 1997) WT/DS27/R/ECU, WT/DS27/R/GTM. WT/DS27/R/HND, WT/DS27/R/MEX, WT/DS27/R/USA [7.124]

affected businesses. However, it is feared that these rights are often exercised on behalf of large corporations that contribute significantly to the economy and that States would seldom undertake the costs and rigours of international trade disputes for peasant farmers with minimal economic output.⁶⁸⁰ Thus, while human rights protect vulnerable populations, trade liberalisation tends to protect dominant market participants or large multinational corporations who contribute substantially to the State economy.⁶⁸¹

Trade liberalisation tends to promote export-oriented agriculture, which in turn encourages the diversion of agriculture from the production of staple foods for food security purposes to export-oriented farming for economic values. The adverse effect of this diversion appears more significant in import-reliant countries. For instance, in Kenya, agriculture supports the livelihood of over 80 percent of the nation's livelihood and contributes about 65 percent of the nation's export earnings.⁶⁸² Agriculture remains its highest employer of labour, employing over 40 percent of the country's total population and contributing over 50 percent of the nation's GDP.⁶⁸³ However, in the 1980s, Kenya diverted from producing staple foods for local consumption to large-scale production of tea and cut-flowers for export purposes.⁶⁸⁴ Thus, while the agricultural sector records high economic growth, driving even the non-manufacturing market, including tourism and construction, food insecurity is also increasing.⁶⁸⁵ Over 36 percent of the population is food insecure, and about 35 percent of children under five suffer from stunting and chronic malnutrition.⁶⁸⁶ In 2020, Kenya had a global hunger index of 23.7, ranking amongst the world's 30 countries with the worst cases of

⁶⁸⁰ See Caroline Dommen, 'Raising Human Rights Concerns in the World Trade Organization: Actors, Processes and Possible Strategies' (2002) 24 Human Rights Quarterly 1, 47.

⁶⁸¹ Schanbacher (n 5) 35-39

⁶⁸² Anne Ulrich, 'Export-Oriented Horticultural Production in Laikipia, Kenya: Assessing the Implications for Rural Livelihoods' (2014) 6(1) Heidelberg University Sustainability Journal 336

⁶⁸³ FAO, 'FAO in Kenya' <www.fao.org/kenya/fao-in-kenya/kenya-at-a-glance/en/> accessed 21 September

⁶⁸⁴ Anne Ulrich (n 682)

⁶⁸⁵ Ibid

⁶⁸⁶ Ibid

food insecurity.⁶⁸⁷ Another instance of diversion from agriculture for food security purposes is seen in the case of *Centre for Minority Rights Development and Another v Kenya*⁶⁸⁸ where the Endorois indigenous pastoralist community were removed from their farmlands by the Kenyan government to establish a wildlife reserve. The ACHPR found that the Kenyan government was in breach of the right to development as the removal of the indigenous people from their farmlands to other semi-arid land was unsuitable for pastoralism and threatened their source of food and livelihood.⁶⁸⁹

Sierra Leone has also had its share of trade liberalisation drawbacks. Famous for its fertile vegetation, Sierra Leone derives over 60 percent of its GDP from agriculture, and the agricultural sector employs over 75 percent of its labour force.⁶⁹⁰ However, with the increasing focus on growing its cocoa industry for export purposes *inter alia*, Sierra Leone came low to a GHI of 30.9 in 2020, ranking among the world's ten countries with the worst hunger crisis in 2020.⁶⁹¹ Furthermore, the country was compelled by donor institutions under the Structural Adjustment Program to liberalise its agricultural commodity market and remove its domestic support measures in the early 90s.⁶⁹² Contrary to the constitutional obligation on the State to emphasise agriculture in all its aspects and promote self-sufficiency in food production,⁶⁹³ the Sierra Leonean government liberalised the cocoa industry in the 90s, withdrawing its quality control regulations and the price support programs which aided local producers, thus exposing the cocoa industry to international competition.⁶⁹⁴ The impact was a drastic drop in the quality

⁶⁸⁷ GHI, 'Global Hunger Index: Kenya' (2021)

<www.globalhungerindex.org/kenya.html#:~:text=In%20the%202020%20Global%20Hunger,See%20overview%20of%20GHI%20calculation%5D> accessed 31 January 2021

⁶⁸⁸ *Centre for Minority Rights Development* (n 55)

⁶⁸⁹ Ibid

⁶⁹⁰ Amara Denis, Edwin Momoh and Oladele Toyin, 'An Economic Analysis of the Production and Export of Cocoa in Sierra Leon' (2014) 5(1) *Research Journal of Agricultural Sciences* 65

⁶⁹¹ GHI, 'Global Hunger Index: Sierra Leone' (2021) <www.globalhungerindex.org/sierra-leone.html> accessed 31 January 2021

⁶⁹² Amara Denis, Edwin Momoh and Oladele Toyin (n 690)

⁶⁹³ The Constitution of Sierra Leone 1991, Article 7(1)(d)

⁶⁹⁴ Amara Denis, Edwin Momoh and Oladele Toyin (n 690)

of local cocoa and a decline in export volume. As a result, cocoa from Sierra Leone was sold on the world market at a 25 percent discounted rate for use as cocoa butter raw material because it was substandard for chocolate.⁶⁹⁵ Production also declined from 26,000 in the 1980s to as low as 6,000 metric tons around 2014.⁶⁹⁶ While the diversion of farming impaired physical access to staple foods, the decline in the economic value of cocoa exacerbated poverty, hampering economic access to food. Thus, trade liberalisation contributed to impairing access to food in Sierra Leone. Similar instances are seen in other SSA countries where subsistence production for food security has given way to industrial production for export purposes.

5.3 The Agreement on Agriculture in Context

Further to assessing the incongruity between human rights and trade, this section examines specific aspects of the AoA and how they impact the realisation of RtF in developing countries. The AoA is preferred for this analysis because all SSA countries are either full members or acceding members of the WTO and are bound by the provisions of the AoA by virtue of the principle of single undertaking.⁶⁹⁷ Thus the AoA has a significant impact on access to food in SSA. This section specifically examines the ‘three pillars’ of the AoA - market access, domestic support and export subsidies and how they impact access to food.⁶⁹⁸

⁶⁹⁵ Ibid

⁶⁹⁶ Ibid

⁶⁹⁷ The Single Undertaken policy provides that all Member States and acceding members states are bound by all WTO agreements as a single undertaking. All 46 SSA countries are members of the WTO except Equatorial Guinea, Ethiopia, South Sudan, Sudan and Somalia, who are observer countries negotiating ascension. See WTO, ‘Members and Observer’ (n. 147)

⁶⁹⁸ Market access, domestic support and export subsidy have been described by scholars as the three pillars of the AoA. See Melaku Geboye Desta, *The Law of International Trade in Agricultural Products* (Kluwer Law International 2002) 395

5.3.1 Market Access – Agreement on Agriculture Part III

Market access refers to the ease with which products from one country penetrate a foreign market where they can be purchased.⁶⁹⁹ Part III of the AoA requires States to convert non-tariff bindings to tariffs (tariffication) and to progressively eliminate all barriers to market access. Barriers to market access may be tariff or non-tariff barriers.⁷⁰⁰ Tariff and non-tariff import measures are set up to restrict importation and protect the local industry, thereby distorting international markets and placing domestic products at a competitive advantage compared to imported products.⁷⁰¹ Market access is particularly important for food producers to sell their products abroad and improve their standard of living. At a macroeconomic level, improved market access promotes economic development, particularly for SSA countries, because they have a significant population of farmers who can access the wider market with higher profits, while the rural dwellers will access a variety of imported products. However, committing to certain market access levels may restrain a State's ability to limit food importation and protect its local market from certain levels of unfair competition.⁷⁰² It may also limit the regulatory autonomy of the State to control the flow of products that may be perceived to be harmful and unacceptable to the community. Hence, a balance between market access and import barriers is necessary for the progressive realisation of various elements of the RtF.

Whilst the ICESCR neither endorses market access nor import barriers but simply requires States to progressively advance towards the realisation of the RtF,⁷⁰³ the AoA assumes a trade-centric approach towards market access, focusing on the opening of markets for

⁶⁹⁹ Ferguson (n 19) 140

⁷⁰⁰ Tariff barriers include fiscal measures set up by a State to check importation e.g. taxes imposed by a State to restrict the importation of products into its borders while non-tariff barriers are non-fiscal measures such as quantitative import restrictions, customs valuation, technical standards, health and safety regulations, labelling laws, inspection requirements and so forth. See WTO, 'Agriculture Agreement: Explanation, Market Access' (2016) <www.wto.org/english/tratop_e/agric_e/ag_intro02_access_e.htm#prohibition> accessed 28 January 2021

⁷⁰¹ Melaku Geboye Desta (n 698) 62

⁷⁰² Ferguson (n 19) 140

⁷⁰³ CESCR General Comment No 3 (n 48) para 8

unrestricted trade relations.⁷⁰⁴ The trade-centric approach tends to focus on short-term market effects, and it measures overall growth and food security in terms of GDP, whereas the socio-economic rights approach focuses on the experiences of vulnerable groups and the need for sustainable development.⁷⁰⁵ In addition to the AoA, the Agreement on Subsidies and Countervailing Measures (SCM)⁷⁰⁶ and the General Agreement on Tariffs and Trade (GATT)⁷⁰⁷ concurrently regulate various aspects of market access in trade in agriculture.⁷⁰⁸ Some specific market access provisions, such as tariffication and comparative advantage, and the market access exceptions are reviewed below to underline their impact on access to food in SSA.

5.3.1.1 Tariffication:

At the Uruguay Round of negotiations, WTO Member States agreed to improve market access by translating non-tariff barriers into ordinary customs duties and setting binding upper limits, a process known as ‘tariffication’.⁷⁰⁹ The AoA expressly prohibits agriculture-specific non-tariff measures and binds almost all agricultural products traded internationally, including food and non-food agricultural products such as grains and textiles.⁷¹⁰ Articles 4, 5 and Annex 5 of the AoA regulate import barriers, including tariff and non-tariff measures. They establish the tariffication system, which requires Member States to convert non-tariff barriers to tariff measures, reduce their tariffs altogether and open up their borders to foreign products. The AoA defers to tariffs rather than non-tariff barriers to enable quantifiable assessment of tariffs

⁷⁰⁴ Market access has always been a primary objective of the WTO and is typified in the most favour nation (MFN) and national treatment principles of the GATT 1947. See WTO, ‘Principles of the Trading System’ (2016) <www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm> accessed 28 January 2021

⁷⁰⁵ See Ferguson (n 19) 143

⁷⁰⁶ SCM Agreement 1994

⁷⁰⁷ General Agreement on Tariffs and Trade (GATT) 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, (Contained in 1867 U.N.T.S. 187, 33 I.L.M. 1153)

⁷⁰⁸ An in-depth examination of these Agreements is beyond the scope of this study.

⁷⁰⁹ AoA 1994 Articles 4 and 5; See also WTO, ‘Agriculture Agreement: Explanation, Market Access’ (n 700); See also Melaku Geboye Desta (n 698) 63

⁷¹⁰ WTO, ‘Agriculture Agreement: Explanation, Market Access’ (n 700)

and to ensure greater transparency.⁷¹¹ The three components of the tariffication system are conversion of non-tariff to tariff measures, reduction of tariff bindings, and opening up of local markets/special safeguard measures:

Conversion of non-tariff to tariff measures: Article 4 AoA establishes the tariffication requirement of the WTO. It points to Member's Schedules as the source of market access concessions⁷¹² and forbids members from maintaining 'measures of the kind required to be converted into ordinary customs duties, except as otherwise provided for in Article 5 and Annex 5'. It thus prohibits the use of non-tariff measures and requires Member States to convert their non-tariff measures to tariffs. In the *EC-Bananas case*,⁷¹³ the Appellate Body of the WTO Dispute Settlement Body (DSB) pointed out that Article 4.1 AoA imposes substantive obligations on Member States regarding tariffication and tariff reduction commitments; however, the content of these obligations are specified in the Schedule, which also constitutes an integral part of Agreement.⁷¹⁴ Articles 4 and 5 AoA cover both measures that have been converted and measures that ought to be converted but have not actually been converted. Thus failure to convert all protectionist measures under this provision does not absolve a member of its obligations.⁷¹⁵ Article 5 AoA is not explicit on the acceptable levels of market access and the indicators for its application, thus making it difficult to quantify the impact of tariffication policies on food prices or access to food. However, the preclusion of non-tariff measures restricts the ability of the State to implement contingent trade-protective measures to safeguard food production, prevent dumping or support domestic farmers to ensure adequate availability

⁷¹¹ *Chile: Price Band System and Safeguard Measures Relating to Certain Agricultural Products—Report of the Appellate Body* (23 September 2002) WT/DS207/AB/R [200]. See also WTO, *WTO Analytical Index* (Second Edition, Volume 1, CUP 2007) 331

⁷¹² AoA 1994, Article 4.1

⁷¹³ *EC Bananas — Report of the Panel* (n 679)

⁷¹⁴ *EC: Regime for the Importation, Sale and Distribution of Bananas (EC Bananas)—Report of the Appellate Body* (9 September 1997) WT/DS27/AB/R [156]

⁷¹⁵ *Chile: Price Band System and Safeguard Measures Relating to Certain Agricultural Products—Report of the Appellate Body* (n 711) [205]-[209]

and access to food in the State. This way, it limits the ‘available resources’ of the State to achieve the progressive realisation of the RtF.

Reduction of tariff bindings: In addition to conversion of all measures to tariffs, tariffication requires developed-country Member States to reduce their tariffs bindings by an average of 36 percent, with a minimum of 15 percent reduction on each listed product over a period of six years (1995 - 2000).⁷¹⁶ On the contrary, developing countries were required to reduce their tariff bindings by an average of 24 percent for 1995 – 2004, with a 10 percent minimum reduction on each product listed in the schedule.⁷¹⁷ And least-developed countries have no obligations in this regard.⁷¹⁸ It is contested that this tariff reduction provision does not facilitate the creation of a fair and equitable global market economy firstly because a 15 percent reduction in tariff bindings for developed countries bears minimal impact when compared to the impact of a 10 percent tariff reduction for developing countries.⁷¹⁹ Thus tariff reduction may result in a significant loss of income for developing economies. Secondly, tariff reduction encourages international competition, which tends to expose the emerging market of these developing countries to external market forces which may suppress local production and deprive local producers of their livelihood and access to food.⁷²⁰

Opening up of local markets/special safeguard measures: In addition to the tariff reduction, tariffication under the WTO requires Member States to maintain a level of access opportunities for the entry of imports into their territory.⁷²¹ The guaranteed access opportunities are typically achieved through the use of tariff quotas and are computed in relation to the duties normally applied to products above the allowed quota.⁷²² Although the agreement came into force in

⁷¹⁶ WTO, ‘Understanding the WTO: The Agreements, Agriculture: fairer markets for farmers’ (2015) <www.wto.org/english/thewto_e/whatis_e/tif_e/agrm3_e.htm> accessed 31 January 2021

⁷¹⁷ Ibid

⁷¹⁸ Ibid

⁷¹⁹ Ferguson (n 19)

⁷²⁰ Ibid 162-163

⁷²¹ WTO, ‘Agriculture Agreement: Explanation, Market Access’ (700)

⁷²² Ibid

1995, it uses the base period of 1986-88 to define the level of access, permitted protection and import surges.⁷²³ Where, for instance, the access levels at the time that the agreement entered into force in 1995 amounted to less than 5 percent of consumption of that product in the importing country during the base period of 1986-88, that importing country is obligated to ensure minimum access opportunities of at least 3 percent of that base period consumption and to progressively reduce the tariff quota to at least 5 percent of the base period consumption by the year 2000.⁷²⁴ While developed countries were to achieve this 5 percent tariff reduction commitment by 2000, developing countries were to achieve the 5 percent tariff reduction commitment by 2004.⁷²⁵ However, it is contested that the impact of a 5 percent reduction on the growing markets SSA, for instance, may be significant on the economy as to hamper access to food due to reduced income. While reducing tariff commitments and opening the market may facilitate transnational trade, it will induce higher levels of competition which may stifle the emerging production industries of developing countries of SSA and thus impair access to food in these countries.

- *Impact of Tariffication on access to food*

A major challenge of the tariffication system is its adoption of a blanket approach to reduction commitments rather than a product-by-product computation basis. The blanket approach expresses the reduction commitments in terms of a country's total Aggregate Measurement of Support (AMS) which includes all product-specific support and non-product-specific support in one single figure.⁷²⁶ It creates loopholes whereby a country can maintain the required level of commitment by applying higher tariffs on select products of particular

⁷²³ AoA 1994, Arts 1(b), 4, 5 and annex 5

⁷²⁴ WTO, 'Agriculture Agreement: Explanation, Market Access' (n 700)

⁷²⁵ Ibid

⁷²⁶ WTO, 'Agriculture Explanation: Domestic Support'

<www.wto.org/english/tratop_e/agric_e/ag_intro03_domestic_e.htm> accessed 01 May 2023

importance while applying higher reductions on other products of less importance. Some countries have applied this measure to protect and support the domestic production of some important agricultural products through unusually high import tariffs on low-tariff products (otherwise known as the problem of ‘tariff peaks’)⁷²⁷ to discourage exporting countries. For instance, during the Uruguay Round, it was discovered that developed countries made smaller reduction commitments ‘on products which are mainly exported by developing countries (37 percent) than on imports from all countries (40 percent).’⁷²⁸ Tariffs on tropical products remained higher and more complex than tariffs on temperate zone products.⁷²⁹ Since SSA countries specialise in a very limited number of tropical products, the tariff peaks limit set by these developed countries on tropical goods limited the access of SSA countries to the global market. The impact of such tariff peaks is that it debilitates access to food by reducing returns on export, discouraging local production and increasing dependency on the importation of lower-tariff products. Hence, tariff peaks are said to be the most notable limitation of the AoA market access regime.⁷³⁰

Another challenge is the problem of tariff escalation, which occurs when countries retain higher tariffs on processed products than on raw materials.⁷³¹ Thus discouraging the importation of processed rubber into the EC. Tariff escalation becomes problematic when developed countries maintain tariff peaks on processed goods and low tariffs on unprocessed agricultural products to attract raw material imports and suppress international competition on processed foods.⁷³² This is because tariff escalation limits the competing power of developing

⁷²⁷ WTO, ‘Glossary’ (2016) <www.wto.org/english/thewto_e/glossary_e/glossary_e.htm> accessed 02 February 2021

⁷²⁸ WTO, ‘Understanding the WTO: Developing Countries, Some Issues Raised’ <www.wto.org/english/thewto_e/whatis_e/tif_e/dev4_e.htm> accessed 02 February 2021

⁷²⁹ Oliver De Schutter, ‘International Trade in Agriculture and the Right to Food’ (2009) 46 Dialogue on Globalization (Friedrich-Ebert-Stiftung 2009) 13

⁷³⁰ Melaku Geboye Desta (n 698) 62

⁷³¹ WTO, ‘Glossary’ (n 727)

⁷³² Ferguson (n 19) 166; See also GATT, ‘Import Duties and Internal Charges on Natural Rubber’ <www.wto.org/gatt_docs/English/SULPDF/90310214.pdf> accessed 23 September 2021

countries to trade in raw materials and discourages diversification of the local markets into products of higher economic value.⁷³³ It hampers economic expansion, denying developing countries of SSA the long-term goals of market access.⁷³⁴ According to Desta, tariff escalation impairs access to food by undermining the expected long-term gains of market access concessions, discouraging investment in other economically viable levels of production and decimating the local industry in developing countries of SSA.⁷³⁵

A further challenge is the problem of ‘dirty tariffication’.⁷³⁶ This is a situation whereby countries inflated their tariffs during the base period of 1986-88 or in the process of tariffication, overestimating the tariff equivalent of their non-tariff barriers and thereby exaggerating their 1986-88 base rate to avoid any requirement to reduce their commitments.⁷³⁷ As the WTO did not provide a standard formula for the computation of tariffication, some countries were said to adopt arbitrary values as their base rate. These values were not challenged at the time, and they eventually became binding on all parties.⁷³⁸ This was more common among developed countries as only a few developing countries had joined the WTO at the relevant time, and no SSA country had tariffied at the base period of 1986-88 due to constraints of international loan conditions.⁷³⁹ Thus, the AoA created loopholes which were over-stretched by its developed-country primordial members to suit their economic needs to the detriment of developing-country counterparts.⁷⁴⁰ Dirty tariffication placed emerging developing-country members of SSA at an undue disadvantage in the international agricultural

⁷³³ Ibid

⁷³⁴ WTO, ‘Glossary’ (n 727)

⁷³⁵ Melaku Geboye Desta (n 698) 167

⁷³⁶ Andrew Stoeckel and George Reeves, ‘Agricultural Trade Policy Made Easy: Making Sense of Trade Policy for Farmers, Policymakers and the Public’ <www.wto.org/english/forums_e/ngo_e/posp46_cie_e.pdf> accessed 23 September 2021

⁷³⁷ Melaku Geboye Desta (n 698) 75

⁷³⁸ Ibid

⁷³⁹ FAO, ‘Agriculture, Trade and Food Security Issues and Options in the WTO Negotiations from the Perspective of Developing Countries, Country Case Studies’ (Volume II, 2004) <www.fao.org/docrep/003/x8731e/x8731e00.htm#TopOfPage> accessed 18 September 2021

⁷⁴⁰ Joseph (n 91)

market, thus limiting their export, increasing dependency on imports and invariably limiting access to food in SSA.

5.3.1.2 Comparative Advantage

Comparative advantage is an international trade policy of the WTO which posits that countries prosper first by taking advantage of their assets to concentrate on what they can produce best and secondly by trading these products for products that are best produced by other countries.⁷⁴¹ In other words, it requires countries to specialise in products they can most efficiently produce and import other products in which they do not have an advantage.⁷⁴² This is the principle of specialisation and comparative advantage. Specialisation encourages the production of foods that a country's environment naturally supports, and the country has a production advantage compared to other countries.⁷⁴³ States are then encouraged to open their markets to other products that do not have comparative advantage.⁷⁴⁴ It stimulates increased productivity as States are encouraged to concentrate on products in which they have comparative advantage and, by doing so, gain mastery and specialise in that specific area of production. It promotes the efficient use of resources for improved production by encouraging the redirection of resources away from low-yielding crops in a given environment and toward those that can deliver higher profits.⁷⁴⁵

Comparative advantage, however, comes with its gains and drawbacks. On a macro-economic level, requiring a country to specialise in the products in which it has competitive

⁷⁴¹ WTO, 'The Case for Open Trade' <www.wto.org/english/thewto_e/whatis_e/tif_e/fact3_e.htm> accessed 24 September 2021

⁷⁴² OHCHR, 'Report of the Special Rapporteur on the Right to Food Olivier De Schutter - Addendum - Mission to the World Trade Organisation' (2009) (n 88) para 20

⁷⁴³ Ferguson (n 19) 196-7

⁷⁴⁴ Joel R Paul, 'Do International Trade Institutions Contribute to Economic Growth and Development?' (2003) 44 Virginia Journal of International Law 285, 290-2

⁷⁴⁵ Kym Anderson, 'Agriculture, Trade Reform and Poverty Reduction: Implications for Sub-Saharan Africa' (2002) 22 Policy Series in International Trade and Commodities Study Series (United Nations Publication contained in document UNCTAD/ITCD/TAB/24)

advantage would engender increased productivity resulting in increased export and a better standard of living.⁷⁴⁶ However, on the flip side, this practice discourages diversification as it encourages vulnerable countries to concentrate on producing a limited number of foodstuffs irrespective of the economic viability of the product. Thus it tends to breed inequality because it primarily encourages the efficient majority and discourages diversification into other less efficient food products.⁷⁴⁷ By discouraging diversification, it tends to suppress production in those areas of minimal productivity and, as such, increases dependency on imports from countries with more efficient production. The inability to diversify production, especially for the SSA countries, tends to hamper access to food because it increases reliance on imported foods rather than investing in local food production. As SSA countries mostly produce unprocessed foods, specialising in the production and trade of raw agricultural products would make them vulnerable to the Prebisch-Singer theory and impairs their access to food.

The Prebisch-Singer hypothesis of deteriorating terms of trade was postulated by the UN Economic Commission for Latin America led by Raúl Prebisch.⁷⁴⁸ It hypothesises that the price of manufactured commodities and processed food rises over time while the price of primary commodities and unprocessed food declines, resulting in declining terms of trade of primary products.⁷⁴⁹ This implies that since SSA countries specialise in the production of unprocessed foods and import processed foods, the value of their exports will continue to depreciate while the value of their imports will appreciate leading to deteriorating terms of trade. Deteriorating terms of trade imply that if export and import volumes remain stable, these developing countries will experience a decline in income derived from exports while they

⁷⁴⁶ OHCHR, 'Report of the Special Rapporteur on the Right to Food Olivier De Schutter - Addendum - Mission to the World Trade Organisation' (2009) (n 88) para 20; See also Ferguson (n 19) 147

⁷⁴⁷ Joseph (n 91) 40-42

⁷⁴⁸ Raúl Prebisch 'Terms of Trade: Raul Prebisch and the challenges of the development of XXI Century (2012) Economic Commission for Latin America and the Caribbean

<https://biblioguias.cepal.org/ld.php?content_id=31791956> accessed 26 December 2022

⁷⁴⁹ Ibid

spend much more on imported foods, thus limiting their entitlement to food.⁷⁵⁰ If the value of unprocessed foods continues to depreciate while the value of processed foods appreciates, the rural farmers of SSA will soon lose their entitlement/food purchasing power, thereby depriving them of access to food.

Impact of comparative advantage on access to food

Comparative advantage may enhance market access through specialisation; however, it appears to have a converse effect among low-income SSA countries because they are also faced with the long-term challenges of Prebisch-Singer deteriorating terms of trade. Where SSA countries continue to produce low-priced primary agricultural products in which they have comparative advantage, like cocoa in Ghana and rubber in Nigeria, in exchange for the expensive processed foods from developed countries, over time, depreciating terms of trade sets in while the value of the processed foods appreciates. In the years preceding the entry into force of the WTO in 1970-72, SSA had a global market share of 60 percent due to the volume of agricultural products it produced and traded in the world market. But with the introduction and continued practice of comparative advantage *inter alia*, their global market share fell to 28 percent in 1998-2000.⁷⁵¹ Thus, trade liberalisation may have the short-term effect of enhancing productivity through the specialisation of countries in products in which they have comparative advantage. But in the long run, it creates inequalities, exacerbates reliance on food importation and impairs access to food in SSA.⁷⁵²

Another major impact of comparative advantage on access to food is that it could lead to import surges where a high volume of imported products flood a market, driving down the

⁷⁵⁰ Ibid

⁷⁵¹ Olivier De Schutter, 'The World Trade Organization and the Post-Global Food Crisis Agenda' (Activity Report 2011) <www.wto.org/english/news_e/news11_e/deschutter_2011_e.pdf> accessed 22 January 2021

⁷⁵² Joseph (n 91) viii

price of similar local products and suppressing local production.⁷⁵³ The Agreement on Safeguards defines surges as a situation where a product is imported into a country in such large quantities and under such conditions that it causes or threatens to cause serious injury to the domestic industry that produces a similar or directly competitive product.⁷⁵⁴ Import surges into SSA became particularly notorious following the ratification of the AoA. According to the former SR on RtF, prior to the ratification of the AoA, SSA had comparative advantage in agricultural products like rice, sugar and palm oil prices, and export in these products accounted for over 20 percent of agricultural trade in the 1980s.⁷⁵⁵ However, with the opening of the market in the early 2000s, surges of these agricultural products from richer countries with established subsidies and mechanised production systems into SSA led to the decimation of local production in SSA, denying local farmers in SSA access to the market, suppressing local competitors and debilitating access to food in SSA.⁷⁵⁶ Thus comparative advantage tends to impair access to food in SSA by discouraging local production and exacerbating reliance on food importation. The result is poor access to food because, over time, the people lose their entitlement because they are unable to exchange their unprocessed farm produce for the food they need.

5.3.1.3 Market Access Exceptions

⁷⁵³ OHCHR, 'Report of the Special Rapporteur on the Right to Food Olivier De Schutter - Addendum - Mission to the World Trade Organisation' (2009) (n 88) para 22

⁷⁵⁴ WTO Agreement on Safeguards Pursuant to Article XIX GATT 1994 (Contained in documents 1869 UNTS 154) Article 2

⁷⁵⁵ De Schutter, 'International Trade in Agriculture and the Right to Food' (n 729) 25

⁷⁵⁶ FAO, 'Import Surges: What are they and how can they be identified?' (Briefs on Import Surges No. 1, October 2006) 1 <<ftp://ftp.fao.org/docrep/fao/009/j8671e/j8671e00.pdf>> accessed 18 February 2021; See also Samuel K Gayi, 'Does the WTO Agreement on Agriculture Endanger Food Security in Sub-Saharan Africa?' in Basudeb Guha-Khasnobis, Shabd S. Acharya and Benjamin Davis (eds), *Food Security; Indicators, Measurement, and the Impact of Trade Openness* (OUP 2007) 316

Articles 5 and Annex 5 of the AoA provide exceptions to the market access provisions in the form of Special Safeguard (SSG) measures and Special Treatment (ST) measures. These exceptions and their impact on access to food in SSA are examined below.

- *Special Safeguard Measures (SSG)*

Article 5 AoA permits a State to apply Special Safeguard (SSG) Measures in the form of additional tariffs on imports where there are import surges or influx of low-priced products into its territory. However, the proviso for applying SSG measures is that the affected products must have been converted into ordinary customs duty (tariffied), and members must mark the relevant products as ‘SSG’ in their Schedule.⁷⁵⁷ These conditions must be observed before safeguard measures can be applied to any product.⁷⁵⁸ Safeguard measures enable the importing country to respond to import surges that threaten local production, but they cannot be applied to imports that are already under a tariff quota.⁷⁵⁹ Thus, safeguard measures only avail countries that have undergone tariffication and have designated their products with the mark ‘SSG’. Notably, most SSA countries had not tariffied their products at the relevant time. They could not, therefore, impose SSG (additional tariffs) to protect their local markets when confronted with import surges above the specified trigger level. Thus, as SSA countries could not apply safeguards because they had not tariffied their products by the base period, they were exposed to surges and external forces which suppressed local production, increased reliance on importation and limited access to food in SSA.⁷⁶⁰ Some specific impacts of SSG on access to food are discussed below.

Impact of SSG on Access to Food

⁷⁵⁷ AoA 1994, Article 5

⁷⁵⁸ Ibid Article 5 and Annex 5; See also WTO, ‘Understanding the WTO: The Agreements, Agriculture: fairer markets for farmers’ (n 716)

⁷⁵⁹ Olivier De Schutter, ‘The World Trade Organization and the Post-Global Food Crisis Agenda’ (n 751)

⁷⁶⁰ Ibid

Firstly, SSG flexibilities appeared inadequate to assist food SSA countries in fulfilling their RtF obligations because they were limited to tariffied products only. Before SSG measures could apply, a product must have been tariffied by the base period of 1986-88 and designated as ‘SSG’.⁷⁶¹ Case studies conducted by the FAO indicate that at the relevant time, all 38 out of 49 SSA country members of the WTO save Botswana had all their products tariffied under the stringent terms of the World Bank loan agreements.⁷⁶² These loan conditions mandated borrowing countries to adopt structural adjustment programs and precluded the adoption of high tariff measures.⁷⁶³ Tariffication measures undertaken under the strict loan conditions of the World Bank prior to the Uruguay Round, which obligated these countries to undergo structural adjustment programs, were not recognised by the WTO.⁷⁶⁴ Thus, except for Botswana, SSA countries who were members of the WTO at the time could not register their products as ‘SSG’ before the commencement of the AoA as required because of their loan commitments.⁷⁶⁵ Thus they could not make use of the safeguard provisions of the AoA. Although Botswana was allowed some flexibility, its participation in safeguard measures was only limited to a few products.⁷⁶⁶ Other countries who joined subsequently were not allowed this flexibility as they could not have embraced tariffication at the relevant base period of 1986-88.⁷⁶⁷ The requirement to liberalise their markets, coupled with their inability to rely on the safeguard provisions, exposed these SSA countries to the risk of import surges which destroyed local industries, increasing dependency on importation and limiting market access to these countries.⁷⁶⁸

⁷⁶¹ AoA 1994, Article 5.1

⁷⁶² FAO, ‘Agriculture, Trade and Food Security Issues and Options in the WTO Negotiations from the Perspective of Developing Countries, Country Case Studies’ (n 739)

⁷⁶³ Ibid

⁷⁶⁴ Ibid

⁷⁶⁵ Ibid

⁷⁶⁶ Ibid

⁷⁶⁷ OHCHR, ‘Report of the Special Rapporteur on the Right to Food Olivier De Schutter - Addendum - Mission to the World Trade Organisation’ (2009) (n 88) para 23

⁷⁶⁸ FAO, ‘Agriculture, Trade and Food Security Issues and Options in the WTO Negotiations from the Perspective of Developing Countries, Country Case Studies’ (n 739)

Secondly, as net-food importers, it is argued that overdependence on importation and the need to maintain bilateral trade agreements and affordable import prices deterred SSA countries from maximising the SSG flexibilities.⁷⁶⁹ This is because imposing high bound tariff levels would result in higher costs of food in the importing country, thus compounding the already dire situation of food not being affordable and accessible to the people. Thus, with increased liberalisation and increased dependence on foreign products, these food-importing SSA countries had limited options in terms of ‘appropriate measures’ for the progressive realisation of RtF under Article 11 ICESCR.

Thirdly, due to the tariffication of all restrictive measures, the WTO only implemented cap limits rather than reduction commitments in the event of import surges. Article 5 and Annexure 5 AoA allows developing countries to increase tariff limits to a fixed level depending on the level of import surges. Case studies conducted by the FAO on SSA countries in 2004 showed that this flexibility was inadequate to meet the RtF obligations of these SSA countries because most SSA countries already applied tariff rates that were much lower than the permitted bound tariff rates, meaning that these countries were not taking advantage of the flexibility.⁷⁷⁰ The reason for the low tariff rates was traced back to tariffication under the strict loan conditions of the World Bank prior to the Uruguay Round. These countries were obligated to undergo structural adjustment programs, which the WTO did not recognise.⁷⁷¹ As the SSA countries, most of whom were bound by the World Bank loan terms, were not able to tariffy under the AoA, they were deterred from applying the higher tariff rates allowed under the WTO Agreements signifying that the flexibility offered by the AoA was not adequate to assist SSA countries. Additionally, where tariff rates were increased pursuant to the cap limit under Article 5 AoA, it often resulted in an increase in food prices in local markets, thus making the food

⁷⁶⁹ Ibid

⁷⁷⁰ Ibid

⁷⁷¹ Ibid

unaffordable/inaccessible to vulnerable populations living in poverty.⁷⁷² As tariffs were the only allowed protective measure under the tariffication system, it suggested that the SSG flexibilities, including the use of overall cap limits rather than reduction commitments, did not profit SSA because they lacked the capacity and resources to utilise this exception.⁷⁷³ It thus limited the available resources for SSA countries to achieve the progressive realisation of RtF under Articles 2 and 11 of the ICESCR.

Fourthly, where SSA countries were permitted to apply SSG measures to shield local producers against import surges, the challenge of fulfilling the conditions precedent was often perceived as a deterrent to their ability to maximise the flexibilities.⁷⁷⁴ This is particularly so as the importing SSA country was required to justify safeguard measures by identifying surges and proving their impact on the local economy. These conditions are expensive to satisfy and as there are no set limits or benchmarks, proving that the proposed safeguard is proportional to the impact of the surges on the importing SSA country becomes more difficult. Thus, there are no known cases before the DSB involving the use of SSG by SSA⁷⁷⁵ countries because these countries tend to shy away from the onerous conditions. Thus, in *the EC–Hormones case*⁷⁷⁶, where the US challenged EC's ban on beef treated with hormones as inconsistent with its market access commitments, EC argued that the ban complied with the criteria for regulating the importation of harmful and unhealthy products under GATT XX(b).⁷⁷⁷ The Panel found that the initial burden of proof lies on the complainant to establish market barriers and shifts to the respondent to justify the basis of the restrictive measure in question.⁷⁷⁸ The Appellate Body,

⁷⁷² Ibid

⁷⁷³ Ibid

⁷⁷⁴ FAO, *Agricultural Import Surges in Developing Countries—Analytical Framework and Insights from Case Studies*, Manitra A Rakotoarisoa, Ramesh P. Sharma and David Hallam (eds) (FAO 2011) 125

⁷⁷⁵ Ibid

⁷⁷⁶ EC: *Measures Concerning Meat and Meat Products (EC Hormones)*—Report of the Panel (18 August 1997) WT/DS26/R/USA; EC: *Measures Concerning Meat and Meat Products (EC Hormones)*—Report of the Appellate Body (16 January 1998) WT/DS26/AB/R, WT/DS48/AB/R

⁷⁷⁷ Ibid Report of the Panel [3.4]

⁷⁷⁸ Ibid Report of the Panel [8.48]

however, observed that the burden of justifying a restrictive measure through scientific assessment, economic analysis, risk assessment, etc., would be especially difficult for developing countries due to capacity constraints.⁷⁷⁹ However, it found the ban inconsistent with the EC's trade commitments as the EC had failed to justify the basis of the restrictive measure it applied. Thus international trade commitments tend to limit the measures a State may adopt in fulfilling its RtF obligations under Article 11 ICESCR.⁷⁸⁰

Furthermore, the conditions for applying the SSG measures require the State to take the least trade restrictive measure rather than the most effective measure to achieve the desired aim. Thus, where the measures taken by a State to protect the RtF affect the market of an exporting country, the State would be required to demonstrate that the said measure is not only the most effective measure to achieve its RtF goal, but it is the least trade restrictive measure to achieve the desired objective.⁷⁸¹ There are no specific measures under the ICESCR for a State to adopt in fulfilling its RtF obligations, and there are no benchmarks under the AoA to define the maximum social impact a trade measure is permitted to have and what measures a State may take to remedy the social impact. Thus, the appropriateness of any measure depends on the facts of each case. There is currently no case law involving SSA countries, however in *Peru—Additional Duty on Imports of Certain Agricultural Products*,⁷⁸² the Panel found that the variable import levy implemented by Peru was transparent and did not exceed the country's bound tariff levels, and it was deemed appropriate for the realisation of essential elements of the RtF.⁷⁸³ Nevertheless, it held that the import levy was inconsistent with Peru's market access obligations and could lead to price distortions in the domestic market.⁷⁸⁴ Moreover, in *EC—*

⁷⁷⁹ Ibid Report of the Appellate Body [117]

⁷⁸⁰ ICESCR Article 11

⁷⁸¹ *EC Hormones*—Report of the Appellate Body (n 776) [9].

⁷⁸² *Peru: Additional Duty on Imports of Certain Agricultural Products—Report of the Panel* (27 November 2014) WT/DS457/R

⁷⁸³ Ibid [8.1(d)] Note however that Peru did not specifically plead its human rights obligations under the ICESCR as justification for its action thus the Panel did not consider the likelihood of any conflict of norms.

⁷⁸⁴ Ibid [7.193]

Hormones case,⁷⁸⁵ the Appellate Body found that although States have sovereign authority over the level of protection they provide to food products, this authority is subject to their commitments as WTO members and the various trade agreements.⁷⁸⁶ It found that the protective measure adopted by the EC may have been the most effective measure to achieve the desired goal; however, it was not the least trade-restrictive measure to achieve the objective. Thus, market access provisions may limit the available resources for a State to fulfil its RtF obligations as the least trade-restrictive measure may not be the most appropriate measure to achieve the progressive realisation of the RtF under Article 11 ICESCR.

- *Special Treatment Measures*

Annex 5 AoA allows members to maintain barriers and refrain from subsequent tariff reduction in relation to primary agricultural products and related ‘worked and/or prepared’ products in certain circumstances, including where it relates to agricultural products that are the predominant staple food in the traditional diet of a developing country Member.⁷⁸⁷ Similar to the SSG requirements discussed above, products for which special treatment is applied must be tariffed and marked as ‘ST-Annex 5’ in the country’s schedule.⁷⁸⁸ Thus, Annex 5 AoA allows developing countries, including all SSA apply a single (lower) tariff quota (special treatment) to local staple crops. In theory, this would encourage the domestic production of adequate and socially acceptable food and promote access to food and food security. In practice, however, this exception appears inadequate to support the realisation of RtF in SSA, as no SSA country has been recorded to have applied this flexibility.⁷⁸⁹ Some specific impacts of the ST exception to the realisation of RtF in SSA are discussed below.

⁷⁸⁵ *EC Hormones—Report of the Appellate Body* (n 776)

⁷⁸⁶ *Ibid* [253(l)]

⁷⁸⁷ AoA 1994, annex 5 section B

⁷⁸⁸ *Ibid* annex 5.1(a)–(e)

⁷⁸⁹ Only five countries, Japan, Republic of Korea, Philippines, Taiwan, and Israel used the advantages afforded through this special treatment provisions. See Ferguson (n 19) 183

Impact of Special Treatment on Access to Food

The ST flexibilities appear to be inaccessible to SSA countries because the World Bank loan conditions, as discussed earlier, precluded most SSA countries from applying higher tariff quotas allowed under the AoA. Some Least Developed Countries (such as Botswana) that were exempt from the World Bank Loan tariffication restrictions could hardly maximise this flexibility because they had very few products designated for the application of tariff quotas.⁷⁹⁰ It has been suggested that these LDCs had low quotas because the tariff system was too expensive for them and because keeping low tariffs helped them maintain trade relations with food exporting countries and keep food prices low.⁷⁹¹ These Special Treatment flexibilities thus appeared inadequate to meet the socioeconomic needs of the vulnerable market participants as they could not be enforced by the SSA countries, and they failed to provide adequate flexibilities for States to meet their RtF obligations through trade.

Secondly, similar to the SSG, there is a requirement for States to adopt the least trade restrictive measure in applying Special Treatment measures. Applying this exception may limit the available resources for a State to fulfil its RtF obligations as the least trade restrictive measure may not be an appropriate measure to facilitate the progressive realisation of the RtF under Article 11 ICESCR. It may also result in regressivity where the State is not able to achieve the progressive realisation of the RtF. This regressivity is indicative of the violation of RtF in SSA.

Thirdly, the threat of retaliatory or countervailing measures allowed under the Subsidies and Countervailing Measures (SCM) Agreement and other WTO agreements appears to further limit the range of policy options available to Member States in pursuance of their human rights

⁷⁹⁰ Olivier De Schutter, 'The World Trade Organization and the Post-Global Food Crisis Agenda' (n 751)

⁷⁹¹ Ibid

obligations.⁷⁹² This is because SSA countries have a limited number of products they specialise in and a few trading partners to deal with. They tend to prioritise these trade relations and may prefer to suspend their human rights obligations rather than face the threats of countermeasures.⁷⁹³ SSA countries particularly have no records of litigation cases sustained against exporting countries for import surges.⁷⁹⁴ It appears that as net food importers, SSA countries cannot generally engage in contentious cases against the countries on which they depend for food supplies. And where perchance, they succeed in bringing a claim against an exporting country, they may lack the capacity to enforce the judgement, which would usually come in the form of legal authorisation to enforce countermeasures where the respondent country fails to comply with the DSB recommendations.⁷⁹⁵ This is because countermeasures enforced by import-reliant SSA countries may have a more significant impact on increased food prices and aggravated food insecurity in the importing country than it would on the exporting country, which may only suffer a loss of business and not food insecurity.⁷⁹⁶

Additionally, both the SSG and ST flexibilities are merely temporal measures, and as such, they are inadequate to address the long-term problems of poor access to food. SSG and ST measures are defined as emergency measures and can only be employed by a State to protect a specific domestic industry.⁷⁹⁷ Thus they fail to address the long-term problem of food insecurity.⁷⁹⁸ While market access may support free trade of food across borders, it poses a risk where it creates trade obligations which tend to limit the ability of Member States to fulfil their RtF obligations. The AoA has provided some exceptions to address the possible harsh impact

⁷⁹² Olivier De Schutter, 'International Trade in Agriculture and the Right to Food' (n 729) 39

⁷⁹³ Ferguson (n 19) 158

⁷⁹⁴ There are no records of cases instituted by any SSA country before the DSB to date, January 2023; See WTO 'Chronological List of Disputes Cases' <www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm> accessed 06 January 2023

⁷⁹⁵ DSU 1994, Article 22(6)

⁷⁹⁶ Ibid

⁷⁹⁷ WTO, 'Safeguard Measures' <https://www.wto.org/english/tratop_e/safeg_e/safeg_e.htm> accessed 17 May 2022

⁷⁹⁸ Olivier De Schutter, 'The World Trade Organization and the Post-Global Food Crisis Agenda' (n 751)

of trade obligations; however, due to the reasons discussed above, *inter alia*, these exceptions do not seem to provide adequate flexibilities to enable vulnerable Member States to fulfil their RtF obligations. The effect of trade liberalisation and these trade constraints on SSA is that it tends to expose the SSA markets to import surges which destroy local industries, aggravate reliance on imports and vulnerability to the volatilities of the international market, and ultimately impair access to food in SSA.

To address the socioeconomic impact of trade liberalisation on vulnerable economies, WTO Member States adopted the Nairobi package in 2015, which committed to improving the access of developing countries to the food market by extending the safeguard measures available to developing countries.⁷⁹⁹ It required developed country members to immediately eliminate all export subsidies and developing country counterparts to eliminate export subsidies by the end of 2018. It also required Member States to assess the international impact of their applied export subsidy measures in line with the shared responsibility for and extraterritoriality of the RtF.⁸⁰⁰ Consequently, the Member States adopted the *Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least-Developed And Net Food-Importing Developing Countries*, which applies to the AoA.⁸⁰¹ Pursuant to this decision, Member States agreed, *inter alia*, to negotiate food aid commitments in light of the Food Aid Convention to ensure an ‘increasing proportion’ of food aid in the form of grants or ‘concessional terms.’⁸⁰² Member States reaffirmed their commitment to international food aid responsibilities and the duty to take into account its impact on food aid recipients.⁸⁰³ They also agreed to adopt cash-based aid and to procure foods in the recipient

⁷⁹⁹ WTO Special Safeguard Mechanism for Developing Country Members – Ministerial Decision of 19 December 2015 – WT/MIN(15)/43 – WT/L/978

⁸⁰⁰ WTO, Ministerial Decision on Export Competition (2015) WT/MIN(15)/45, WT/L/980 para 11; See also WTO, ‘Understanding the WTO: The Agreements, Agriculture: fairer markets for farmers’ (n 716)

⁸⁰¹ WTO, ‘Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least-Developed and Net Food-Importing Developing Countries’ <www.wto.org/english/docs_e/legal_e/35-dag_e.htm> accessed 12 February 2021

⁸⁰² Ibid Para 3(i)-(iii)

⁸⁰³ WTO, ‘Ministerial Decision on Export Competition’ (n 800) Para 22

country rather than importing foods into the recipient country. However, this agreement neither included sanctions nor adopted other drafting techniques to command compliance among Member States.⁸⁰⁴ Thus, it was never enforced and has been of no practical use to SSA.⁸⁰⁵ SSA countries continue to suffer the limiting effect of agricultural trade liberalisation on the realisation of RtF, thus necessitating the incorporation of socioeconomic rights into world trade to facilitate the realisation of RtF through trade.

5.3.2 Subsidies - Part IV-VI Agreement on Agriculture

The AoA recognises Members' Schedules as an important source of obligations, and it precludes a State from providing support to local producers beyond what is listed in its Schedule.⁸⁰⁶ The AoA does not define subsidies; however, the Subsidies and Countervailing Measures (SCM) Agreement defines subsidies as any form of income or price support by which a benefit is conferred.⁸⁰⁷ A subsidy is deemed to exist where there is financial contribution by a government or public body within its territory, such as direct transfer of funds,⁸⁰⁸ foregone government revenue such as tax credits, and provision of goods or services at subsidised rates by the government *inter alia*.⁸⁰⁹ Subsidies may involve government price-setting or direct payment to producers (budgetary transfers) to encourage local production by guaranteeing a certain level of income to local producers. As earlier noted, both the AoA and the SCM Agreement are binding on all WTO members by virtue of the principle of single undertaken; however, where there are conflicts between the AoA and the SCM or other agreement of the

⁸⁰⁴ Ibid Paras 24, 25

⁸⁰⁵ Ferguson (n 19) 150

⁸⁰⁶ AoA 1994, Articles 3.1 and 6

⁸⁰⁷ SCM Agreement 1994, Article 1.1(a)(2)

⁸⁰⁸ grants, loans, and equity infusion

⁸⁰⁹ SCM Agreement 1994, Article 1.1(a)(1)

WTO with regards to agriculture subsidies, the former prevails.⁸¹⁰ There are two major types of subsidies, domestic support and export subsidies.

Domestic Support: Articles 6 and 7 and Annex 2 of the AoA regulate domestic support. Domestic support is not defined by the AoA; however, the provisions of Articles 1, 3, 6, and 7 tend to suggest that it relates to a wide range of State measures that assist agricultural production in the State, including but not limited to subsidy measures.⁸¹¹ For the purposes of this study, the terms ‘domestic support’ and ‘domestic subsidy’ shall be used interchangeably. Domestic support tends to bring domestic products down to an artificially low price, thus placing them at a competitive advantage over imported products. Domestic subsidies are generally enforced locally (within a state), but the impact could be felt internationally (by other countries) in the course of trade.

Article 6 and Annex 2 AoA allow a number of domestic support measures that are exempt from reduction commitments.⁸¹² All measures for which exemptions are claimed shall be provided through publicly-funded government programmes and must not have the effect of providing price support to producers.⁸¹³ These exceptions to the subsidy reduction commitments are intended to support vulnerable countries that are particularly suffering from the impact of import surges. These exceptions allow a State to implement measures such as price support and other production support measures to protect local industries and enhance access to food within the country. However, similar to the SSG and ST, any State seeking to rely on the domestic subsidy exceptions under Article 6 AoA is required to show that the intended measure is the least trade-distorting option for achieving a legitimate aim.⁸¹⁴ These conditions to the exceptions tend to limit the usefulness of the flexibilities and its adequacy for

⁸¹⁰ AoA 1994, Article 21.1

⁸¹¹ Melaku Geboye Desta (n 698) 305

⁸¹² See AoA 1994, Article 6.1 and Annex 2 sets out the basis of exemption for reduction commitments for domestic support.

⁸¹³ Ibid

⁸¹⁴ AoA 1994, Annex 1(1)

supporting the realisation of RtF in SSA, thereby limiting the powers of the State to take measures for the progressive realisation of RtF. This is because a State's available options for fulfilling its RtF obligations are limited to the least trade-restrictive option, bearing in mind that the least trade-restrictive option may not necessarily be the most effective option. The major forms of domestic support are export subsidies and import subsidies.

Export subsidies are considered the most harmful to the realisation of RtF.⁸¹⁵ It includes any support provided by the government or its agencies to boost export performance.⁸¹⁶ It includes benefits conferred for export purposes on more advantageous terms than what would otherwise have been available to the recipient in the market.⁸¹⁷ Export subsidies distort the market by bringing products down to an artificially low price and placing the subsidised products at a competitive advantage over other products in the international market. It is reviewed alongside domestic subsidies in this study because export subsidies are rarely employed without an element of domestic support.

5.3.2.1 Classification of Subsidies

The WTO rules of practice classify subsidies into three boxes according to the level of market distortion and acceptability.⁸¹⁸ These are the green box, the blue box and the amber box:

The green box comprises measures with little or no distorting effect on trade. These measures are allowed without limits for developed and developing countries alike,⁸¹⁹ provided that the measures have little or no trade-distorting effects on production. They are funded by

⁸¹⁵ Olivier De Schutter, 'The World Trade Organization and the Post-Global Food Crisis Agenda' (n 751)

⁸¹⁶ AoA 1994, Article 9(1)

⁸¹⁷ Ibid Articles 8 and 9; See also *Canada: Measures Affecting the Export of Civilian Aircraft—Report of the Appellate Body* (2 August 1999) WT/DS70/AB/R [149], [161]

⁸¹⁸ This classification is not contained in the AoA but is supported by the WTO analytical index and official documents based on the provisions of the AoA. See WTO, 'Domestic Support in Agriculture – the Boxes' <www.wto.org/english/tratop_e/agric_e/agboxes_e.htm> accessed 24 March 2021; See also WTO, *WTO Analytical Index* (n 705)

⁸¹⁹ AoA 1994, Article 6

the State using public funds and do not have the effect of providing ‘support to producers’.⁸²⁰

Such measures must also have clearly defined goals.⁸²¹ They include public stockholding for food security purposes, structural adjustment programmes and regional assistance, income insurance and payments to producers, domestic food aid and mass food reliefs.⁸²²

A major challenge with the green box measures is that they are actionable under the SCM Agreement. Thus, where the measures cause serious injury or serious prejudice, or nullify or impair another member’s benefits, the affected member can implement countervailing measures under the SCM Agreement.⁸²³ Therefore, it is arguable that the green box provides adequate flexibility for States to take appropriate steps to support local food production and facilitate access to food. This is because as net food-importing countries, where the green box measures of SSA countries affect exporting country members, the exporting country may impose countermeasures on the importing country under the SCM Agreement. Such countermeasures may result in a shortage of the affected agricultural products and a rise in prices leading to impaired physical and economic access to food in the importing country.⁸²⁴ However, where SSA countries are impacted by the green box measures applied by an exporting Member State, the affected SSA country may find it difficult to enforce countermeasures against the exporting country because of its dependence on imports. Imposing countermeasures on food exporters may cause the importing country to suffer higher consequences of food shortages and hike in prices while the exporting country suffers minimal trade effects.⁸²⁵ Whilst the green box appears to provide equal flexibility for States to take appropriate steps to achieve the progressive realisation of RtF, the flexibility is hardly achieved

⁸²⁰ Ibid Annex 2 Article 1

⁸²¹ Ibid Articles 3, 4, 6, 8 - 13

⁸²² Ibid Articles 2 - 13

⁸²³ WTO, ‘Subsidies and Countervailing Measures: Overview, Agreement on Subsidies and Countervailing Measures’ <www.wto.org/english/tratop_e/scm_e/subs_e.htm#fntext2> accessed 26 March 2021

⁸²⁴ Joseph (n 91)

⁸²⁵ Olivier De Schutter, ‘The World Trade Organization and the Post-Global Food Crisis Agenda’ (n 751) 6. See also Joseph (n 91) 185

in SSA because, as import-reliant States, they seem unable to impose subsidies for fear of countermeasures. Hence the AoA made further provisions for Special and Differential (S&D) treatment of developing and least developed countries.

The AoA provides for S&D treatment, which allows developed countries up to six years to comply with the listed support reduction commitments; developing countries are given ten years to comply, while least developed countries continue providing domestic support as prescribed.⁸²⁶ However, this phased reduction was never implemented; thus, developed countries continue to implement subsidies that place their products at competitive advantage over products from developing countries.⁸²⁷ The aim of subsidy removal for trade liberalisation seems elusive as countries continue to implement various forms of subsidies. But the impact is more debilitating on SSA countries because they appear ill-equipped to engage in economic battles of countermeasures and countervailing measures due to their excessive reliance on food imports. The impact on SSA is the continued dumping of subsidised agricultural products from exporting countries, thus destroying the local industry, exacerbating reliance on imports, and thereby interfering with the realisation of RtF in SSA.

The blue box comprises measures that should have been prohibited but are otherwise allowed for the purposes of limiting production.⁸²⁸ It includes direct payments under production-limiting programmes, such as payments based on fixed area/yields.⁸²⁹ Pursuant to Article 13 of the Marrakesh Agreement, otherwise known as ‘The Peace Clause’, Blue Box measures are not subject to countervailing measures under the SCM agreement.⁸³⁰

A major challenge with the blue box is that it hardly benefits SSA Countries because these countries seek alternative means of increasing production rather than limiting it.

⁸²⁶ AoA 1994, Article 15

⁸²⁷ Ferguson (n 19) 163 - 164

⁸²⁸ AoA 1994, Article 6(5)

⁸²⁹ For instance, livestock payments made on a fixed number of heads; Ibid, Article 6(5)(a)

⁸³⁰ WTO Agreement 1994. Despite the expiration of the Peace Clause in 2004, no country has so far challenged a blue box subsidy measure under the SCM Agreement 1994. See Joseph (n 91) 189

Furthermore, the former SR on RtF contended that the blue box tends to create loopholes, allowing developed countries to adjust otherwise prohibited measures, reduce their trade impacts and conform them to the blue box criteria to maintain the commitment level allowed in the country's schedule.⁸³¹ Where exporting countries manipulate the blue box to introduce trade-distorting subsidies, it brings down the prices of products for exports, thus suppressing competition from countries that have not applied similar subsidies. This allows subsidised products to be exported to the local markets of food-importing countries at prices below the average production price. These products tend to have a competitive edge over local products because of their lower prices; thus, they suppress local products in the SSA markets and increase reliance on importation, thereby depriving local producers of entitlement and exacerbating the problem of poor access to food.

Although the green and blue boxes appear to have minimal trade distorting effect, another problem arises where the subsidising country engages in 'box shifting'. Box shifting occurs when a State manipulates its aggregate measure of support to counterbalance undue gains from subsidy commitments. In box shifting, a country increases its domestic support levels in such a way that the blue box decreases while green box measures increase in significant proportions, and in the end, the aggregate measure of support is maintained.⁸³² Box shifting tends to defeat the aim of subsidy prohibition, thereby perpetuating the adverse impact of subsidies, including exacerbating overreliance on imports and impairing access to food in SSA.

The amber box comprises domestic support measures not included in the blue or green boxes, provided it falls within *de minimis* values.⁸³³ They are the most trade-distorting of the

⁸³¹ Olivier De Schutter, 'The World Trade Organization and the Post-Global Food Crisis Agenda' (n 751) 6. See also Joseph Ibid

⁸³² Dominic Coppens, *WTO Disciplines on Subsidies and Countervailing Measures* (CUP 2014) 321

⁸³³ That is support which is not up to 5 per cent of the production value of product-specific, and up to 5 percent of production value of non-product-specific subsidies. See AoA 1994 Article 6.4(a)(i)–(ii)

three boxes and are subject to reduction commitments. Developed countries commit to a 20 percent reduction over six years while developing countries commit to a 13 percent subsidy reduction over a period of ten years.⁸³⁴ LDCs are exempt from reductions under the amber box.⁸³⁵ However, this reduction has not been implemented despite the expiration of the stated implementation period, and there is no penalty for non-compliance.⁸³⁶ Thus, it fails to address the problem of trade distortive subsidies. Where subsidy measures are applied under the amber box, it provides support for local production, thus enhancing domestic access to food. However, the impact on the international market is that it brings down the prices of exports, thus placing the subsidised product at an undue competitive advantage over non-subsidised products. These subsidised products eventually flood the import-reliant SSA market, dominating the local markets, discouraging local production and increasing reliance on importation. In the long run, it deprives local producers of their livelihood and exacerbates the problem of inadequate access to food in SSA.

5.3.2.2 Impact of Subsidy on Access to Food

When subsidies are not regulated, they become counterproductive to trade liberalisation and international human rights. Adverse subsidies bring down the price of imported food against local products and increase reliance on importation, thus exacerbating the vulnerability of net food importing countries. In the long run, this could lead to a loss of political power as the dependent country is more likely to yield to international pressure from the exporting country.⁸³⁷ At the same time, it interferes with the ‘natural’ comparative advantage of developing countries.⁸³⁸ A classical illustration is seen in the EU beet sugar subsidies, which

⁸³⁴ Ibid Article 1(f) and 15.2

⁸³⁵ Ibid Article 15.2

⁸³⁶ Joseph (n 91) 186 - 187

⁸³⁷ Lorand Bartels, ‘Trade and Human Rights’ in Daniel Bethlehem, Isabelle Van Damme, Donald McRae, and Rodney Neufeld (eds) *The Oxford Handbook of International Trade Law* (OUP 2009) 574

⁸³⁸ Ibid

led to the overproduction of beet sugar in the EU.⁸³⁹ The subsidised beet sugar was then exported to developing countries at prices below the cost of production. In EC —*Export Subsidies on Sugar case*,⁸⁴⁰ the Panel found that the EC sugar subsidy was traded restrictive and that the EC exceeded its export subsidy commitments as contained in the schedule.⁸⁴¹ Although this judgement led to some reforms in the Common Agricultural Policy (CAP) of the EU, it seems that the reforms have done little to improve the adverse impact on access to food in importing countries as the subsidy levels remain high.⁸⁴² The EU is ranked as the second largest exporter of sugar, although it does not have proportional comparative advantage in the production of sugar beets.⁸⁴³ The importation of these subsidised beet sugar into SSA impacts the ability of local producers of sugar cane in SSA to compete fairly in the international market, although they have comparative advantage in the production of sugar cane.⁸⁴⁴ It impairs the realisation of RtF in SSA by sponsoring overreliance on importation, making the importing country vulnerable to market fluctuations and depriving local producers of economic access to food.⁸⁴⁵

The impact of market fluctuations and food crises is often more intense on poor economies with no safety nets than on stable economies with adequate price stabilization measures.⁸⁴⁶ For instance, during the global economic meltdown of 2008 and the preceding years, food prices rose by an average of 83 percent globally. SSA countries experienced as much as 200 percent increase in food prices because of their high dependence on importation and the lack of safety nets to address such price volatilities. This led to increased hunger, food

⁸³⁹ See EC: *Export Subsidies on Sugar—Report of the Panel* (15 October 2004) WT/DS283/R, WT/DS266/R and WT/DS265/R

⁸⁴⁰ Ibid

⁸⁴¹ Articles 3.3, 8, and 9.1 of the Agreement on Agriculture

⁸⁴² Wouter Vandenhoe, 'Third State Obligations under the ICESCR: A Case Study of EU Sugar Policy' (2007) 76(1) *Nordic Journal of International Law* 73

⁸⁴³ Ibid

⁸⁴⁴ Ibid

⁸⁴⁵ Ibid 91

⁸⁴⁶ Wayne Jones and Armelle Elasmri, 'Rising Food Prices: Causes, Consequences and Policy Responses' in Baris Karapinar and Christian Häberli (eds) *Food Crises and the WTO; World Trade Forum* (CUP 2010) 109

riots and high death rates in SSA.⁸⁴⁷ On the other hand, developed countries recorded minimal price increases, with the EU climaxing at 7.1 percent food price increase in 2008 because of self-sufficiency and the ability to provide domestic support to local food producers.⁸⁴⁸

Ironically, high food prices do not automatically translate to higher income for subsistent farmers of SSA because they may lack the capacity to leverage the hike in prices to increase production or maximise profits.⁸⁴⁹ On the other hand, price drops resulting from excessive importation of subsidised products diminish the livelihood of local producers who drop their prices to beat the competition while they have not received any form of price support from the State. There is also a tendency for farmers to gravitate towards high-income yielding products for economic gains, leaving the production of nutritious staple foods which are acceptable to their immediate community.⁸⁵⁰ High production of the preferred economically viable product could, in turn, result in overproduction of the said product, and where supply outweighs demand, it leads to price drops which diminish the livelihood of the farmers resulting in a lack of entitlement to food+.⁸⁵¹ In such cases, the obligation to fulfil the RtF requires the State to implement effective subsidy measures to encourage diversification into the production of staple crops to facilitate access to nutrition of the State.

Although subsidies tend to distort the market through State intervention in competition, subsidy prohibition under the AoA may limit the available options open to the State to fulfil its RtF obligations, thereby resulting in regressivity and a violation of RtF. To determine the impact of AoA subsidy provisions on the realisation of RtF, it is imperative to examine the

⁸⁴⁷ Ferguson (n 19) 191; See also, FAO, 'What happened to World Food Prices' (2009)

<www.fao.org/3/i0854e/i0854e01.pdf> accessed 01 March 2021

⁸⁴⁸ EC, 'Food Prices: EU Food Prices up by 7.1% year-on-year in April 2008; Impact on Total Inflation Differs Between Member States' (2008) <https://ec.europa.eu/commission/presscorner/detail/en/STAT_08_76> accessed 01 March 2021; see also Derek Headey and Shenggen Fan 'Reflections on the Global Food Crisis. How Did It Happen? How Has It Hurt? And How Can We Prevent the Next One?' (2010) International Food Policy Research Institute (IFPRI) Research Monograph <www.ifpri.org/sites/default/files/publications/rr165.pdf> accessed 01 March 2021

⁸⁴⁹ Wayne Jones and Armelle Elasri (n 846)

⁸⁵⁰ Joseph (n 91) 196

⁸⁵¹ Ibid

binding nature of WTO obligations and its coercive effect on the States in cases of inconsistencies with human rights obligations. By virtue of the principle of *pacta sunt servanda*, the sovereignty of a State is limited by its international law commitments. Thus the ability of a State to undertake certain measures in fulfilment of the RtF is subject to its commitment under the WTO.⁸⁵²

Article 2(1) and 11(1) ICESCR obligate State Parties to ‘appropriate steps... to the maximum of their available resources’ to achieve the progressive realisation of the covered rights.⁸⁵³ In this case, a State's ‘maximum available resources’ refers to the resources that a State could utilise without being subjected to challenge or countermeasures.⁸⁵⁴ ‘Appropriate steps’ are limited where the said measure appears inconsistent with the State’s WTO subsidy reduction commitments. For instance, the obligation of the State to take steps toward the progressive realisation of the RtF using the ‘available resources’ may be limited to the annual *de minimis* requirements of the AoA.⁸⁵⁵ Any support above the *de minimis* levels of support is restricted under the AoA.⁸⁵⁶ Thus, although the AoA does not outrightly prohibit food security programmes, it tends to limit the resources a State may allocate to food security programmes because calculating annual *de minimis* support levels involves the difference between the applied price and the external reference price of products purchased for food security programmes. And where the desired ‘appropriate measure’ for the fulfilment of RtF is permitted under any of the exceptions discussed above, SSA countries may be reluctant to adopt the said measure for fear of countermeasures or other trade measures by food-exporting countries. These circumstances may compel SSA countries to take regressive measures, which

⁸⁵² Vienna Convention 1969, Article 26 establishes the principle of *pacta sunt servanda*, ‘Every treaty in force is binding upon the parties to it and must be performed by them in good faith.’

⁸⁵³ ICESCR 1976, Article 2 (1)

⁸⁵⁴ CESCR General Comment No 3 (n 48) para 9

⁸⁵⁵ Olivier De Schutter, ‘International Trade in Agriculture and the Right to Food’ (n 729) 39

⁸⁵⁶ The AoA *de minimis* levels of support allows up to 5 percent and 10 percent support of the production value of product-specific subsidies for developed and developing countries respectively. The amount that falls within the *de minimis* values are not subject to reduction commitment and anything above that is restricted under the amber box. See AoA 1994, Article 15.2 and 6.4

indicates a violation of Rt.⁸⁵⁷ Whereas trade liberalisation commitments may not outrightly violate RtF obligations, they could constrain the realisation of the latter in the face of conflicting obligations.

The duty to fulfil the RtF under Article 11 ICESCR may require direct State intervention to support local production and availability of affordable food. It may require measures which support local production of nutritious and culturally acceptable food as well as measures which reduce the cost of agricultural products for producers and consumers alike.⁸⁵⁸ It may also require the State to purchase foodstuffs from local producers at supported prices for stockholding programmes and the conservation of food to aid local populations during food crises. The duty to fulfil the RtF may also necessitate indirect measures to support farmers with the resources and technology for food production, preservation and distribution. This may include providing credit facilities, training, fertilisers and farming aides, transportation and food distribution aides. These measures are essential to building strong safety nets so that the State is not vulnerable to external factors, sudden shocks and famines. However, some of these measures are prohibited under the subsidy regime.

Fulfilling the RtF may, in appropriate cases, require State intervention in remote causes of food insecurity, such as environmental issues and price regulation of the petroleum sector.⁸⁵⁹ The CESCR encourages subsidies that support eco-friendly farming techniques, maintain soil integrity, and efficient use of water and natural resources to ensure sustainable food security.⁸⁶⁰ It may involve leveraging domestic support, which encourages research and broader development policies, encourage innovation and supports emerging industries to facilitate food

⁸⁵⁷ Olivier De Schutter, 'The World Trade Organization and the Post-Global Food Crisis Agenda' (n 751) 3

⁸⁵⁸ CESCR General Comment No12 (n 6) paras 11–13

⁸⁵⁹ Kym Anderson, 'Agriculture Trade Liberalisation and the Environment: A Global Perspective' in Kym Anderson and Tim Josling (eds) *The WTO and Agriculture* (Vol. 2, Edward Elgar Publishing 2005) 355

⁸⁶⁰ CESCR General Comment No 12 (n 6) para 7

security.⁸⁶¹ Agricultural support to facilitate access to food may, in appropriate cases, include export subsidies to assist local farmers to compete internationally and make food accessible to the importing country at cheaper prices.⁸⁶² Despite the dire food situation in SSA, these countries are limited in their ability to undertake these measures because they tend to conflict with the trade liberalisation commitments as discussed above. Where a State is unable to implement these measures due to the constraints of its trade liberalisation commitments, it may lead to regressivity which is indicative of a violation of RtF.

This section highlights the need for a balance between trade and human rights regimes, as subsidies may be harmful to the realisation of RtF, where they are either unregulated or outrightly prohibited without considering the socioeconomic impact.⁸⁶³ Trade liberalisation policies may not contradict the RtF obligations of Member States under the ICESCR; however, it may restrict the available options open to a State and limit the ability of the State to take appropriate measures towards the realisation of RtF through strong market commitments. Although the AoA creates exceptions for the S&D treatment of developing countries, the impact of certain trade liberalisation commitments discussed above remains particularly grievous on SSA countries. This is because stringent loan conditions requiring market liberalisation before the advent of the AoA tend to limit the powers of the State to maximise the flexibilities and exceptions of the AoA. In other cases, SSA countries cannot afford the cost of enforcing these flexibilities due to the fear of countermeasures from food exporters. These constrictions encourage regressivity, particularly when the measures taken by the State to fulfil its RtF obligations are assessed on the basis of the totality of rights in the ICESCR vis-à-vis

⁸⁶¹ WTO, *World Trade Report 2006* (World Trade Organization 2006) 66
<https://www.wto.org/english/res_e/booksp_e/anrep_e/world_trade_report06_e.pdf> Accessed 27 December 2022

⁸⁶² Michael Herrmann, 'Agricultural Support Measures in Developed Countries and Food Insecurity in Developing Countries' in Basudeb Guha-Khasnobis, Shabd S. Acharya, and Benjamin Davis (eds) (n 756) 220

⁸⁶³ WTO, *World Trade Report 2006* (861) 64

the entirety of available resources and the ability of the State to maximise these resources.⁸⁶⁴

Where the passive wordings of the ICESCR are juxtaposed with the coercive obligations of the AoA, more States tend to prioritise their trade commitments above human rights obligations due to the fear of countermeasures. As established above, prioritising trade commitments over human rights obligations may limit the ability of the State to fulfil its RtF obligations, leading to regressivity and the violation of RtF in SSA.⁸⁶⁵ The section below examines possible ways of incorporating socioeconomic rights into trade to facilitate the realisation of RtF in SSA through trade.

5.4 Incorporating Socioeconomic Rights into World Trade Rules

Having examined the contradictions between the human rights and trade regime and the adverse impact of trade liberalisation on access to food in SSA, this section examines some entryways in the WTO jurisprudence through which socioeconomic rights could be integrated into world trade to enhance access to food in SSA. Incorporating socioeconomic rights in trade could be through the judicial application of general rules of interpretation on conflict of laws, applying State policy goals or applying the general exceptions to the GATT rules. These entryways are discussed below:

5.4.1 Application of General Principles of Conflicting Laws

The Vienna Convention on the Law of Treaties 1980 provides the rules for the resolution of conflicts of laws.⁸⁶⁶ The general rule of interpretation under Article 31 of the Vienna Convention states that ‘a treaty shall be interpreted in good faith in accordance with the

⁸⁶⁴ Malcolm Langford and Jeff A. King, ‘Committee on Economic, Social and Cultural Rights’ in Malcolm Langford (n 41) 501

⁸⁶⁵ Melaku Geboye Desta (n 698) 13

⁸⁶⁶ Vienna Convention on the Law of Treaties (Vienna Convention) Adopted 23 May 1969, entered into force 27 January 1980 (Contained in document 1155 UNTS 331) Article 30

ordinary meaning to be given to the terms of the treaty in their context and the light of its object and purpose'.⁸⁶⁷ It requires State Parties to take into account any relevant rules of international law applicable to their relationship.⁸⁶⁸ Due to its long usage and vast coverage, this general rule of interpretation has attained the status of customary law.⁸⁶⁹ It thus forms part of the "customary rules of interpretation of public international law" acknowledged in the Dispute Settlement Understanding (DSU) and applies to all WTO Member States, including all EU and SSA countries.⁸⁷⁰ Article 3(2) DSU directs the Dispute Settlement Body (DSB) to interpret existing provisions of WTO agreements in accordance with customary rules of interpretation of public international law.⁸⁷¹ In the *US Gasoline case*⁸⁷², the Appellate Body recognised that the general rule of interpretation under the Vienna Convention has attained the status of a rule of customary or general international law and that it forms part of the "customary rules of interpretation of public international law" which the DSB is directed by DSU Article 3(2), to apply when clarifying the provisions of the GATT and the other WTO Agreements. It also noted that applying the general rule of interpretation requires the DSB to give meaning and effect to all the terms of a treaty and not to adopt an interpretation that would result in reducing whole clauses or paragraphs of a treaty to nullity.⁸⁷³

However, for this rule of conflict of laws to apply, the overlapping/conflicting rules of international law must relate to the same subject matter.⁸⁷⁴ It has been contested that the rule may not apply to inconsistencies between the WTO and RtF provisions because they do not

⁸⁶⁷ Ibid Art. 31(1)

⁸⁶⁸ Ibid Article 31(3)(c)

⁸⁶⁹ *Golder v United Kingdom* [1975] App No 4451/70, A/18, 1EHRR 524 ECHR, IHRL 9; See also Robert Jennings and Arthur Watts (eds), *Oppenheim's International Law* (9th ed., Vol 1, OUP 1992) 1271-1275

⁸⁷⁰ DSU 1994, Article 3(2)

⁸⁷¹ WTO Agreement 1994, Article 3(2) and Annex 2- DSU 1994

⁸⁷² See *US: Standards for Reformulated and Conventional Gasoline—Report of the Appellate Body* (29 April 1996) WT/DS2/AB/R [16]

⁸⁷³ Ibid; See also Vienna Convention 1980, Article 31(1)

⁸⁷⁴ UN International Law Commission, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law' Report of the Study Group of the International Law Commission presented on 13 April 200 (Contained in document A/CN.4/L.682) Para 21

relate to the same subject matter.⁸⁷⁵ While the WTO provisions relate to international trade laws, the RtF under the ICESCR relates to international human rights law. However, this is disputed on the grounds that there is no known, universally acceptable basis for the classification of international law provisions. Although trade and human rights relate to two different areas of law, it is practically impossible to compartmentalise the rules, their application, obligations and entitlements into separate air-tight capsules without the possibility of diffusion and interrelations.

Whereas the subject matter of ICESCR and the AoA appears to be different, the objectives are not dissimilar. Both Article 11 ICESCR and the AoA relate to the availability and accessibility of food, but the approach differs.⁸⁷⁶ While Article 11 ICESCR is concerned with the right of each individual to access food, Articles 4 and 5 AoA relate to the equitable distribution of food among states. Both the ICESCR and the AoA promote the economic wellbeing of the human person. The former DG of the WTO, Pascal Lamy, suggested that both trade and human rights regimes are based on the ‘same values’ including ‘individual freedom,’ ‘non-discrimination,’ and ‘welfare.’⁸⁷⁷ In his opinion, ‘trade is only a means to an end, and the intended end is to raise the standards and conditions of living of all’,⁸⁷⁸ a concept referred to in this study as wellbeing. Likewise, Article 11 ICESCR recognises the right of everyone to an adequate standard of living and to the continuous improvement of living conditions,⁸⁷⁹ which concept is also assessed and referred to in this study as wellbeing.

Furthermore, both the ICESCR and the WTO Agreement promote sustainable development. While the WTO Agreement advocates the ‘optimal use of the world’s resources

⁸⁷⁵ Ferguson (n 19) 171-2. See further argument on whether the WTO trade rules are inconsistent with human rights norms in *Indonesia: Certain Measures Affecting the Automobile Industry—Report of the Panel* (2 July 1998) WT/DS54/R WT/DS55/R WT/DS59/R WT/DS64/R

⁸⁷⁶ Ibid 171-2; See also Hans Morten Haugen, *The Right To Food and the TRIPS Agreement* (Martinus Nijhoff Publishers, 2007) 345

⁸⁷⁷ Lamy (n 102)

⁸⁷⁸ Ibid

⁸⁷⁹ ICESCR 1976, Article 11(1)

in accordance with the objective of sustainable development’,⁸⁸⁰ the ICESCR reinforces the importance of agricultural improvements ‘to achieve the most efficient development and utilisation of natural resources’.⁸⁸¹ The former Director General of the WTO, Pascal Lamy, identified sustainable development as a substantive objective of WTO trade rules, highlighting the provision of the WTO Agreement that ‘Trade and economic endeavours should be conducted with a view to raising standards of living’.⁸⁸² The AoA also recognises the need to reform agricultural trade having regard to non-trade concerns of food security and the environment,⁸⁸³ while the ICESCR requires States to take measures to reform agricultural systems, taking into account the problems of both food-importing and food-exporting countries to ensure an equitable distribution of world food supplies in relation to need.’⁸⁸⁴ The RtF is realised in a state of food security which entails sustainable physical and economic access to adequate food at the household and individual levels, and world trade is recognised as an important vehicle through which this could be achieved.⁸⁸⁵ These overlaps, therefore, demonstrate the need to integrate human rights into trade to facilitate sustainable access to food in SSSA through trade liberalisation.

It is therefore suggested that in giving life to the AoA, the DSB ought to take into account relevant rules of international law which are applicable to the parties in dispute.⁸⁸⁶ As food security is recognised in the preamble to the AoA, it is suggested that the DSB ought to interpret the Agreement in a manner as to give life to the human rights obligation of Member States to take steps for the progressive realisation of RtF, including access to food.⁸⁸⁷ Given that over 84 percent of WTO members are signatories to the ICESCR taking account of the relevant rules

⁸⁸⁰ Preamble to the WTO Agreement 1994

⁸⁸¹ ICESCR 1976, Article 11.2

⁸⁸² Lamy (n 102); See also Preamble to the WTO Agreement 1994, Para 1

⁸⁸³ Preamble to the AoA 1994

⁸⁸⁴ ICESCR 1976, Article 11.2(a)

⁸⁸⁵ Kerstin Mechlem, ‘Food Security and the Right to Food in the Discourse of the United Nations’ (2004) 10 *European Law Journal* 631

⁸⁸⁶ Vienna Convention 1980, Article 31(3)(c)

⁸⁸⁷ This is in line with Vienna Convention 1980, Articles 31(1) and 31(3) (c)

of international law which are applicable to the parties requires the DSB to consider Articles 2 and 11 of the ICESCR when interpreting the AoA.⁸⁸⁸

However, there appears to be no records of human rights being considered in the decision-making of the DSB.⁸⁸⁹ This is probably due to the fact that no State has been recorded to have pleaded human rights as justification for any trade restrictive measures.⁸⁹⁰ Additionally, the ambiguous wordings of the ICESCR and the fact that its provisions have mostly been interpreted by the Committee through General Comments and guidelines, which have no legally binding effect, is a major challenge to the enforcement of RtF obligations through the world trade system because the ICESCR does not set any parameters that the DSB could follow in determining any case. However, the DSB could contribute to the clarification and enforcement of the ICESCR if wellbeing and human rights considerations are taken into account when interpreting trade agreements.

In *EC- Seal Products*,⁸⁹¹ the EC banned the importation of seal products to save products hunted by Indigenous communities or products hunted through marine resource management measures. It sought to rely on Article XX GATT, contending that the measure was necessary for protecting ‘public morals’ and the livelihood of the indigenous people. The Appellate Body declined the opportunity to address the issue as a human right of the indigenous people; rather, it considered it as an issue of community interests. The Appellate Body found that the policy may be justifiable under other GATT exceptions;⁸⁹² however, it was a breach of EC’s trade

⁸⁸⁸ Holger Hestermeyer, ‘Economic, Social and Cultural Rights in the World Trade Organisation: Legal Aspects and Practice’, in Eibe Riedel and Gilles Giacca, *Economic, Social and cultural Rights: Contemporary Issues and Challenges* (2014 OUP) 260

⁸⁸⁹ Joseph (n 91)

⁸⁹⁰ Ibid

⁸⁹¹ See Vienna Convention 1980, Arts 31(1); See also *EC: Measures Prohibiting the Importation and Marketing of Seal Products—Report of the Appellate Body* (22 May 2014) WT/DS400/AB/R; WT/DS401/AB/R [4.6]; See also Marie Wilke ‘The Litmus Test: Non-Trade Interests and WTO Law After Seals’ (2014) 8(7) Boires (International Centre for Trade and Sustainable Development) <<https://ictsd.iisd.org/bridges-news/biores/news/the-litmus-test-non-trade-interests-and-wto-law-after-seals>> accessed 23 April 2021

⁸⁹² GATT 1994, Article XX

commitments.⁸⁹³ It held that the discriminatory effect of the measure questioned the appropriateness of the ban in achieving the stated objective because the commercial seal hunts by importers were as harmful to animal welfare as the hunt performed by indigenous people. The Appellate Body failed to appreciate the wellbeing implications of the ban, indicating that the WTO is unlikely to accept human rights obligations as justification for trade-restrictive measures.

Furthermore, in the *US Shrimp* case,⁸⁹⁴ the Appellate Body employed non-trade considerations in interpreting Article XX (g) GATT 1994 on the conservation of ‘exhaustible natural resources.’⁸⁹⁵ However, it avoided considerations of human rights in its interpretation, holding that countries have the right to take action to protect the environment (in particular, human, animal, or plant life and health), but the WTO does not have to ‘allow this right’ where the measure in question is not the least trade-restrictive measure. The DSB thus seemed more concerned with trade liberalisation and the restrictiveness of a measure than the efficiency of the measure in achieving the desired aim.⁸⁹⁶ By taking this position, the DSB failed to interpret the relevant GATT provisions in accordance with the ordinary meaning to be given to the wordings of the treaty in their context and in the light of the food security objective of the WTO.⁸⁹⁷ It also failed to take into account international human rights laws applicable in the relations between the parties, which in this case is the ICESCR, thereby denying Member States the opportunity to marry their human rights obligations with trade commitments.⁸⁹⁸

⁸⁹³ *EC: Measures Prohibiting the Importation and Marketing of Seal Products—Report of the Appellate Body* (n 891) [5.209] and [5.338]–[5.339]

⁸⁹⁴ *US: Import Prohibition of Certain Shrimp and Shrimp Products— Report of the Appellate Body* (12 October 1998) WT/DS58/AB/R [128]–[129]

⁸⁹⁵ GATT 1994, Article XX(g)

⁸⁹⁶ Marie Wilke (n 883)

⁸⁹⁷ Vienna Convention 1980, Art. 31(1)

⁸⁹⁸ *Ibid* Article 31(3). This study notes however that the parties to the above listed cases did not specifically plead human right obligations as the basis for the trade restrictive measures.

5.4.2 State Policy Goals under GATT Article XX

GATT Article XX provides exceptions to the trade liberalisation rules. It allows measures that are necessary to protect public morals, human, animal or plant life or health, and measures relating to the conservation of exhaustible natural resources *inter alia*, provided that such measures are not applied in a manner which would constitute unjustifiable discrimination between countries, or a disguised restriction on international trade.⁸⁹⁹ Thus, it allows a State to implement certain restrictive measures in accordance with domestic policy. The restrictive measure in question must be necessary to protect public morals, including protecting human, animal and plant life or health, and for the conservation of exhaustible natural resources *inter alia*.⁹⁰⁰ By implication, where the trade activities in a State are conducted in a manner that threatens the enjoyment and sustainability of the RtF, the importing country can adopt appropriate measures to support sustainable production locally.⁹⁰¹ Article XX (g) allows otherwise trade-restrictive measures employed for the conservation of exhaustible natural resources if such measures are applied in conjunction with restrictions on domestic production or consumption.⁹⁰² In *US Shrimp Case*,⁹⁰³ the Appellate Body recognised that the meaning of ‘natural resources’ may evolve to include contemporary environmental concerns. It is also suggested that ‘natural resources’ may be further extended to apply to resources necessary for the production of safe foods, such as water and fertile land.⁹⁰⁴

Article XX GATT appears to provide some entryway for the incorporation of socioeconomic rights into world trade; however, the constrictive interpretation of this Article by the DSB does not seem to allow the incorporation of wellbeing and human rights considerations. Article XX GATT allows a State to take measures to restrict imports to protect

⁸⁹⁹ GATT 1994, Article XX

⁹⁰⁰ GATT 1994, Article XX (b); see also (a), (e) and (g)

⁹⁰¹ *US: Import Prohibition of Certain Shrimp and Shrimp Products— Report of the Appellate Body* (n 894)

⁹⁰² GATT 1994, Article XX (g)

⁹⁰³ *US: Import Prohibition of Certain Shrimp and Shrimp Products— Report of the Appellate Body* (n 894)

⁹⁰⁴ Ferguson (n 19) 247

“public morals”⁹⁰⁵ or to protect “human life or health”.⁹⁰⁶ It is, however, debatable whether the RtF and other socioeconomic rights would fall under this category. In light of the narrow interpretation of this Article, particularly in *US Shrimp Case*,⁹⁰⁷ it is arguable whether Article 11 ICESCR meets the standard for measures allowed under Article XX GATT.⁹⁰⁸ However, it is noteworthy that no State has been recorded as having pleaded the ICESCR as the basis for its trade measures. It is, therefore, unclear what actions a State may take in response to violations of socioeconomic rights in light of Article XX GATT.⁹⁰⁹

In the *US Shrimp case*,⁹¹⁰ Section 609 of US Public Law of 1989 restricted the importation of shrimp harvested with technology that may adversely affect certain sea turtles unless the harvesting nation used turtle excluder devices to avoid exterminating endangered species of turtle. In holding the US liable for breach of its trade commitments, the Appellate Body noted that countries have the right to take action to protect the environment and conserve exhaustible resources, but the WTO would not “allow” this right where the measure in question is not the least trade-restrictive measure. Similarly, in *EC— Seal Products Case*,⁹¹¹ the EC banned the importation of seal products save products hunted by Indigenous communities or products hunted through marine resource management measures. The EC claimed that the prohibitive policy was intended to protect ‘public morals’ pursuant to Article XX (a) GATT. The Appellate Body found that EC was in breach of its trade commitment. In its decision, the Appellate Body examined non-trade issues of public policy, recognising that the policy was

⁹⁰⁵ GATT1994, Article XX(a)

⁹⁰⁶ Ibid Article XX(b)

⁹⁰⁷ *US: Import Prohibition of Certain Shrimp and Shrimp Products— Report of the Appellate Body* (n 894)

⁹⁰⁸ Lorand Bartels, ‘Article XX of GATT and the Problem of Extraterritorial Jurisdiction The Case of Trade Measures for the Protection of Human Rights’ (2002) 36 *Journal of World Trade* 353, 353; See also Barbara Brandtner and Allan Rosas, ‘Trade Preferences and Human Rights’ in Philip Alston (ed.), *The EU and Human Rights* (OUP 1999) 705

⁹⁰⁹ See chapeau of article XX. See also GATT 1994, Article XX paragraphs (a)–(g).

⁹¹⁰ *US: Import Prohibition of Certain Shrimp and Shrimp Products— Report of the Appellate Body* (n 894) [128]–[129]

⁹¹¹ *EC: Measures Prohibiting the Importation and Marketing of Seal Products—Report of the Appellate Body* (n 891) 5.276

justifiable under GATT XX,⁹¹² but the Appellate Body failed to establish a link between human rights obligations and trade.⁹¹³ The decision of the Appellate Body, in this case, has been construed as an indication that the DSB would not accept human rights considerations as supplementary objectives of exempted measures.⁹¹⁴

Elucidating further on the exceptions in GATT Article XX, the Panel held in the *US Tuna Case*⁹¹⁵ that this Article may be employed to justify trade-restrictive measures where a violation of a trade provision is established or is imminent. Any State seeking to rely on the exceptions of Article XX GATT must show that the measure in question is necessary to achieve a desired legitimate end.⁹¹⁶ The test for determining necessity was established in the *US—Section 337 case*,⁹¹⁷ where the Panel held that necessity is not synonymous with indispensability. It found that for a measure to satisfy the requirements of Article XX GATT, it must not be indispensable. Necessity involves assessing all the relevant factors, especially the usefulness of the measure in achieving the desired objective.⁹¹⁸ Explaining further in *Korean Beef Case*⁹¹⁹, the Appellate Body reiterated that necessity must not be construed as indispensability. A measure that is not indispensable to achieving an intended objective may nevertheless be 'necessary' within the meaning of Article XX GATT. Necessity is strictly construed in terms of the usefulness of the said measure in achieving the desired trade objective. However, this test does not seem to take cognisance of the socioeconomic impact of the said measure or its human rights implication. Thus, it fails to make adequate provision for the protection of RtF in trade because progressive measures for the realisation of RtF must be an

⁹¹² Ibid 5.209

⁹¹³ Ferguson (n 19) 255

⁹¹⁴ Marie Wilke (n 883)

⁹¹⁵ *US: Restrictions on Imports of Tuna—Report of the Panel* (16 June 1994) GATT BISD DS29/R

⁹¹⁶ See GATT 1994, Article XX paragraphs (a)–(g), and Chapeau of Article XX

⁹¹⁷ *US: Section 337 of the Tariff Act of 1930—Report of the Panel* (7 November 1989) 36S/345 [5.26]

⁹¹⁸ *Brazil: Measures Affecting Imports of Retreaded Tyres—Report of the Appellate Body* (12 March 2007) WT/DS332/AB/R [156]

⁹¹⁹ *Korea: Measures Affecting Imports of Fresh, Chilled and Frozen Beef—Report of the Appellate Body* (11 December 2000) WT/DS161/AB/R, WT/DS169/AB/R

intentional and well-calculated act. Whereas Article XX GATT only allows a State to take measures affecting food and agriculture solely on the basis of the necessity of such measures in achieving trade objectives and without considering the impact on food security. This may result in regressivity which is indicative of a violation of the RtF because necessary trade measures may not be the most effective means of achieving RtF objectives.

Furthermore, any State seeking to rely on the exceptions of Article XX GATT must show that the measure in question is the least trade-restrictive option to achieve a desired legitimate end. The State must show that there is no alternative less restrictive measure that it could reasonably employ. Trade restrictiveness is decided on a case-by-case basis, and the onus lies on the Respondent State to show that it adopted the least restrictive measure and that other alternatives are not available/practicable in the circumstance.⁹²⁰ In the *US— Gambling and Betting Services Case*,⁹²¹ the Appellate Body held that the requirement to use the least trade-distorting measure as opposed to other reasonably available options should be considered in light of the capacity of the State, the available resources and any limiting factors. In certain circumstances, a State may not have the resources to explore less trade-restrictive options, or alternative options may cause undue hardship on the State, such as incurring excessive costs or substantial technical difficulties.⁹²² Thus, this exception fails to make adequate provision for the protection of RtF in trade because it poses the risk of regressivity, where the most appropriate measure for achieving RtF obligation is not the least trade-restrictive measure. The challenge of regressivity arises when a State is swayed by trade considerations to adopt measures that fall short of its obligation to take appropriate steps for the progressive realisation of RtF under the ICESCR. Such regressive steps may exacerbate the violation of RtF.

⁹²⁰ *Brazil: Measures Affecting Imports of Retreaded Tyres—Report of the Appellate Body* (n 918)

⁹²¹ *US: Measures Affecting the Cross-Border Supply of Gambling and Betting Services—Report of the Appellate Body* (7 April 2005) WT/DS285/AB [308]

⁹²² *Ibid* See also: WTO, *WTO, Brazil: Measures Affecting Imports of Retreaded Tyres—Report of the Appellate Body* (n 918); EC: *Measures Prohibiting the Importation and Marketing of Seal Products—Report of the Appellate Body* (n 891) 5.276

Necessity and trade restrictiveness must be construed together. Thus, necessity must not be overreached to justify arbitrary measures which discriminate between countries where the same conditions prevail. These elements are decided on a case-by-case basis, and the onus lies on the Respondent State to show that the measures in question are necessary and the least restrictive option available.⁹²³ It is immaterial at this point that the least trade restrictive measure may be detrimental to the realisation of RtF. Thus where trade liberalisation requirements constrict the reasonable measures open a State, it tends to limit the available resources for the State to take appropriate measures for the progressive realisation of RtF through these trade provisos. Through this, trade liberalisation may limit the ability of the State to fulfil its RtF obligations under the ICESCR.

Article 11 ICESCR allows States the discretion to adopt a variety of approaches for the progressive realisation of RtF, while Article XX GATT constrains the options to the least trade restrictive measures available to a State. However, the threshold for the necessity test under GATT Article XX is more stringent than the test of appropriateness under the ICESCR. Article XX GATT also bears strong coercive influence, which is lacking in the ICESCR. Given the lack of coercion and ambiguities of the ICESCR (as discussed in previous chapters) and the fact that it does not clearly stipulate what measures are necessary for the realisation of RtF, it is difficult to determine where a State measure has met the required level of ‘appropriateness’. The significance is that a State may readily prioritise its trade commitments over obligations to respect, protect and fulfil the RtF.⁹²⁴ Thus appropriateness would practically be construed in terms of the least trade-restrictive measure rather than the most effective measure for achieving the desired RtF objective. Therefore, Article XX fails to provide adequate room for the incorporation of socioeconomic rights into the WTO regime as it does not explicitly

⁹²³ *Brazil: Measures Affecting Imports of Retreaded Tyres—Report of the Appellate Body* (n 918)

⁹²⁴ Adam McBeth (n 661) 124

contemplate the socioeconomic impact of trade measures, the wellbeing of vulnerable populations, or the protection of international human rights. This study, therefore, highlights the need for proactive measures to enhance the incorporation of socioeconomic rights into the WTO through periodic impact assessment and enhanced public participation in trade policy negotiation processes.⁹²⁵

5.4.3 National Security Exceptions under GATT Article XXI)

GATT Article XXI allows countries to take measures to protect security information and essential security interests, and to take action in pursuance of their obligations under the UN Charter.⁹²⁶ ‘Nothing in the agreement shall be construed to require a contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests; or taking any action which it considers necessary for the protection of its essential security interests’.⁹²⁷ It allows the State to take appropriate trade measures in the face of an actual or potential security threat, thus granting States the discretion to determine their security interests with minimal external influence.⁹²⁸

Although there appears to be no records of any State relying on Article XXI GATT to justify food security-related measures, it is contended that measures taken in economic defence against threats to a State’s domestic industries are an essential part of national security policy. This is because chronic food insecurity can jeopardise national security by endangering the general health of the public, inciting internal unrest and general apathy towards the government.⁹²⁹ Overdependence on food importation increases the vulnerability of the importing country, making them highly susceptible to external influence and security invasion.

⁹²⁵ Marie Wilke (n 883)

⁹²⁶ GATT 1994, Article XX(a) – (c)

⁹²⁷ Ibid Article XXI(a) and (b)

⁹²⁸ Ferguson (n 19) 255-60

⁹²⁹ Ibid

In such cases, measures taken to protect food security are synonymous with measures taken for State security purposes. It may also be very necessary to take restrictive measures as a part of national planning to meet food security needs in cases of war or national emergency.⁹³⁰

Article XXI(c) appears to establish a link between the WTO and UN Charter. It provides that ‘nothing in this Agreement shall be construed to prevent a contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security’.⁹³¹ It was originally designed to deal with the conflict of responsibilities between the UN and WTO, particularly in political matters.⁹³² Thus it does not apply to every aspect of the UN Charter. As food security programmes are non-trade concerns, they may be integrated into the trade system as defences rather than legitimate ends in themselves.⁹³³ Thus the flexibility provided under Article XXI(c) GATT appear to be insufficient grounds for introducing human rights considerations into the WTO system.

Although the exceptions provided in Articles XX and XXI GATT appear to allow States the regulatory space necessary for the protection of human rights, in practice, they do not integrate international human rights law into the WTO trade system. These exceptions do not adequately address human rights issues in the context of trade. Incorporating socioeconomic rights in trade requires calculated positive measures to progressively achieve the realisation of socioeconomic rights. It is contended that international trade in agriculture ought to facilitate international cooperation to improve methods of production, conservation and distribution of food, taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need.⁹³⁴ Thus, trade liberalisation goals should have clear social impact objectives based on periodic impact

⁹³⁰ Ibid

⁹³¹ GATT 1994, Article XXI(c)

⁹³² Ferguson (n 19) 255 - 260

⁹³³ Ibid 257

⁹³⁴ ICESCR Article 11.2

assessment and enhanced grassroots involvement, promoting wellbeing considerations alongside trade.⁹³⁵

5.4.4 Generalised System of Preferences (GSP)

Prior to the establishment of the WTO, there was a system of preferential trade arrangements between developed and developing countries. As early as 1947, most developed country members of the GATT had preference arrangements with developing countries which involved reciprocal terms of transnational trade.⁹³⁶ GATT 1955 and 1966 further enshrined this system, enabling developed countries to grant preferences to developing countries that would otherwise have been incompatible with their obligations.⁹³⁷ This preferential trade system encourages developed countries to offer preferential terms of trade, including reduced tariffs/non-tariff barriers, to developing countries to enhance their access to that developed country's markets.⁹³⁸

In 1971, the *GATT adopted the Decision on a Generalised System of Preferences* as a temporary waiver, authorising the grant of preferential duties to products from developing-country GATT parties.⁹³⁹ In 1979, the *Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries* (the 'Enabling Clause') was adopted.⁹⁴⁰ The Enabling Clause provides a more permanent waiver which 'enables developed members to give differential and more favourable treatment to developing

⁹³⁵ Adam McBeth (n 661) 126

⁹³⁶ Kevin C. Kennedy, 'The Generalized System of Preferences After Four Decades: Conditionality and the Shrinking Margin of Preference' (2012) 20 Michigan State International Law Review (2012) 520, 533

⁹³⁷ GATT 1955, Articles XVIII and GATT 1966, Part IV

⁹³⁸ Kevin C. Kennedy (n 936) 536

⁹³⁹ GATT, 'Generalized System of Preferences' (Decision of 25 June 1971)

<www.wto.org/gatt_docs/English/SULPDF/90840258.pdf> accessed 28 April 2021

⁹⁴⁰ WTO, 'Differential and More Favourable Treatment Reciprocity and Fuller Participation of Developing Countries' (Decision of 28 November 1979) L/4903 available at

<www.wto.org/english/docs_e/legal_e/enabling1979_e.htm> accessed 28 April 2021; See also WTO 'Special and Differential Treatment Provisions'

<www.wto.org/english/tratop_e/devel_e/dev_special_differential_provisions_e.htm> accessed 30 April 2021

countries without having to extend such treatment to other contracting parties'.⁹⁴¹ It requires preferential treatment to be designed or modified to respond positively to the development, financial and trade needs of developing countries.⁹⁴² The Enabling Clause has been criticised because it simply encourages developed countries to set up preferential trading terms with developing countries but does not create a legal obligation to do so; thus, the option to establish a preferential trade agreement is left to the discretion of the developed countries.⁹⁴³ Secondly, the preference granting terms are loosely regulated, giving the preference-granting country a wide discretion to set the trade terms.⁹⁴⁴ These preference-granting States may prioritise trade deals of higher economic value without considering issues of wellbeing and the protection of human rights in the receiving country.

In recent times, the nature of GSP involves unilateral measures, mostly designed by the preference-granting country for its own benefit.⁹⁴⁵ The preference-granting conditions are hardly set to meet the developmental concerns of the recipient country. Some preferential trade conditions also tend to exclude certain countries on negative grounds, which do not seem to mirror the original intendment of the Enabling Clause.⁹⁴⁶ For example, under the GSP scheme granted by the US, a country will not qualify for preferential status if it is found to nationalise American property without compensation or if it is a communist State or a member of a commodity export cartel causing 'serious disruption to the world economy'.⁹⁴⁷ Furthermore, upon expiration, the terms of renewal of the GSPs are subjective and uncertain. The renewal

⁹⁴¹ Ibid

⁹⁴² Ibid

⁹⁴³ Çaglar Ozden and Eric Reinhardt, 'The Perversity of Preferences The Generalized System of Preferences and Developing Country Trade Policies, 1976–2000' (2003) World Bank Policy Research Working Paper 2955 (World Bank 2003) 5

⁹⁴⁴ Ibid

⁹⁴⁵ Ibid

⁹⁴⁶ Ferguson (n 19) 261

⁹⁴⁷ Office of the United States Trade Representative, 'U. S. Generalized System of Preference Guidebook' 17 <https://ustr.gov/sites/default/files/gsp/GSPGuidebook_0.pdf> accessed 05 October 2021

terms may introduce further negative terms that do not facilitate the development of the developing countries.

Incorporating the RtF in trade requires that the GSP terms and conditions take cognisance of the socioeconomic impact of trade terms. Negative terms should be channelled to encourage States to prioritise their RtF obligations. For instance, the eligibility criteria may require recipient countries to ratify the ICESCR and the Optional Protocols to the ICESCR, or it may require recipient countries to demonstrate practical steps taken to fulfil the RtF.⁹⁴⁸ However, the downside is that where a State is unable to meet these requirements for genuine reasons, it could be excluded from the GSP arrangement to its detriment. In that way, using the ratification of human rights Conventions as a condition precedent for GSP agreements becomes detrimental to achieving RtF objectives. Another major challenge with this approach relates to the ambiguities of the ICESCR. As the ICESCR is not precise on the obligations of States and the means of fulfilling the RtF, it is left at the discretion of the States to adopt the most suitable means of achieving the RtF. One State may adhere to national food security principles while another enforces food sovereignty. Imposing the preference-granting country's RtF modalities as preconditions for GSP may seem like an abuse of vantage position to dictate the internal agricultural practices of another State and thus undermine its sovereignty.⁹⁴⁹

Summarily, the GSP system does not seem to provide an adequate gateway for the incorporation of socioeconomic rights into world trade. The system allows the preference-granting State to dictate the conditions of grant and eligibility of recipient countries; the GSP system reinforces the system of economic inequality and unfair power structure, which it was created to address. It is, however, suggested that adopting open, internationally recognised human rights standards as GSP conditions and requirements would help prevent imperialist

⁹⁴⁸ ICESCR 1976, Article 2(2)

⁹⁴⁹ Diego J Linàn Noguera and Luis M Hinojosa Martinez, 'Human Rights Conditionality in the External Trade of the European Union: Legal and Legitimacy Problems' (2001) 7 Columbia Journal of European Law, 307

tendencies by adhering to internationally recognised norms and reinforcing the universality of human rights norms.⁹⁵⁰

5.4.4.1 A Review of the EU/SSA Trade Agreement

This section reviews the EU economic partnership agreement with developing and least-developed countries, otherwise referred to as the Everything But Arms (EBA) Agreement, established in 2001 under the GSP.⁹⁵¹ It specifically reviews the impact of the EU sugar regulation (Sugar Common Market Organisation) on the EBA. Sugar is singled out for this analysis because it is a vital agricultural product in the international market, and one-third of the world's sugar production is sold in the international market.⁹⁵² Secondly, sugar farming is one area in which SSA has comparative advantage. And thirdly, the EU sugar market is highly regulated and is notorious for its high quota system, high intervention prices and prohibitive import tariff, which dissuades importation.⁹⁵³ In 2009, the intervention prices were reported to be up to three times the world market prices, enabling the EU to become the second-largest exporter of white sugar.⁹⁵⁴ In 2007, sugar accounted for around two-thirds of all protection concerning trade between the EU and less developed countries.⁹⁵⁵

The EBA agreement was designed to grant Least Developed Countries (LDCs) and African, Caribbean and Pacific (ACP) countries unlimited, tariff-free access to the European

⁹⁵⁰ Ibid

⁹⁵¹ It was established by virtue of Council Regulation (EC) No 732/2008 which is now repealed and replaced with EC Regulation No 978/2012 applying a scheme of generalised tariff preferences and repealing Council Regulation (2012)

⁹⁵² Thomas Kopp, Sören Prehn, and Bernhard Brümmer, 'Preference Erosion – The Case of Everything But Arms and Sugar' (2016) 39(9) *World Economy* 1339

⁹⁵³ Michael Cardwell, *The European Model of Agriculture* (OUP 2004)

⁹⁵⁴ In 2009 for instance, factories received 631.90 euro/ton for white sugar and 523.70 euro/ton for raw sugar while the price for sugar beet was 47.00 euro/ton for A-quota sugar and 32.00 euro/ton for B quota sugar See Elisabetta Gotor, 'The Reform of the EU Sugar Trade Preferences toward Developing Countries in Light of the Economic Partnership Agreements' (2009) 10 (2) *The Estey Centre Journal of International Law and Trade Policy*, 15–29

⁹⁵⁵ Piero Conforti, Deep Ford, David Hallam, George Rapsomanikis and Luca Salvatici, 'The European Union Preferential Trade with Developing Countries: Total trade restrictiveness and the case of sugar' (2007) Working Paper (Università degli Studi del Molise).

market for all goods except arms and ammunition.⁹⁵⁶ It allows free access to all agricultural products from the preference-receiving countries to the EU, except sugar, bananas and rice, which provided longer transition periods.⁹⁵⁷ As of September 2021, there were 47 preference-receiving countries, 32 of which are SSA countries.⁹⁵⁸

Prior to the EBA agreement, the EU operated a Common Market Order (CMO) for sugar. The sugar–CMO was introduced in 1968 to become a self-supporter and sustain the key sector of agriculture at the time.⁹⁵⁹ It continued to grow with increased mechanisation and productivity, contributing to the industrialisation of the agricultural sector of the EU.⁹⁶⁰ The CMO highly regulated the domestic supply, import and export of sugar. Domestic supply was controlled through production quotas classed as A, B and C quotas.⁹⁶¹ With the establishment of the EBA agreement, the CMO continued to implement prohibitive tariffs, which shielded it from cheaper imports to prevent an oversupply while granting preferential access to the preference-receiving developing countries, which enabled high imports of unrefined sugar.

In 2004, the Panel of the WTO Dispute Settlement Body found the EU Sugar-CMO to be trade restrictive in *EC – Export Subsidies on Sugar Case*.⁹⁶² The Panel held that the C sugar was being ‘cross-subsidised’ via the A and B subsidies contrary to Article 9(a) and (c) of the

⁹⁵⁶ EC Regulation No 978/2012 (n 943); see also Thomas Kopp, Sören Prehn, and Bernhard Brümmer (n 944) 1339-359.

⁹⁵⁷ Michael Brüntrup, ‘Everything But Arms (EBA) and the EU-sugar Market Reform: Development Gift Or Trojan Horse?’ (2006) Discussion Papers 10/2006, German Development Institute / Deutsches Institut für Entwicklungspolitik (DIE)

⁹⁵⁸ The SSA preference-receiving countries are Angola, Benin, Burkina Faso, Burundi, Central African Republic, Chad, Comoros, DR Congo, Djibouti, Equatorial Guinea, Eritrea, Ethiopia, Gambia, Guinea, Guinea-Bissau, Lesotho, Liberia, Madagascar, Malawi, Mali, Mauritania, Niger, Rwanda, Sao Tome and Principe, Senegal, Sierra Leone, Somalia, South Sudan, Sudan, Tanzania, Togo, Uganda and Zambia; See EC, ‘Everything But Arms’ <<https://trade.ec.europa.eu/access-to-markets/en/content/everything-arms-eba>> accessed 05 October 2021

⁹⁵⁹ Elisabetta Gotor (n 946)

⁹⁶⁰ Ibid

⁹⁶¹ A quota limits production of sugar for use in the EU and is highly subsidised at the intervention price minus 2 per cent. B quota sugar is entitled to export subsidy at the intervention price (which is the international market price plus the subsidy) minus 37.5 per cent). The 2 and 37.5 per cent that are subtracted are used to finance the export subsidies. Then the C quota sugars are produced in addition to each farm’s quota for export purposes.

⁹⁶² *EC – Export Subsidies on Sugar* (n 831)

AoA.⁹⁶³ The transfer of financial resources from the high revenues from sales of A and B sugar to the export production of C sugar exceeded the EU trade commitment level. The sum of the two factors led to an export of 4.1 million tons of subsidised sugar in 2001, which amounted to 2.8 million more than the EU trade commitment.⁹⁶⁴ The EU contested that the sugar imported under the trade agreement with ACP countries and exported to other countries should not be included in the computation of its subsidised exports, but this argument was rejected by both the Panel and the Appellate Body. The Appellate Body upheld the Panel report, which found that EC acted inconsistently with Articles 3.3 and 8 of the AoA by providing export subsidies above its commitment levels as specified in its Schedule.⁹⁶⁵ It recognised that the EC preferential agreements with the ACP countries were permitted under the WTO GSP; however, it discriminated within the group of developing countries because the basis for selecting 19 ACP countries as preference-recipient countries was unclear.⁹⁶⁶ Therefore the EU was found to be in breach of its trade commitments.⁹⁶⁷

In addition to the trade-distorting impact of the EU subsidy regime,⁹⁶⁸ the importation of unrefined sugar/sugar canes from SSA under the EBA duty-free terms may have had substantial adverse effects on the SSA sugar markets. As discussed in earlier sections, one major problem relates to the Prebisch Singer deteriorating terms of trade.⁹⁶⁹ Unrefined sugar was imported from SSA, processed and exported to SSA (and the rest of the world) at subsidised prices under the reciprocal EBA terms of trade. The long-term effect would be the depreciation of the value

⁹⁶³ Producers/exporters of sugar to the ACP countries who exceeded the ECs' reduction commitment levels received subsidies contrary to AoA 1994, Article 9.1(a), and producers/exporters of C sugar that exceeded ECs' reduction commitment levels received payments on export contrary to Article 9.1(c) AoA 1994. *EC – Export Subsidies on Sugar* Ibid

⁹⁶⁴ Hannah Chaplin and Alan Matthews, 'Coping with the Fallout for Preference-Receiving Countries from EU Sugar Reform' (2006) 7(1) *The Estey Centre Journal of International Law and Trade Policy*, 15

⁹⁶⁵ *EC – Export Subsidies on Sugar* (n 831)

⁹⁶⁶ The basis for selection of the 19 ACP countries as preference recipient countries was unclear as most of these countries are not really 'least developed'. It seemed to accommodate only represent and former colonial ties between the EU Member States and these developing countries. A See Michael Brüntrup (n 957)

⁹⁶⁷ *EC – Export Subsidies on Sugar* (n 831)

⁹⁶⁸ Ibid

⁹⁶⁹ Raúl Prebisch 'Terms of Trade: Raul Prebisch and the challenges of the development of XXI Century (n 748)

of unrefined sugar exports from SSA while the value of the EU exports of refined sugar appreciated. Where the inflow of income to the SSA farmers fails to meet the cost of purchase of the imported products, it substantially impairs economic access to food in SSA. Furthermore, the importation of refined sugar from the EU at subsidised prices had the potential of discouraging diversification and refinement in SSA and increasing dependence on the EU for refined sugars.

Following the decision of the DSB in 2005,⁹⁷⁰ the EU lowered the intervention price for sugar resulting in a 36 – 40 percent reduction in the price of sugar. The intervention price of sugar was reduced from 631.9 Euros/ton in 2004 to 404.4 euros/ton in 2009 as the EU gradually liberalised its sugar market. Nevertheless, sugar constituted the highest preferential value for the LDCs, given the high EU price of 600 Euros per ton as of 2006.⁹⁷¹ In 2009 sugar imports were fully liberalised under the EBA. However, the reduction in intervention price resulted in preference erosion in that it hurt both the European farmers and the developing-country trading partners resulting in losses of about 393.5 million euros.⁹⁷² The preferential tariff to SSA countries under the EBA was zero, and it has stayed the same, but the same terms were extended to some third-party countries like Brazil and Paraguay⁹⁷³, signifying further preference erosion for SSA countries. This resulted in a high volume of imports into the EU and a reduction in prices as supply met the demand level. The fall in sugar prices has caused a substantial decline in the profit made by SSA exporters. However, these SSA countries continue to trade despite the losses to avoid the risk of agglutination and the high cost of

⁹⁷⁰ EC – *Export Subsidies on Sugar* (n 831)

⁹⁷¹ Ibid

⁹⁷² Erosion of preferences is basically caused by three factors: a shrinking of the quota which a country is allocated a preferential tariff for, an increase in the preferential tariff rate, or a decrease in the price that is paid. See Thomas Kopp, Sören Prehn, and Bernhard Brümmer (n 944)

⁹⁷³ EU, 'The EU Sugar Sector'

[www.europarl.europa.eu/RegData/etudes/BRIE/2020/652040/EPRS_BRI\(2020\)652040_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2020/652040/EPRS_BRI(2020)652040_EN.pdf)> accessed 05 October 2021

preservation.⁹⁷⁴ The impact was a reduction in the livelihood of SSA sugar exporters, loss of entitlement and ultimately, poor economic access to food.

As the terms of trade are largely within the discretion of the EU as the preference-granting country, the EU compensated its local producers for the preference eroded and made no provisions to compensate the affected SSA trading partners or to improve their competitiveness or promote their diversification into other areas of production. It was presumed that their losses would be recovered through the gains of future exports under the preferential trade arrangement.⁹⁷⁵ This presumption is contrary to the requirements of socioeconomic rights as the SR noted in 2009 that any notion which tends to suggest that the advantages of trade liberalisation would eventually compensate the poor through its net gains and redistributive policies is inconsistent with human rights requirements.⁹⁷⁶

Although the EU promised to increase its official development assistance (ODA) by 0.7 percent to assist affected ACP trading partners, the adequacy of this compensation remains contentious.⁹⁷⁷ Some scholars believe that the additional assistance may fall into ‘ambitious targets levels and will not increase the overall aid’.⁹⁷⁸ An offer of aid in exchange for preference erosion may be channelled to sectors which will eventually benefit the preference-giver rather than the wellbeing of the SSA partners.⁹⁷⁹ This way, an offer of development assistance may also fail to improve the wellbeing of the people or facilitate the realisation of RtF in SSA.

Consequently, the GSP between the EU and developing countries have also failed to facilitate access to food in SSA. It is suggested that wellbeing considerations in such trade agreements would require that preference erosion be compensated by non-ODA measures such

⁹⁷⁴ Michael Brüntrup (n 957)

⁹⁷⁵ Ibid

⁹⁷⁶ OHCHR, ‘Report of the Special Rapporteur on the Right to Food Olivier De Schutter - Addendum - Mission to the World Trade Organisation’ (2009) (n 88) para 8

⁹⁷⁷ Michael Brüntrup (n 957)

⁹⁷⁸ Calgar Ozden and Eric Reinhardt (n 943); See also Michael Brüntrup, Ibid

⁹⁷⁹ For instance granting preference. to export development and uncompetitive industries rather than improving health and agricultural diversification

as additional trade preferences in other agricultural products or other sectors, such as the service sector.⁹⁸⁰ Incorporating socioeconomic rights considerations through periodic impact assessment, public participation, and State accountability would also help to ensure that wellbeing considerations, including access to food, remain a primary objective of trade agreements.

5.5 Conclusion

This chapter examined the incongruity between international human rights and international trade liberalisation regimes, particularly under the WTO. Whereas it did not identify any flagrant conflict between the legal frameworks of both regimes, it did identify some inconsistencies in the application, obligations, objectives and outcome of both frameworks. It is submitted that greater harmony between both regimes would facilitate access to food, particularly in SSA. This chapter suggests that trade rules should be redefined to incorporate socioeconomic rights as part of its objectives because fulfilling the RtF requires firstly that the adequacy, acceptability and accessibility of food be recognised as a legitimate trade concern. Likewise, to enhance seamless incorporation into trade regimes, socioeconomic rights frameworks should be redefined to provide greater clarity on their legal entitlements and obligations. The language of the law should be direct, creating clear legal rights, imposing clear legal obligations on duty bearers, and clarifying the role of the international community in the realisation of the provided rights. This way, it would create clear expectations and benchmarks. It would also inform the interpretation of trade rules by States and the DSB, as well as enhance the effective incorporation of socioeconomic rights in trade.

This chapter further analysed the AoA, specifically examining the market access and subsidy regimes of the AoA and the extent to which these regimes impact access to food in

⁹⁸⁰ Ibid

SSA. It finds that the AoA does not seem to make adequate provisions to promote the duty of net-food importing countries to fulfil their RtF obligations. This is because the market access and subsidy provisions do not provide adequate flexibilities/exceptions for improved public spending and investment in agriculture (including technological improvement, credit services, transportation, *inter alia*) for food security purposes. The AoA ought to make provisions which encourage Member States to direct resources towards non-trade concerns of food security and special and differential (S&D) treatment of developing countries in order to mitigate the adverse effects of export-oriented agriculture and augment the realisation of sustainable food security among developing countries.⁹⁸¹ This may require further flexibility for developing countries that have gone through tariffication and reduced barriers prior to the AoA. It may also require imposing legal obligations and sanctions to ensure compliance with the various progressive agreements and ministerial decisions.⁹⁸²

Finally, this chapter examined vehicular policies and framework through which the RtF could be incorporated into the WTO system to facilitate access to food among developing countries. A major route will be applying the general rules of interpretation pursuant to the Vienna Convention when interpreting WTO Agreements. Thus, where disputing parties are signatories to the ICESCR, their trade commitments ought to be interpreted in light of their socioeconomic rights obligations. Other possible entryways include applying the GATT exceptions pursuant to Articles XX, XXI and XVIII of the GATT. This chapter found that while GATT Articles XX and XXI secure some level of regulatory autonomy for States; however, they fail to facilitate access to food as they do not explicitly recognise the duty of States to implement appropriate measures for the progressive realisation of socio-economic rights. Furthermore, the GSP mechanism in GATT Article XVIII equally fails to provide the

⁹⁸¹ Ferguson (n 19) 183-4

⁹⁸² Ibid

requisite flexibility to allow the incorporation of socioeconomic rights in trade because it is loosely regulated, leading to the inclusion of arbitrary trade terms by preference providers. To effectively serve its purpose, trade exceptions ought to establish the RtF and how it applies as an exception to trade liberalisation. Examining the rigid position of the DSB, this chapter found that access to food could be facilitated through dynamic judicial activism- interpreting trade commitments to give life to the wider objective, taking into consideration the non-trade concern of food security and S&D treatment of developing countries, balancing human rights and trade objectives, establishing greater coherence with the UN treaties and international organisations, and establishing clear structures for the application human rights considerations as exceptions to onerous trade rules.

Chapter 6: Right to Food in Sub-Saharan Africa

6.1 Introduction

Having examined the impact of WTO trade liberalisation policies on access to food in SSA in Chapter 5, this chapter conducts a critical evaluation of the realisation and violation of RtF in SSA using the UN list of illustrative indicators on the right to adequate food (ICESCR, Art. 11).⁹⁸³ It examines the structural, process and outcome indicators of the RtF in SSA using the UN list of illustrative indicators of the RtF.⁹⁸⁴ These indicators are adopted in this study because of their wide coverage and the fact that they are endorsed by the UN for objective analysis of the implementation of RtF by Member States.⁹⁸⁵ Assessing the structural indicators of the RtF in SSA involves an examination of the relevant international, regional and State human rights instruments in SSA to determine the extent of protection accorded by the RtF in the regional laws and the respective constitutions of the SSA countries.

Assessing the process indicators of the RtF in SSA involves examining the trade rules, policies and strategies applicable in the region and how they incorporate elements of socioeconomic rights to facilitate the realisation of RtF in SSA. It particularly examines the Agreement establishing the AfCFTA and how it impacts the realisation of RtF in the region. As earlier stated, the AfCFTA Agreement is preferred in this analysis due to its wide coverage in SSA.⁹⁸⁶ Assessing the outcome indicators of the RtF in SSA involves an examination of the prevalence of poverty and hunger in SSA using the 2021 Global Hunger Index (GHI) and the UN progress report on the achievement of SDG1 of no poverty and SDG2 of zero hunger. The GHI is an independent objective report providing comprehensive measures to track hunger at

⁹⁸³ OHCHR, 'Report on Indicators for Monitoring Compliance with International Human Rights Instruments' (n11)

⁹⁸⁴ Ibid

⁹⁸⁵ Ibid

⁹⁸⁶ As at November 2022, 54 out of the 55 SSA countries have signed the AfCFTA Agreement and 40 SSA countries have ratified it. Thus it is binding on 40 out of 55 SSA countries. See AU-AfCFTA, 'State Parties' <<https://au-afcfta.org/state-parties/>> accessed 25 November 2022

the global, regional and country levels. The SDG reports are published as official reports of the UN Statistics Division to track the status of the various regions and countries and their progress towards achieving the desired goals. These data are preferred for this analysis due to their objectivity, universal coverage and widespread acceptance.

6.2 Structural Indicators of the Right to Food in Sub-Saharan Africa

The structural indicators of the RtF include international, regional and domestic human rights instruments that protect the right to adequate food.⁹⁸⁷ As the applicable international instruments were analysed in Chapter 4 of this study, this section examines the regional laws of SSA and the extent to which they protect the RtF. It also examines the domestic laws of SSA countries, evaluating the level of constitutional protection of RtF in the respective SSA countries as low, medium or high-level protection using the benchmark of the FAO guidelines on the RtF.⁹⁸⁸ High-level protection includes an express inclusion of the RtF in the constitution of the State, recognising the RtF as a fundamental right which accrues to every citizen.⁹⁸⁹ Medium-level protection includes an implicit recognition of the RtF as a component of other socioeconomic rights, such as the right to an adequate standard of living. Low-level protection is inferred where the RtF is completely absent from the relevant laws of the State, or it may only be remotely inferred from other socioeconomic rights which are recognised by the State or where elements of RtF are contained in policy guidelines which are not justiciable. This assessment is done on the understanding that the legislative protection of the RtF in any jurisdiction is fundamental to the realisation of RtF and its enforceability as a legal right.

⁹⁸⁷ OHCHR, 'Report on Indicators for Monitoring Compliance with International Human Rights Instruments' (n 11) and (n 230)

⁹⁸⁸ FAO, 'Right to Food Guidelines; Information Papers and Case Studies' <www.fao.org/3/a0511e/a0511e.pdf> accessed 02 October 2021

⁹⁸⁹ Ibid

6.2.1 The Human Rights Mechanism of Sub-Saharan Africa

The UDHR establishes the right of everyone to an adequate standard of living, including food.⁹⁹⁰ Although it is a soft law instrument, the UDHR is recognised by the ICESCR and, therefore, applicable to SSA countries, over 90 percent of whom have ratified the ICESCR.⁹⁹¹ The AU (Banjul) Charter also recognises and reaffirms the commitment of State Parties to the UDHR and other instruments adopted by the UN.⁹⁹² As all SSA countries are parties to the AU Charter, the RtF and other rights established under the UDHR apply to them.

The ICESCR establishes the RtF and the right of everyone to be free from hunger.⁹⁹³ It is a legally binding document of the UN and binding on all SSA countries that have ratified it. As of 2021, all SSA countries have ratified the ICESCR save Botswana, South Sudan and Mozambique.⁹⁹⁴ The Banjul Charter recognises the ICESCR and the UN Charter reaffirms the commitment of State Parties to the UN human rights instruments.⁹⁹⁵ As all SSA countries are parties to the AU Charter and the Banjul Charter, the RtF and other socioeconomic rights established under the ICESCR apply to all SSA countries.

The DRD establishes the RtD as the inalienable right to the constant improvement of the wellbeing of every individual based on their active, free and meaningful participation in development and the fair distribution of benefits resulting therefrom.⁹⁹⁶ The RtD is recognised in Article 22 of the Banjul Charter and is therefore applicable to all SSA countries because all SSA countries have ratified the Banjul Charter. The Sustainable Development Goals (SDG) of the UN are also applicable to over 90 percent of SSA countries as all SSA countries are

⁹⁹⁰ UDHR 1948, Article 25

⁹⁹¹ See the Preamble to the ICESCR; Preamble to the Banjul Charter 1986 and Article 60

⁹⁹² Constitutive Act of the African Union 2001, Article 3(e)

⁹⁹³ See ICESCR 1967, Article 11; Convention on the Rights of the child (CRC) 1989, Article 27; See also UN, 'Sustainable Development Goals Report 2018' (n 135)

⁹⁹⁴ See OHCHR 'Status of Ratification' (n 127)

⁹⁹⁵ See the Preamble to the Banjul Charter 1986 and Article 60; See also Constitutive Act of the African Union (2001) Article 3(e)

⁹⁹⁶ Preamble to the DRD 1986, Para 2

participating members of the SDGs save Congo, Eswatini and Tanzania.⁹⁹⁷ The SDGs are not binding instruments; rather, they are goals set by the UN to be achieved by 2030. The first two goals of zero hunger and no poverty are utilised in this chapter to assess the achievement of access to food in SSA.

At the regional level, human rights in the AU is governed by the African (Banjul) Charter of Human and Peoples' Right 1986 and reinforced by the African Court of Human and People's Right (ACPHR).⁹⁹⁸ The Banjul Charter establishes the rights, duties and freedoms of all AU Member States.⁹⁹⁹ It does not expressly recognise the RtF; however, the RtF is implicitly recognised through the interpretation of other recognised human rights, particularly the right to life, health, and development, *inter alia*. For instance, in *SERAC and Another v Nigeria*,¹⁰⁰⁰ the ACHPR considered an action against the Nigerian government for various acts of violation of RtF of the Ogoni indigenous community, which depended largely on farming and fishing. The Nigerian government had taken part in irresponsible oil development, which poisoned the soil and water of the Ogoni community. The State security operatives raided the villages, destroying crops and killing farm animals. These activities left the villagers apprehensive about returning to their farmlands. Although the RtF is not expressly protected in the Banjul Charter, the ACHPR held that the RtF is implicit in the Banjul Charter in such provisions as the right to life,¹⁰⁰¹ the right to health¹⁰⁰² and the right to economic, social and cultural development.¹⁰⁰³ Holding the Nigerian government to be in breach of the RtF, the court noted that the RtF is

⁹⁹⁷ UN, 'Member States of the UN and Member States of Specialised Agencies' <<https://sustainabledevelopment.un.org/memberstates.html>> accessed 29 September 2021; See also UN, 'Sustainable Development Goals Report 2018' (n 135)

⁹⁹⁸ The African (Banjul) Charter on Human and Peoples' Rights (Banjul Charter) 1986 was adopted on 27 June 1981 and entered into force 21 October 1986

⁹⁹⁹ Ibid Article 1

¹⁰⁰⁰ *SERAC* (n 34) Para 64

¹⁰⁰¹ Banjul 1986, Article 4

¹⁰⁰² Banjul 1986, Article 16

¹⁰⁰³ Banjul Charter 1986, Article 22

inseparably linked to the dignity of human beings and is therefore essential for the enjoyment and fulfilment of such other rights as health, education, work and political participation.¹⁰⁰⁴

A similar decision was made in *Centre for Minority Rights v Kenya*,¹⁰⁰⁵ where two NGOs filed an action on behalf of the Endorois indigenous pastoralist community who were removed from their lands by the Kenyan government to establish a wildlife reserve. The ACHPR found that the Kenyan government was in breach of the right to development as the removal of the indigenous people to other semi-arid land was unsuitable for pastoralism and threatened their source of livelihood and food.¹⁰⁰⁶ By this decision, the ACHPR endorsed the legality and enforceability of the right to an adequate standard of living, including food and sustainable livelihood.¹⁰⁰⁷

Weighing this against the benchmark of the FAO guidelines on the RtF¹⁰⁰⁸, it may be inferred that the legal protection of the RtF in the regional framework of SSA could be rated as medium. This is because the RtF is not expressly protected in the AU Charter and the Banjul Charter. However, it is directly inferred from other protected rights, such as the right to life.¹⁰⁰⁹ The section below examines the structural indicators of RtF in the respective SSA countries.

6.2.2 Rights to Food in the Domestic Laws of Sub-Saharan Africa

Having reviewed the level of protection accorded the RtF in the regional laws of SSA, this section analyses the domestic laws of the respective SSA countries and the extent to which the RtF is protected in these States. Using the benchmark of the FAO guidelines on the RtF, this study rates the level of constitutional protection of RtF in the respective laws as low, medium

¹⁰⁰⁴ *SERAC* (n 34) para 65; See also CESCR General Comment No 12 (n 6) para 4

¹⁰⁰⁵ *Centre for Minority Rights Development* (n 55)

¹⁰⁰⁶ *Ibid*

¹⁰⁰⁷ UDHR 1948, Article 25

¹⁰⁰⁸ FAO, 'Right to Food Guidelines; Information Papers and Case Studies' (n 988)

¹⁰⁰⁹ See *SERAC* (n 34)

or high.¹⁰¹⁰ A high-level of protection includes an express provision for the RtF in the constitution of the State.¹⁰¹¹ A medium-level protection includes an implicit recognition of the RtF as a component of other socioeconomic rights, such as the right to an adequate standard of living, and social security, *inter alia*. Low-level protection is found where the RtF is completely absent from the relevant laws of the State, or it may only be remotely inferred from other socioeconomic rights which are recognised by the State or where elements of RtF are contained in policy guidelines which are not justiciable. An evaluation of the constitutional provisions of the various SSA countries against the benchmark of the FAO guidelines on the RtF tends to suggest a medium level of protection of RtF in the respective constitutions of SSA countries.¹⁰¹² As the analysis in this section reveals, the RtF is expressly protected in the substantive laws of some SSA countries; for instance, the Constitution of Kenya recognises the right ‘to be free from hunger, and to have adequate food of acceptable quality’.¹⁰¹³ Such provisions indicate a high level of protection of the RtF. A second class of SSA countries implicitly recognise the RtF as a component of other socioeconomic rights such as the right to an adequate standard of living, social security, etc., thus, according it a medium level of protection. A third class of countries do not expressly recognise the RtF in their constitutions but have recognised it as a goal in the policy guidelines, which are not justiciable; in some other countries, the RtF may only be inferred from other socioeconomic rights which the State recognises. In this third class of countries, the RtF appears to be accorded a low level of protection. However, the RtF is contained in some respect in the individual laws of all SSA countries. Thus, suggesting that whilst the average level of protection accorded the RtF in SSA may not be at a very high level, it is not at the lowest levels either.

¹⁰¹⁰ FAO, ‘Right to Food Guidelines; Information Papers and Case Studies’ (n 988)

¹⁰¹¹ *Ibid*

¹⁰¹² *Ibid*

¹⁰¹³ Constitution of Kenya, Section 43.1

Table 4 below shows the assessment of the constitutional protection of the RtF in the SSA domestic laws with the relevant Article(s) or Section(s) of the Constitution in brackets. Using the benchmark provided in the FAO guidelines on the RtF,¹⁰¹⁴ the respective SSA countries in Table 4 below are rated as high, medium or low based on the level of protection they provide.

Table 4 Assessment of Constitutional protection of the right to food in SSA

S/N	Country	High Protection/Explicit Constitutional Provision	Medium Protection/Implicit Constitutional Provision	Low Protection/Inferred from other provisions
1	Angola	—	—	Right to health and social protection (Art 77 of the constitution)
2	Benin	—	—	Right to health, education, culture and employment (Art 8 of the constitution)
3	Botswana	---	---	Right to life (4 of the constitution)
4	Burkina Faso	—	—	Right to portable water, social security, and health (18 and 26 of the constitution)
5	Burundi	---	---	Right to life (24 of the constitution)
6	Cabo Verde	—	—	Right to Compensation, Social Security, Childhood and the disabled (Articles 61, 70, 74 and 76 of the constitution)
7	Cameroon	—	—	Resolve to harness natural resources to ensure the wellbeing of every citizen, raising living standards, and right to development (Preamble to the constitution)
8	Central African Republic	—	—	Right to life, physical and moral integrity (10 of the constitution)
9	Chad	—	—	Right to life and personal integrity (17 of the constitution)
10	Comoros	—	—	Commitment to principles of fundamental rights as defined by the UN Charter, AU Charter, UDHR, etc. (Preamble to the constitution)
11	Congo Republic	—	—	Right to life (8 of the constitution)
12	DR Congo	—	Right to health and a secure food supply, and right to access to drinking water (47 and 48 of the constitution)	
13	Cote D'Ivoire	—	—	Inviolable right to life (3 of the constitution)
14	Djibouti	-----	-----	Right to life (10 of the constitution)

¹⁰¹⁴ FAO, 'Right to Food Guidelines; Information Papers and Case Studies' (n 988)

15	Equatorial Guinea	—	—	Right to life and human dignity (S. 13 of the constitution)
16	Eritrea	—	—	Right to economic development and to fulfil the material and spiritual needs, and right to social services (S. 8 and 21 of the constitution)
17	Eswatini	—	—	Right to work and equal payment (S. 32 of the constitution)
18	Ethiopia	Right to access to public health and education, clean water, housing, food and social security. (S. 90 of the constitution)		Right to a reasonable standard of living (S. 89 of the constitution)
19	Gabon	—	—	Guarantees of protection of health, social security, a preserved natural environment, rest and leisure (S. 1.8 of the constitution)
20	Gambia	—	—	The State shall endeavour to facilitate equal access to clean and safe water, adequate health and medical services, habitable shelter, sufficient food and security to all persons.” (216- Directive principles of State policy)
21	Ghana	—	—	Economic and social objectives (S. 36 and 37 of the constitution)
22	Guinea	—	—	Right to life, health and physical wellbeing (S. 6 and 15 of the constitution)
23	Guinea-Bissau	—	—	The right culture and to Social Security (S. 17 of the constitution)
24	Kenya	The right ‘to be free from hunger, and to have adequate food of acceptable quality (S. 43.1 of the constitution)		
25	Lesotho	-----	-----	Right to life and health (S. 5 and 27 of the constitution)
26	Liberia	-----	-----	Right to life (S.11 of the constitution)
27	Madagascar	—	—	Right to life, health and culture (8,17 and 26)
28	Malawi	—	Right to development, including access to food (S. 30 of the constitution)	State commitment to achieving adequate nutrition, promoting good health and enhancing the quality of rural life (13- Food Multi-Sector Nutrition Policy 2018-2022)
29	Mali	—	—	State commitment to the improvement of quality of life and Commitment to UDHR, Banjul Charter and other treaties ratified by the State (preamble and 116 to the constitution)
30	Mauritania	—	—	Right to life, security and protection of the law (S. 3 of the constitution)
31	Mauritius			Basic legislation on food quality control/food safety; inspection;

		—	—	right to food; nutrition, water supply, etc. (Public Health Act 1925)
32	Mozambique	—	—	Rights to life; protection of wellbeing of Children, the disabled, and the elderly (Art. 40, 47, 124, and 125 of the constitution)
33	Namibia	—	—	State commitment to promoting the welfare of the people through consistent planning to raise and maintain an acceptable level of nutrition and standard of living and to improve public health for all (S. 95(j) of the constitution)
34	Niger		Right to life, health, physical and moral integrity, healthy and sufficient food supply, and drinking water. (S. 12 of the constitution)	132
35	Nigeria	—	Right to a reasonable standard of living, and State policy directive to suitable and adequate shelter and food, a reasonable national minimum living wage, etc. (S. 17.3 and 16 of the constitution)	
36	Rwanda	—	—	Right to good health and culture; duty of the State to promote good health and culture (S. 21, 36, 45, and 47 of the constitution)
37	Sao Tome And Principe	—	—	right to social security, and protection of Childhood and the elderly (Art 44, 52, and 54 of the constitution)
38	Senegal	—	—	Right to health and cultural freedoms (S. 8 of the constitution)
39	Seychelles	—	Right to a reasonable standard of living- an adequate and progressive social order guaranteeing food, clothing, shelter, education, health, and a steadily rising standard of living for all (preamble to the constitution)	
40	Sierra Leone	—	—	Duty of the State to place proper and adequate emphasis on agriculture in all its aspects to ensure self-sufficiency in food production (7(d) Fundamental Principles of State Policy)
41	Somalia			Right to clean potable water. (S. 27 of the constitution)
42	South Africa	everyone has the right to have access to sufficient food and		

		water (S. 27,28 and 35 of the constitution)		
43	South Sudan	—	—	The fundamental objective is to dedicate public resources to providing clean water, food security, etc. (S. 35 of the constitution)
44	Sudan	—	—	Right to life and human dignity (S. 44 of the constitution) All rights and freedoms contained in international and regional human rights agreements and charters ratified by the Republic of Sudan shall be considered an integral part of the Constitution. (S. 42 and 44 of the constitution)
45	Tanzania	—	—	The primary objective of the government is the welfare of the people, and the government shall be accountable to the people. (S. 8 of the constitution)
46	Togo	—	—	Right to development and physical, intellectual, moral, and cultural fulfilment of a person (S. 12 of the constitution)
47	Uganda	—	Right to access education, health services, clean and safe water, work, decent shelter, adequate clothing, food security, etc. The State shall take appropriate steps to encourage people to grow and store adequate food; it shall establish national food reserves; and encourage and promote proper nutrition through mass education and other appropriate means to build a healthy State. (Arts XIV and XXII of the constitution)	The Uganda Food and Nutrition Policy 2003
48	Zambia	—	—	To uphold the human rights and fundamental freedoms of every person; life, liberty, security of the person, and the protection of the law (Preamble and Article 11 of the constitution)
49	Zimbabwe	Food security rights - The State must encourage people to grow and store adequate food; secure the establishment of adequate food reserves; and encourage and promote adequate and proper nutrition	State duty to provide basic nutrition and social care for children and the elderly (S. 19 and 21 of the constitution)	

		through mass education and other appropriate means.” (15)		
--	--	--	--	--

The information in Table 4 above demonstrates that the presence of the RtF in the various domestic frameworks of SSA countries is generally high, but the legal protection for purposes of enforceability is generally low. Therefore, it is rated as medium-level protection on the average. About 10 percent of the forty-nine SSA States in review provide high protection for the RtF with clear provisions for the RtF in their constitution. For instance, the Constitution of Kenya, 2010 recognises it as the right ‘to be free from hunger, and to have adequate food of acceptable quality’.¹⁰¹⁵ The South African constitution expressly provides that ‘everyone has the right to have access to sufficient food and water...’¹⁰¹⁶ the State must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights’.¹⁰¹⁷ About 15 percent of SSA countries provide medium-level protection, including the RtF as a component of another socioeconomic right. For instance, the Malawian constitution provides for the right to development, including food access.¹⁰¹⁸ The other 75 percent of SSA countries do not explicitly protect the RtF as a socioeconomic right in their Constitutions. Some of these countries provide for the RtF in the guiding principles/State objectives, establishing the duty of the State without necessarily reinforcing the ensuing right. For instance, the Nigerian constitution includes the RtF in the guiding principles, which are declarations of principles that define the goals or main aims of State policy.¹⁰¹⁹ In some SSA countries, the RtF could be inferred from provisions on the right to life and other protected socioeconomic rights. Most SSA countries, however, have established other State policies or laws besides the constitution, which legislate on the RtF. For

¹⁰¹⁵ Constitution of Kenya, 2010, S 43.1(c)

¹⁰¹⁶ Constitution of the Federal Republic of South Africa 1996, S 27.1(b)

¹⁰¹⁷ Ibid S 27.2

¹⁰¹⁸ Malawi's Constitution of 1994 with Amendments through 2017, Article 30.2

¹⁰¹⁹ Constitution of the Federal Republic of Nigeria 1999, S 16.2(d)

instance, the Public Health Act of Mauritius 1925¹⁰²⁰ and the Food Act of Mauritius 1998 regulate food quality control/food safety, inspection, right to food, nutrition, and water supply *inter alia*.¹⁰²¹

Whilst it is recommended that the RtF be enshrined as a fundamental socioeconomic right, this study recognises that the absence of an express provision for the RtF in the constitution of any State may not always signify the absence of the right in the State. The local courts have, in certain cases, inferred the RtF from other subsisting rights in the constitution, thus reinforcing its justiciability. For instance, the RtF is not explicitly recognised in Zambia's constitution as an individual right or a component of another subsisting right. However, in *George Peter Mwanza and Melvin Beene v Attorney General*,¹⁰²² the appellants were local prison inmates living with HIV/AIDS. They brought a petition against the State, claiming that the failure of the State to provide a balanced diet infringed on their right to life contrary to Articles 11 and 12 of the Constitution of Zambia.¹⁰²³ They contended that the State had a duty at common law and statutory law to provide a healthy diet for prisoners living with HIV/Aids. The Zambian Supreme Court queried whether justiciable rights such as the right to life can be enforced through a non-justiciable right such as the RtF. Holding in the affirmative, the Court recognised that the RtF is a universal right under the UDHR¹⁰²⁴ and ICESCR.¹⁰²⁵ Although the RtF is not inscribed in the Zambian Constitution, the Supreme Court adopted a liberal interpretation of the constitutional provision on the right to life,¹⁰²⁶ drawing an inter-connection between the right to life, the RtF and the freedom from inhuman and degrading treatment. It thus inferred the RtF from the right to life, holding that 'eating a balanced diet is of vital importance for

¹⁰²⁰ Public Health Act of Mauritius, 1925 (Act 47/1925)

¹⁰²¹ Food Act of Mauritius 1998 (Act No. 1/1998 Proclamation No. 23 of 1999)

¹⁰²² *George Peter Mwanza and Melvin Beene v Attorney General* [2019] Appeal No. 153/2016 SC Selected Judgment No. 33, Para 16.3

¹⁰²³ Zambia's Constitution of 1991 with Amendments through 2016, Article 11 and 12

¹⁰²⁴ UDHR 1948, Article 25

¹⁰²⁵ ICESCR 1976, Article 11

¹⁰²⁶ Zambian Constitution 1991, Article 11 and 12

maintaining good health and wellbeing, which in turn guarantees the right to life. It found the State liable for violations of the appellants' RtF, holding that 'the right to life entails that the two prisoners should have the right to decent food— adequate nutritious food'.¹⁰²⁷ Thus the Zambian Supreme Court enforced the RtF as a component of the right to life, recognising the need for a balanced diet as necessary for their survival.

Nevertheless, this study suggests that the inclusion of the RtF in the fundamental laws of the State is vital for the enforcement of the right in any jurisdiction. Based on the UN list of illustrative indicators, including the RtF in the laws of any State is a major structural indicator of the progressive realisation of RtF.¹⁰²⁸ Thus where the RtF is not adequately protected in the local laws of any State, it creates a *prima facie* evidence of the violation of RtF in the State.

6.3 Outcome Indicators of the Rights to Food in Sub-Saharan Africa

This section examines the outcome indicators of the RtF in SSA based on the UN list of illustrative indicators.¹⁰²⁹ Assessing the outcome indicators in this section involves an examination of the incidences of poverty, starvation and undernutrition in SSA using the 2021 progress reports on SDG1 of poverty elimination and SDG2 of zero hunger for the year 2021.¹⁰³⁰ These SDG reports also indicate the progress towards achieving the RtF by 2030, thus providing the necessary data for assessing the progress made towards achieving the RtF in SSA. This section also assesses the prevalence of undernutrition in SSA using the Global Hunger Index (GHI) for SSA up to 2020.¹⁰³¹ This period is chosen because it provides a more accurate average score of hunger and starvation in SSA without the intervening impact of the

¹⁰²⁷ George Peter Mwanza (n 1011) Para 15.2

¹⁰²⁸ OHCHR, 'Report on Indicators for Monitoring Compliance with International Human Rights Instruments' (n 11)

¹⁰²⁹ Ibid

¹⁰³⁰ UN, 'Sustainable Development Goals Report 2021' <<https://unstats.un.org/sdgs/report/2021/>> accessed 02 October 2021

¹⁰³¹ GHI, 'Global Hunger Index 2019' (n 122)

Covid-19 pandemic. GHI is assessed based on the rate of undernourishment, child mortality and child undernutrition.¹⁰³²

Violations of RtF in this study are assessed against the values of food security. As earlier explained, the analytical framework of this study is based on Sen's wellbeing theory and the rights-based approach to food security in trade. Wellbeing herein relates to a person's standard of living, which could be assessed in terms of food security pursuant to the provisions of the UDEHM, which provides that wellbeing 'largely depends on the adequate production and distribution of food as well as the establishment of a world food security system which would ensure adequate availability of, and reasonable prices for food at all times...'¹⁰³³ Food is adopted as the preferred wellbeing indicator based on the provisions of Article 11 ICESCR, which includes food as a component of an adequate standard of living¹⁰³⁴ Food security in this section is indicative of the progressive realisation of RtF, and food insecurity is indicative of widespread violations of the RtF. This is based on the Voluntary Guidelines of the FAO, which states that food security exists 'when all people, at all times, have physical, social and economic access to sufficient, safe and nutritious food that meets their dietary needs and food preferences for an active and healthy life.'¹⁰³⁵ These imperatives are examined in the sections below in relation to the realisation of RtF in SSA.

6.3.1 Assessment of the Prevalence of Undernourishment

This section examines the prevalence of undernutrition in SSA using the Global Hunger Index (GHI). It examines the GHI scores of SSA in 2019, 2020 and 2021 to portray the average state of undernourishment in the region prior to the Covid-19 pandemic and the current status following the impact of the Covid-19 pandemic on the region. It also conducts a State-by-State

¹⁰³² Ibid

¹⁰³³ Preamble to the UDEHM 1974, para G

¹⁰³⁴ ICESCR 1976, Article 11

¹⁰³⁵ FAO, 'The State of Food Insecurity in the World 2001' (n 322)

analysis of the prevalence of undernourishment in SSA countries prior to the pandemic using the GHI scores between 2000 and 2020, thus providing an average analysis of the State of undernourishment in the respective SSA countries without the impact of Covid-19 pandemic. Additionally, there is a shortage of information in 2021/22 due to poor record keeping and the impact of the lockdown in SSA countries. Thus, making it difficult to provide a country-by-country analysis of the prevalence of undernourishment in SSA during and after the Covid-19 pandemic.

In 2019, the GHI score for SSA was 28.4, indicating serious hunger levels. Based on the 2019 GHI scores, the prevalence of undernourishment and infant mortality in SSA were scored at 22.3 and 75 percent, respectively, thus ranking as the region with the highest level of undernourishment and infant mortality in the world.¹⁰³⁶ Ironically, in the same year, the World Bank data showed that SSA had the highest proportion of agriculturists in the world, with about 55 percent of its population employed in the agricultural sector.¹⁰³⁷ Thus indicating that food insecurity in the region goes beyond the lack of food availability. It transcends beyond poor physical access to issues of impaired economic access to food. Therefore, the prevalence of poverty will be examined in subsequent sections to underscore the situation of food insecurity in SSA.

In 2020, the GHI score for SSA was 27.8, indicating serious hunger levels ¹⁰³⁸. Although it was lower than the previous year by 0.6 scores, SSA remained the region with the highest levels of hunger and undernutrition globally.¹⁰³⁹ In 2020, about 690 million people were reportedly undernourished globally; one-third of these were from SSA.¹⁰⁴⁰ The lower scores of 2020 are partly attributed to the challenges of the Covid-19 lockdown, which resulted

¹⁰³⁶ GHI, Global Hunger Index 2019 (n 122)

¹⁰³⁷ World Bank, 'Indicators' (n 124)

¹⁰³⁸ GHI, 'Global, Regional and National Trends' (2020) <www.globalhungerindex.org/trends.html> accessed 12 June 2021

¹⁰³⁹ Ibid

¹⁰⁴⁰ Ibid

in insufficient data and impaired access to information. Out of 135 countries assessed in 2020, there were sufficient data to calculate GHI scores and ranking for 107 countries only.¹⁰⁴¹ The 2020 global statistics showed that 144 million children suffered from stunting, a sign of chronic undernutrition; 191 million children suffered from severe symptoms of undernutrition, and 5.3 million children between the ages of zero to five reportedly died from starvation;¹⁰⁴² and more than one-third of these were in SSA.¹⁰⁴³

In 2021, the GHI score for SSA was 27.1, indicating serious levels of hunger.¹⁰⁴⁴ Despite the reduction in GHI scores by a further 0.7 between 2020 and 2021, SSA remains the region with the highest GHI scores globally. It is, however, determined that the lower scores of 2021 are partly due to insufficient data in SSA resulting from the Covid-19 lockdown. Out of 135 countries assessed in 2021, there were sufficient data to calculate GHI scores for and rank only 116 countries.¹⁰⁴⁵ However, UN statistics for 2021 show an increasing population of undernourished persons globally, with SSA recording the highest rate of undernourishment globally.¹⁰⁴⁶ Although SSA may not have suffered the worst impact of Covid-19 in the world, it is perceived that a high percentage of the fatal incidences of Covid-19 in the region resulted from chronic hunger.¹⁰⁴⁷ This is because hunger is the primary cause of immunodeficiency worldwide across all age groups, increasing vulnerability to infections and reducing the

¹⁰⁴¹ GHI, 'Hunger and Food Systems in Conflict Settings' (2021)

<www.globalhungerindex.org/pdf/en/2021.pdf> accessed 31 May 2022

¹⁰⁴² GHI, 'Global, Regional and National Trends' (2020) (n 1038)

¹⁰⁴³ Ibid; See also UNICEF, 'Levels and Trends in Child Malnutrition' <<https://data.unicef.org/wp-content/uploads/2021/07/JME-2021-United-Nations-regions-v2.pdf>> accessed 18 October 2022

¹⁰⁴⁴ GHI, 'Hunger and Food Systems in Conflict Settings' (n 1030)

¹⁰⁴⁵ Ibid

¹⁰⁴⁶ See UN, Sustainable Development Goals: Goal 2: Zero Hunger

<www.un.org/sustainabledevelopment/hunger/> accessed 22 June 2021; See also Simon Fraval and others, 'Food Access Deficiencies in Sub-Saharan Africa: Prevalence and Implication for Agricultural Interventions' (2019) 3(104) *Frontiers in Sustainable Food Systems* 1-13

<www.frontiersin.org/articles/10.3389/fsufs.2019.00104/full#h9> accessed 22 June 2021; See also Pedro Sanchez, M. S. Swaminathan, Philip Dobie and Nalan Yuksel (n 4) 4

¹⁰⁴⁷ Elly Mertens and José L. Peñalvo, 'The Burden of Malnutrition and Fatal COVID-19: A Global Burden of Disease Analysis' (2021) 7 *Frontiers in Nutrition* (2021 Institute of Tropical Medicine, Belgium) <<https://www.frontiersin.org/article/10.3389/fnut.2020.619850>> accessed 12 June 2021

chances of survival.¹⁰⁴⁸ Persons who suffer from various forms of undernutrition, including obesity and malnutrition, develop a weaker immune system.¹⁰⁴⁹ This increases their vulnerability and predisposes them to higher risks of death, including fatal Covid-19 reactions. Unfortunately, over 100 million people in Africa face chronic food insecurity, significantly influencing the high mortality rate in SSA.¹⁰⁵⁰ This situation is indicative of a widespread violation of RtF in the region.

It is estimated that in the aftermath of the Covid-19 pandemic, in 2022, about 140 million people face acute food insecurity in Africa.¹⁰⁵¹ Coupled with the impact of the war in Ukraine and the rising cost of food, fuel and fertilizer, the level of food insecurity has continued to soar and at least one in 5 Africans skip a meal in a day due to a lack of access to food.¹⁰⁵² Particularly as a number of African countries depend on Russia and Ukraine for grains, wheat, and sunflower oil, the current crisis in Russia/Ukraine has exacerbated the food crisis in SSA, making it increasingly difficult for a significant percentage of the SSA population to meet their daily calories requirement.¹⁰⁵³ Agricultural prices are expected to decline by at least 5 percent in 2023, with a potential loss of income for SSA countries, which are basically exporters of unprocessed agricultural products. With the global economic crisis and the continuous depreciation of currencies across the globe, the impact is said to be more significant on import-

¹⁰⁴⁸ Ibid

¹⁰⁴⁹ Judd L. Walson and James A. Berkley, 'The impact of malnutrition on childhood infections' (2018) 31(3) *Current Opinions in Infections*, 231

¹⁰⁵⁰ OCHA, 'Food Insecurity and Hunger in Africa – Information Bulletin – April 2021' <<https://reliefweb.int/report/angola/food-insecurity-and-hunger-africa-information-bulletin-april-2021>> accessed 02 October 2021

¹⁰⁵¹ World Bank, 'Putting Africa at the Heart of Food Security and Climate Resilience' <www.worldbank.org/en/news/immersive-story/2022/10/17/putting-africans-at-the-heart-of-food-security-and-climate-resilience> accessed 29 November 2022

¹⁰⁵² World Bank, 'Global Progress in Reducing Extreme Poverty Grinds to a Halt' <www.worldbank.org/en/news/press-release/2022/10/05/global-progress-in-reducing-extreme-poverty-grinds-to-a-halt> accessed 29 November 2022

¹⁰⁵³ Ibid

reliant countries with no safety nets. The impact is a continued rise in the prevalence of food insecurity in SSA, which is indicative of a violation of RtF.¹⁰⁵⁴

Table 5 below portrays the country-by-country Global Hunger Index and Ranking for all 49 SSA countries in 2000 and 2020.¹⁰⁵⁵ GHI is assessed based on the rate of undernourishment, child mortality and child undernutrition.¹⁰⁵⁶ As earlier established, these indicators are also suggestive of food insecurity which is *prima facie* evidence of widespread violations of the RtF. This study recognises the challenges in accessing and procuring data in SSA as a result of incessant wars, poor record keeping among least-developed countries and the impact of Covid-19 lockdown on the States.

*Table 5 Global Hunger Index in SSA between 2000 and 2020*¹⁰⁵⁷

S/n	Country	2000	2020	Rank in 2020
1	Angola	64.9	26.8	93
2	Benin	34.1	22.4	79
3	Botswana	28.2	22.6	80
4	Burkina Faso	47.5	28.5	90
5	Burundi	No data	No data	No data
6	Cabo Verde	No data	No data	No data
7	Cameroon	36.4	19.1	70
8	Central African Republic	No data	No data	No data
9	Chad	50.9	44.7	107
10	Comoros	No data	No data	No data
11	Congo Republic	No data	No data	91
12	DR Congo	33.8	26.0	No data
13	Cote D'Ivoire	33.6	24.5	87
14	Djibouti	No data	No data	No data
15	Equatorial Guinea	No data	No data	No data
16	Eritrea	No data	No data	No data
17	Eswatini	No data	No data	74
18	Ethiopia	53.7	26.2	92
19	Gabon	21.1	18.2	68
20	Gambia	29.2	17.8	67
21	Ghana	28.5	15.2	63
22	Guinea	No data	No data	No data

¹⁰⁵⁴ World Bank, 'Currency Depreciation Risk Intensifying Food, Energy Crisis in Developing Economies' <<https://www.worldbank.org/en/news/press-release/2022/10/26/commodity-markets-outlook>> accessed 29 November 2022

¹⁰⁵⁵ 48 out of the 54 African countries are categorised SSA countries by the World Bank. However, Djibouti is included in this study although it is controversial whether it part of SSA because of its geographical location. See World Bank, 'Focus: Sub-Saharan Africa' <<https://openknowledge.worldbank.org/pages/focus-sub-saharan-africa>> accessed 02 October 2021

¹⁰⁵⁶ GHI, 'Global Hunger Index 2019' (n 122)

¹⁰⁵⁷ GHI, 'Global, Regional and National Trends' (2020) (n 1038)

23	Guinea-Bissau	No data	No data	No data
24	Kenya	37.4	23.7	84
25	Lesotho	36.0	30.7	100
26	Liberia	48.0	31.4	102
27	Madagascar	42.7	36.0	105
28	Malawi	43.2	22.6	80
29	Mali	41.9	31.3	82
30	Mauritania	No data	No data	85
31	Mauritius	No data	No data	47
32	Mozambique	48.1	33.1	103
33	Namibia	25.3	19.1	70
34	Niger	No data	No data	No data
35	Nigeria	40.6	29.2	98
36	Rwanda	49.7	28.3	97
37	Sao Tome And Principe	No data	No data	No data
38	Senegal	34.3	17.1	65
39	Seychelles	No data	No data	No data
40	Sierra Leone	58.3	30.9	101
41	Somalia	No data	No data	No data
42	South Africa	18.4	13.5	60
43	South Sudan	No data	No data	No data
44	Sudan	No data	27.7	94
45	Tanzania	40.8	25.0	89
46	Togo	39.3	21.4	86
47	Uganda	No data	No data	No data
48	Zambia	No data	No data	No data
49	Zimbabwe	No data	No data	No data

Table 6 below provides the key/explanation to Table 5 above

Table 6: Explanation:

GHI Score	Interpretation
10.0 – 19.9	Moderate
20.0 – 34.9	Serious
35.0 – 49.9	Alarming
50.0 and below	Extremely alarming

Tables 5 and 6 above show that GHI scores on the average within the period in review indicate serious levels of hunger in SSA. Chad and Madagascar have alarming GHI scores of 44.7 and 36, respectively, in 2020, ranking as the most food insecure States at 107 and 105, respectively. Mauritius and Ghana have moderate GHI scores, with Mauritius presenting no data and Ghana scoring 15.2 in 2020. Both countries rank as the most food-secure countries at

47 and 63, respectively. Although the figures seem to have reduced remarkably between the years 2000 and 2020, when compared to other regions of the world, SSA remains the most food-insecure region in the world,¹⁰⁵⁸ with the fastest-growing population of undernourished persons.¹⁰⁵⁹ These high global hunger scores are indicative of widespread violation of RtF in SSA.

6.3.2 Assessment of the Prevalence of Poverty in SSA

Further to the Global Hunger scores above, this section examines prevalence of poverty in SSA using the UN reports on SDG1- Eradicating poverty in all its forms. It also evaluates economic access to food in SSA and the progress towards achieving SDG1- Eradicating poverty in all its forms. As earlier established, starvation occurs due to the unavailability of food and much more by the inability of an individual to exchange his primary entitlement (such as labour) for the available food because the financial value of his primary entitlement cannot purchase the desired food.¹⁰⁶⁰ This lack of entitlement to purchase the desired food is examined in this section as the prevalence of poverty.¹⁰⁶¹

Table 7 below shows a country-by-country assessment of the prevalence of poverty in all 49 SSA countries in 2021. The respective country status was assessed as an estimated percentage of the population living below the poverty threshold of \$1.90 and \$3.20 per day.¹⁰⁶² Based on this assessment, persons living below the international poverty line of \$1.90 per day

¹⁰⁵⁸ GHI, 'Global, Regional and National Trends' (2020) (n 1038)

¹⁰⁵⁹ See UN, Sustainable Development Goals: Goal 2: Zero Hunger (n 1035); See also Simon Fraval (n 1046); See also Pedro Sanchez, M. S. Swaminathan, Philip Dobie and Nalan Yuksel (n 4)

¹⁰⁶⁰ Sen, *Poverty and Famines: An Essay on Entitlement and Deprivation* (n 9)

¹⁰⁶¹ Ibid

¹⁰⁶² The World Bank set the international poverty line of the poorest economies at \$1.90 per day based on the 2011 international food prices while the national poverty line of lower middle-income countries is placed at \$3.20 per day. See World Bank, 'Measuring Poverty' (n 637) In September 2022, the international poverty line was changed from \$1.90 to \$2.15 using the 2017 prices. However, at the time of writing, there are no global data on world poverty levels yet, based on the 2022 poverty line. See World Bank, 'Fact Sheet: An Adjustment of Global Poverty Line' <www.worldbank.org/en/news/factsheet/2022/05/02/fact-sheet-an-adjustment-to-global-poverty-lines#2> accessed 29 November 2022

are deemed to be living in extreme poverty, and persons living within the international poverty threshold of \$1.90 and \$3.20 per day are deemed to be living in poverty. Both imperatives are indicative of severe food insecurity and food insecurity, respectively, which in turn indicates violations of RtF in the assessed States.

Table 7 Assessment of SDG1- Proportion of Persons Living in Extreme Poverty in SSA in the year 2021¹⁰⁶³

S/N	Country	Poverty headcount ratio at \$1.90 per day (%)	Poverty headcount ratio at \$3.20 per day (%)	Country Status	Progress on the attainment of SDG1
1	Angola	53.9	75.7	Major challenges remain	Decreasing
2	Benin	48.1	720	Major challenges remain	Moderately increasing
3	Botswana	18.1	33.7	Major challenges remain	Decreasing
4	Burkina Faso	41.9	74.8	Major challenges remain	Stagnating
5	Burundi	80.1	94.3	Major challenges remain	Decreasing
6	Cabo Verde	2.1	15.8	Significant challenges remain	Moderately increasing
7	Cameroon	23.7	42.6	Major challenges remain	Stagnating
8	Central African Republic	78.8	90.8	Major challenges remain	Stagnating
9	Chad	42.5	67.9	Major challenges remain	Decreasing
10	Comoros	22.4	40.8	Major challenges remain	Decreasing
11	Congo	75.0	90.2	Major challenges remain	Decreasing
12	DR Congo	74.0	9.5	Major challenges remain	Decreasing
13	Cote D'Ivoire	20.2	43.6	Major challenges remain	Moderately Increasing
14	Djibouti	13.1	33.1	Major challenges remain	Moderately Increasing
15	Equatorial Guinea	No data	No data	No data	No data
16	Eritrea	No data	No data	No data	No data
17	Eswatini	32.3	49.5	Major challenges remain	Stagnating
18	Ethiopia	23.3	56.8	Major challenges remain	On track
19	Gabon	3.6	14.7	Significant challenges remain	Stagnating
20	Gambia	7.7	31.4	Significant challenges remain	Moderately Increasing
21	Ghana	11.8	26.8	Significant challenges remain	Stagnating
22	Guinea	27.8	61.4	Major challenges remain	Stagnating
23	Guinea-Bissau	56.5	78.0	Major challenges remain	Stagnating
24	Kenya	15.8	41.2	Major challenges remain	Moderately Increasing
25	Lesotho	29.1	49.1	Major challenges remain	Stagnating
26	Liberia	43.5	74.7	Major challenges remain	Decreasing
27	Madagascar	77.4	92.7	Major challenges remain	Decreasing
28	Malawi	73.0	90.1	Major challenges remain	Decreasing
29	Mali	40.2	72.6	Major challenges remain	Stagnating

¹⁰⁶³ UN 'Sustainable Development Goals Report 2021' (n 1030)

30	Mauritania	6.3	27.7	Significant challenges remain	Decreasing
31	Mauritius	0.3	1.5	SDG Achievement	On track
32	Mozambique	60.7	81.0	Major challenges remain	Stagnating
33	Namibia	22.0	34.9	Major challenges remain	Decreasing
34	Niger	40.8	72.9	Major challenges remain	Stagnating
35	Nigeria	42.8	73.7	Major challenges remain	Decreasing
36	Rwanda	45.2	72.7	Major challenges remain	Decreasing
37	Sao Tome and Principe	40.0	68.8	Major challenges remain	Decreasing
38	Senegal	28.9	55.0	Major challenges remain	Stagnating
39	Seychelles	No data	No data	No data	No data
40	Sierra Leone	43.1	75.7	Major challenges remain	Stagnating
41	Somalia	60.9	86.2	Major challenges remain	Decreasing
42	South Africa	27.4	38.0	Major challenges remain	Decreasing
43	South Sudan	84.8	96.2	Major challenges remain	Decreasing
44	Sudan	21.9	57.0	Major challenges remain	Decreasing
45	Tanzania	45.4	74.3	Major challenges remain	Stagnating
46	Togo	46.3	71.2	Major challenges remain	Stagnating
47	Uganda	38.2	65.4	Major challenges remain	Stagnating
48	Zambia	59.1	77.0	Major challenges remain	Decreasing
49	Zimbabwe	No data	No data	No data	

Using the lower threshold level of \$1.90, Table 7 above shows that Burundi ranks as the highest, with an estimate of 80.1 percent of its population living in extreme poverty, thus indicating very low access to food in the State. Using the higher threshold level of \$3.20, South Sudan ranks as the highest, with an estimate of 96.2 percent of its population living in poverty, thus indicating low access to food in the State. Unfortunately, both Burundi and South Sudan have low levels of constitutional protection for the RtF, as seen in Table 5 above. South Sudan includes providing clean water and food security in its fundamental objectives, which are not enforceable, while in Burundi, the RtF may be remotely inferred from other protected rights, such as the right to life.

Table 7 further demonstrates that all SSA countries save Mauritius are living below the UN target to achieve sustainable development through poverty eradication. The country status of most SSA countries in 2021 were reported as ‘major challenges remaining’, and these countries were either decreasing or stagnating in progress, thus indicating a failure to achieve the progressive realisation of RtF. Additional 2022 data shows that it is increasingly unlikely that the world will meet the goal of eradicating extreme poverty by 2030 due to the debilitating

impact of Covid-19, the Ukraine war, depreciating currencies and the rising cost of living. As of October 2022, SSA was recorded as having about 389 million, accounting for 60 percent of all people in extreme poverty worldwide.¹⁰⁶⁴ It is thus the region with the highest prevalence of extreme poverty. The poverty rate in SSA is estimated at 35 percent, which is also the highest rate worldwide, the world's highest.¹⁰⁶⁵ With these figures, it is almost impossible for SSA to achieve the poverty eradication goal (SDG1) by 2030. This is an indication of regressivity which is herein regarded as an act violation of the RtF.¹⁰⁶⁶

6.3.3 Assessment of the Prevalence of Hunger

Further to the assessment of the progress towards achieving SDG1 in SSA above, this section evaluates the prevalence of hunger in SSA and then progress towards food security based on the UN Reports on SDG2- Ending Hunger and Achieving Food Security. The assessment is based on the prevalence of undernourishment, stunting and wasting in SSA. Table 8 below provides a country-by-country analysis of the level of hunger in all 49 SSA countries using the 2021 SDG 2 reports on the attainment of zero hunger in the respective SSA countries.¹⁰⁶⁷ The variables were determined using the prevalence of undernourishment amongst the general population and the prevalence of stunting and wasting in children under the age of 5 years. The prevalence of undernourishment refers to the percentage of the population whose food intake is insufficient to meet their dietary energy requirements for one year. The prevalence of stunting includes the percentage of children up to the age of 5 who fall below minus-two standard deviation from the median height for their age. The prevalence of wasting includes the percentage of children below the age of 5 years whose weight falls below

¹⁰⁶⁴ World Bank, 'Global Progress in Reducing Extreme Poverty Grinds to a Halt' (n 1052)

¹⁰⁶⁵ Ibid

¹⁰⁶⁶ OHCHR, 'Report of the Special Rapporteur on the Right to Food Olivier De Schutter - Addendum - Mission to the World Trade Organisation' (2009) (n 88) para 9

¹⁰⁶⁷ UN, 'Sustainable Development Goals Report 2021' (n 1030)

minus-two standard deviations from the median weight for their age. The threshold for determining the average height and weight of children for purposes of assessing stunting and wasting in children below the age of 5 is based on the international child-growth threshold set by the World Health Organisation.¹⁰⁶⁸ These variables are examined in this section as indicators and food insecurity in SSA, which is *prima facie* evidence of violations of RtF.

Table 8 SDG2- Prevalence of hunger in SSA in the year 2021¹⁰⁶⁹

S/ N	Country	Prevalence of undernourishment (%)	Prevalence of stunting in children under 5 years of age (%)	Prevalence of wasting in children under 5 years of age (%)	Country Status	Progress Report on the attainment of SDG2
1	Angola	18.6	37.6	4.9	Major challenges remain	Stagnating
2	Benin	7.4	32.2	5.0	Major challenges remain	Moderately increasing
3	Botswana	24.1	28.9	7.3	Major challenges remain	Stagnating
4	Burkina Faso	19.2	24.9	8.4	Major challenges remain	Stagnating
5	Burundi	No data	54.2	5.1	Major challenges remain	Stagnating
6	Cabo Verde	18.5	No data	No data	Major challenges remain	Stagnating
7	Cameroon	6.3	28.9	4.3	Major challenges remain	Stagnating
8	Central African Republic	40.8	6.6	7.5	Major challenges remain	Stagnating
9	Chad	39.6	39.8	13.3	Major challenges remain	Stagnating
10	Comoros	31.1	11.2	7.8	Major challenges remain	Stagnating
11	Congo	28.0	21.2	8.2	Major challenges remain	Stagnating
12	DR Congo	No data	42.7	8.1	Major challenges remain	Stagnating
13	Cote D'Ivoire	19.9	21.6	6.1	Major challenges remain	Stagnating
14	Djibouti	No data	33.5	21.5	Major challenges remain	Stagnating
15	Equatorial Guinea	No data	26.2	3.1	Major challenges remain	Stagnating
16	Eritrea	No data	52.5	14.6	Major challenges remain	Stagnating
17	Eswatini	16.9	25.5	2.0	Major challenges remain	Stagnating
18	Ethiopia	19.7	36.8	7.2	Major challenges remain	Stagnating
19	Gabon	16.6	17.0	3.4	Major challenges remain	Stagnating
20	Gambia	11.9	13.6	6.0	Major challenges remain	Stagnating
21	Ghana	6.5	17.5	6.8	Major challenges remain	Stagnating
22	Guinea	No data	30.3	9.2	Major challenges remain	Stagnating
23	Guinea-Bissau	No data	27.6	6.0	Major challenges remain	Stagnating
24	Kenya	23.0	26.2	4.2	Major challenges remain	Stagnating
25	Lesotho	32.6	34.6	2.1	Major challenges remain	Stagnating
26	Liberia	37.5	30.1	4.3	Major challenges remain	Stagnating
27	Madagascar	41.7	41.6	6.4	Major challenges remain	Moderately Increasing

¹⁰⁶⁸ WHO, 'Child Growth Standards' <www.who.int/tools/child-growth-standards/standards> accessed 14 September 2021

¹⁰⁶⁹ UN, 'Sustainable Development Goals Report 2021' (n 1030)

28	Malawi	18.8	39.0	1.3	Major challenges remain	Stagnating
29	Mali	5.1	26.9	9.0	Major challenges remain	Moderately Increasing
30	Mauritania	1.9	22.8	11.5	Major challenges remain	Stagnating
31	Mauritius	5.3	2.6	0.7	Significant challenges remain	Stagnating
32	Mozambique	32.6	42.3	4.4	Major challenges remain	Stagnating
33	Namibia	14.7	22.7	7.1	Major challenges remain	Stagnating
34	Niger	No data	48.5	14.1	Major challenges remain	Stagnating
35	Nigeria	12.6	36.8	6.8	Major challenges remain	Stagnating
36	Rwanda	35.6	36.9	2.0	Major challenges remain	Stagnating
37	Sao Tome and Principe	12.0	17.2	4.0	Major challenges remain	Stagnating
38	Senegal	9.4	18.8	8.1	Major challenges remain	Moderately increasing
39	Seychelles	1.2	7.9	4.3	Major challenges remain	Stagnating
40	Sierra Leone	26.0	29.5	5.4	Major challenges remain	Stagnating
41	Somalia	No data	25.3	14.3	Major challenges remain	Stagnating
42	South Africa	5.7	27.4	2.5	Major challenges remain	Stagnating
43	South Sudan	No data	31.1	22.7	Major challenges remain	Stagnating
44	Sudan	12.4	38.2	16.3	Major challenges remain	Stagnating
45	Tanzania	25.0	31.8	3.5	Major challenges remain	Stagnating
46	Togo	20.7	23.8	5.0	Major challenges remain	Stagnating
47	Uganda	No data	28.9	3.5	Major challenges remain	Moderately increasing
48	Zambia	No data	34.6	4.2	Major challenges remain	Stagnating
49	Zimbabwe	No data	23.5	2.9	Major challenges remain	Stagnating

Table 8 above shows the dire situation of food insecurity in SSA. All SSA countries face major food security challenges except Mauritius, which faces significant challenges. Madagascar and Central African Republic present the highest rates of widespread undernourishment, with estimated values of 41.7 percent and 40.8 percent, respectively. Burundi and Eritrea present severe cases of stunting in children below the age of 5 at 54.2 percent and 52.5 percent, respectively. Infant wasting in South Sudan and Djibouti is the highest in SSA at 22.7 and 21.5 percent, respectively. The lowest levels of undernourishment and stunting are recorded in Seychelles and Mauritius at 1.2 percent and 2.6 percent, respectively. The lowest level of wasting is recorded in Mauritius, also at 0.7 percent. These indices are generally alarming and are indicative of severe food insecurity and widespread violation of RtF in SSA.

Table 8 also shows how progress towards achieving food security in SSA is stagnating in 45 of the 49 SSA countries in review. This is suggestive of slack in the progressive realisation

of RtF. These progress rates for 2021 were determined using historical data, including an estimate of the countries' progress towards the pre-set SDG thresholds.¹⁰⁷⁰ Further data from 2022 reports show that due to the Covid-19 pandemic in 2020 and its continued impacts in 2021, progress towards achieving food security took an inverted slide revealing major setbacks, with growing numbers of people facing hunger and food insecurity. An estimate of 702-828 million people were affected by hunger in 2021, and 33-40 percent of this population are in Africa.¹⁰⁷¹ 278 million people being 20.8 percent of the African population, suffer from undernourishment, making Africa the region with the highest prevalence of undernourishment across the globe.¹⁰⁷² These data are suggestive of regressivity which is prima facie evidence of a violation of RtF. It is suggested, therefore, that incorporating socioeconomic rights in trade through good governance, political transparency, accountability, periodic impact assessment, and increased public involvement will help address the Siamese menace of poverty and starvation and facilitate the realisation of RtF in SSA. The section below examines the process indicators of RtF and how trade liberalisation in SSA impacts the realisation of RtF in the region.

6.4 Process Indicators of the Right to Food in Sub-Saharan Africa

Further to the analysis of the structural and outcome indicators of the RtF in sections 6.2 and 6.3 above, this section examines the process indicators of the RtF in SSA based on the UN list of illustrative indicators.¹⁰⁷³ Having reviewed the impact of the AoA on physical and economic access to food in SSA in Chapter 5, this section further reviews the Agreement

¹⁰⁷⁰ Ibid 71

¹⁰⁷¹ FAO, 'The State of Food Insecurity and Nutrition in the World' (2022) <www.fao.org/3/cc0639en/online/sofi-2022/food-security-nutrition-indicators.html> accessed 30 November 2022

¹⁰⁷² Ibid

¹⁰⁷³ OHCHR, 'Report on Indicators for Monitoring Compliance with International Human Rights Instruments' (n 11)

establishing the AfCFTA Agreement 2019¹⁰⁷⁴ as the predominant trade agreement in SSA and how the AfCFTA Agreement contributes to the process of progressively realising the RtF in SSA. It also examines the impact of trade liberalisation under the AfCFTA Agreement and its Protocol on Trade in Goods on access to food in SSA.¹⁰⁷⁵

The AfCFTA Agreement¹⁰⁷⁶ was concluded on 21 March 2018 following the decision at the 18th ordinary session of the Assembly of Heads of States and Governments of the African Union to form a distinct continental cooperation arrangement to boost intra-African trade and promote socioeconomic development in Africa.¹⁰⁷⁷ The AfCFTA Agreement set the path to the largest Free Trade Area (FTA) since the inception of the WTO.¹⁰⁷⁸ As of November 2022, all 55 AU countries have signed the AfCFTA Agreement except Eritrea, and 40 countries have ratified it. It is thus binding on over 70 percent of SSA countries.¹⁰⁷⁹ Like most regional trade agreements, the AfCFTA Agreement is independent of the WTO, but its policies are guided by the rules of the WTO system.¹⁰⁸⁰ Of the 54 AfCFTA signatories, 44 are WTO members, and the rest are acceding and observer countries of the WTO.¹⁰⁸¹

The AfCFTA Agreement establishes a mechanism to create a single market for goods and services and to facilitate the free movement of persons within the FTA to deepen the

¹⁰⁷⁴ Agreement Establishing the African Continental Free Trade Area 2019

¹⁰⁷⁵ Physical access refers to food availability and the equitable distribution of world food supplies, making food reachable in relation to need CESCR General Comment No 12 (n 6) para 13; See also ICESCR 1976, Article 11 (2) (b) ICESCR. Economic access refers to food affordability. It implies that personal or household financial costs associated with the acquisition of food for an adequate diet should be at a level which must not compromise the satisfaction of other basic needs of the person/household. See CESCR General Comment No 12 (n 6) para 13

¹⁰⁷⁶ Agreement Establishing the African Continental Free Trade Area 2019

¹⁰⁷⁷ AU, 'The African Continental Free Trade Area' <<https://au.int/en/african-continental-free-trade-area>> accessed 11 June 2021

¹⁰⁷⁸ Omphemetse S. Sibanda, 'The Advent of the African Continental Free Trade Agreement as a Tool for Development' (2021) 56(2) Foreign Trade Review 216; See also Regis Y. Simo, Trade in Services in the African Continental Free Trade Area: Prospects, Challenges and WTO Compatibility (2020) 23 (1) J Int Economic Law 65

¹⁰⁷⁹ See AU-AfCFTA (n 986)

¹⁰⁸⁰ Alan W M Wolff, 'AfCFTA and WTO Can Help "Knit Together" Africa in Peace and Prosperity' <www.wto.org/english/news_e/news21_e/ddgaw_04mar21_e.htm> accessed 21 June 2021

¹⁰⁸¹ Ibid

economic integration of the African continent.¹⁰⁸² Similar to the WTO, it creates a liberalised market for goods and services through successive rounds of negotiations to enhance competition and promote industrial development through economic diversification, agricultural development and food security.¹⁰⁸³ Similar to the WTO framework, State Parties are required to progressively eliminate tariffs and non-tariff barriers to trade in goods and services, cooperate on all trade-related areas, establish a dispute settlement mechanism and maintain an institutional framework for the implementation and administration of the AfCFTA.¹⁰⁸⁴

Prior to its inception, the African Union (AU) had eight established regional economic communities (RECs), which were regulated by various regional economic blocs in the AU.¹⁰⁸⁵ The structure and the free trade areas established by these RECs form the building block for the AfCFTA.¹⁰⁸⁶ The AfCFTA Agreement harmonises the laws on trade in goods, trade in services, mobility of labour, and trade in agriculture, *inter alia*, thus legislating on almost all aspects of the people's lives and wellbeing.¹⁰⁸⁷ Its core principle is to establish a free trade area driven by Member States of the African Union through transparency and disclosure of information, and best practices in the RECs, State Parties and International Conventions binding the Union.¹⁰⁸⁸

Similar to the AoA, the AfCFTA Agreement recognises food security as an objective, but it differs slightly in its approach in that it takes a more active approach to food security than the AoA. Under the AfCFTA Agreement, Member States commit to trade liberalisation to

¹⁰⁸² AfCFTA Agreement 2019, Article 3a

¹⁰⁸³ Ibid Article 3b and g

¹⁰⁸⁴ Ibid Article 4

¹⁰⁸⁵ The eight RECs are: Arab Maghreb Union (UMA), Common Market for Eastern and Southern Africa (COMESA), Community of Sahel-Saharan States (CEN-SAD), East African Community (EAC), Economic Community of Central African States (ECCAS), Economic Community of West African States (ECOWAS), Intergovernmental Authority on Development (IGAD), and Southern African Development Community (SADC).

¹⁰⁸⁶ AfCFTA Agreement 2019, Article 3

¹⁰⁸⁷ Omphemetse S. Sibanda (n 1078)

¹⁰⁸⁸ AfCFTA Agreement 2019, Article 5

deepen economic integration and promote agricultural development, food security, industrialisation and structural economic transformation.¹⁰⁸⁹ Whereas under the AoA, State Parties commit to an equitable reform programme, ‘having regard to non-trade concerns including food security and environmental protection; having further regard to the agreement for S&D treatment of developing countries and the effect of the reform programme on net food-importing countries’.¹⁰⁹⁰ Thus, while the AoA recognises food security as a non-trade objective, the AfCFTA Agreement regards economic integration, agricultural development, food security, industrialisation and structural economic transformation as the desired outcome of trade liberalisation.¹⁰⁹¹ The AfCFTA Agreement also recognises food security and agricultural development as a means of promoting industrial development.¹⁰⁹² Thus food security is recognised both as an end of trade liberalisation and a means of achieving industrial development in SSA. Hence, the AfCFTA Agreement accords greater importance to food security in trade, portraying it as fundamental to trade mechanisms.

Furthermore, similar to the AoA, the AfCFTA Agreement fails to define or conceptualise food security. Both Agreements recognise food security as an objective but fail to define the term or set clear objectives on how food security could be achieved through the respective trade regimes. They do not set out the benchmark for achieving food security or indicators to monitor the achievement of food security. The implication is that the food security objective of both Agreements is vague and, therefore, difficult to enforce because there are no clear modalities on how it could be achieved. There is no way of deciphering the extent of the realisation of food security nor assessing the progress of trade liberalisation in achieving food security under the respective agreements. The lack of clarity makes it even more difficult to prioritise food

¹⁰⁸⁹ Preamble to the AfCFTA Agreement 2019. Para 4

¹⁰⁹⁰ Ibid Para 6

¹⁰⁹¹ Ibid Para 4

¹⁰⁹² AfCFTA Agreement 2019, Article 3(g)

security in trade negotiations or for Member States to plead food security as a defence in a trade dispute.

The AfCFTA Agreement establishes various protocols to regulate specific aspects of trade. The first set of protocols which are the Protocols on Trade in Goods, Trade in Services and Dispute Settlement were launched on 01 January 2021. The Protocol on Trade in Goods specifically covers trade in food and agricultural products, which are the focus of this study. The section below examines food and agricultural trade under the Protocol on Trade in Goods and how socioeconomic rights could be incorporated into this trade regime to facilitate access to food in SSA.

6.5 Incorporating Socioeconomic Rights in Sub-Saharan African Trade

Having highlighted the lapses of the AfCFTA Agreement in that it recognises food security as a trade objective but sets no goal as to how this objective may be achieved, this section further examines the Protocol on Trade in Goods, demonstrating possible gateways through which socioeconomic rights may be incorporated into the SSA trade liberalisation system through the exceptions allowed under the Protocol on Trade in Goods. The Protocol on Trade in Goods appears to be patterned after the GATT. It provides for the elimination of non-trade barriers,¹⁰⁹³ requires Member States to progressively eliminate import duties¹⁰⁹⁴ and prohibits all forms of discriminatory export duties.¹⁰⁹⁵ State parties are also precluded from introducing new import duties and restrictions that were not in place at the time of the Agreement.¹⁰⁹⁶ Similar to the GATT, the Protocol on Trade in Goods prohibits all forms of discriminatory trade policies, including the Most-Favoured-Nation Treatment and the

¹⁰⁹³ AfCFTA Agreement 2019, Protocols on Trade in Goods Article 12

¹⁰⁹⁴ Ibid Article 7(1)

¹⁰⁹⁵ Ibid Article 10

¹⁰⁹⁶ Ibid Article 7(2)

Nationality Treatment principles.¹⁰⁹⁷ It encourages the provision of special and differential treatment to vulnerable State Members, including an additional transition period in the implementation of the Agreement.¹⁰⁹⁸ Annex 9 of the Protocol regulates the antidumping and countervailing measures under the AfCFTA.¹⁰⁹⁹ It creates additional flexibility to protect access to food among vulnerable members, but it states that its provisions are to be observed in line with the relevant WTO Agreements.¹¹⁰⁰ It is suggested below that socioeconomic rights could be incorporated into the AfCFTA trade regime through the exception allowed under the Protocol on Trade in Goods and by adopting the rights-based approach to food security in trade.

6.5.1 Incorporating the Right to Food through the General Exception to the Protocol on Trade in Goods

In addition to reinforcing the GATT exceptions which were discussed in Chapter 5 of this study, the AfCFTA Protocol on Trade establishes certain exceptions through which socioeconomic rights may be integrated into the trade regime to facilitate the realisation of RtF.

Paragraph 26(i) of the Protocol on Trade in Goods provides that ‘Nothing in this Protocol shall be construed as preventing the adoption or enforcement of measures by any State Party... involving restrictions on exports of domestic materials necessary to ensure essential quantities of such materials to a domestic processing industry during periods when the domestic price of such materials is held below the world price as part of a governmental stabilisation plan’.¹¹⁰¹ Thus the Protocol on Trade in Goods permits States to adopt measures to bring down the domestic price of specific products in order to ensure adequate supplies of that product to local manufacturers. The State may, at such times, limit the export of these domestic materials

¹⁰⁹⁷ Ibid Article 4 and 5

¹⁰⁹⁸ Ibid Article 6

¹⁰⁹⁹ Ibid Annex 9

¹¹⁰⁰ Preamble to the AfCFTA Agreement 2019, Ibid Article 17

¹¹⁰¹ Protocol on Trade in Goods Para 26(i)

to ensure that local manufacturers have sufficient volumes of the said material, especially in times of scarcity. Thus, the Protocol allows States to make policies to protect the local industry and ensure access to products within the State, even where it may have a trade-distorting effect. However, there is no case law demonstrating the application of this provision in the Region,¹¹⁰² but it could be inferred that this exception also applies to the export of unprocessed agricultural products to protect access to food in appropriate cases.

Nonetheless, this flexibility is subject to the requirement that such trade-restrictive measures are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between State Parties or constitute a disguised restriction on international trade.¹¹⁰³ Thus implying that States must at all times act in good faith and not manipulate these exceptions as an opportunity to renege on their trade obligations. Such restrictions shall not operate to increase the exports of the product in question or to increase the protection afforded to the domestic industry. The use of this flexibility is strictly to increase internal access to specific products and not to depart from the provisions of the Protocol relating to non-discrimination.¹¹⁰⁴

Furthermore, paragraph 26(j) of the Protocol on Trade in Goods provides that ‘nothing in this Protocol shall be construed as preventing the adoption or enforcement of measures by any State Party that is... essential to the acquisition or distribution of foodstuffs or any other products in general or local short supply’.¹¹⁰⁵ This provision is similar to subparagraph 2(i) discussed above; however, 26(j) is specifically tailored to the acquisition and distribution of foodstuff in short supply. Thus, the AfCFTA Protocol on Trade in Goods tends to make additional provisions to address the issues of scarcity and to ensure adequate access to foodstuff among vulnerable Member States. Although there has been no case law in this area, given the

¹¹⁰² There is no case law to date, January 2023

¹¹⁰³ Protocol on Trade in Goods Para 26

¹¹⁰⁴ Ibid Para 26(i)

¹¹⁰⁵ Ibid Para 26(j)

direct phrasing of this exception, it is assumed that a State may rely on this provision and plead access to food or the lack of it as a defence for its trade-restrictive measures.

However, paragraph 26(j) of the Protocol is subject to the requirement that the trade-restrictive measure in question must not be applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between State Parties or constitute a disguised restriction on international trade.¹¹⁰⁶ Thus implying that the State must at all times act in good faith and not manipulate these exceptions as an opportunity to renege on its trade obligations. Any restrictive measures implemented under this subparagraph shall be consistent with the principle that all State Parties are entitled to an equitable share of the international supply of such products and that any such measures which are inconsistent with the other provisions of the Protocol shall be discontinued as soon as the conditions giving rise to them have ceased to exist.¹¹⁰⁷ The restrictive measure shall only be applied to address a specific problem of shortage of foodstuff. And once the problem is addressed, such restrictive measures must be discontinued. Thus, the flexibilities of the Protocol on Trade in Goods may be utilised to address sudden food shortages and famines to enable local producers to access materials and foodstuff at lower prices than the world market and to limit exports during this period. This way, the State is able to protect local industries from sudden shortages and ensure adequate physical and economic access to food within the state.

6.5.2 Incorporating the Rights-Based Approach to Trade in Sub-Saharan Africa

Socioeconomic rights could also be incorporated into the SSA trade regime by adopting the rights-based approach (RBA) to food security in trade. The six basic principles of the RBA, as set out in the “Common Understanding” of the UN Sustainable Development Group are

¹¹⁰⁶ Ibid Para 26

¹¹⁰⁷ Ibid Para 26(j)

universality and inalienability, indivisibility, inter-dependence and inter-relatedness, equality and non-discrimination, participation and inclusion, and accountability and the rule of law.¹¹⁰⁸

The Voluntary Guidelines also reinforce *inter alia* democracy, good governance, human rights and international cooperation as essential components for the achievement of food security.¹¹⁰⁹

The RBA aims to realise the desired outcomes of international trade through the process of non-discrimination, public participation, periodic impact assessment and monitoring, capacity building for sustainable development and access to food, accountability, and international cooperation and assistance for the progressive realisation of RtF.¹¹¹⁰ Some of these elements appear to be missing in the negotiations around the formation of the AfCFTA.

In terms of non-discrimination and international cooperation and assistance, the Protocol on Trade in Goods commits to Special and Differential Treatment of vulnerable groups. It recognises the different levels of development among State Parties and the need to provide flexibilities, special and differential treatment and technical assistance to State Parties with special needs.¹¹¹¹ This is similar to the AoA, which also regards the agreement on S&D treatment of developing countries as an integral element of the negotiations and takes into account the possible negative effect of the implementation of trade reform programmes on least-developed and net food-importing developing countries.¹¹¹²

The Protocol on Trade in Goods set out some clear wellbeing objectives by recognising the importance of a comprehensive Protocol on Trade in Goods to deepen economic efficiency

¹¹⁰⁸ United Nations Sustainable Development Group, The Human Rights-Based Approach to Development Cooperation - Towards a Common Understanding Among UN Agencies (n 300)

¹¹⁰⁹ See FAO, 'Voluntary Guidelines to Support the Progressive Realisation of the Right to Food in the Context of Food Security' (n 100) Para 19; See also Brenda K. Kombo, 'Emerging Voices: Doing Regional Integration Better? The Possibility of Reinvigorating the Relationship Between International Human Rights Law and International Economic Law Through the African Continental Free Trade Area' <<http://opiniojuris.org/2019/08/12/emerging-voices-doing-regional-integration-better-the-possibility-of-reinvigorating-the-relationship-between-international-human-rights-law-and-international-economic-law-through-the-african-contine/>> accessed 7 September 2021

¹¹¹⁰ Ibid

¹¹¹¹ Preamble to the AfCFTA Agreement 2019, Protocol on Trade in Goods Para 7

¹¹¹² Ibid Para 6

and improve social welfare. It aims to deepen economic cooperation, improve social welfare, progressively eliminate trade barriers, and increase trade and investment with greater opportunities for economies of scale for businesses.¹¹¹³ Its objective appears all-inclusive, integrating tenets of trade liberalisation alongside wellbeing considerations to ensure sustainable development. It recognises that industrial development is effectively achieved through diversification and regional value chain development, agricultural development and food security'.¹¹¹⁴ Whilst these provisions are helpful for the progressive realisation of RtF, the manner in which they will be applied in practice will determine how the trade regime is able to engender the realisation of RtF in SSA. It is suggested that wellbeing considerations should not be made subject to free trade such that the ability of States to make policies to facilitate the realisation of RtF is limited by the requirement to take the least trade restrictive rather than the most efficient measures to achieve food security.

Furthermore, the Protocol on Trade in Goods tends to focus on capacity building which is a fundamental aspect of the RBA.¹¹¹⁵ Capacity building involves international cooperation to contribute towards the development of the capacities of Member States to meet their socioeconomic rights obligations.¹¹¹⁶ The Protocol on Trade in Goods provides for the coordinated effort of the secretariat, RECS and partners to provide technical assistance and capacity building in trade and trade-related issues.¹¹¹⁷ It allows some flexibilities for the protection of infant industries within a State.¹¹¹⁸ State Parties may impose measures to protect infant industries, provided that they have exhausted every other reasonable option and the measure in question is applied on a non-discriminatory basis and for a specific period.¹¹¹⁹ A

¹¹¹³ Ibid Protocol on Trade in Goods Para 5

¹¹¹⁴ AfCFTA Agreement 2019, Article 3(g)

¹¹¹⁵ UN, 'Human Rights-Based Approach to Development Programming' (n 3148)

¹¹¹⁶ Ibid; See also FAO, 'Fifteen years implementing the Right to Food Guidelines; Reviewing Progress to Achieve the 2030 Agenda' (n 315)

¹¹¹⁷ AfCFTA Agreement 2019, Part IX Article 29

¹¹¹⁸ Preamble to the AfCFTA 2019, Protocol on Trade in Goods Para 24

¹¹¹⁹ Ibid

State Party in the critical balance of payments difficulties or threat of same may adopt appropriate restrictive measures in accordance with international rights and obligations of the State, including those under the WTO Agreement *inter alia*, to remedy its balance of payment problems.¹¹²⁰ Provided always that the measures are strictly necessary to remedy the balance of payments situation. The measures must be equitable, non-discriminatory, applied in good faith and only for a specific period.¹¹²¹ Further to the discussion in Chapter 5, it is suggested that these provisions will contribute effectively towards capacity building which is essential for the realisation of sustainable development and food security, provided that their application in future is not limited in such a way that State Parties are compelled to adopt the least trade restrictive measures rather than the most effective measures to meet the impending need as is the case with the WTO.¹¹²² If the AfCFTA adopts a more comprehensive approach than the WTO, incorporating elements of the RBA, it will provide a strong platform for the realisation of RtF through its trade regime.

However, the AfCFTA Agreement has been criticised in previous sections of this chapter because it recognises food security as an objective of free trade; however it fails to articulate and effectively incorporate food security in the Agreement itself or its Protocols. It does not provide indicators or benchmarks to assess the achievement of its food security objective and other socioeconomic goals. The challenge is that although the AfCFTA and its Protocols regulate agricultural trade in SSA, it remains difficult to assess the achievements of the Protocol and how it facilitates the progressive realisation of the RtF through agricultural trade liberalisation. The progressive realisation of RtF requires States to take deliberate and calculated measures towards realising the RtF. Where there are no clear steps to facilitate

¹¹²⁰ AfCFTA Agreement 2019, Article 28

¹¹²¹ Ibid

¹¹²² *EC Hormones—Report of the Appellate Body* (n 776).

progressive measures and no benchmarks for assessing its achievement, it may lead to regressivity, thus resulting in possible violations of the RtF.

The AfCFTA Agreement has also been flawed for its failure to embrace the RBA through periodic impact assessment, public involvement and good governance. At the start of trade negotiations, the UN commissioned an *ex-ante* human rights impact assessment of the AfCFTA Agreement.¹¹²³ It found that the trade negotiations paid minimal attention to the important human rights implications of the free trade agreement, which are likely to be significant. Trade liberalisation can impact various socioeconomic groups in different ways due to inequality of assets and economic status. It also found that agricultural trade liberalisation raises particular concerns about adverse impacts on agricultural livelihoods and food security.¹¹²⁴ The UN Impact Assessment report on the AfCFTA thus recommended broader consultation and participation in trade negotiations and implementation to ensure that the process is inclusive, participatory and consultative with all stakeholders and that a wide range of views and impacts are taken into account before the conclusion of the agreement.¹¹²⁵ Data collection should be disaggregated, involving samples from vulnerable groups because a human rights approach ought to pay attention to the situation of the most vulnerable and disadvantaged.¹¹²⁶ Additionally, impact assessment must be disaggregated, adopting a human rights approach which takes into account the needs of different population groups, paying particular attention to the most vulnerable groups. Thus, the AfCFTA Agreement could offer a conceptual framework and operational tools to guide State Parties on the importance of effective public participation in trade policy-making. It is also suggested that trade liberalisation should be phased and gradual to enable periodic adjustments following periodic

¹¹²³ See OHCHR, 'Report: The Continental Free Trade Agreement in Africa, A Human Right Perspective' <www.ohchr.org/Documents/Issues/Globalization/TheCFTA_A_HR_ImpactAssessment.pdf> accessed 01 June 2022

¹¹²⁴ Ibid

¹¹²⁵ Ibid

¹¹²⁶ Ibid

impact assessment. This will help ensure that effective measures are taken from time to time to protect vulnerable groups, especially in key areas such as food security.¹¹²⁷

Furthermore, the Report advised State Parties to preserve their policy space so that their trade commitments do not interfere with their ability to observe their human rights obligations under the UN and other international human rights agreements. It encouraged AfCFTA Member States to resist trade commitments that could undermine their ability to implement future measures to ensure that human rights are respected, protected and fulfilled.¹¹²⁸ In the agricultural sector particularly, States should reserve the right to promote agricultural development, meet the needs of small-scale agricultural producers and strengthen domestic food production.¹¹²⁹ Likely human rights impact of trade liberalisation should be monitored from time to time and necessary changes made to accommodate the vulnerable and check discrimination. Any commitments that will impair the ability of States to make necessary adjustments to prevent or stop discriminatory practices or human rights abuses ought to be avoided. Rather than simply waiting on the long-term gains of trade liberalisation, State Parties are encouraged to establish compensatory funds to provide immediate financial and technical support to vulnerable persons during the transition unto liberalised trade.¹¹³⁰ By adopting the RBA to trade through increased public participation, periodic impact assessment, wellbeing considerations and accountability, the AfCFTA will be in a better position to facilitate access to food and realise its food security objectives in SSA through its trade liberalisation regime.

6.6 Conclusion

In conclusion, the outcome indicators assessed in this chapter reveal that there is a dire situation of severe food insecurity and abuse of RtF in SSA. With regards to the outcome

¹¹²⁷ Ibid

¹¹²⁸ Ibid

¹¹²⁹ Ibid

¹¹³⁰ Ibid

indicators of RtF, it finds that the level of protection accorded the RtF in the State and regional laws of SSA is regrettably low. Recognising the RtF as a fundamental human right in the constitutions of the respective SSA countries and the regional laws will help protect the RtF, create awareness among right holders and facilitate the enforceability of this right in SSA. With regards to the process indicators, this chapter found that the AfCFTA has taken some steps towards capacity building and wellbeing considerations in trade. However, a common pitfall arises where trade agreements inadvertently undermine human rights obligations by focusing on trade alone without consideration of human rights. This may result in regressivity which is suggestive of a violation of the RtF. It is suggested that a more pragmatic approach towards the rights-based approach to trade through increased public participation, periodic impact assessment, enhanced wellbeing considerations and State accountability will help facilitate the realisation of RtF through trade in SSA. Incorporating the RtF in trade would require prioritising socioeconomic wellbeing as the end, and trade liberalisation as a means to achieving this end. Trade liberalisation agreements ought to provide adequate safeguards for victims of trade liberalisation, articulate clear socioeconomic goals and benchmarks for accessing progress, and provide adequate flexibilities for a State to rely on human rights as a valid defence for appropriate trade-restrictive measures. The indicators of RtF in the EU are examined in Chapter 8 to establish the basis for a comparative analysis in Chapter 9.

Chapter 7: Right to Food In The European Union

7.1 Introduction

Further to the examination of the indicators of RtF in SSA in Chapter 6, this chapter conducts a critical evaluation of the realisation and violation of RtF in the EU using the UN list of illustrative indicators on the right to adequate food (ICESCR, Art. 11).¹¹³¹ It critically examines the regional trade and human rights regimes of the EU, demonstrating how regional trade could be leveraged to promote the realisation of RtF in light of the extraterritoriality of the RtF obligations. It examines the realisation of RtF in the EU to establish the basis for the comparative analysis in chapter 9. The EU is preferred for this analysis because it stands in sharp contrast with SSA in terms of structural and economic development and in terms of food security, as it is rated among the most food-secure regions in the world. The EU has well-developed human rights and trade laws as well as food and agricultural policies, thus leaving a clear path for effective legal transplant into SSA to facilitate the progressive realisation of RtF through trade. The UN list of illustrative indicators is used for this analysis because of their wide coverage and endorsement by the UN for objective analysis of the implementation of RtF.¹¹³² This chapter examines the structural, process and outcome indicators of RtF in the EU.

Assessing the structural indicators of the RtF in the EU involves an examination of the legal framework and human rights mechanism to assess the extent of realisation of the RtF based on the level of protection accorded to this right in the regional framework of the Union. This chapter also examines the respective constitutions of the 27 EU Member States to determine the extent to which the RtF is protected in the States.

Assessing the process indicators of the RtF in the EU involves an examination of the rules, policies and strategies used in the process of governing the region. It examines the trade

¹¹³¹ OHCHR, 'Report on Indicators for Monitoring Compliance with International Human Rights Instruments' (n 11)

¹¹³² Ibid

policies of the EU and the extent to which they incorporate elements of socioeconomic rights to facilitate the realisation of RtF through trade liberalisation in the region. To achieve this objective, this chapter particularly examines the trade regime under the Treaty of the European Union (TEU) 2009, the Treaty on the Functioning of the European Union (TFEU) 2009 and the relevant trade policies under them to demonstrate how the EU trade liberalisation system impacts on physical and economic access to food in the region.¹¹³³ The TEU and TFEU are preferred in this analysis because they are the fundamental treaties governing trade and other relations in the EU. All EU countries have ratified both treaties and are bound by their provisions.

Assessing the outcome indicators of the RtF in the EU involves an examination of secondary data on the prevalence of poverty, undernourishment and hunger in the EU using the Global Hunger Index (GHI) and the UN progress reports on Sustainable Development Goals (SDG) 1 of poverty eradication and SDG 2 of zero hunger. The SDG reports are published as official reports of the UN Statistics Division to track the status of the various regions and countries and their progress towards achieving the SDGs. The GHI is an independent objective report providing a comprehensive measure to specifically track hunger at the global, regional and country levels. These data are preferred for this analysis due to their objectivity, holistic coverage and universal acceptance. The 2021 UN progress report on SDG1 of poverty eradication is used to assess the prevalence of poverty and the progress towards eradicating poverty in the EU. The prevalence of hunger in the EU is assessed using the 2021 GHI, while the prevalence of undernutrition, infant mortality rate and the progress towards eliminating hunger in the EU are assessed using the 2021 UN progress reports on SDG2 of

¹¹³³ Physical Access refers to food availability and the equitable distribution of world food supplies, making food reachable in relation to need while Economic Access refers to food affordability. It implies that personal or household financial costs associated with the acquisition of food for an adequate diet should be at a level which must not compromise the satisfaction of other basic needs of the person/household. See CESCR General Comment No 12 (n 6) para 13; See also ICESCR 1976, Article 11 (2) (b)

eliminating hunger. These data are also used to examine regressivity and the extent of food insecurity in the EU as fundamental indicators of the violation of the RtF.

7.2 Structural Indicators of the Right to Food in the European Union

This section examines the structural indicators of the RtF in the EU. Structural indicators include relevant international, regional and domestic human rights instruments that protect the various elements of the RtF in the EU.¹¹³⁴ This section reviews relevant UN conventions that protect the RtF and the extent to which they apply to the EU legal system. It also examines the EU legal framework, human rights mechanism and State laws to demonstrate the extent to which the RtF is protected in the EU. The regional human rights mechanism is vital to this analysis because the Union is vested with the competence to legislate on a wide range of issues. The State only legislates in areas where the Union laws are inadequate, subject to the principles of conferral, subsidiarity and proportionality.¹¹³⁵ The essence of this analysis is to determine the extent to which the RtF is protected in the legal framework of the EU and to highlight the need for improvements to facilitate the progressive realisation of RtF in the region.

7.2 1 The EU Regional Framework and Human Rights Mechanism

This section examines the legal framework and human rights mechanism of the EU to determine the extent to which socioeconomic rights and the RtF are protected in the system. It examines the extent to which the legal framework of the EU facilitates the realisation of the tripartite obligations of the State to respect, protect and fulfil socioeconomic rights in their jurisdictions.

¹¹³⁴ OHCHR, 'Report on Indicators for Monitoring Compliance with International Human Rights Instruments' (n 11)

¹¹³⁵ TEU 2009, Article 5

All EU Member States and the Union itself are Members of the UN Charter, which obligates States to ‘promote... universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion’.¹¹³⁶ The Union and its Member States are thus bound by the provisions of this Charter to promote the observance of human rights without discrimination. All EU Member States are signatories to the UDHR and have also ratified the ICESCR; they thus indicate their commitment to the UDHR and are bound by the provisions of the ICESCR. The UDHR establishes the right of everyone to an adequate standard of living, including food.¹¹³⁷ Although the UDHR is not a treaty, it is recognised by the ICESCR 1976. The ICESCR further establishes the right to food and the right of everyone to be free from hunger.¹¹³⁸ It is a legally binding document of the UN and binding on all countries who have ratified it, including the EU and its Member States.¹¹³⁹

At the regional level, the Treaty of Rome established the European Economic Community (EEC) in 1957 to create a single market for goods, labour and services amongst all Member States.¹¹⁴⁰ In 2009, the Lisbon Treaty came into force, amending the Treaty of Rome and establishing the Treaty of the European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU). These two treaties form the constitutional basis of the European Union and empower the Union to enter into international agreements as a legal entity.

Due to the nature of the treaty and the relationship it creates between the Union and the Member States, EU Member States are deemed to have delegated substantial policy and legislative powers to the Union over a range of policy areas.¹¹⁴¹ Some areas of competence are

¹¹³⁶ UN Charter 1945, Articles 55 and 56

¹¹³⁷ UDHR 1948, Article 25

¹¹³⁸ See ICESCR 1967, Article 11; Article 27 of the Convention on the rights of the child 1989 (CRC); See also UN, ‘Sustainable Development Goals Report 2018’ (n 135)

¹¹³⁹ See OHCHR ‘Status of Ratification’ (n 127); Note that the Union itself has not yet ratified or acceded to any UN human rights treaty besides the Convention on the Rights of Persons with Disabilities which it acceded to in 2010. See OHCHR, ‘The European Union and International Human Rights Law’

<https://europe.ohchr.org/Documents/Publications/EU_and_International_Law.pdf> accessed 16 January 2022

¹¹⁴⁰ Treaty Establishing the European Community (Consolidated Version) Rome Treaty, 25 March 1957,

¹¹⁴¹ TFEU 2009, Article 2(1)

‘exclusive’ to the Union; as such, Member States cannot take independent measures in these areas. Article 3 TFEU sets out the areas over which the Union has exclusive competence; for example, the conclusion of international agreements, the establishment of competition rules necessary for the functioning of the internal market, and common commercial policy *inter alia*.¹¹⁴² Competencies which are not exclusive to the Union may be ‘shared’ between the Union and the Member States. Article 4 TFEU lists the areas of shared competence, including the Union's internal market, agriculture and fisheries, transport, development cooperation and humanitarian aid, *inter alia*.¹¹⁴³ However, competencies not conferred upon the Union in the Treaties remain with the Member States.¹¹⁴⁴ Thus issues relating to international trade in food and agriculture are shared competence between the region and the State.

In matters of shared competence, Member States may exercise independent authority to legislate or make policy changes provided the changes are not inconsistent with existing EU measures. Thus, the policy space of the Member States in shared areas of competence is limited by the existing policies of the Union- where the EU policies are silent, the State has greater competence, and where the EU policies are vast, the competence of the States shrinks accordingly. Although the policy area is shared, it may be progressively exclusive for the Union because the more the Union takes collective measures, the lower the competence of the State to act independently. Given that issues of human rights and international trade in food and agriculture are issues of exclusive Union and shared competence, this section will examine the regional and State framework and human rights mechanism of the EU and the extent to which it protects the RtF.¹¹⁴⁵

¹¹⁴² TEU 2009, Article 3

¹¹⁴³ Ibid Article 4

¹¹⁴⁴ Ibid Article 5

¹¹⁴⁵ EC, ‘Types of EU Laws’ <https://ec.europa.eu/info/law/law-making-process/types-eu-law_en> accessed 24 November 2021

The European Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR) of 1950:¹¹⁴⁶

This Convention enshrines the human rights of people in countries that belong to the Council of Europe, including all 27 countries of the EU.¹¹⁴⁷ It reinforces the UDHR, resolving to take steps for ‘the collective enforcement of “certain” of the rights stated in the Universal Declaration’.¹¹⁴⁸ However, ECHR does not seem to mirror the vast range of socioeconomic rights under the UN conventions. Its scope is narrow, encompassing a limited number of rights, most of which are civil and political rights. Thus, it does not seem to make adequate provisions for the protection of socioeconomic rights, including the RtF. As the ECHR forms the substratum of the general principles (discussed in the next paragraph), this limitation tends to have extensive implications even on the enforcement of socioeconomic rights in the EU. This is particularly because including the rights in the fundamental laws is essential for the protection, respect and fulfilment of the said rights in any jurisdiction.

The General Principles: The general principles are also regarded as primary legislation and are legally binding on all EU countries. Article 6(3) of the TEU provides that the ‘Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights, and Fundamental Freedoms as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union’s law’.¹¹⁴⁹ The general principles are fundamentally constituted of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). The general principles also recognise the constitutions of the Member States, human rights conventions of the United Nations and other

¹¹⁴⁶ European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14 (ECHR) 1950 ETS 5

¹¹⁴⁷ Note that The European Convention for the Protection of Human Rights and Fundamental (ECHR) and the European Court of Human Rights (ECtHR), which is part of the Council of Europe, has 47 Member States including all 27 EU countries.

¹¹⁴⁸ Preamble to the ECHR 1950

¹¹⁴⁹ TEU 2009, Article 6(3)

treaties to which EU Member States are parties.¹¹⁵⁰ The ECHR contemplates mainly civil and political rights with the exception of a few socioeconomic rights, such as the right to property and education.¹¹⁵¹ Due to this limitation of the ECHR, the general principles appear to be limited in the scope of rights it protects, failing to make adequate provision for the protection of socioeconomic rights. As the general principles form the basis of the jurisdictional powers of the Courts (as discussed in subsequent paragraphs), this failure to make adequate provision for the protection of socioeconomic rights tends to undermine the enforcement of the said rights in the region.

The European Court of Human Rights (ECtHR): was established by the ECtHR in 1959. Its decisions (otherwise known as ‘the regulations’) are legally binding on European countries without needing to be transposed into national law. Due to the limited scope of rights protected under the ECHR, as discussed above, a number of socio-economic rights, including the RtF, appear non-justiciable before the ECtHR. The RtF is not included in the ECHR, and there is currently no case law set by the ECtHR on the RtF.

However, the ECtHR contributes to the protection of socioeconomic rights by adopting a flexible approach to judicial interpretation through which it embraces the universality of human rights, drawing from the UN treaties to indirectly expand the scope of the ECHR. It also contributes to the CFR by laying persuasive precedents for the CJEU. In appropriate circumstances, the ECtHR has resorted to UN instruments and the interpretation of the UN treaty bodies to decide on cases of socioeconomic rights where the European laws are silent. For instance, in *Rantsev v Cyprus and Russia*,¹¹⁵² the ECtHR was faced with the challenge of deciding a case of human trafficking in circumstances where the ECHR prohibits slavery but

¹¹⁵⁰ Takis Tridimas, *The General Principles of EC Law* (2nd edn OUP 2007); *Stauder v Ulm* [1969] ECR 4119 28 Case C-29/69; *Nold v Commission* [1974] ECR 491 Case C-4/73; *Rutili v Minister for the Interior* [1975] ECR 1219 Case 36/75; *P v S and Cornwall CC* [1996] ECR I-2143 Case C-13/94

¹¹⁵¹ Protocol No. 1 to the ECHR 1952, CETS No. 9

¹¹⁵² *Rantsev v Cyprus and Russia* [2010] No. 25965/04

is silent on human trafficking. The ECtHR relied on the provisions of CEDAW and other relevant UN instruments to interpret human trafficking in the context of slavery, noting that the Convention must be read as a whole and interpreted in such a way as to promote internal consistency and harmony amongst its various provisions. It further noted that account must be taken of any relevant rules and principles of international law applicable between Contracting Parties; the Convention should, as much as possible, be interpreted in harmony with relevant rules of international law.¹¹⁵³ Similarly, in *Opuz v Turkey*,¹¹⁵⁴ in deciding a petition against the State for failure to take adequate steps to protect women from domestic violence (including the manner in which domestic police and courts dealt with allegations), in circumstances where the ECHR precludes gender-based discrimination but is silent on domestic violence; the ECtHR adopted the definition of gender-based discrimination under the CEDAW and the general recommendation of the CEDAW Committee on violence against women.¹¹⁵⁵ Applying these to the issues in question, it found that gender-based violence constituted a form of discrimination.¹¹⁵⁶ The ECtHR noted that in interpreting the provisions of the ECHR and the scope of human rights obligations of States, it would take cognisance of common values emerging from the practices of European States, specialised international instruments, and the evolution of norms and principles in international law.¹¹⁵⁷ It could be inferred, therefore, that this principle may be extended and applied to issues relating to the RtF. Thus, where the European laws are silent on the RtF, the court may assume jurisdiction in appropriate cases, taking cognisance of international human rights instruments such as the ICESCR and the UDHR, which have been ratified by all EU Member States and applies to them. However, the challenge is that a party seeking to rely on these international instruments would have to

¹¹⁵³ Ibid Paras. 274, 282

¹¹⁵⁴ *Opuz v Turkey* [2009] No. 33401/02, para. 164

¹¹⁵⁵ UN Committee on the Elimination of Discrimination Against Women (CEDAW), 'CEDAW General Recommendation No. 19: Violence Against Women' 1992 (Contained in document CEDAW/C/GC/35)

¹¹⁵⁶ Ibid, paras. 74, 184-191, 199-202

¹¹⁵⁷ *Opuz* (n 1154)

establish a foundational basis for its claims subject to the provisions of the ECHR. Thus, the EU framework/human rights mechanism under the ECHR and the ECtHR does not seem to make adequate provisions for the protection of RtF in the EU.

The Charter of Fundamental Rights (CFR) 2009¹¹⁵⁸: The CFR is an important development in the EU's human rights framework. It is considered primary legislation and legally binding on all EU countries. The CFR enshrines certain political, social and economic rights of EU citizens and residents. It recognises the respect for human rights as a condition for the legality of EU action.¹¹⁵⁹ It thus compels political institutions of the EU to respect human rights. The CFR reinforces the superiority of EU human rights provisions and international human rights conventions, providing that it must not derogate from UN human rights conventions (such as the UDHR, ICCPR and the ICESCR) to which the Union or all its Member States are signatories.¹¹⁶⁰ Similar to the ECHR, the CFR protects mostly civil and political rights. It makes no express provision for the fulfilment of a number of socioeconomic rights, including the RtF, which require additional positive measures for their realisation. Thus, it does not seem to make adequate provisions for the protection of socioeconomic rights, including the RtF. As the CFR forms the basis of the jurisdiction of the Court of Justice of the EU (CJEU), which is discussed in the next paragraph), this limitation tends to have significant implications on the enforcement of socioeconomic rights and the RtF in the EU.

The Court of Justice of the EU: The CJEU was reborn in 2009 from the pre-existing European Court of Justice (ECJ), pursuant to the Lisbon Treaty of 2009. It is guided by the General Principles and the CFR in its judicial interpretation, and its decisions are binding on all 27 EU Member States. Due to the limited scope of rights protected under the CFR and General Principles, as discussed above, most socioeconomic rights, including the RtF, appear

¹¹⁵⁸ Charter of Fundamental Rights of the European Union (CFR) 2009 2007/C 303/01

¹¹⁵⁹ CFR 2009, Article 51(2); See also Butler and De Schutter, 'Binding the EU to International Human Rights Law' (2009) Yearbook of European Law 277, 293-298.

¹¹⁶⁰ CFR 2009, Article 53

unenforceable before the CJEU. The CJEU also lacks the competence to expand the scope of the covered rights, modify the obligations or develop a separate human rights policy to protect socioeconomic rights. Therefore, the RtF appears to be non-justiciable because it is not expressly protected by the CFR, and to date (January 2023), there is no case law set by the CJEU on the application of this right.

However, the CJEU tends to contribute to the protection of socioeconomic rights by deferring to UN conventions and decisions of the ECtHR, which in turn refers to UN treaties.¹¹⁶¹ Where the CFR is silent, the CJEU expands the scope of the protection by drawing from the constitutional traditions common to the Member States and the guidelines supplied by international instruments in appropriate cases, subject to the provisions of relevant EU laws.¹¹⁶² For instance, in *Parliament v Council*,¹¹⁶³ the CJEU referred to the CRC in positive terms but relied mostly on the CFR, ECHR and case law to expound on the scope of the right of a child to family life under Article 8 CRC. Thus, CJEU contributes to the protection of socioeconomic rights by adopting a dynamic approach to judicial interpretation giving life to the provisions of the EU laws and applicable international human rights conventions.

In other cases, the CJEU has interpreted the CFR in conjunction with other international instruments to interpret socioeconomic rights not contained in the CFR. For instance, in *Detiček v Sgueglia*,¹¹⁶⁴ the CJEU relied on Article 24 of the CFR and Articles 12-13 of the Hague Convention (1980) in deciding a child custody application. It thus interpreted the rights of the child under the CFR without discussions on the ‘general principles’, particularly as the complaint in question explicitly sought to assert the right under the CFR.¹¹⁶⁵ However, similar

¹¹⁶¹ *Detiček v Sgueglia* [2009] ECJ C 43/09 Case C-403/09 PPU, paras. 6, 53-58; *Salahadin Abdulla and others v Bundesrepublik Deutschland* [2010] Joined Cases C-175 – 179/08; See also *Rhimou Chakroun v Minister van Buitenlandse Zaken* [2010] Case C-578/08

¹¹⁶² *Parliament v Council* [2006] ECR I-5769 Case C-540/03, paras. 52-66

¹¹⁶³ *Ibid*

¹¹⁶⁴ *Detiček* (n 1161)

¹¹⁶⁵ *Detiček* (n 1141); *Salahadin Abdulla* (n 1161); *Chakroun* (n 1161)

to the enforcement of socioeconomic rights before the ECtHR, a party seeking to enforce the RtF before the CJEU would face the challenges of establishing a fundamental nexus between a protected right in the EU system and the international conventions sought to be relied upon.

The Treaty on European Union (TEU) 1992¹¹⁶⁶:

This is a primary legislation of the EU. It was agreed upon by all Member States and ratified by their various parliaments through a referendum, and it is therefore legally binding on all EU Member States.¹¹⁶⁷ Alongside the Treaty on the Functioning of the European Union (TFEU), the TEU establishes the constitutional basis of the European Union and empowers the Union to enter into international agreements as a legal entity. The TEU sets out the objectives of the EU and the means of achieving these objectives. The TEU provides that ‘the Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities.’¹¹⁶⁸ Thus the TEU establishes the basis of the EU human rights mechanism.

The TEU also establishes an internal and external market system for the Union. The internal market promotes sustainable development through balanced economic growth, price stability and a competitive social market economy, while the external market policy upholds the values of the Unions and contributes to sustainable development, free and fair trade, poverty eradication, protection of human rights as well as the strict observance and the development of international law, including respect for the principles of the United Nations Charter.¹¹⁶⁹ Thus the TEU tends to align with the sustainable development goals, incorporating elements of human rights and wellbeing considerations into the EU trade system.

¹¹⁶⁶ Treaty on European Union (TEU) 2009 OJ C115/13

¹¹⁶⁷ The TEU changed the name of the previously established European Economic Community (EEC) to the European Union (EU) and established the basis for the Member States to form a monetary union.

¹¹⁶⁸ TEU 2009, Article 2

¹¹⁶⁹ Ibid Article 3.3 and 3.5

The Treaty on the Functioning of the European Union (TFEU) 2009¹¹⁷⁰:

The TFEU is a primary legislation of the EU and is also legally binding on all Member States. It sets out the organisational structure of the Union and the arrangements for exercising its competencies.¹¹⁷¹ It also provides a list of objectives the EU must pursue through its international trade relations, stating that the Union shall ‘foster the sustainable economic, social and environmental development of developing countries with the primary aim of eradicating poverty’.¹¹⁷² Thus aligning its objectives with the sustainable development goals of the UN.

The TFEU also sets the basis for EU external trade relations. It encourages the progressive elimination of international trade restrictions, regulates the EU procedure for concluding external trade agreements and promotes an international system based on multilateral cooperation and good global governance.¹¹⁷³ It sets out the Common Commercial Policy of the EU, granting the Union exclusive legislative competence in this area.¹¹⁷⁴ The common commercial policy, which will be discussed in greater detail in subsequent sections, covers changes in tariff rates, the conclusion of agricultural and other trade agreements, export policy and measures to protect the market against adverse external influences such as dumping.¹¹⁷⁵ It establishes the trading principles of the EU, including the Nationality and MFN¹¹⁷⁶ principles which prohibit all forms of discrimination at the borders and beyond.¹¹⁷⁷ However, it recognises agriculture as an exception to these trade liberalisation principles. It allows policies designed to make it easier to dispose of agricultural products for the best returns possible.¹¹⁷⁸ It also ensures equivalent safeguards for the employment and standard of living

¹¹⁷⁰ Treaty on the Functioning of the European Union (TFEU) 2009 OJ C202/1

¹¹⁷¹ Ibid Article 1

¹¹⁷² Ibid Article 21(d)

¹¹⁷³ Ibid Article 21(e) - (h)

¹¹⁷⁴ Ibid Article 3

¹¹⁷⁵ Ibid Article 207

¹¹⁷⁶ Most Favoured Nation Principle

¹¹⁷⁷ TEU 2009, Article 37

¹¹⁷⁸ TFEU 2009, Article 37.3. Agricultural products include the products of the soil, of stock farming and of fisheries and products of first-stage processing directly related to these products

of the farmers.¹¹⁷⁹ Thus through its Common Commercial Policy, the TFEU makes provisions to support local agricultural producers, facilitate access to food and enhance the progressive realisation of RtF through trade.

The TFEU also establishes the Common Agriculture and Fisheries Policy (CAP) to regulate agriculture, fisheries and trade in all forms of agricultural products.¹¹⁸⁰ The CAP aims to increase agricultural productivity by promoting advanced agricultural production and the optimal utilisation of available resources.¹¹⁸¹ It also aims to stabilise the agricultural market of the EU, ensure food availability, and promote physical and economic access to food.¹¹⁸² It recognises that agriculture constitutes an important sector which is closely linked to the economy as a whole.¹¹⁸³ It thus seeks to address the issue of food production and distribution as an economic factor which has far-reaching consequences on the socioeconomic wellbeing of the people. The CAP is administered by a common organisation of agricultural markets.¹¹⁸⁴ This organisation regulates prices, subsidies, production, preservation, imports and exports of various agricultural products.¹¹⁸⁵ The organisation makes common rules on competition, price fixing, quantitative limitations, and equivalent safeguards for food producers.¹¹⁸⁶ Thus through the CAP and its Common Organisation, the TFEU facilitates access to food by safeguarding the individual earnings of farmers and ensuring a fair standard of living for persons engaged in agriculture.¹¹⁸⁷

¹¹⁷⁹ Ibid

¹¹⁸⁰ Ibid Article 38.1

¹¹⁸¹ Ibid Article 39(a) – (b)

¹¹⁸² Ibid Article 39(c) – (e)

¹¹⁸³ Ibid Article 39.2

¹¹⁸⁴ Ibid Article 40.1

¹¹⁸⁵ Ibid Article 40.2

¹¹⁸⁶ Ibid Article 40.1(a) – (c)

¹¹⁸⁷ Ibid Article 39(b)

7.2 2 The Framework and Human Rights Mechanism of EU Member States

Given that the EU internal mechanisms for the protection of human right does not seem to reflect the range of rights nor mirror the depth of the obligations undertaken by the UN human rights instruments, EU Member States appear to be subject to a wide range of human rights obligations derived from both the EU treaties and UN human rights conventions. The impact is that it tends to create a dual system of human rights protection reflecting the obligations of the Member States under the EU human rights system and their obligations under the UN and other international treaties. With regard to its relationship with the EU, issues of human rights are of shared competence between the Union and the Member States. Thus the States are required to give effect to EU rules except where the rules are silent, inadequate or do not cover the broader scope of the obligations/requirements on any given issue. Where the EU rules are silent or inadequate, Member States may act independently, subject to their obligations under the EU and UN human rights treaties.¹¹⁸⁸

However, an examination of the independent laws of the EU Member States shows that the RtF is not expressly protected in any constitution of the respective countries. Although some States have taken steps to protect some socioeconomic rights in their domestic constitutions¹¹⁸⁹, the RtF is notably absent as it is not explicitly guaranteed in the respective constitutions of the various EU countries. The closest attempt towards the explicit protection of elements of the RtF in the domestic laws of the 27 EU countries under review is found in Hungary's Constitution (2011). It provides that 'Hungary shall promote the effective application of the right to physical and mental health 'by an agriculture free of genetically modified organisms, by ensuring access to healthy food and drinking water, by organising safety at work and healthcare provision, by supporting sports and regular physical exercise, as well as by ensuring

¹¹⁸⁸ TEU 2009, Article 5

¹¹⁸⁹ For instance, the right to physical and mental health in Article XX of the Hungary's Constitution of 2011 with Amendments through 2013.

the protection of the environment'.¹¹⁹⁰ However, it recognises access to healthy food and drinking water not as a right in itself but as a means of realising the right to physical and mental health. The constitutions of some other EU countries contain other provisions from which the RtF may be remotely inferred. For example, the constitution of Ireland promotes welfare among its directive principles of social policy¹¹⁹¹, and the Belgium constitution recognises the right to work, fair remuneration, cultural and social fulfilment.¹¹⁹² However, access to food or other aspects of the RtF is not expressly protected in the respective constitutions of the EU Member States, thus indicating a structural violation of the RtF.

An assessment of the constitutional provisions of the 27 EU countries against the benchmark of the FAO guidelines on the RtF tends to suggest that the general level of constitutional protection of RtF in the respective EU country constitutions is low.¹¹⁹³ This is because these constitutions fall short of the requirements for high-level protection, which requires an express provision for the RtF in the substantive laws¹¹⁹⁴. Using the benchmark of the FAO guidelines on the RtF, this study rates the level of constitutional protection of RtF in the respective laws as low, medium or high.¹¹⁹⁵ A high-level of protection includes an express provision for the RtF in the constitution of the state.¹¹⁹⁶ A medium-level protection includes an implicit recognition of the RtF as a component of other socioeconomic rights, such as the right to an adequate standard of living, and social security, *inter alia*. Low-level protection is found where the RtF is completely absent from the relevant laws of the State, or it may only be remotely inferred from other socioeconomic rights which are recognised by the State or where elements of RtF are contained in policy guidelines which are not justiciable. Although some

¹¹⁹⁰ Hungary's Constitution of 2011 with Amendments through 2013, Article xx, Para 2

¹¹⁹¹ Constitution of Ireland, 1937 with Amendments through 2020, Section 45

¹¹⁹² Belgium's Constitution of 1831 with Amendments through 2014, Section 45

¹¹⁹³ FAO, 'Right to Food Guidelines; Information Papers and Case Studies' (n 988)

¹¹⁹⁴ *Ibid*

¹¹⁹⁵ *Ibid*

¹¹⁹⁶ *Ibid*

EU countries have recognised some socioeconomic rights from which the RtF may be inferred, this study notes that where the wordings of the relevant provisions are such that the RtF is remotely inferable or where elements of RtF are contained in policy guidelines which are not justiciable, the level of protection ought to be rated as low. As earlier established, the legislative protection of the RtF in any jurisdiction is fundamental to the enforceability and ultimate realisation of RtF as a legal right.¹¹⁹⁷ The low protection of the RtF in the constitutions of the 27 EU countries waters down the enforceability of this right in the region. This is a structural indicator of the violation of RtF in the region.

7.3 Outcome Indicators of the Right to Food in the EU

This section examines the outcome indicators of the realisation of RtF in the EU pursuant to the indicators endorsed by the UN Statistical Commission for global monitoring of sustainable development goals. The outcome indicators examined are the prevalence of poverty, starvation and undernutrition in the EU. The prevalence of poverty is analysed based on the 2021 UN progress reports on SDG 1 (no poverty goal), while the prevalence of hunger, including starvation and undernourishment in the EU, is analysed using the Global Hunger Index (GHI) of 2021 and the 2021 UN progress reports on SDG 2 (zero hunger goal).¹¹⁹⁸ As earlier explained, these data are preferred for this analysis due to their objectivity, holistic coverage and universal acceptance. The aim of these analyses is to examine the State of food insecurity and the extent of the realisation of RtF in the EU. Through these analyses also, this study will assess the progressivity of food security in the EU as an essential element of the progressive realisation of RtF, taking cognisance of the fact that the realisation of the RtF is a progressive right and any indication of regressivity is suggestive of a violation of RtF.

¹¹⁹⁷ Bart Wenaart (n 532)

¹¹⁹⁸ UN, 'Sustainable Development Goals Report 2021' (n 1030)

7.3.1 Assessment of the Prevalence of Undernourishment

This section examines the prevalence of undernourishment in the EU as an outcome indicator of the realisation/violation of RtF in the region based on the Global Hunger Index (GI) Scores. The indices for assessment of hunger in this section include an analysis of the rate of undernourishment, infant mortality and child undernutrition in the EU.¹¹⁹⁹ This study recognises the challenges with the GHI in that it examines the level of hunger in States with chronic food insecurity and is silent on the existing indices of hunger in States with low levels of food insecurity. Additionally, data collation and analysis were impaired in 2020 as a result of the lockdown across the globe due to the Covid-19 pandemic. Table 9 below portrays the country-by-country hunger index and global hunger ranking for all 27 EU countries based on the global hunger index (GHI) of 2000 and 2020.¹²⁰⁰

Table 9 Global Hunger Index in the EU between the years 2000 and 2020

S/N	Country	2000	2020
1	Austria	-	-
2	Belgium	-	-
3	Bulgaria	8.2	5.5
4	Croatia	2.5<5	2.5<5
5	Cyprus	-	-
6	Czech Republic	-	-
7	Denmark	-	-
8	Estonia	5.9	2.5<5
9	Finland	-	-
10	France	-	-
11	Germany	-	-
12	Greece	-	-
13	Hungary	-	-
14	Ireland	-	-
15	Italy	-	-
16	Latvia	7.0	2.5<5
17	Lithuania	6.1	2.5<5
18	Luxembourg	-	-
19	Malta	-	-
20	Netherlands	-	-

¹¹⁹⁹ GHI, 'Global Hunger Index 2019' (n 122)

¹²⁰⁰ 48 out of the 54 African countries are categorised SSA countries by the World Bank. However, Djibouti is included in this study although it is controversial whether it part of SSA because of its geographical location. See World Bank, 'Focus: Sub-Saharan Africa' (n 1055)

21	Poland	-	-
22	Portugal	-	-
23	Romania	8.0	2.5<5
24	Slovakia	6.5	6.4
25	Slovenia	-	-
26	Spain	-	-
27	Sweden	-	-

Table 10 below provides the key/explanation to Table 9 above

Table 10: Explanation

GHI Score	Interpretation
10.0 – 19.9	Moderate
20.0 – 34.9	Serious
35.0 – 49.9	Alarming
50.0 and below	Extremely alarming

Table 9 above shows that the prevalence of undernourishment is generally low in the EU. The lack of data in 20 States is mainly due to the low rate of undernourishment, as most EU countries are in good shape and are, as such, not reflected in the GHI. Between 2000 and 2020, the EU achieved tremendous success in reducing the absolute number of hungry people and the overall level of starvation. By the end of this period, only seven countries had degrees of hunger which warranted their inclusion in the GHI. However, all seven countries had low GHI scores in 2020 except Bulgaria and Slovakia, which scored 5.5 and 6.2, respectively, thus placing them within moderate levels of hunger. This is indicative of the achievement of the progressive realisation of RtF in the region.

7.3.2 Assessment of the Prevalence of Poverty

Having established in earlier chapters that poverty is a fundamental hindrance to access to food, this section analyses the prevalence of poverty in the EU as an indicator of poor access to food and, invariably, an indicator of the violation of RtF. It utilises the UN Reports on SDG1 – To Eradicate Poverty in all its Forms. Starvation is precipitated, not only by a decline in food availability but much more by the inability of an individual to exchange his primary entitlement

(such as labour) for food because the financial value of his primary entitlement cannot purchase the desired food.¹²⁰¹ This failure of one's entitlement to purchase the desired basic amenities and food is otherwise referred to as poverty.¹²⁰² This section examines the extent of the realisation of RtF in the EU based on the 2021 UN Report on SDG1- to eradicate all forms of poverty in the EU.

Table 11 below shows the country-by-country assessment of the prevalence of poverty in all 27 EU countries and the progress towards eradicating poverty based on the 2021 UN progress reports on SDG 2 in 2021. It measures the level of poverty based on the headcount ratio of \$1.90 and \$3.20, signifying the percentage of people that survive on an average of \$1.90 or less per day and the percentage of people that survive on an average of \$3.20 per day or less. These threshold levels were determined by the World Bank when it set the national poverty line of poor economies at \$1.90 per day, middle-income countries at \$3.20 per day and high-income countries at \$5.50 per day based on the 2011 international food prices.¹²⁰³ Table 11 below assesses poverty in the EU using the low-income and mid-income economy threshold levels of \$1.90 and \$3.20 per day to provide a fair basis for the comparison with SSA in chapter 8.

Table 11: Assessment of SDG1- Proportion of Persons Living Below the National Poverty Line of \$1.90 and \$3.20 per day

S/N	Country	Poverty headcount ratio at \$1.90 per day (%)	Poverty headcount ratio at \$3.20 per day (%)	Country Status	Progress on the attainment of SDG1
1	Austria	0.3	0.4	SDG Achievement	Progressing
2	Belgium	0.3	0.3	SDG Achievement	Progressing

¹²⁰¹ Sen, *Poverty and Famines: An Essay on Entitlement and Deprivation* (n 9)

¹²⁰² Ibid

¹²⁰³ The World Bank set the international poverty line of the poorest economies at \$1.90 per day based on the 2011 international food prices while the national poverty line of lower middle-income and high income countries are placed at \$3.20 and \$5.50 respectively per day. See World Bank, 'Measuring Poverty' (n 637) In September 2022, the international poverty line was changed from \$1.90 to \$2.15 using the 2017 prices. However, at the time of writing, there are no global data on world poverty levels yet, based on the 2022 poverty line. See World Bank, 'Fact Sheet: An Adjustment of Global Poverty Line' (n 1062)

3	Bulgaria	1.0	1.8	SDG Achievement	Progressing
4	Croatia	0.6	1.0	Challenges remain	On track
5	Republic of Cyprus	0.0	0.1	SDG achievement	On track
6	Czech Republic	0.1	0.1	SDG Achievement	Progressing
7	Denmark	0.2	0.2	SDG Achievement	Progressing
8	Estonia	0.0	0.1	Challenges remain	Moderately increasing
9	Finland	0.1	0.1	SDG Achievement	Progressing
10	France	0.1	0.2	SDG Achievement	Progressing
11	Germany	0.2	0.3	Challenges remain	Moderately increasing
12	Greece	0.9	1.6	Challenges remain	Progressing
13	Hungary	0.6	0.9	Significant Challenges remain	Moderately increasing
14	Ireland	0.1	0.1	SDG Achievement	Progressing
15	Italy	1.0	1.3	Challenges remain	Moderately increasing
16	Latvia	0.4	0.8	Significant Challenges remain	Moderately increasing
17	Lithuania	0.7	1.1	Challenges remain	Moderately increasing
18	Luxembourg	0.3	0.4	Challenges remain	Moderately increasing
19	Malta	0.1	0.1	SDG achievement	On track
20	Netherlands	0.2	0.3	SDG Achievement	Progressing
21	Poland	0.2	0.4	SDG Achievement	Progressing
22	Portugal	0.3	0.5	Challenges remain	Progressing
23	Romania	1.8	4.1	Challenges remain	On track
24	Slovakia	0.9	1.2	SDG Achievement	Progressing
25	Slovenia	0.1	0.1	SDG Achievement	Progressing
26	Spain	2.5	2.6	Challenges remain	Progressing
27	Sweden	0.3	0.4	SDG Achievement	Progressing

Table 11 above shows all EU countries are either on track or progressing towards achieving zero poverty, thus indicating progressive realisation of the RtF. Although Romania has the highest percentage of persons living below the \$1.90 and \$3.20 at 1.8 percent and 4.1 percent, respectively, it is not recorded as having significant challenges, and it is on track towards achieving zero poverty, thus indicating relatively average access to food. Latvia is the only EU country recorded as having significant challenges in this analysis, with 0.4 and 0.8 percent of its population living below the poverty line of \$1.90 and \$3.20, respectively. However, Latvia continues to increase, indicating a level of progress towards eradicating poverty and, by implication, enhancing access to food. Based on this analysis, the EU, on the average, ranks high in the progressive realisation of the RtF.

The UN, however, recommends a higher indicator for assessing the poverty level in high-income economies such as the developed countries of the EU.¹²⁰⁴ It assesses poverty based on the prevalence of severely materially deprived people and the prevalence of persons living below the poverty line of \$5.50 per day. Severe material deprivation in this analysis relates to a lack of resources and the inability of an individual to afford at least four of the major components necessary for an adequate quality of life. These components include the ability to pay one's rent or utility bills, keep one's home adequately warm, pay unexpected expenses, and eat meat, fish or a protein equivalent every second day.¹²⁰⁵

Table 12 below assesses the prevalence of poverty using the higher threshold level of \$5.50 set by the World Bank for assessing poverty in rich economies.¹²⁰⁶ Considering the overwhelming impact of poverty on access to food and the importance of poverty elimination to the realisation of RtF,¹²⁰⁷ this study contemplates the prevalence of materially deprived persons as a most relevant indicator in the overall assessment of the extent of poverty and progress towards poverty eradication and ultimately the progressive realisation of RtF. Table 12 below examines the prevalence of extreme poverty in the EU based on the average proportion of severely materially deprived persons and the prevalence of persons living below the poverty line of \$5.50 per day between 1999 and 2021.

¹²⁰⁴ UN, 'Sustainable Development Goals Report 2021' (n 1030); See also SDSN and IEEP, 'Europe Sustainable Development Report 2019' https://s3.amazonaws.com/sustainabledevelopment.report/2019/2019_europe_sustainable_development_report.pdf accessed 20 February 2022

¹²⁰⁵ EC Eurostat, 'Living Conditions in Europe- Material Deprivation and Economic Strain' https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Living_conditions_in_Europe_-_material_deprivation_and_economic_strain#Material_deprivation accessed 07 January 2022

¹²⁰⁶ The national poverty line of the poorest economies is placed at \$1.90 per day based on the 2011 international food prices, the national poverty line of lower middle-income countries is placed at \$3.20 per day and the threshold level for high income countries is set at \$5.50 per day. See World Bank, 'Measuring Poverty' (n 637)

¹²⁰⁷ CESCR General Comment No 12 (n 6) para 23

Table 12 SDG1- Proportion of Persons Living in Extreme Poverty in the EU (1999-2021)¹²⁰⁸

S/N	Country	Severely materially deprived people (%)	Poverty headcount ratio at \$5.50 per day (%)	Country Status	Progress on the attainment of SDG1
1	Austria	2.7	0.5	SDG Achievement	Progressing
2	Belgium	3.9	0.5	SDG Achievement	Progressing
3	Bulgaria	19.4	4.7	SDG Achievement	Progressing
4	Croatia	6.9	2.7	Challenges remain	On track
5	Republic of Cyprus	8.3	0.1	SDG achievement	On track
6	Czech Republic	2.4	0.3	SDG Achievement	Progressing
7	Denmark	2.4	0.3	SDG Achievement	Progressing
8	Estonia	2.8	0.3	Challenges remain	Moderately increasing
9	Finland	2.6	0.2	SDG Achievement	Progressing
10	France	4.8	0.3	SDG Achievement	Progressing
11	Germany	2.6	0.5	Challenges remain	Moderately increasing
12	Greece	16.5	4.4	Challenges remain	Progressing
13	Hungary	8.0	1.8	Significant Challenges remain	Moderately increasing
14	Ireland	5.4	0.3	SDG Achievement	Progressing
15	Italy	7.4	2.2	Challenges remain	Moderately increasing
16	Latvia	7.8	2.3	Significant Challenges remain	Moderately increasing
17	Lithuania	7.7	2.4	Challenges remain	Moderately increasing
18	Luxembourg	1.3	0.5	Challenges remain	Moderately increasing
19	Malta	3.3	0.2	SDG achievement	On track
20	Netherlands	2.1	0.4	SDG Achievement	Progressing
21	Poland	3.6	0.9	SDG Achievement	Progressing
22	Portugal	5.6	1.3	Challenges remain	Progressing
23	Romania	15.2	10.3	Challenges remain	On track
24	Slovakia	5.9	2.0	SDG Achievement	Progressing
25	Slovenia	3.0	0.2	SDG Achievement	Progressing
26	Spain	7.0	2.0	Challenges remain	Progressing
27	Sweden	1.8	0.6	SDG Achievement	Progressing

Table 12 above shows that over 50 percent of EU countries have achieved SDG1 of zero poverty and are either progressing or on track to eradicate poverty by 2030. No EU country is experiencing significant or serious challenges save Hungary and Latvia, with 8.0 and 7.8 percent of severely materially deprived persons, respectively, and 1.8 and 2.3 percent of its

¹²⁰⁸ UN, ‘Sustainable Development Goals Report 2021’ (n 1030); See also UN, ‘SDG Report 2021’ <<https://s3.amazonaws.com/sustainabledevelopment.report/2021/Europe+Sustainable+Development+Report+2021.pdf>> accessed 06 January 2022

population living below the poverty line of \$5.50 per day, thus, indicating low-medium access to food. However, both countries are moderately progressing towards achieving zero poverty. Bulgaria has the highest percentage of severely materially deprived persons at 19.5 percent, and Romania has the highest percentage of persons living below the national poverty line of \$5.50 per day. However, considering the wider range of factors, Bulgaria seems to be achieving the SDG of zero poverty and is progressing towards eliminating poverty by 2030. Romania records the highest levels of poverty in the EU, with the prevalence of severely materially deprived people at 15.2 percent and 10.3 percent of its population living below the poverty line of \$5.50 per day. Whilst the specific measure of these indicators indicates significant challenges, the overall analysis, which puts other economic factors (such as the percentage of people at risk of income poverty after social transfers and robust international comparisons of homelessness *inter alia*) into consideration, shows that Romania has challenges but is on track towards achieving SDG1. These indices indicate the progressive realisation of poverty eradication in Romania. Notably, no EU country is stagnating or regressing in this analysis, indicating a significant achievement of the progressive realisation of RtF.

These analyses on the prevalence of poverty in the EU using the various thresholds for low, high and medium-income earners show that the poverty level in the EU is relatively low. Whilst the EU may not have achieved SDG1 to eradicate poverty, it continues to advance towards eradicating poverty. Low levels of poverty indicate high levels of entitlement and, by implication, access to food. Based on these analyses, the EU appears to be achieving the progressive realisation of the RtF.

7.3.3 Assessment of the Prevalence of Hunger

This section assesses the prevalence of hunger in the EU based on the achievement of SDG 2- to end hunger and ensure access by all people (in particular the poor and people in

vulnerable situations) to safe, nutritious and sufficient food all year round' by 2030.¹²⁰⁹ A high level of achievement of SDG2 is indicative of low levels of hunger and high levels of access to food which implies the progressive realisation of RtF in the EU.

Table 13 below examines the prevalence of hunger and the progress towards realising food security based on the 2021 UN report on SDG 2. The overall result is determined by a number of indicators, including the prevalence of undernourishment, prevalence of stunting and wasting in children below 5 years of age, obesity in the adult population, and human trophic level *inter alia*. The prevalence of undernourishment (PoU) is an estimate of the number of people whose food consumption is insufficient to meet their dietary energy needs for an active and healthy life over a one-year period.¹²¹⁰ This indicator is recommended by the UN and FAO, and it remains an important metric for tracking national and regional trends in the proportion of people suffering from hunger.¹²¹¹ The prevalence of stunting in children up to the age of 5 years relates to the percentage of children below the age of five who fall below minus two standard deviations from the median height for their age and wasting refers to the prevalence of children below the age of 5 years whose weight falls below minus two standard deviations from the median weight for their age. The threshold for determining the average height and weight of children for assessing stunting and wasting in children below the age of 5 is based on the international child-growth threshold set by the World Health Organisation.¹²¹²

*Table 13 SDG2- Prevalence of Hunger in the EU in 2021*¹²¹³

S/N	Country	Prevalence of	Prevalence of stunting in	Prevalence of wasting in	Country Status in hunger	Progress Report on
-----	---------	---------------	---------------------------	--------------------------	--------------------------	--------------------

¹²⁰⁹ UN, 'Envision 2030 Goal 2: Zero Hunger' <www.un.org/development/desa/disabilities/envision2030-goal2.html> accessed 12 February 2022

¹²¹⁰ Dietary energy requirements are defined as the amount of dietary energy required by an individual to maintain body functions, health and normal activity. FAO, 'The State of Food and agriculture- Social Protection and Agriculture: Breaking the Cycle of Rural Poverty' (2015) <www.fao.org/3/i4910e/i4910e.pdf> accessed 11 February 2022

¹²¹¹ Ibid

¹²¹² WHO, 'Child Growth Standards' (n 1068)

¹²¹³ UN, 'Sustainable Development Goals Report 2021' (n 1030)

		undernourishment (%)	children under 5 years of age (%)	children under 5 years of age (%)		the attainment of SDG2
1	Austria	2.5	2.5	0.7	Significant challenges remain	Stagnating
2	Belgium	2.5	2.6	0.7	Significant challenges remain	Moderately Increasing
3	Bulgaria	3.0	7.0	6.3	Significant challenges remain	Stagnating
4	Croatia	2.5	2.6	0.7	Significant Challenges	Moderately increasing
5	Republic of Cyprus	6.8	2.6	0.7	Significant challenges remain	stagnating
6	Czech Republic	2.5	2.7	4.6	Major challenges remain	Moderately Increasing
7	Denmark	2.5	2.6	0.7	Major challenges remain	Moderately Increasing
8	Estonia	2.5	2.6	0.7	Major challenges remain	Moderately Increasing
9	Finland	2.5	2.6	0.7	Significant challenges remain	Moderately increasing
10	France	2.5	2.6	0.7	Significant challenges remain	Moderately increasing
11	Germany	2.5	1.7	0.3	Significant challenges remain	Moderately increasing
12	Greece	2.5	2.6	0.7	Significant challenges remain	Stagnating
13	Hungary	2.5	2.6	0.7	Major challenges remain	Stagnating
14	Ireland	2.5	2.6	0.7	Major challenges remain	Moderately increasing
15	Italy	2.5	2.6	0.7	Significant challenges remain	Moderately increasing
16	Latvia	2.5	2.6	0.7	Significant challenges remain	Stagnating
17	Lithuania	2.5	2.6	0.7	Major challenges remain	Stagnating
18	Luxembourg	2.5	2.6	0.7	Major challenges remain	Moderately increasing
19	Malta	2.5	2.6	0.7	Major challenges remain	Moderately increasing
20	Netherlands	2.5	2.6	0.7	Major challenges remain	Moderately Increasing
21	Poland	2.5	2.6	0.7	Significant challenges remain	Moderately Increasing
22	Portugal	2.5	2.6	0.7	Major challenges remain	Moderately increasing
23	Romania	2.5	12.8	3.5	Significant challenges remain	Moderately increasing
24	Slovakia	6.1	2.6	0.7	Major challenges remain	Stagnating
25	Slovenia	2.5	2.6	0.7	Major challenges remain	Moderately increasing
26	Spain	2.5	2.6	0.7	Major challenges remain	Moderately increasing
27	Sweden	2.5	2.6	0.7	Major challenges remain	Moderately increasing

Table 13 above shows that the percentage of undernourishment in the EU is relatively low. There is insufficient data on the prevalence of stunting and wasting in the EU because most research on chronic undernourishment in children has been conducted in vulnerable poorer countries rather than high-income countries. The UNICEF report, however, shows that the average rate of stunting and wasting in these countries is estimated at 2.58% and 0.75%, respectively.¹²¹⁴ Considering these indicators alongside other indicators such as obesity in adults and human trophic level *inter alia*, the EU generally appears not to have achieved food security. Table 13 also shows that no EU country is on track in achieving food security. However, no EU country is regressing save Bulgaria and six other States which are stagnating. On the average, EU countries are moderately increasing and progressing towards the realisation of RtF. Although there are evident indications of hunger and malnourishment, there is progress towards achieving the RtF in the region.

To mitigate the challenges of insufficiency of data on the prevalence of undernourishment, stunting and wasting, this section further analyses the prevalence of malnourishment/obesity among adults and the mortality rate among children aged 5 years and below as indicators of hunger in the EU. Table 14 below examines the prevalence of malnourishment/obesity in adults and mortality in children below 5 years of age based on the UN SDG report 2021.¹²¹⁵ This study regards high levels of adult malnourishment and infant mortality as indicative of violations of the RtF.

Table 14 SDG2- Prevalence of hunger in the EU in the year 2021¹²¹⁶

S/N	Country	Prevalence of undernourishment/obesity BMI ≥ 30 (%)	Mortality rate in children under 5 years of age (per 1,000)	Country Status	Progress Report on the attainment of SDG2

¹²¹⁴ UN, 'Sustainable Development Goals Report 2021' (n 1030)

¹²¹⁵ Ibid

¹²¹⁶ Ibid

1	Austria	17.1	3.5	Significant challenges	Stagnating
2	Belgium	16.3	3.4	Significant challenges	Moderately Increasing
3	Bulgaria	13.6	6.7	Significant challenges	Stagnating
4	Croatia	23.0	4.8	Significant Challenges	Moderately increasing
5	Republic of Cyprus	15.2	2.3	Significant challenges	stagnating
6	Czech Republic	19.8	3.2	Major challenges	Moderately Increasing
7	Denmark	16.5	3.8	Major challenges	Moderately Increasing
8	Estonia	21.8	2.4	Major challenges	Moderately Increasing
9	Finland	20.9	2.4	Significant challenges	Moderately increasing
10	France	15.0	4.5	Significant challenges	Moderately increasing
11	Germany	19.0	3.8	Significant challenges	Moderately increasing
12	Greece	16.7	3.8	Significant challenges	Stagnating
13	Hungary	24.5	3.7	Major challenges	Stagnating
14	Ireland	25.9	3.3	Major challenges	Moderately increasing
15	Italy	11.7	3.1	Significant challenges	Moderately increasing
16	Latvia	23.0	3.6	Significant challenges	Stagnating
17	Lithuania	18.9	3.7	Major challenges	Stagnating
18	Luxembourg	16.5	2.8	Major challenges	Moderately increasing
19	Malta	28.7	7.0	Major challenges	Moderately increasing
20	Netherlands	14.7	4.0	Major challenges	Moderately Increasing
21	Poland	19.0	4.4	Significant challenges	Moderately Increasing
22	Portugal	17.7	3.7	Major challenges	Moderately increasing
23	Romania	10.9	7.0	Significant challenges	Moderately increasing
24	Slovakia	19.7	5.8	Major challenges	Stagnating
25	Slovenia	19.9	2.1	Major challenges	Moderately increasing
26	Spain	16.0	3.1	Major challenges	Moderately increasing
27	Sweden	15.3	2.6	Major challenges	Moderately increasing

Table 14 above shows that the rate of adult malnutrition in the EU is moderate, below 20 percent on average, and infant mortality is generally low, below 5 percent on average. Malta has the highest rate of malnourishment and infant mortality at 28.7 and 7.0 percent, respectively. Although Malta suffers major challenges, it is moderately increasing in progress towards eradicating hunger and achieving sustainable food security. Hungary, Lithuania and Slovakia experience major challenges with a prevalence of malnourishment at 24.5, 18.9 and 19.7 percent, respectively, and are stagnating in progress towards the realisation of sustainable food security. Although no EU country is on track towards eradicating hunger by 2030, there is no indication of regressivity and thus no overall violation of the progressive realisation of the RtF.

7.4 Process Indicators of the Right to Food in the EU

This section examines the process indicators of the RtF in the EU based on the UN list of illustrative indicators.¹²¹⁷ It examines the place of human rights in the governance and regulatory structure of the EU. An important aspect of the governing system is that the same governing body administers the political, trade and human rights systems. This governing system is founded on the values of respect for human rights, freedom, democracy, equality, and the rule of law. It also establishes the non-regression clause, which requires Member States not to derogate from the recognised human rights standards. Through this fusion, the EU governing process tends to facilitate the tripartite duty of States to respect, protect and fulfil the RtF in the EU.

The duty to respect: Although the EU law does not explicitly protect a large number of socioeconomic rights, including the RtF, the framework carries within itself an implied recognition of the duty of the State to respect, protect and fulfil socioeconomic rights. The TEU provides that ‘the Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities.’¹²¹⁸ These values must be applied without discrimination. In line with these values, the European Commission determined that Union policies and measures must be consistent with Treaty objectives and the respect for Fundamental Rights.¹²¹⁹ The Commission established the impact assessment mechanism to implement these values and ensure that the objectives of any policy are coherent with existing EU policies, including the respect for Fundamental Rights.¹²²⁰ Through these values, the Commission promotes the duty of States to respect socioeconomic rights by requiring them to refrain from measures and

¹²¹⁷ OHCHR, ‘Report on Indicators for Monitoring Compliance with International Human Rights Instruments’ (n 11)

¹²¹⁸ TEU 2009, Article 2

¹²¹⁹ EC, ‘Impact Assessment Guidelines’, 15 January 2009, SEC (2009) 92 1.1

¹²²⁰ Ibid 1.2

activities that could interfere with existing rights.¹²²¹ Member States were required to avoid policies which contradict their human rights obligations.¹²²² Member States were also required to abstain from and restrain others from engaging in activities that could violate the socioeconomic rights of the people. Through this requirement, the Commission creates a social and political order which facilitates the realisation of socioeconomic rights in the region.¹²²³

Secondly, the TEU sets non-regression as the basis for continued membership of the Union.¹²²⁴ Non-regression is a negative obligation inherent in all positive obligations associated with fundamental rights. It requires the participating countries to maintain the agreed minimum human rights standards and not to allow any measures that fall short of these standards. Thus as the Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, Member States are required to respect these values as a precondition for membership and as an ongoing condition for continued membership.¹²²⁵ Through this requirement, the Commission facilitates the realisation of socioeconomic rights in the region by encouraging States to respect protected rights.¹²²⁶

The duty to protect: The duty to protect is a positive duty requiring the duty bearer to take steps to prevent third parties from interfering with the enjoyment of the protected right. Incorporating the ‘non-regression’ clause into various Union Directives and Agreements enables the protection of RtF through government policies because it prevents Member States from derogating from the fundamental human rights values. There are currently no Directives

¹²²¹ CESCR General Comment No. 12 (n 6) para. 15 See also Joseph (n 91) 22

¹²²² See EC, ‘Impact Assessment Guidelines’ (n 1219); See also EC, ‘Report on the Practical Operation of the Methodology for a Systematic and Rigorous Monitoring of Compliance with the Charter of Fundamental Rights’, COM (2009) 205 final; See also, EC, ‘Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union’, COM (2010) 573

¹²²³ UDHR Article 28; See Henry Steiner, Philip Alston and Ryann Goodman, *International Human Rights in Context: Law, Politics, Morals* (3rd edn, OUP 2008), 182-184

¹²²⁴ TEU 2007, Article 49

¹²²⁵ TEU 2007, Articles 2 and 49

¹²²⁶ UDHR Article 28; See Henry Steiner, Philip Alston and Ryann Goodman (n 1223)

on the RtF; however, there are some Directives requiring the application of the ‘non-regression’ clause to certain socioeconomic rights. For instance, the EU Letter of Rights, which protects the right to information in criminal proceedings, provides that ‘nothing in this Directive shall be construed as limiting or derogating from any of the rights and procedural safeguards that may be ensured under the Charter, the ECHR and other relevant provisions of international law or under the laws of any Member States which provide a higher level of protection’.¹²²⁷ The explanatory memorandum suggests that this Article empowers Member States to set higher standards than those agreed in the Directive as ‘the purpose is to ensure that setting common minimum standards in accordance with this Directive does not lower the standards in certain Member States and that the standards set in the ECHR are maintained.’¹²²⁸ In *Parliament v Council*,¹²²⁹ the CJEU noted that ‘while the Directive leaves the Member States a margin of appreciation, it is sufficiently wide to enable them to apply the Directive’s rules in a manner that is consistent with the requirements flowing from the protection of fundamental rights’.¹²³⁰ Thus, suggesting that States are encouraged to respect socioeconomic rights by applying the laws in a manner that is consistent with human rights. Hence, the non-regression clause tends to enable States to protect socioeconomic rights within their jurisdiction and prevent their violation by third parties because it sets the minimum standards and broadens the discretion of the Member State to adopt appropriate measures for the protection of socioeconomic rights.

However, the challenge is that these Directives that convey the ‘non-regression’ clause are not hard law and are not enforceable in the Courts. Secondly, the ‘non-regression’ clause does not compel compliance with human rights provisions, sets no clear benchmarks to measure

¹²²⁷ EC, ‘Commission Proposal for a Directive on the right to information in criminal proceedings’ [2011] COM(2010)0392 final <www.europarl.europa.eu/doceo/document/A-7-2011-0408_EN.html> accessed 05 February 2022; See also EU, Directive 2012/13/EU of the European Parliament and of the Council on the Right to Information in Criminal Proceedings [2012] COM(2010) 392 final 2010/0215 (COD) <<https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0392:FIN:EN:PDF>> accessed 06 January 2023

¹²²⁸ EU, Directive 2012/13/EU of the European Parliament and of the Council on the Right to Information in Criminal Proceedings Ibid para 35

¹²²⁹ *Parliament v Council* (n 1162)

¹²³⁰ Ibid paras 103-104.

compliance with human rights obligations, and does not stipulate any remedies for breaches. Thus, it generally fails to create an enforceable obligation. This unenforceability may be construed as a failure to make adequate provisions to protect socioeconomic rights and the RtF in the EU.

The duty to fulfil: is a positive obligation requiring the State ‘to adopt appropriate legislative, administrative, budgetary, judicial, promotional and other measures towards the realisation of the protected rights.’¹²³¹ It requires the State to take positive steps to create an environment where these rights can be realised, including progressive measures to ensure the ready availability of affordable and nutritious food. Although certain elements of this duty may be remotely inferred from other protected rights, such as the duty to fulfil the right to life,¹²³² the absence of the RtF in the legal framework tends to water down the enforceability of this right, the duty of States to fulfil the RtF, and the State’s obligation to guarantee the conditions necessary for the realisation of this right¹²³³ and to prevent or punish the violation of same.

The analysis in this section suggests that despite the notable absence of the RtF in the legal framework of the EU, the Union has taken positive steps to integrate human rights into the trade and political system. This fusion is suggestive that the process indicators in the EU show practical measures to progressively realise the RtF. Section 7.5 below examines other channels through which socioeconomic rights have been integrated into the EU political structure and what else could be done to integrate this right into the EU trade and legal system to facilitate the realisation of RtF in the region.

¹²³¹ CESCR, General Comment No 14 (n 34) Para 33

¹²³² The fundamental right to life includes, not only the right of every human being not to be deprived of his life arbitrarily, but also the right of access to the conditions that guarantee a dignified existence. See *Villagran Morales and others v Guatemala* (the ‘Street Children’ case) [1999] Inter-American Court of Human Rights, Series C No. 63, para. 144

¹²³³ UDHR 1948, Article 28

7.5 Incorporating Socioeconomic Rights into the EU

Having examined the indicators of RtF in the EU and the limited scope of socioeconomic rights explicitly protected in the framework, this section examines how the EU incorporates socioeconomic rights into the governance system and how this integration could be expanded through judicial activism and intentional application of existing laws and policies to further facilitate the realisation of the RtF. As the legislative competence is a shared space between the States and the Union, incorporating socioeconomic rights into the regional system would significantly impact the enforceability and realisation of the RtF both in the region and the respective Member States.

The ECHR recognises that the fundamental freedoms established in the UDHR are best maintained by ‘an effective political democracy’ and ‘a common understanding and observance of the Human Rights upon which they depend’.¹²³⁴ The Union is required to take steps for ‘the collective enforcement of *certain* of the rights stated in the Universal Declaration’.¹²³⁵ As the UDHR recognises the RtF, this provision could be extended to imply the application of RtF in the EU. In 2009, the European parliament reinforced the commitment of the Union to the realisation of socioeconomic rights in its Resolution, determining that socioeconomic rights ‘are just as important as civil and political rights’.¹²³⁶ It also reinforced the commitment of the Union to the SDGs and its commitment to contribute to the achievement of the SDGs in the least developed countries through its external trade policy. Although this Resolution does not create legal rights that may be enforced, it sets out a structure through which the RtF could be incorporated, protected and fulfilled in very practical ways.

¹²³⁴ Preamble to the ECHR 1950

¹²³⁵ Ibid

¹²³⁶ European Parliament Resolution of 7 May 2009 on the Annual Report on Human Rights in the World 2008 and the European Union’s policy on the matter, P6_TA (2009) 0385, Para. 121; Europarl, Resolution of 07 May 2009 on the Annual Report on Human Rights in the World 2008 and the European Union’s Policy on the Matter (2008/2336(INI)) <www.europarl.europa.eu/doceo/document/TA-6-2009-0385_EN.html> accessed 02 December 2021

Secondly, the broader goal of the Union includes promoting the wellbeing of the people.¹²³⁷ This goal is in line with the UDHR provision for an adequate standard of living for the health and wellbeing of every person, including food.¹²³⁸ To fulfil this goal, the EU operates a ‘Food Distribution Programme for the Most Deprived Persons of the Community’.¹²³⁹ An impact assessment of this programme by the commission showed that the distribution of food stocks to vulnerable populations is an effective way of facilitating the progressive realisation of RtF in the EU.¹²⁴⁰ The EU also operates a number of other programs that facilitate the realisation of RtF, including the ‘School Fruit Scheme’ and the ‘School Milk Scheme’, which provide funds to Member States to distribute foodstuffs that promote a healthy diet amongst school children.¹²⁴¹ Whilst these policies aim to achieve the broader goal of the EU; they invariably contribute in practical ways to the progressive realisation of RtF in the EU.

Thirdly, respect for human rights is a condition for the legality of EU Law. For issues which lie within the legislative prerogative of the States, the CFR requires the States, as well as the various institutions, agencies and groups, to observe and give life to the rights, obligations and limitations flowing from the EU treaties.¹²⁴² The institutions which act for the Union at various levels are also guided by human rights provisions in their policymaking. Thus, even where the CFR has not made express provisions for the RtF, elements of this right are built into the provisions of the Treaties and the Union’s commitment to the wellbeing of its peoples,¹²⁴³

¹²³⁷ TEU 2009, Article 3

¹²³⁸ UDHR 1948, Article 25

¹²³⁹ See Europa, ‘Commission staff working document accompanying the Proposal for a Council Regulation amending Regulations (EC) N°. 1290/2005 on the financing of the common agricultural policy and (EC) No. 1234/2007 establishing a common organisation of agricultural markets and on specific provisions for certain agricultural products (Single CMO Regulation) as regard food distribution to the most deprived persons in the Community: Impact Assessment, SEC(2008) 2436/2’ <https://ec.europa.eu/smart-regulation/impact/ia_carried_out/docs/ia_2008/sec_2008_2436_en.pdf> accessed 15 February 2022

¹²⁴⁰ Ibid

¹²⁴¹ See Regulation 288/2009 (School Fruit Scheme), OJ L 94, 38; Regulation 657/2008 (School Milk Scheme), OJ L 183, 17

¹²⁴² CFR 2009, Article 51(1)

¹²⁴³ TEU 2009, Article 3.1

sustainable development of Europe and competitive social market economy,¹²⁴⁴ solidarity and mutual respect among peoples, as well as its commitment to free trade, eradication of poverty and the protection of human rights including respect for the principles of the UN Charter.¹²⁴⁵ It could also be inferred through an effective application of the Common Agricultural and fisheries Policy and several other policies of the EU.

Fourthly, the Commission requires legislative proposals and other policies to pass through a human rights impact assessment to ensure compliance with the CFR.¹²⁴⁶ Whilst there are no precedents of the application of this principle to the RtF, it has been applied to other socioeconomic rights issues. For instance, immigration laws include considerations of family life and incorporate elements of the rights of the child and the best interest of the child.¹²⁴⁷ This provision may also be extended to apply to the RtF in appropriate cases.

Furthermore, EU trade policies are guided by the General Principles and the Union's commitment to free trade, eradication of poverty and the protection of human rights.¹²⁴⁸ Its external trade policy promotes the ratification of UN human rights treaties by the trading countries and commits to the observance of international human rights in trade.¹²⁴⁹ Thus the EU prioritises human rights in trade, including agricultural trade, and it refuses to trade with any country that has not ratified the UN human rights treaties. As discussed in Chapter 5.4.4, incorporating the RtF in trade requires that GSP terms take cognisance of the socioeconomic

¹²⁴⁴ Ibid Article 3.3

¹²⁴⁵ Ibid Article 3.5

¹²⁴⁶ See EC, 'Report on the Practical Operation of the Methodology for a Systematic and Rigorous Monitoring of Compliance with the Charter of Fundamental Rights' (n 1222); See also EC, 'Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union', (n 1222)

¹²⁴⁷ EC, 'Towards an EU Strategy on the Rights of the Child', COM(2006) 367 <<https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2006:0367:FIN:EN:PDF>> accessed 28 February 2022; European Commission, 'Implementation of the European Union's Strategy on the Rights of the Child: State of Play – November 2009' <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32009G1219%2801%29>> accessed 28 February 2022; See also EC Communication, 'An EU Agenda for the Rights of the Child', COM (2011) 60 final <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52011DC0060>> accessed 28 February 2022

¹²⁴⁸ Ibid Article 3.5

¹²⁴⁹ European Parliament Resolution of 7 May 2009 on the Annual Report on Human Rights in the World 2008 and the European Union's Policy on the Matter', P6_TA(2009)0385, para. E <www.europarl.europa.eu/doceo/document/TA-6-2009-0385_EN.html> accessed 02 December 2021

impact of trade terms. The EU tends to adopt negative terms/eligibility criteria in trade, encouraging trading partners to prioritise their human rights obligations, including the RtF. This way, it facilitates the realisation of RtF through trade.

Additionally, the Union establishes several committees, agencies and institutions which deal with various aspects of human rights at the regional and State levels. They set the benchmarks and monitor the uniform implementation of EU laws. These include the Committee on Human Rights¹²⁵⁰, the Committee on Employment and Social Affairs, the EU Fundamental Rights Agency (FRA), and National Human Rights Institutions *inter alia*. For instance, the FRA was established in 2007 to help administer the CFR as well as promote and protect human rights in the EU.¹²⁵¹ It collects and analyses data and publishes conclusions and opinions on specific thematic topics for the Union, treaty bodies and Member States.¹²⁵² The FRA monitors the human rights impact of various political measures, makes recommendations which guide the States in applying the relevant EU laws, collates, analyses and prepares reports which facilitate implementation of the ‘better law agenda’¹²⁵³ *inter alia*, but its recommendations are only advisory, not binding. Although it is the only dedicated human rights agency in the EU, the FRA is not empowered to assess the conformity of legislative proposals with fundamental rights or criticise State policies and legislative instruments for non-compliance with human rights.¹²⁵⁴

¹²⁵⁰ A subcommittee of the Committee on Foreign Affairs

¹²⁵¹ EU, ‘European Union Agency for Fundamental Rights’ <<https://fra.europa.eu/en/about-fra>> accessed 17 December 2021

¹²⁵² Council Regulation NO 168/2007 of February 2007 establishing a European Union Agency for Fundamental Rights (OJ L 53, 22.2.2007, 1) Article 4(1)(d)

¹²⁵³ Ibid

¹²⁵⁴ EC, ‘Compliance with the Charter of Fundamental Rights in Commission legislative proposals - Methodology for systematic and rigorous monitoring’ COM/2005/0172 final, <<https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52005DC0172>> accessed 28 February 2022

Nevertheless, in 2009 the FRA produced a report on the right to an adequate standard of living under Article 11 ICESCR.¹²⁵⁵ The report is a comparative account of the housing conditions of Roma people and travellers in the EU based on the right to an adequate standard of living.¹²⁵⁶ It examined the impact of the policies and practices of EU Member States on the realisation of the right to an adequate standard of living, including housing.¹²⁵⁷ It has also examined specific aspects of the RtF, and in 2018 the Hungarian Helsinki Committee produced a more comprehensive report on the abuse of the right to food and liberty among asylum seekers and immigration returnees in the EU, making recommendations for the protection of RtF among this group.¹²⁵⁸ Although its recommendations do not impose legal obligations on the State, it establishes a background on which legal reforms could be founded. Where appropriate measures are taken to address the issues raised in the impact assessment reports and recommendations of the various human rights institutions, it will significantly augment the realisation of RtF in the region.

7.6 Conclusion

This chapter finds that the outcome indicators of the RtF in the EU show relatively low levels of poverty, a factor necessary to enhance access to food, and while there are relatively low levels of undernutrition, stunting and wasting among infants, the EU still faces challenges of food insecurity and violations of the RtF in other forms such as malnutrition. However, on

¹²⁵⁵ European Union Agency for Fundamental Rights, 'Housing conditions of Roma and Travellers in the European Union: Comparative Report' (2009), 12-14. <https://fra.europa.eu/sites/default/files/fra_uploads/703-Roma_Housing_Comparative-final_en.pdf> accessed 03 February 2022

¹²⁵⁶ Ibid; See also ICESCR 1976, Article 11(1) and CESCR General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant) Adopted at the Sixth Session of the Committee on Economic, Social and Cultural Rights, on 13 December 1991 (Contained in Document E/1992/23)

¹²⁵⁷ Ibid; See also FRA, 'Housing Conditions of Roma and Travellers in the EU; Comparative Report 2009' <https://fra.europa.eu/sites/default/files/fra_uploads/703-Roma_Housing_Comparative-final_en.pdf> accessed 03 February 2022

¹²⁵⁸ See Gruša Matevžič, 'Crossing the Red Line- How EU Countries Undermine the Right to Liberty by Expanding the Use of Detention of Asylum Seekers upon Entry: Case Studies on Bulgaria, Greece, Hungary, and Italy' (Hungarian Helsinki Committee 2019) <https://helsinki.hu/wp-content/uploads/crossing_a_red_line.pdf> accessed 18 October 2022

average, the EU experiences a medium-low level of food insecurity and continues to advance in terms of progress towards achieving the RtF. An analysis of the structural indicators shows that both the regional and State human rights mechanisms do not seem to have made adequate provisions for the protection of socioeconomic rights because food is not expressly recognised as a human right in the legal framework of the EU and its Member States. This is indicative of lapses in the duty to respect and protect the RtF in the EU. Although the absence of the RtF in the various constitutions of the Member States and the regional framework of the Union does not relieve the State of its responsibilities as the primary duty holder, it tends to erode the justiciability of the right, makes the assessment of violations of RtF inconclusive and thus the RtF appears elusive to the right-holders.

Furthermore, an examination of the process indicators shows that the Union has taken very practical steps to incorporate elements of socioeconomic rights into its trade and political structure, thus facilitating the realisation of RtF in the region. Although there are significant indicators of food insecurity in the EU, the level of violation of RtF is relatively low compared to other regions, such as the SSA, as seen in chapter eight. The EU thus leaves trails of landmarks for vulnerable regions like SSA to emulate. The next chapter undertakes a comparative analysis of the EU and SSA, highlighting the possible areas of legal transplant.

Chapter 8: Comparative Analysis

8.1 Introduction

Having examined the indicators of RtF in SSA and the EU in chapters 6 and 7, respectively, this chapter conducts a critical and comparative evaluation of the realisation and violation of RtF in SSA and the EU using the UN list of illustrative indicators on the right to adequate food (ICESCR, Art. 11). It examines the structural, process and outcome indicators of RtF in SSA, comparing it with the corresponding indicators in the EU to highlight how structural and process reforms could augment the outcome of adequate access to food. Comparing the realisation of RtF in both regions, it highlights necessary areas of improvement to facilitate the realisation of RtF through trade liberalisation. To achieve this goal, this chapter compares the structural and outcome indicators of the RtF in SSA and the EU to highlight the achievement and lapses of both regions. It also compares the process indicators to demonstrate how the EU addresses food security issues through its trade regime in light of the world trade rules. It then highlights relevant areas of effective legal transplant to facilitate the progressive realisation of RtF in SSA.

This chapter also contrasts the regional trade in the EU and SSA in light of the WTO provisions to demonstrate practical ways of incorporating socioeconomic rights into trade liberalisation to facilitate the realisation of RtF through trade. It contrasts both regions, suggesting that SSA countries with chronic cases of food insecurity may achieve better food security through effective legal transplant. Legal transplant, as suggested in this study, involves the process of learning and adaptation to changes, bearing in mind the cultural, political and economic differences between the EU and SSA.¹²⁵⁹ This chapter suggests an adaptive evolution of the SSA agricultural trade regime through observations and cross-pollination with the EU

¹²⁵⁹ The cultural, political and economic differences between the EU and SSA include differences in the social, political and legal structure of both regions and the fact that the EU comprises mostly food-exporting developed countries while SSA comprises mostly food-importing developing countries.

trade policies in light of the situation in the WTO to augment the realisation of RtF in SSA. Drawing from this comparative analysis, this study draws a conclusion and makes recommendations on effective ways of incorporating socio-economic rights in world trade to facilitate access to food in SSA through trade liberalisation.

8.2 Comparative Analysis of the Outcome Indicators of the Right to Food in EU and SSA

Further to the analysis in previous chapters, this section contrasts the outcome indicators of RtF¹²⁶⁰ and progress towards achieving these rights in SSA and EU using the Global Hunger Index of 2000 – 2021 as well as the 2021 report of the UN on SDGs 1 and 2 of poverty eradication and hunger elimination respectively. As food insecurity is recognised in this study as a fundamental indicator of violations of RtF, this section further compares the indices of food insecurity in both regions using the GHI scores on the prevalence of severe food insecurity, undernourishment, infant stunting, infant wasting and infant mortality. These indicators will be discussed in greater detail in subsections 8.2.1 to 8.2.4.

Figure 3 below demonstrates the hunger index (GHI) scores of SSA between 2000 and 2021 based on the prevalence of undernourishment, stunting, wasting and mortality in children below the age of 5 years.

¹²⁶⁰ UN list of illustrative indicators on the right to adequate food (ICESCR, art. 11) See OHCHR, ‘Report on Indicators for Monitoring Compliance with International Human Rights Instruments’ (n 11)

Figure 3 GHI scores of SSA between 2000 and 2021¹²⁶¹

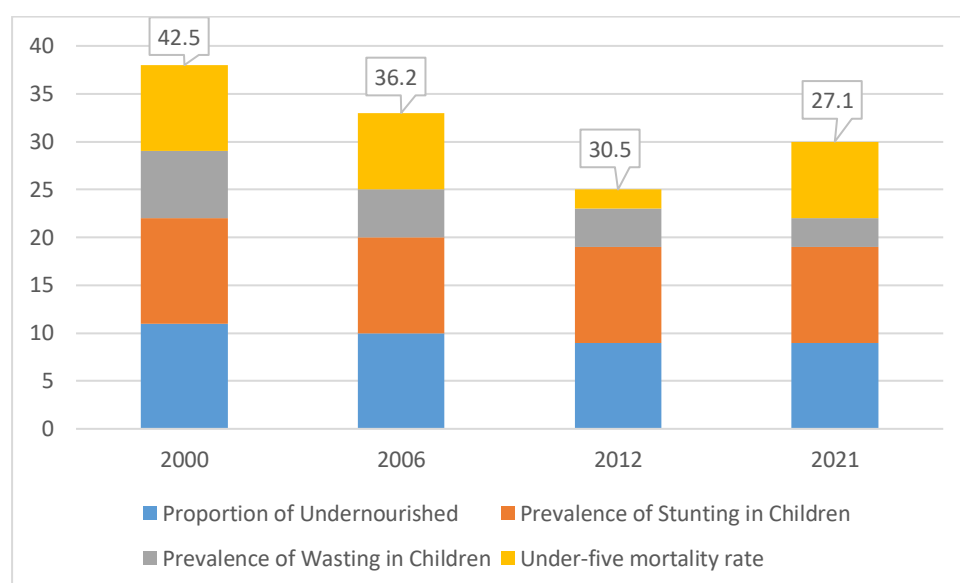


Figure 3 above shows that the GHI scores in SSA gradually reduced from 42.5 in 2000 to 27.1 in 2021, indicating a level of progress as higher GHI scores are indicative of high levels of widespread hunger in a region. The proportion of undernourished persons reduced from about 11 in 2000 to 9 in 2021. However, a further breakdown by the FAO, which contemplated a wider range of indicators, suggested that the rate of undernourishment in SSA increased from 19.6 percent to 21.8 percent between 2014 and 2020.¹²⁶² The GHI scores above also show that infant stunting reduced by approximately one GHI score between 2000 and 2020. FAO reports also confirm that infant stunting declined slowly in the region, from 34.8 percent in 2015 to 32.4 percent in 2020.¹²⁶³ However, about one in every three children in this region is stunted, indicating chronic undernutrition and a widespread violation of RtF.¹²⁶⁴

¹²⁶¹ Data sourced from GHI ‘Global, Regional and National Trends’ (2021)

www.globalhungerindex.org/trends.html

¹²⁶² FAO, Data: Suite of Food Security Indicators 2021’ <www.fao.org/faostat/en/#data/FS> accessed 08 January 2022

¹²⁶³ UNICEF, WHO, and World Bank, ‘Joint Child Malnutrition Estimates 2021’

<<https://data.unicef.org/resources/dataset/malnutrition-data/>> accessed 08 January 2022

¹²⁶⁴ Ibid

Based on the 2021 GHI scores, SSA has the highest rates of undernourishment, child stunting, and infant mortality, above any region of the world.¹²⁶⁵ The rate of undernourishment in SSA is considered particularly serious when contrasted with the situation in Europe and other parts of the world, where GHI scores are in the low or moderate range.

Additionally, there are projections of regressivity flowing from the slow and stagnating progress rate in achieving food security in the region. SSA is predicted to experience increasing numbers of undernourishment up to 2030, when the SDGs are expected to be achieved.¹²⁶⁶ It is projected that due to the impact of Covid-19, soaring food prices, loss of household income, the lack of available, affordable, nutritious food, and disruptions in essential nutrition services caused by the war in Ukraine, about 60 percent of SSA countries will not be able to achieve the SDG2 of halving hunger by 2030.¹²⁶⁷ It is also projected that due to the possible long-term effect of the Covid-19 pandemic, about 30 million more people will become undernourished globally in 2030, and more than half of these will be in SSA.¹²⁶⁸ These indices of stagnation and regressivity are indicative of violation of the RtF in SSA.

Figure 4 below demonstrates the hunger index (GHI) scores of the EU between 2000 and 2021 based on the prevalence of undernourishment, stunting, wasting and mortality in children under the age of 5 years.

¹²⁶⁵ GHI 'Global, Regional and National Trends' 2021 (n 1261) See also FAO, Data: Suite of Food Security Indicators 2021' (n 1249)

¹²⁶⁶ FAO, IFAD, UNICEF, WFP, and WHO, 'The State of Food Security and Nutrition in the World 2021: Transforming Food Systems for Food Security, Improved Nutrition and Affordable Healthy Diets for All', <<https://doi.org/10.4060/cb4474en>> accessed 08 January 2022

¹²⁶⁷ Ibid. See also UN SDG 2022 on the SDG2 <<https://unstats.un.org/sdgs/report/2022/Goal-02/>> accessed 06 December 2022

¹²⁶⁸ Ibid

Figure 4 GHI scores of EU between 2000 and 2021¹²⁶⁹

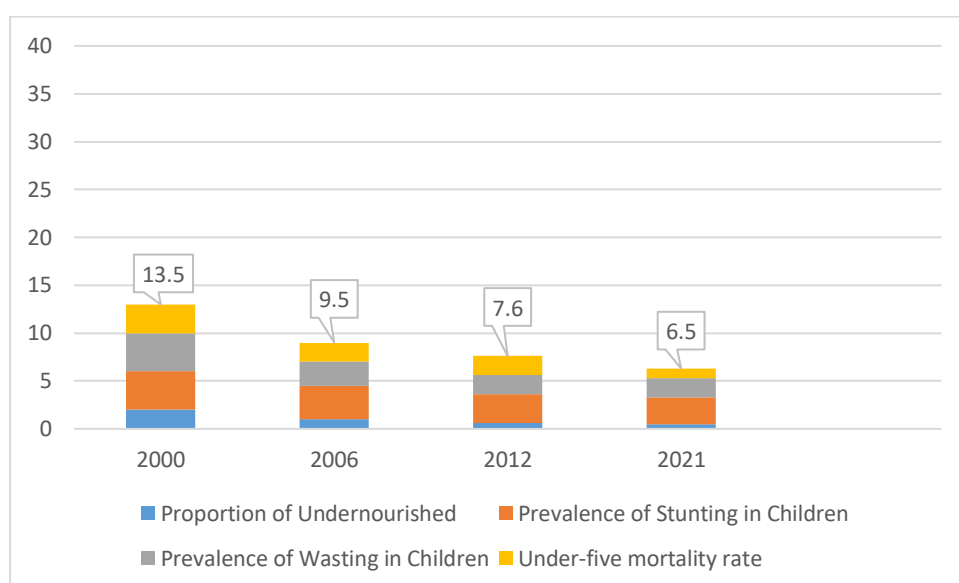


Figure 4 above shows that in contrast to SSA, the GHI scores in Europe reduced from 13.5 in 2000 to 6.5 in 2021, indicating over 100 percent reduction in hunger levels. The overall hunger index came down from a 7.6 GHI score in 2012 to 6.5 in 2021 despite the impact of the Covid-19 pandemic.¹²⁷⁰ The proportion of undernourished persons declined from 2 to less than 1 between 2000 and 2021. The prevalence of stunting in children below 5 years of age also declined from 4 in 2000 to about 2.5 in 2021, indicating a progressive reduction in the rate of hunger. In 2021, Europe and Central Asia had the lowest GHI scores compared to other regions of the world.¹²⁷¹ Further to the analysis in Chapter 7, over 70 percent of the 27 EU countries are progressing towards achieving SDG2 of halving hunger by 2030, and no EU country is regressing.¹²⁷² This is indicative of relative progress towards the realisation of the RtF in the EU in contrast to the situation in SSA.

¹²⁶⁹ Data sourced from GHI, 'Global, regional and national trends' 2021 (n 1261)

¹²⁷⁰ Ibid

¹²⁷¹ Ibid

¹²⁷² See Table 7.4 above and the explanatory notes. See also FAO, IFAD, UNICEF, WFP, and WHO, 'The State of Food Security and Nutrition in the World' 2021 (n 1253)

8.2.1 Severe Food Insecurity in the EU and SSA

This section compares the prevalence of severe food insecurity in the EU and SSA. As earlier discussed, this study recognises food insecurity as a fundamental indicator of violation of RtF in any region. The prevalence of severe food insecurity reflects an estimated percentage of the population in households classified as severely food insecure based on the Food Insecurity Experience Scale (FEIS)¹²⁷³. The FEIS uses a standard set of interview questions to measure the level of access to food. Respondents were asked whether, in the past 12 months, they had been worried about not being able to obtain enough food, whether they had had to reduce the quantity or quality of food or had gone for entire days without food due to the lack of money or other resources.¹²⁷⁴ All these conditions directly relate to an individual's overall ability to access food. Based on the answers provided by the respondents, individuals/households are classified as low, moderate or severe food insecurity terms signifying the level of severity of food insecurity they suffer. Low food insecurity is indicative of a good level of access to a variety of food to maintain a healthy life and good quality of life. Moderate food insecurity indicates compromised diet quality and limited variety/accessible food options. It may also indicate certain diet-related health conditions, such as micronutrient deficiency or obesity. Severe food insecurity is indicative of a reduction in the quantity of food consumed, including reducing portions or frequency of meals, fasting and hunger.¹²⁷⁵ The threshold for determining the severity of food insecurity is where an adult member of a household identifies that he/she has been exposed to starvation, forced to skip meals, go hungry

¹²⁷³ See FAO, 'The Food Insecurity Experience Scale' <www.fao.org/in-action/voices-of-the-hungry/fies/en/> accessed 10 January 2022

¹²⁷⁴ Ibid. The FIES is a widely accepted statistical scale consisting of eight questions regarding people's access to adequate food. These questions are: Are you worried you would not have enough food to eat? Were you unable to eat healthy and nutritious food? Did you eat only a few kinds of food? Did you have to skip a meal? Did you eat less than you thought you should? Did your household run out of food? Were you hungry but did not eat? And did you go without food for a whole day?

¹²⁷⁵ FAO, 'The State of Food Security and Nutrition in the World 2017: Building resilience for peace and food security' <www.fao.org/3/I7695e/I7695e.pdf> accessed 24 February 2022

or cut down on food quantity due to a lack of money or entitlement to secure access to food.¹²⁷⁶

This indicator directly signifies a lack of access to food which is the major thrust of this study.

Figure 5 below provides the comparative data of four elements of food insecurity examined in Chapters 6 and 7- prevalence of severe food insecurity, undernourishment, infant stunting, and infant wasting in the EU and SSA based on the 2021 FAO reports on food security indicators.¹²⁷⁷ Table 15 below provides the key/explanation to Figure 5.

*Figure 5 Comparative Index of food security indicators in SSA and EU*¹²⁷⁸

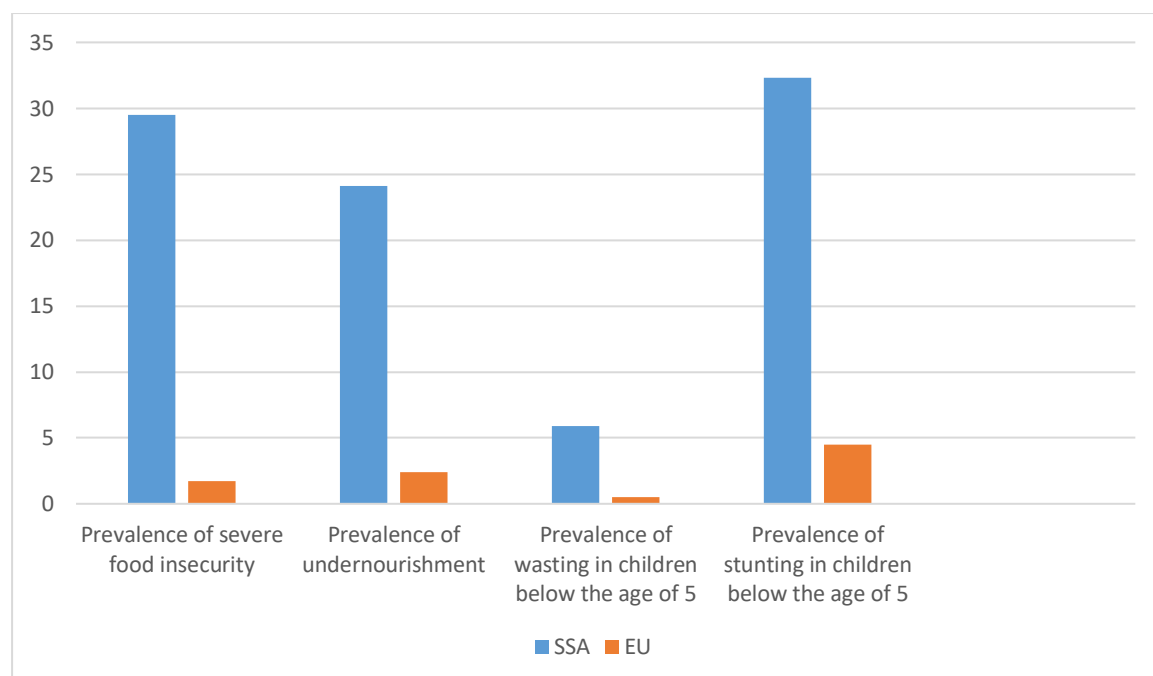


Table 15: Key to Figure 5

	SSA	EU
Prevalence of severe food insecurity (%)	29.5	1.7
Prevalence of undernourishment (%)	24.1	2.4
Prevalence of wasting in children below the age of 5 (%)	5.9	No data
Prevalence of stunting in children below the age of 5 (%)	32.3	4.5

¹²⁷⁶ Ibid. See also FAO, 'The Food Insecurity Experience Scale' (n 1260)

¹²⁷⁷ FAO, 'Data: Suite of Food Security Indicators (n 1249)

¹²⁷⁸ Ibid

Figure 5 above contains a comparative analysis of the extent of food insecurity in the EU and SSA based on the FAO reports of 2021.¹²⁷⁹ The four major indicators of food security examined in Figure 5 and explained in Table 15 above are the prevalence of severe food insecurity, undernourishment, wasting in children below the age of 5 and stunting in children below the age of 5. Figure 5 above shows that the prevalence of severe food insecurity in SSA is estimated as 29 percent, while in the EU, it is estimated as 1.7 percent, leaving a margin of 27.8 percent.¹²⁸⁰ From the earlier explanation, it could be inferred that the percentage of the adult population in SSA forced to starve or cut down food quantity/frequency as a result of lack of access to food is over 17 times more than the percentage of the adult population in the EU who suffer from the same problem. This is indicative of comparatively high levels of violation of RtF in SSA vis-à-vis the EU.

8.2.2 Undernourishment in the EU and SSA

Figure 5 above shows that the prevalence of undernourishment in SSA in 2021 is estimated at 24.1 percent in contrast to the 2.4 percent prevalence in the EU, thus leaving a margin of 21.7 percent.¹²⁸¹ Prevalence of undernourishment herein refers to the probability that a certain number of persons consume an amount of calories that is inadequate to cover their energy requirements for a healthy and active life.¹²⁸² The prevalence of undernourishment is derived by comparing the probable daily dietary energy consumption in the target area with the minimum dietary energy requirements specified by the WHO¹²⁸³ and multiplying this by the average population in the target area. Figure 5 above suggests that the estimated percentage of the population in SSA who are undernourished/consume a lower amount of calories than is

¹²⁷⁹ FAO, 'Data: Suite of Food Security Indicators 2021' (n 1249)

¹²⁸⁰ GHI, 'Global, Regional and National Trends' 2021(n 1261)

¹²⁸¹ Ibid

¹²⁸² A guide on the amount of calories required for an active and healthy life is provided by the WHO. See WHO, 'Healthy Diet' <www.who.int/news-room/fact-sheets/detail/healthy-diet> accessed 10 January 2022

¹²⁸³ Ibid

required for a healthy and active life is over ten times more than the percentage of the population in the EU who are faced with the same challenge of undernourishment. Thus indicating comparatively high levels of undernourishment and violation of RtF in SSA vis-à-vis the EU.

8.2.3 Prevalence of Wasting in Children Below 5 Years of Age in the EU and SSA

Figure 5 above shows that the prevalence of wasting in children below 5 years of age in the SSA is estimated at 5.9 percent, whilst there is no data for wasting in the EU.¹²⁸⁴ There is insufficient data on the prevalence of wasting in the EU because most research on chronic undernourishment in children is conducted in vulnerable poorer countries of SSA and Asia rather than in developed, high-income countries of the EU. The UNICEF report, however, shows that the average rate of wasting in these developed countries is estimated at 0.75 percent.¹²⁸⁵ The UNICEF 2020 statistical report shows that SSA had a prevalence of 6.2 percent of wasting in children below the age of 5, and a 1.9 percent prevalence of wasting in infants in Eastern Europe and Central Asia.¹²⁸⁶ Wasting herein refers to the estimated percentage of children who suffer from low weight compared to their height due to recent rapid weight loss or a failure to gain weight.¹²⁸⁷ It is the average number of children between the ages of 0–59 months whose weight is more than two standard deviations lower than the specified weight for their height. Figure 5 above, therefore, suggests that the population of children below the age of five who suffer from low weight as a result of dietary deficiency in SSA is more than 200

¹²⁸⁴ GHI, 'Global, Regional and National Trends' 2021(n 1261)

¹²⁸⁵ Jeffrey D. Sachs, Christian Kroll, Guillaume Lafortune, Grayson Fuller, and Finn Woelm *Sustainable Development Report 2021* (CUP 2021) <<https://s3.amazonaws.com/sustainabledevelopment.report/2021/2021-sustainable-development-report.pdf>> Accessed 26 December 2022

¹²⁸⁶ UNICEF, 'Levels and Trends in Child Malnutrition' (n 1032) This report provided no data for Western Europe as it tends to concentrate on regions with intense cases of food insecurity

¹²⁸⁷ The threshold for wasting is set by the World Health Organisation. See WHO 'Wasting Among Children under 5 Years of Age' <www.who.int/data/gho/indicator-metadata-registry/imr-details/302> accessed 10 January 2022

percent more than the population in the EU, thus indicating a relatively high level of wasting and violations of RtF in SSA vis-à-vis the EU.

8.2.4 Prevalence of Stunting in Children Below 5 Years of Age in the EU and SSA

Figure 5 above shows that the prevalence of stunting in children below 5 years of age in SSA is 32.3 percent while the EU presents with a stunting prevalence of 4.5 percent of the average population of children aged between 0–59 months.¹²⁸⁸ This gives a difference of 27.8 percent between both regions. The prevalence of stunting involves an estimation of the percentage of children below the age of 5 in the target area whose height-for-age is below the threshold set by the World Health Organisation.¹²⁸⁹ This implies that the percentage of children aged 0–59 months in SSA who suffer from retarded growth as a result of chronic or recurrent undernutrition, usually associated with poverty (among other causes),¹²⁹⁰ in SSA is over seven times more than the rate in the EU. As earlier established, this significantly high prevalence of stunting in children is indicative of widespread violation of RtF in SSA compared to the EU.

Hunger in all the forms discussed above, including severe food insecurity, widespread undernourishment, as well as stunting and mortality in under-aged children, create heavy social and economic burdens for any society, affecting people's health, wellbeing and productivity and presenting a significant impediment to the achievement of the SDG targets.¹²⁹¹

8.3 Comparative Analysis of the Structural Indicators of Right to Food in EU and SSA

This section compares the human right mechanism of the EU and SSA and the extent of protection provided in both frameworks. The analysis in the previous chapters- 6 and 7, suggests that the extent of protection of the RtF in both regions is inadequate. The RtF does

¹²⁸⁸ GHI, 'Global, Regional and National Trends' 2021 (n 1261)

¹²⁸⁹ See WHO, 'Malnutrition' <www.who.int/health-topics/malnutrition#tab=tab_1> accessed 10 January 2022

¹²⁹⁰ Ibid

¹²⁹¹ FAO, 'The State of Food Security and Nutrition in Europe and Central Asia' (n 145)

not seem to be expressly protected in the legal framework of the African Union. However, this right has been inferred by the ACHPR as a component of the right to life in *SERAC and Another v Nigeria*¹²⁹². The RtF is also recognised in the constitution and domestic laws of the various SSA countries that still retain their independence when negotiating international agreements. Similarly, the RtF is not expressly protected in the regional legal framework of the EU, and there seems to be inadequate protection of other socioeconomic rights from which the RtF could be inferred in the EU legal framework. Unlike the situation in SSA, the RtF is not expressly protected in the legal framework of the respective EU Member States. There also seem to be no cases so far where the RtF under the ICESCR was discussed and explicitly enforced by the European Courts. Thus, indicating very low levels of protection of RtF in the legal framework of the EU, which is suggestive of structural indication of a violation of the RtF in the EU compared to SSA.

8.4 Comparative Analysis of the Process Indicators of Right to Food in the EU and SSA

This section compares the trade and governance systems in the EU and SSA and the measures taken to incorporate socioeconomic rights into trade system to augment the realisation of RtF. The comparative analysis in this section flows from the assessment of process indicators of RtF in SSA and EU in chapters 6 and 7, respectively. A fundamental aspect of the process indicators of RtF in the EU and SSA relates to the governance structures, which substantially affect the incorporation of socioeconomic rights into the trade regimes of both regions.

On the one hand, the AU is governed by a set of rules contained in the AU Charter. The Charter sets out the duties, powers and structures of government and is administered by the Assembly of Heads of States and Governments, the highest decision-making body of the AU.

¹²⁹² *SERAC* (n 34) para 64

Human rights in the AU are established in the African (Banjul) Charter on Human and Peoples' Rights, enforced by the ACPHR. The AU trade regime- AfCFTA, is governed by a completely different set of laws laid down in the AfCFTA Agreement. The AfCFTA secretariat is an autonomous body within the AU system. It is an independent legal personality, administered by the Council of Ministers responsible for trade, and separate from the Assembly of Heads of States and Governments. Thus, the trading system is separated from the human rights and governance system, making it difficult to incorporate human rights into the trade regime to augment the realisation of RtF through trade.

An examination of the process indicators of RtF in SSA in chapter 6 suggests that SSA has taken some steps to incorporate the RtF into its trade regime. However, compared to the EU, it appears there is still a range of measures that could be taken to promote socioeconomic rights through trade. The AfCFTA Agreement recognises agricultural development and food security as essential trade objectives.¹²⁹³ It also recognises food security and agricultural development as the means of promoting industrial development.¹²⁹⁴ Thus recognising food security both as an end of trade liberalisation and a means of achieving another fundamental end, the industrial development of the African continent. However, it fails to define food security or provide indicators or benchmarks for assessing its achievement. Thus making it difficult to assess the realisation of trade objectives and how they facilitate the progressive realisation of RtF through agricultural trade liberalisation in the region.

Furthermore, the AfCFTA Protocol on Trade in Goods permits Member States to adopt restrictive measures aimed at the acquisition and distribution of foodstuff in short supply, thus, promoting access to food in times of famine.¹²⁹⁵ Thus, States are allowed to protect local industries and facilitate access to food by limiting the export of scarce domestic materials,

¹²⁹³ Preamble to the AfCFTA Agreement 2019, Para 4

¹²⁹⁴ AfCFTA Agreement 2019, Article 3(g)

¹²⁹⁵ Protocol on Trade in Goods Para 26(j)

provided always that the trade-restrictive measures do not constitute ‘disguised restriction’ or arbitrary discrimination between State Parties.¹²⁹⁶ As the Protocol does not set benchmarks for determining ‘disguised restriction’, similar to the AoA exceptions, its application may be determined on a case-by-case basis. Although the Protocol is quite recent, and there is no case law on the application of this proviso yet, it is contended that if a strict interpretation is adopted, as is the case in the WTO, the application of the proviso may erode the human rights import of the exception.¹²⁹⁷ For instance, any interpretation which requires States to take the least trade restrictive measure, as in the *US Shrimp Case*¹²⁹⁸ rather than the most effective measure, would most likely defeat the essence of allowing trade restrictions to fulfil the RtF where necessary. In the absence of clear provisions and benchmarks, the AfCFTA does not seem to make adequate provisions for the incorporation of socioeconomic rights into trade to facilitate the realisation of RtF in SSA.

On the other hand, in the EU, the political and trade regimes are controlled under a unified system of governance. The Union is governed by a set of laws contained in the TEU and the TFEU. These Treaties set out the rules for various areas of governance, including trade and politics, while the Charter of Fundamental Rights (CFR) 2009 sets out the rights of the citizens and the human rights obligations of the State and the Union. It also has a robust mechanism for monitoring and enforcing fundamental human rights alongside the principles of the EU. The Union has a single executive body (the Commission) which administers the Treaties, a legislative body, and a single judicial body (the Court of Justice of the EU) which administers the CFR. The unified system of governance means that the trade regime is not completely separated from other aspects of government, particularly as trade and human rights rules are made and administered by the same legislative and executive bodies. This way, the

¹²⁹⁶ Ibid Para 26

¹²⁹⁷ *US: Import Prohibition of Certain Shrimp and Shrimp Products* (n 894)

¹²⁹⁸ Ibid

Union sets human rights goals as the basis for all governance policies, including trade. This makes for the easy incorporation of human rights into trade, thus enabling the realisation of RtF through the trade process.

An examination of the process indicators of RtF in the EU in chapter 7 suggests that the EU has taken steps to incorporate socioeconomic rights into its trade regime. The TEU provides that the Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, and Member States are required to respect these values as a condition for new and ongoing membership.¹²⁹⁹ The Union and its Member States must thus ensure that their laws and policies do not derogate from fundamental human rights provisions.¹³⁰⁰ The EU also adopts the non-regression clause, which requires Member States to maintain the agreed minimum human rights standards and not allow any measures that fall short of these standards. This clause creates a negative obligation inherent in all positive obligations associated with fundamental rights. Hence all Union laws and Regulations, as well as State laws and policies, including trade agreements and policies, must comply with the minimum human rights requirements set out in this provision. By setting human rights as the substratum of its protocols, the Commission encourages States to prioritise their human rights obligations which will include the RtF in appropriate cases.¹³⁰¹ The section below, therefore, examines other ways of incorporating socioeconomic rights into trade to augment the realisation of RtF through trade.

8.5 Incorporating the Right to Food Security in Trade Regimes

This section examines how the SSA and EU trade regimes incorporate elements of socioeconomic rights by adopting the right-based approach (RBA) to food security in trade.

¹²⁹⁹ TEU 2009, Article 49

¹³⁰⁰ Ibid Article 2 and 49

¹³⁰¹ UDHR 1948, Article 28; See Henry Steiner, Philip Alston and Ryann Goodman (n 1223) 182-184

The RBA to food reinforces the indicators that capture the nature of access and availability of food as the essential elements that allow individuals to enjoy their rights.¹³⁰² In its strongest form, the RBA realises the outcome indicators of RtF by infusing the process indicators of RtF into the trade and governance process through public participation, impact assessment, accountability, and non-discrimination *inter alia*.¹³⁰³ In other words, the RBA to food security helps to realise the desired process and outcome indicators of RtF by incorporating elements of non-discrimination, capacity building, public participation, impact assessment, accountability, wellbeing considerations and international cooperation and assistance into trade.¹³⁰⁴ It encourages embedding trade within society, maintaining the people as the end, and trade as a means of enriching the quality of life.

Although there is no universal recipe for implementing the RBA, UN human rights agencies tend to agree that in all cases, the RBA will include elements of non-discrimination, public participation and accountability.¹³⁰⁵ The CESCR determined that the formulation and implementation of national strategies for the RtF should involve principles of accountability, transparency, people participation, decentralization, legislative capacity and the independence of the judiciary'.¹³⁰⁶ The Voluntary Guidelines further recognise democracy, equality and non-discrimination, participation and inclusion, accountability and the rule of law, as well as the universality, indivisibility and interdependence of all human rights as fundamental guidelines to support the achievement of food security, noting that food must not be used as a tool for political and economic pressure.¹³⁰⁷ Thus the subsections below elements of the RBA to food security, including public participation, impact assessment, accountability, wellbeing

¹³⁰² This is in line with the Report on Indicators of RtF. See OHCHR, 'Report on indicators for monitoring compliance with international human rights instruments' (n 230)

¹³⁰³ Morten Broberg and Hans-Otto Sano (n 210) 664-680; See also Kombo (n 1109)

¹³⁰⁴ *Ibid*

¹³⁰⁵ UN, 'The Human Rights-Based Approach to Development Cooperation Towards a Common Understanding Among UN Agencies' (n 306)

¹³⁰⁶ CESCR General Comment No 12 (n 6) para 23

¹³⁰⁷ FAO, 'Voluntary Guidelines to Support the Progressive Realisation of the Right to Food in the Context of Food Security' (n 100) Para 19

considerations, and international cooperation and assistance for the progressive realisation of RtF, and how they are incorporated into the WTO, EU and SSA trade regimes.

8.5.1 Realising the Right to Food Through Public Participation in Trade

Public participation in governance and trade systems is a fundamental element of the RBA to food security in trade. Public participation in this study involves ‘the right of every citizen to take part in the conduct of public affairs, the right to vote and to be elected and the right to have access to public service’ pursuant to Articles 25 ICCPR as well as the right of the minority to indulge in their culture pursuant to Article 27 ICCPR.¹³⁰⁸ Public participation is fundamental to any legislative process as it lends credibility to the legislative process and legitimacy to the substantive rules resulting from the process.¹³⁰⁹ The right to public participation under Article 25 of the ICCPR is not limited to the right of the majority to vote and be voted for. It accords every individual with the right to a meaningful opportunity to take part in the political process. According to the Human Rights Committee (HRC),¹³¹⁰ it is the right of every citizen to take part in the conduct of public affairs.¹³¹¹ This conduct of public affairs includes the exercise of political, legislative, executive and administrative powers, including formulating and implementing policies at national, regional and international levels.¹³¹² It is suggested that the allocation of powers and the means by which individual citizens may exercise the right to participate in the conduct of public affairs should be established in the substantive laws.¹³¹³

¹³⁰⁸ ICCPR 1976, Article 25 and 27

¹³⁰⁹ Kal Raustiala, ‘Rethinking The Sovereignty Debate In International Economic Law’ (2003) 6 Journal of International Economic Law 841, 862; Daniel C Esty, ‘The World Trade Organization’s Legitimacy Crisis’ (2002) 1 World Trade Review 7, 15–16

¹³¹⁰ Human Rights Committee (HRC) is the monitoring body established under the ICCPR 1976

¹³¹¹ HRC, ‘General Comment No 25: The right to participate in public affairs, voting rights and the right of equal access to public service (Article 25)’, Adopted at the Fifty-seventh Session of the Human Rights Committee on 12 July 1996 (Contained in document CCPR/C/21/Rev.1/Add.7 (12 July 1996) Para 1

¹³¹² Ibid Para 5

¹³¹³ Ibid

Public participation captures ‘the extent to which the process to implement and realise human rights is participatory, inclusionary, empowering, non-discriminatory or accountable’.¹³¹⁴ It entails inclusivity and is essential for the realisation of all human rights.¹³¹⁵ It is regarded as a cross-cutting indicator of human rights norms because it does not exclusively apply to a specific human right; rather, it forms the basic element of several substantive human rights.¹³¹⁶ For instance, the CESCR noted that ‘the participation of the population in all health-related decision-making at the community, national and international levels is an important aspect of the right to health’.¹³¹⁷ The CESCR also noted that public participation is essential for the realisation of RtF.¹³¹⁸

Public participation is regarded as a “procedural right” that significantly impacts the realisation of a specific ‘substantive right’ which in this case is the RtF.¹³¹⁹ In other words, it enhances the process through which a human right is achieved. Public participation is concerned not only with economic development and food security but also with how these goals are achieved because the actual realisation of the RtF and the process of progressively realising the RtF are all important aspects of the RtF.¹³²⁰ Public participation encourages the equitable distribution of food and other benefits of development through a process which incorporates the masses.¹³²¹ The subsections below examine grassroots involvement as an essential element of the RBA to food in the EU and SSA vis-à-vis the WTO trade laws.

¹³¹⁴ OHCHR, ‘Report on indicators for monitoring compliance with international human rights instruments’(n 230) para 10

¹³¹⁵ Ibid

¹³¹⁶ Ibid

¹³¹⁷ CESCR General Comment No 14 (n 34) para 11

¹³¹⁸ CESCR, General Comment No 12 (n 6) para 23

¹³¹⁹ Unlike substantive rights which have a relatively clear content, procedural rights like the participatory rights and anti-discriminatory rights are critical to the process of realising the substantive rights and are easier to define in the specific context of substantive rights. See OHCHR, ‘Report on indicators for monitoring compliance with international human rights instruments’(n 230) para 10

¹³²⁰ Arjun Sengupta, ‘On the Theory and Practice of the Right to Development’ (2002) 24 Human Rights Quarterly 837, 851

¹³²¹ OHCHR, ‘Report on indicators for monitoring compliance with international human rights instruments’(n 230) para 10

Public participation in the WTO

It appears that any breaches of Article 25 ICCPR through inadequate participatory mechanisms within the WTO may suggest a breach of the right to public participation and a derogation from the rights-based approach to food security in trade. Generally, there appears to be limited public participation in the WTO processes. For instance, there appears to be limited public involvement in a State's decision to join the WTO, even though that decision produces binding WTO obligations, which can have an immense impact on the people's wellbeing.¹³²² Negotiating agreements and accession deals are usually carried out by trade technocrats, and ratification is often a function of the executive government rather than the parliament/people's representatives.¹³²³ Furthermore, the State has limited options in negotiating its ascension terms into the WTO. Acceding States have, on past occasions, been required to accept more onerous undertakings than existing members without reciprocal guarantee.¹³²⁴ As discussed in Chapter 3 above, these conditions may impose onerous conditions on acceding members with no mutuality or reciprocity. The involvement of acceding States is, thus, limited, and where these preconditions are not accepted, it may prevent the State's inclusion in the WTO.

There also appears to be very little involvement of human rights experts in WTO trade negotiations. The WTO tends to involve NGOs through informal dialogues involving the NGOs, State delegates and WTO personnel. The WTO also organises periodic public briefings for NGOs and Civil Society Organisation; as of June 2022, 46 local NGOs were registered with

¹³²² Joseph (n 91) 57

¹³²³ Ibid

¹³²⁴ See Chapter 3.2.2 above. Some pre-conditions imposed on acceding WTO members may include additional obligations, not imposed under existing WTO rules (WTO plus conditions) while some others require a loss of concessions that a State would ordinarily be entitled to under WTO rules (WTO minus conditions). For example when Tonga, acceded to the WTO in 2007, it was made to commit to liberalising a large number of services, even though GATS generally permits States to choose which services they will open up to foreign competition. See Jane Kelsey (n 241)

the WTO.¹³²⁵ However, the NGOs can only contribute to the WTO debate through participation in the public forum and the presentation of *amicus curiae* briefs before the Dispute Settlement Body. Furthermore, the WTO maintains a public forum in the form of open platforms through which members of various civil society groups can listen in and exchange views with the WTO official on a wide range of issues. However, the views expressed at these public forums are neither binding nor persuasive on the WTO. The WTO also maintains interactions with intergovernmental organisations such as the FAO; however, these organisations are only accorded observer status, and despite the impact of trade on human rights, their input is not sought in trade negotiations.¹³²⁶ For instance, despite the age-long controversies surrounding the TRIPS Agreement, the right to health was first discussed in the WTO in 2004 when the SR on the Right to Health took a mission to the WTO.¹³²⁷ In 2008, the SR on the RtF also visited the WTO, and he raised strong concerns regarding the impact of World Trade Rules on the RtF, particularly among developing countries.¹³²⁸ However, the recommendations of the SR on these occasions are only advisory and scarcely have persuasive effects on the WTO.

In addition to its limited inclusiveness, WTO membership, like most international law regimes (including the UN human rights regimes), limits certain policy choices of its Member States under international law. While human rights treaties are negotiated in open meetings, which sometimes involve NGO participation, world trade negotiations are often conducted in closed meetings with minimal public participation.¹³²⁹ Thus, trade rules significantly affect the

¹³²⁵ WTO, 'NGOs and the WTO' <www.wto.org/english/forums_e/ngo_e/ngo_e.htm> accessed 10 January 2022; See also Joseph (n 91) 68 - 78

¹³²⁶ Steve Charnovitz, 'The WTO and Cosmopolitics' (2004) 7 *Journal of International Economic Law* 675, 276 - 277

¹³²⁷ Commission on Human Rights, 'The Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health' Report of the Special Rapporteur, Paul Hunt: Mission to the World Trade Organization' on 1 March 2004 (Contained in document UN doc. E/CN.4/2004/49/Add.1) Para 5. See also Joseph (n 91) 68 - 78

¹³²⁸ OHCHR, 'Report of the Special Rapporteur on the Right to Food Olivier De Schutter - Addendum - Mission to the World Trade Organisation' (2009) (n 88) para 40.

¹³²⁹ See Robert McCorquodale, 'An Inclusive International Legal System' (2004) 17 *Leiden Journal of International Law* 477, 493-4

rights of the people while simultaneously limiting their involvement in trade policymaking processes. For instance, as noted in Chapter 3, small-scale farmers are mostly impacted by the WTO's agricultural trade policies. However, only States (not individuals) have direct participatory rights under the WTO. It is contested that a State would hardly undertake the intensive dispute resolution process under the WTO for peasant farmers with minimal economic significance.¹³³⁰ On the contrary, urban groups have a stronger economic influence and can afford to organise themselves into trade unions which guarantee them stronger political lobbying powers. The limited involvement of less significant/minority market participants further widens the gap between the rich dominant market participants and the vulnerable farmers. Hence, limited public participation in the WTO continues to increase market inequalities with greater likelihood that trade rules will be made for the benefit of the rich at the expense of vulnerable farmers with minimal economic and political lobbying powers.¹³³¹ It appears, therefore, that the WTO does not seem to make adequate provisions for the rights-based approach to trade through public participation, and this seems to have an adverse impact on the realisation of RtF through trade.

Public Participation in the EU:

Prior to the Lisbon Treaty,¹³³² international trade policymaking in the EU basically took the form of institutional dialogues between the Commission and the Council, with partial involvement of the European Parliament. However, the changes introduced by the Lisbon Treaty provided for greater public involvement in trade negotiations and policymaking in the EU. It empowered the EU Parliament to become more involved in the Union's trade policymaking without directly taking part in the negotiation process. The TFEU requires the

¹³³⁰ See also Caroline Dommen (n 680) 24

¹³³¹ Joseph (n 91) 167 - 169

¹³³² The Lisbon Treaty of the European Union, 2009

consent of the EU Parliament to be obtained for the conclusion of any new agreement to which the Union is a party.¹³³³ Notwithstanding the limited involvement of the EU Parliament in negotiations, it must be immediately informed of all the stages of the negotiation processes. The Council must obtain the consent of the Parliament before concluding certain treaties under Article 218 TFEU.¹³³⁴ The TFEU also grants the Parliament power to veto or reject international trade agreements; where this is done, it cannot be implemented in the EU.¹³³⁵ The Parliament first exercised this veto power in 2012 when it rejected the Anti-Counterfeiting Trade Agreement (ACTA), making it unenforceable.¹³³⁶ Thus the EU maintains a system of checks and balances, encouraging public participation in trade policymaking.

Despite the limited involvement in WTO ascension and negotiations, the Common Commercial Policy of the EU requires the Commission to first obtain the authorisation of the Council through a qualified majority voting to initiate the negotiation of any trade agreement.¹³³⁷ The Council also gives negotiating directives to the Commission, clarifying the priorities and the desired objectives for any proposed trade agreement. The Commission thus sets the objectives and the appropriate legal instruments in consultation with the Council and other organs of the EU.¹³³⁸ The Commission continuously updates the Council and Parliament on the policies as negotiations progress, and the Council can send directives to the negotiators and designate a special consultation committee to work with the negotiators through the negotiations process.¹³³⁹ When the negotiations are complete, the final draft of the trade

¹³³³ TFEU 2009, Article 2 and 218

¹³³⁴ Ibid Article 2 and 218

¹³³⁵ Ibid Article 294

¹³³⁶ European Parliament, 'European Parliament Rejects ACTA'

<<https://www.europarl.europa.eu/news/en/press-room/20120703IPR48247/european-parliament-rejects-acta>> accessed 17 February 2022

¹³³⁷ The EU Common Commercial policy covers changes in tariff rates, the conclusion of agricultural and other trade agreements, export policy and measures to protect the market against adverse external influence such as dumping. It establishes the trading principles of the EU including the Nationality and MFN principles which prohibit all forms of discrimination at the borders and beyond. See TFEU, Articles 207 and 37

¹³³⁸ The Common Commercial policy is included in the general European strategies and it is considered a key factor in protecting the competitiveness of the EU in the international market.

¹³³⁹ TFEU 2009, Article 27

agreement is sent to the Council for authorisation before it becomes enforceable. The Council, on the contrary, cannot grant this authorisation without the approval of the EU Parliament, which in turn requires a qualified majority vote of the House.¹³⁴⁰ Thus, the EU operates a system of checks and balances, which allows public participation through the Parliament, which indicates that the RBA is integrated into its trade regime.

Another important area is the EU market strategy. The EU Market Access Strategy addresses the import tariffs levied on EU exports by third countries to support the presence of EU businesses in other countries, augmenting job creation and improving the general standard of living.¹³⁴¹ Trade Tariffs are an important aspect of the EU Market Access strategy because import tariffs imposed by third countries could make EU exports more expensive and less marketable in the domestic markets of the importing country, resulting in a loss of revenues to the exporting country.¹³⁴² The EU Market Access Strategy involves a special component known as the Market Access Partnership, which establishes a direct link between Member State officials and European businesses. It provides a platform for the Commission, Member States and business representatives to exchange information and develop strategies to penetrate the international market. Through this Partnership, the Commission derives direct information from business operators regarding the challenges their products face in the markets. Such information influences the Union's position in world trade disputes and international trade negotiations. The Partnership also establishes several working groups for specific products. For instance, the working group dealing with barriers to food products has been active since 2005 and has actively engaged representatives of the EU food industry since June 2008.¹³⁴³

¹³⁴⁰ Ibid

¹³⁴¹ Europa, 'Communication of the European Communities: Global Europe: a stronger partnership to deliver market access for European exporters' COM(2007) 183 final <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52007DC0183>> accessed 15 March 2021

¹³⁴² Giovanni Gruni, *The EU, World Trade Law and the Right to Food: Rethinking Free Trade Agreements with Developing Countries* (Bloomsbury Publishing Plc 2018) 80

¹³⁴³ Europa, 'Evaluation of the Market Access Partnership' <https://trade.ec.europa.eu/doclib/docs/2013/april/tradoc_150847.pdf> accessed 15 March 2021

Additionally, the Partnership uses a Market Access Database that classifies existing trade barriers to EU exports and helps develop the regulatory instruments to tackle them.¹³⁴⁴ Through the Market Access Partnerships and its working groups, the EU incorporates public participation into its Market Access Strategy, which is indicative of the RBA to food security in trade.

Public Participation in SSA:

As a recent agreement, the AfCFTA Protocols are currently under negotiation, and there are no precedents to assess the extent to which it incorporates the RBA to trade. Whilst there have been several reports by the AU and other international bodies on the progress of the negotiations and the prospects it holds for the African economy, this study notes that there are so far no calls for public inputs or reports on grassroots involvement in the negotiations of the main agreement or its protocols. The UN Impact Assessment report on the AfCFTA recommended broader consultation and public participation in trade negotiations and implementation to ensure that a wide range of views and impacts are taken into account before Agreements are concluded.¹³⁴⁵ It recommended that data collection be disaggregated to involve samples from vulnerable groups because the RBA requires States to pay attention to the situation of the most vulnerable.¹³⁴⁶ It, therefore, appears that the AfCFTA has not made adequate provisions to incorporate the rights-based approach through enhanced public involvement in trade.

¹³⁴⁴ EC, 'Market Access Database User Guide', <http://madb.europa.eu/userguide/EN_def.pdf> accessed 15 March 2021

¹³⁴⁵ See OHCHR, 'Report: The Continental Free Trade Agreement in Africa, A Human Right Perspective' (n 1123)

¹³⁴⁶ Ibid; See also OHCHR, 'Report on indicators for monitoring compliance with international human rights instruments' (n 230) para 10

8.5.2 Realising the Right to Food Through Wellbeing Considerations in Trade

This section examines how the RBA to food security is better realised by prioritising wellbeing as the ultimate goal of trade rules. Trade liberalisation ought to maintain human beings as the end and commodities/income as a means to an end. Trade as a socioeconomic process should be targeted at the progressive improvement of the wellbeing of vulnerable populations and everyone.¹³⁴⁷

Wellbeing in the WTO

In light of the limited grassroots involvement in the WTO processes, it may seem difficult to incorporate wellbeing considerations into the WTO trade liberalisation regime. It is argued that trade liberalisation under the WTO unduly restricts the regulatory capacities of its Member States, undermining their ability to make policies which prioritise wellbeing over trade commitments.¹³⁴⁸ This is particularly evident where trade commitments under the WTO tend to limit the available options to a State to fulfil its socioeconomic rights obligations. For instance, where the ICESCR obligates a State to take measures subject to its ‘maximum available resources’ for the progressive realisation of RtF, these available resources may be limited by trade obligations which require the State to adopt the ‘least trade restrictive’ rather than the most effective measures to achieve the desired objective as in the *US Shrimp* case.¹³⁴⁹ Furthermore, in *EC Hormones Case*¹³⁵⁰ the EC banned the importation of hormone-treated meat because of its health hazards. The DSB found that the ban breached the Sanitary and Phytosanitary (SPS) Agreement. The EC was mandated to lift the ban, although doing so was not beneficial to the wellbeing of the European population, who feared that these hormones

¹³⁴⁷ Preamble to the DRD 1986, Para 2

¹³⁴⁸ Jeffrey L Dunoff, ‘The Death of the Trade Regime’ (1999) 10 *European Journal of International Law* 733, 758

¹³⁴⁹ *US: Import Prohibition of Certain Shrimp and Shrimp Products— Report of the Appellate Body* (n 894)

¹³⁵⁰ *EC Hormones— Report of the Panel and Report of the Appellate Body* (n 776)

were unsafe for their health. Thus, the DSB seems to focus on liberalising the market, prioritising economic goals over wellbeing needs. This is an indication that the WTO does not seem to adequately incorporate the RBA to food security by prioritising wellbeing considerations in trade.

Wellbeing in the EU:

The EU trade regime in the EU is centred on welfare, improving general standard of living and access to consumer goods, including food, and prioritising the wellbeing of domestic producers and consumers.¹³⁵¹ Article 3 of the TEU states that the aim of the Union is to promote its values and the wellbeing of its people.¹³⁵² The TFEU affirms that the essential objective of the Union, its common agricultural, common market and common commercial policies *inter alia* is ‘the constant improvements of the living and working conditions of their peoples’.¹³⁵³ The Europe 2020 Strategy reinforces this objective and sets out the structural and common indicators to monitor its achievement. These indicators include economic performance, employment, research, innovation and education, economic reform, social cohesion, environment and reduction of the risk of poverty.¹³⁵⁴ It thus establishes welfare as an objective of the Union and a fundamental indicator of the achievement of Union objectives.

The Union's wellbeing objectives are reiterated in the various laws and policies of the EU, and it forms the bedrock of the EU trade liberalisation regime. For instance, the EU trade policy aims to eliminate poverty and enhance access to goods (including food).¹³⁵⁵ It is committed to supporting local producers and encourages international trade agreements that

¹³⁵¹ EU Parliament, ‘EU Trade Policy’

<[https://www.europarl.europa.eu/RegData/etudes/IDAN/2019/642229/EPRS_IDA\(2019\)642229_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/IDAN/2019/642229/EPRS_IDA(2019)642229_EN.pdf)> accessed 18 February 2022

¹³⁵² TEU 2009, Article 3.1

¹³⁵³ Preamble to the TFEU 2009, Para 3

¹³⁵⁴ EU, ‘Europe 2020’,

<<https://ec.europa.eu/eu2020/pdf/COMPLET%20EN%20BARROSO%20%20%20007%20-%20Europe%202020%20-%20EN%20version.pdf>> accessed 25 June 2022

¹³⁵⁵ EU Parliament, ‘EU Trade Policy’ (n 1338)

expand its market access.¹³⁵⁶ The EU market strategy, including the export strategy, which regulates export restrictions in the EU,¹³⁵⁷ aims to ensure that adequate raw materials are supplied to local industries so that local producers are not susceptible to fluctuations in the international market.¹³⁵⁸ This aim is achieved through the raw materials initiative, which helps secure access to raw materials that are scarce in the EU.¹³⁵⁹ This aim also influences the position of the EU in world trade negotiations. For instance, in *China—Raw Materials*¹³⁶⁰ and *China—Rare Earths*,¹³⁶¹ the EU challenged the export restrictions imposed by China on raw materials because they were adverse to EU industries. The DSB took a strict interpretation of Article XI GATT exceptions, finding China to be in breach of its trade commitments.¹³⁶² This indicates that trade liberalisation in the EU is centred on improving general standard of living and access to consumer goods, including food and prioritising the wellbeing of domestic producers and consumers, which is indicative of the RBA to food security in trade.¹³⁶³

Wellbeing Considerations in SSA:

As earlier noted, the AfCFTA Protocols are still under negotiation. Unlike the TEU, the AfCFTA Agreement does not seem to set wellbeing as a primary trade objective. The Protocol on Trade in Goods recognises that a comprehensive Protocol on Trade in Goods will deepen economic efficiency, improve social welfare, and progressively eliminate trade barriers *inter*

¹³⁵⁶ Ibid

¹³⁵⁷ Export restrictions are measures with which countries put an artificial ceiling or tariff on the export of goods to limit the quantity of a specific good exported to third countries. See Gruni (n 1329) 81

¹³⁵⁸ Europa, ‘The Raw Materials Initiative—Meeting our Critical Needs for Growth and Jobs in Europe’ COM(2008) 699 final <<https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0699:FIN:en:PDF>> accessed 18 February 2022

¹³⁵⁹ Ibid

¹³⁶⁰ *China—Measures Related to the Exportation of Various Raw Materials* (30 January 2012) WT/DS395/AB/R

¹³⁶¹ *China—Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum* (20 May 2015) WT/DS/431/AB/R

¹³⁶² See *China—Measures Related to the Exportation of Various Raw Materials* (n 1347); GATT Article XI prohibits quantitative restrictions on imports or exports of any product. It provides that ‘No prohibitions or restrictions other than duties, taxes or other charges shall be instituted or maintained by any Member...’

¹³⁶³ EU Parliament, ‘EU Trade Policy’ (n 1338)

alia; however, wellbeing is not expressly listed among its objectives.¹³⁶⁴ Due to the novelty of the AfCFTA, there are so far no precedents to assess the extent to which it incorporates wellbeing considerations in the protocols and policies. However, its failure to explicitly identify wellbeing as an objective in its legal framework falls short of the wellbeing requirements under the RBA to food security. The UN also identified lapses in public inclusion in the AfCFTA Agreement, stating that data collection should involve samples from vulnerable groups because a human rights approach ought to pay attention to the situation of the most vulnerable.¹³⁶⁵ It, therefore, appears that the AfCFTA Agreement has not made adequate provisions to incorporate the RBA through welfare considerations in trade.

8.5.3 Realising the Right to Food Through Period Impact Assessment of Trade Laws on Human Rights

This section contrasts how the WTO, EU and SSA trade regimes incorporate the RBA to food security through periodic assessment of the impact of trade liberalisation rules on the human rights.

Socioeconomic Impact Assessment in the WTO

It appears that the WTO trade regime does not make provision for the periodic impact assessment of its various agreements with the Member States. By virtue of the Single Undertaking principle of the WTO, all actual and intending members of the WTO are bound to observe virtually every agreement as part of a whole and indivisible package which cannot be agreed separately.¹³⁶⁶ These trade agreements are final and do not make provisions for victims of adverse trade agreements to challenge their provisions. An aggrieved State may only

¹³⁶⁴ AfCFTA Agreement 2019, Protocol on Trade in Goods, Article 2

¹³⁶⁵ See OHCHR, 'Report: The Continental Free Trade Agreement in Africa, A Human Right Perspective' (n 1123)

¹³⁶⁶ See OHCHR 'Status of Ratification' (n 127)

bring an action where it is impacted by the restrictive measures of another State. This is further aggravated by the rules not supporting periodic impact assessment of trade on human rights. For instance, in *EC Hormones Case*¹³⁶⁷ the EC banned the importation of hormone-treated meat because of its health hazards. The DSB found that the ban breached the Sanitary and Phytosanitary (SPS) Agreement. The EC was mandated to lift the ban with minimal consideration of the impact of the banned hormone-treated meat on the right to health. There is no platform in the WTO to monitor the impact of this decision on the people; neither is there provision for the health victims of hormone-injected meat to subsequently challenge this decision before the DSB. Where the implementation of WTO trade agreements and the decisions of the DSB continue to impact the wellbeing of the vulnerable, with no room for public inclusion and impact assessment, it may result in regressivity and a continued violation of the RtF.

Additionally, WTO agreements and decisions of the DSB are coercive, involving the use of cross-retaliation and countermeasures to compel compliance by the defaulting States. The Agreement on Subsidies and Countervailing Measures (SCM Agreement), for instance, allows the use of countervailing measures to offset the injury caused by subsidised imports. The DSB may also allow a State to suspend its obligations and impose countermeasures in response to a member's violation or failure to comply with its decisions.¹³⁶⁸ This method of enforcement has been criticised as it tends to expose vulnerable States to the vices of other aggrieved Member States.¹³⁶⁹ It does not consider the human rights implication of any countermeasures, and there is no provision for assessing the socioeconomic impact of cross-retaliatory measures when implemented. Thus, the WTO trade rules do not seem to incorporate

¹³⁶⁷ *EC Hormones— Report of the Panel and Report of the Appellate Body* (n 776)

¹³⁶⁸ DSU 1994, Article 3

¹³⁶⁹ Grace C. Young, 'A Critical Review Of Cross-Retaliation As A Justiciable Countermeasure; With Reference To The EC – Bananas III (Article 22.6 – EC) Case And (EC – Regime For The Importation, Sale And Distribution Of Bananas (WT/DS27 – Ecuador))' 4 (2013) Nnamdi Azikiwe Journal of International Law and Jurisprudence <www.ajol.info/index.php/nauijlj/article/view/136290> accessed 26 February 2022

the RBA approach to food security through periodic impact assessment of trade measures on human rights.

Periodic Impact Assessment in the EU

Unlike the WTO, the EU appears to maintain an integrated system of free trade and human rights, and court judgments are enforced through dialogue and cooperation.¹³⁷⁰ The EU establishes both human rights and trade laws that go hand-in-hand and are enforced by the European Commission. The Commission encourages Member States to implement court decisions through guidance and dialogue.¹³⁷¹ Under this system, a State is required to issue adequate notice to the defaulting State before commencing legal action against it. Although Article 260 TFEU empowers the CJEU to enforce its decisions through sanctions and prohibitive measures, the CJEU would often engage a defaulting State in dialogues and enforce its decisions through cooperation.¹³⁷² The CJEU applied sanction schemes for the first time in July 2019 in the case of *Commission v Belgium*,¹³⁷³ where it imposed a daily penalty on Belgium for its failure to adopt and communicate all the measures necessary to reduce the cost of deploying high-speed electronic communications networks. Through dialogue and cooperation, the EU trade system engages with the States, taking record of the reasons for non-enforcement by the State, which may include the projected socioeconomic impact of the trade decision on the RtF. Through such dialogue and cooperation, the EU considers the human rights impact of trade measures, thus incorporating the RBA in trade.

¹³⁷⁰ Report of the World Commission on the Social Dimension of Globalisation 'A Fair Globalization: Promoting Opportunities for all' (ILO 2004) <www.ilo.org/wcmsp5/groups/public/---dgreports/---integration/documents/publication/wcms_079151.pdf> accessed 18 October 2022

¹³⁷¹ EC, 'Member States' Compliance with EU Law'

<https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1389> accessed 14 January 2022

¹³⁷² Sanctions scheme subject to TFEU 2009, Article 260(3)

¹³⁷³ *EC v Kingdom of Belgium* [2019] C-543/17 and 2017/C 374/32

Furthermore, the EU political system encourages periodic assessment of the social, economic and environmental impact of its policies. Assessments may involve the collection of relevant data to support a decision/policy or data collection to assess the impact of a State policy. In 2009, the Commission established a clear set of Guidelines on Impact Assessment.¹³⁷⁴ Although the Guidelines did not directly base its impact assessment on human rights, it did make reference to fundamental rights. The Guidelines provided that all Commission proposals must be compatible with the EU Charter of Fundamental Rights and that impact assessments must take into account the impacts of initiatives on fundamental rights as laid out in the Charter.¹³⁷⁵ Such impact assessment must include quantitative as well as quantitative impacts of the proposed measure on human rights. The Impact Assessment Guidelines are no longer in use; they were replaced by the Better Regulation Guidelines in 2021.¹³⁷⁶

Under the Better Regulation Guidelines, the EU continues to conduct impact assessments of various legislative and political measures. When negotiating an agreement or a law/policy, the Better Regulation Guidelines require the Commission to analyse the problem it intends to resolve, the policy objectives and the likely impact of the proposed law. Stakeholders must then be consulted on all key aspects of the policy through open public consultation.¹³⁷⁷ Thereafter, the Commission must publish the legislative proposals and impact statement reports to enable the public to send feedback. The impact assessment reports and the feedback are further scrutinised by a regulatory scrutiny board which then issues opinions before it goes back to the EU legislators.¹³⁷⁸ Through this system, the EU incorporates the RBA through

¹³⁷⁴ EC, 'Impact Assessment Guidelines' (n 1209); EC, 'Report on the Practical Operation of the Methodology for a Systematic and Rigorous Monitoring of Compliance with the Charter of Fundamental Rights' (n 1222)

¹³⁷⁵ Ibid

¹³⁷⁶ EC, 'Better Regulation Guidelines' [2021] SWD(2021) 305 final; See EU, 'Impact Assessment' <https://ec.europa.eu/info/law/law-making-process/planning-and-proposing-law/impact-assessments_en> accessed 16 December 2021

¹³⁷⁷ Ibid

¹³⁷⁸ Ibid

public participation and periodic impact assessment of trade laws on socioeconomic rights in the region.

Socioeconomic Impact Assessment in SSA

Whilst negotiations on the AfCFTA Protocols progress, there appears to be little indication that human rights impact assessments are carried out on the Agreement and its protocols. An ex-ante assessment conducted by the UN Economic Commission for Africa noted that adequate human rights impact assessments were yet to be conducted on the AfCFTA Agreement.¹³⁷⁹ It suggested that an initial impact assessment of the AfCFTA Agreement at the foundational stage is important to help collate information on the potential socioeconomic impacts of trade agreements and that the outcome will influence trade negotiations.¹³⁸⁰ Since all SSA countries have ratified at least one of the major human rights conventions of the United Nations, it is suggested that a human rights impact assessment of the AfCFTA trade regime will help ensure that trade protocols facilitate the realisation of human rights goals of the Member States.¹³⁸¹ Human rights impact assessment will also strengthen public participation in regional trade processes, reduce opposition to trade agreements and prevent litigation around human rights concerns. However, there are so far no records of human rights impact assessment of the AfCFTA conducted among native populations of SSA. Thus indicating that the SSA may not have taken adequate measures to incorporate the RBA through public participation and periodic impact assessment of trade laws on socioeconomic rights in the region.

¹³⁷⁹ See OHCHR, 'Report: The Continental Free Trade Agreement in Africa, A Human Right Perspective (n 1123)

¹³⁸⁰ Ibid

¹³⁸¹ Ibid

8.5.4 Realising the Right to Food Through International Cooperation and Assistance

This section examines how the RBA to food security could be realised through effective international cooperation to realise the RtF. It also contrasts the involvement of the EU and SSA in world trade to demonstrate how the regions contribute to the development of world trade through their involvement in international trade and how they facilitate the progressive realisation of RtF through international cooperation and assistance. This analysis is based on the understanding that to contribute to the progressive realisation of RtF, trade liberalisation ought to create opportunities for international cooperation among States to improve methods of production, conservation and distribution of food, taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need.¹³⁸² The RtF places an obligation on the State to respect, protect and fulfil this right, recognising the essential importance of international cooperation based on free consent.¹³⁸³ Article 11 ICESCR also requires States to take measures individually and through international cooperation to facilitate the progressive realisation of this right.¹³⁸⁴

The intervention of the international society is therefore needed to realise the RtF, particularly in light of the impact of international trade on the physical and economic access to food. Although international bodies have no primary obligation to fulfil the RtF, some regional bodies tend to command a significant level of control in the international space, which implies a responsibility to facilitate the progressive realisation of this right through international cooperation. For instance, unlike the AU, which has limited direct involvement in world trade, the EU is a member of the WTO, and all EU countries are individual members of the WTO. However, international trade in the EU (including agricultural and food trade and WTO dispute settlement) falls within the Common Commercial Policy, where the Union has exclusive

¹³⁸² Ibid Article 11.2

¹³⁸³ Ibid Article 11.1

¹³⁸⁴ Ibid Article 11

legislative competence. EU Member States are limited in their ability to realise RtF through trade because the Union has exclusive jurisdiction, and the States only take part in this process through the procedures laid down in the EU Treaties. Some areas through which the regions facilitate the realisation of RtF through international cooperation are discussed below.

The EU has exclusive legislative competence in the subject of international trade, including trade in food and agriculture. It also has the exclusive competence to initiate legal actions under the WTO dispute settlement system when it deems that its trade partners are violating their obligations. Thus, Member States have limited competence in this area and are bound by the agreements concluded by the Union on their behalf. Whilst there are barely any WTO dispute proceedings involving SSA countries, the EU has actively taken part in several disputes under the WTO Dispute Settlement System, through which the Union contributes to the growth and legal interpretation of international trade laws.¹³⁸⁵ Although the State is the duty-bearer under the ICESCR, the exclusive jurisdiction of the Union in such matters places an obligation on the Union to act in the best interest of its Member States and to facilitate the realisation of RtF in the States through trade.

As a rich economy, the EU impacts the realisation of RtF through its involvement in preferential trade agreements and providing food aid to vulnerable countries in food shortages. The EU has substantially influenced world trade law through its involvement in several free trade agreements (FTA) under the GATT Article XXIV Generalised System of Preference (GSP).¹³⁸⁶ As of November 2020, the EU had thirty-six FTAs involving over 100 countries¹³⁸⁷, with some GSPs exclusively for developing countries.¹³⁸⁸ These FTAs relate to more limited

¹³⁸⁵ *EC Hormones— Report of the Panel and Report of the Appellate Body* (n 776); See also *EC Bananas— Report of Panel* (n 679) and *EC – Bananas – Report of the Appellate Body* (n 714)

¹³⁸⁶ GATT, Article XXIV relates to the Generalised System of Preferences (GSP)

¹³⁸⁷ See for instance Europa, ‘Negotiations and Agreements: Implementing EU Agreements’

<https://ec.europa.eu/trade/policy/countries-and-regions/negotiations-and-agreements/index_en.htm#:~:text=Published%20in%20November%202020%2C%20and,36%20main%20preferential%20trade%20agreements> Accessed 17 May 2021

¹³⁸⁸ EC, ‘Development’ <<https://ec.europa.eu/trade/policy/countries-and-regions/development/>> accessed 17 May 2021

issues than the WTO agreements and are viewed as alternative ways of liberalising trade in specific areas.¹³⁸⁹ In dealing with developing countries, the EU may also provide Aid for Trade (AfT) assistance in sectors where the developing countries need support, including infrastructure, transport and agriculture. These aids may be granted on reciprocal terms which restrict export tariffs on agricultural products and raw materials, thus granting the EU access to foodstuff and raw materials from the developing country trading partner.¹³⁹⁰ Through these preferential trade agreements and aid for trade, the EU promote the realisation of RtF through international cooperation and trade for itself and the developing country-trading partners.

Under the Lisbon Treaty, the Union and the States have concurrent legislative competence in issues relating to the direct provision of food to vulnerable third-party countries in cases of food shortages. Article 214 TFEU empowers the Union to offer humanitarian aid to non-EU member countries, whilst Articles 208, 209, and 21 TFEU allow the State limited competence in such dealings with third-party countries provided the State exercises its competence through development cooperation. The ECJ, however, extended the external competence of Member States when it laid down the doctrine of parallel competence in Case T-576/08 *Federal Republic of Germany v European Commission*.¹³⁹¹ This doctrine of parallel competence allows Member States to develop extraterritorial food aid policies aside from the policies of the Union.¹³⁹² To avoid conflicts in the execution of these parallel competencies, in 2006, the Council laid down the European Consensus on Development which sets out the common goals and principles for the exercise of these parallel competencies¹³⁹³. These

¹³⁸⁹ See for instance the EBA Agreement discussed in Chapter 5. See also Gruni (n 1329) 83

¹³⁹⁰ Europa, 'The Raw Materials Initiative—Meeting our Critical Needs for Growth and Jobs in Europe' (n 1345); See also Europa, Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, 'Global Europe: Competing in The World, a Contribution to the EU's Growth and Jobs Strategy', COM/2006/0567 final 2 <<https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52006DC0567&from=ES>> accessed 14 October 2021

¹³⁹¹ *Federal Republic of Germany v European Commission* [2011] ECJ Case T-576/08

¹³⁹² Ibid

¹³⁹³ Europa, 'Joint Statement by the Council and the Representatives of the Governments of the Member States Meeting within the Council, the European Parliament and the European Commission on European Union

common goals include reducing poverty, fighting hunger and supporting social development *inter alia*.¹³⁹⁴ This Consensus on Development requires the EU to contribute to the attainment of the SDGs¹³⁹⁵ and other development objectives when concluding measures in its areas of exclusive competence, including international trade.¹³⁹⁶ Pursuing this obligation would require the EU to promote non-trade objectives such as food security and poverty eradication as part of its international trade objectives. This was because the Union may promote the realisation of RtF through international cooperation.

Under the framework discussed above, the EU contributes to SDG2 of eliminating hunger through external structural funds such as the EU Development Fund and the EU Development Co-operation Instrument dedicated to promoting food security and providing economic support to developing countries.¹³⁹⁷ It also established the Food Security Thematic Programme under which it carries out a number of development programmes among developing countries.¹³⁹⁸ In 2008 – 2010 it established another external fund, Food Facility Fund, to encourage food producers to increase food supply by providing safety nets to local populations affected by volatile food prices to improve food production in the long term.¹³⁹⁹ Under this framework, the EU provides food directly to vulnerable populations during famines

Development Policy' (2006) OJ C46/1 <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A42006X0224%2801%29>> accessed 21 February 2022

¹³⁹⁴ *Ibid*

¹³⁹⁵ Then Millennium Development Goals (MDGs)

¹³⁹⁶ See The New European Consensus on Development: Europa, 'Joint Statement by the Council and the Representatives of the Governments of the Member States Meeting within the Council (n 1380)

¹³⁹⁷ See Europa, 'Towards the full integration of co-operation with ACP countries in the EU budget', COM (2003) 590 final

¹³⁹⁸ See for instance EC Regulation No. 960/2009 of 14 October 2009 amending Regulation (EC) No. 1905/2006 of the European Parliament and of the Council establishing a financing instrument for development cooperation [2009] OJ L270; See also EU Regulation No. 233/2014 of the European Parliament and the Council of 11 March 2014 which established a financing instrument for development cooperation for the period of 2014-2020, and the Development and International Cooperation Instrument budgeting €29.18 billion for geographic and development programme in Sub-Saharan Africa <https://international-partnerships.ec.europa.eu/funding/funding-instruments/global-europe-neighbourhood-development-and-international-cooperation-instrument_en> accessed 18 October 2022

¹³⁹⁹ See for instance EC Regulation No 1337/2008 of the European Parliament and of the Council of 16 December 2008 establishing a facility for rapid response to soaring food prices in developing countries between 2008 - 2010[2008] OJ L354/62

and extreme food shortages.¹⁴⁰⁰ The EU Directorate General for Humanitarian Aid and the EU External Action Service coordinate these measures and liaise with multilateral institutions such as the UN, FAO, and World Food Programme (WFP) for research and food provision.¹⁴⁰¹ Thus, through the Developmental Policy established under Article 214 TFEU, the EU facilitates the realisation of RtF through international cooperation and assistance.¹⁴⁰²

The Lisbon Treaty also mandates the Union to promote human rights through its external action. The TEU explicitly mandates the Union to include objectives such as sustainable development, human rights and development cooperation in its external policies.¹⁴⁰³ The CJEU interpreted this mandate in Opinion 2/15 as an ‘obligation’ falling on the EU to include such interests in its Common Commercial Policy when negotiating free trade agreements with other countries.¹⁴⁰⁴ Although this obligation does not create a justiciable right on the part of third-party States, the EU pursues this obligation through various initiatives, including measures which facilitate the progressive realisation of RtF. For instance, it observes the European Consensus on Development which requires it to contribute to the attainment of the SDGs and other development objectives as part of its trade objectives.¹⁴⁰⁵ It also establishes a policy review programme- Policy Coherence for Development which encourages the EU to

¹⁴⁰⁰ See Regulation (EC) No. 219/2009 of the European Parliament and of the Council of 11 March 2009 with amendments in 2021. See also EC Regulation No 219/2009 of the European Parliament and of the Council of 11 March 2009 adapting a number of instruments subject to the procedure referred to in Article 251 of the Treaty to Council Decision 1999/468/EC with regard to the regulatory procedure with scrutiny Adaptation to the regulatory procedure with scrutiny — Part Two OJ L 087. It also provides humanitarian aid and agricultural support to developing countries.

¹⁴⁰¹ The Partnership Between the UN and EU ‘The United Nations and the European Commission working together in Development and Humanitarian Cooperation’
<<https://www.unbrussels.org/wp-content/uploads/2011/09/report2005.pdf>> accessed 21 February 2022; See also WFP – EU Partnership Report (2015)

<https://www.europarl.europa.eu/meetdocs/2014_2019/documents/deve/dv/wfp-eu_partnership_factsheet_2015/wfp-eu_partnership_factsheet_2015_en.pdf> accessed 21 February 2022

¹⁴⁰² See TFEU 2009, Arts 21, 208, 209 and 214; See also Europa, ‘Joint Statement by the Council and the Representatives of the Governments on European Union Development Policy’ (n 1380)

¹⁴⁰³ Lisbon Treaty 2009, TEU Article 21

¹⁴⁰⁴ Europa, ‘Opinion of the Court (Full Court) pursuant to Article 218(11) TFEU’ (16 May 2017) Document 62015CV0002(01) <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62015CV0002%2801%29>> accessed 27 February 2022

¹⁴⁰⁵ See The New European Consensus on Development: Europa, ‘Joint Statement by the Council and the Representatives of the Governments on European Union Development Policy’ (n 1380)

entrench development objectives in its external policies and to use its external trade policies to pursue nontrade objectives such as food security in vulnerable countries.¹⁴⁰⁶ Thus, beyond the provisions of Article 11 ICESCR, the Lisbon Treaty imposes an obligation on the Union to facilitate the realisation of RtF through trade and international cooperation.

The Lisbon treaty encourages international cooperation rooted in respecting and promoting socioeconomic rights in third-party countries. Thus, the EU tends to support food security in vulnerable countries through trade. For instance, in Article 9 of the defunct Cotonou Agreement, the EU sought to establish cooperation aimed ‘towards sustainable development centred on the human person who is the main protagonist and beneficiary of development; this entails respect for and promotion of all human rights’.¹⁴⁰⁷ It also undertook to ‘promote and protect all fundamental freedoms and human rights, be they civil and political, or economic, social and cultural’.¹⁴⁰⁸ All parties to this agreement- the EU and the ACP countries included the realisation of the RtF among the objectives of the Agreement.¹⁴⁰⁹ In its recent EBA Agreement with ACP countries, the EU introduced terms under the GSP plus, requiring the recipient States to ratify a number of human rights conventions, including the ICESCR and CRC.¹⁴¹⁰ This way, it facilitates the progressive realisation of RtF by integrating socioeconomic rights in international trade regimes.

¹⁴⁰⁶ See Communication from the Commission, ‘Policy Coherence for Development—Establishing the policy framework for a whole-of-the-Union approach’ COM(2009) 458 final establishing the framework for Overseas Development Assistance (ODA); See also EU Commission, ‘A twelve-point EU action plan in support of Millennium Development Goals’ COM(2010) 159 final

¹⁴⁰⁷ Partnership Agreement between the members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 June 2000 (revised in 2005 and 2010), O.J. L 287, Article 9.1

¹⁴⁰⁸ Ibid

¹⁴⁰⁹ Ibid amended in 2018, (OJ L 317 15.12.2000) Article 52

<http://data.europa.eu/eli/agree_internation/2003/159/2018-05-31> accessed 22 February 2022

Although this Agreement has been criticised because it tends to place unrealistic responsibilities on the EU with no provision for reciprocity. This clause was removed in subsequent agreements such as the EBA Agreement.

See EC Regulation No 978/2012 (n 943)

¹⁴¹⁰ EBA, Article 9 and Annex VIII

8.6 Conclusions

Having contrasted the outcome indicators of the RtF in the EU and SSA, this chapter finds that compared to the EU, SSA has an alarming rate of food insecurity which is a primary indicator of violation of the RtF. SSA also appears to be stagnating and regressing in terms of SDGs 1 and 2 of eliminating poverty and halving hunger by 2030, thus signifying regressivity which is also indicative of the violation of RtF. A comparative analysis of the structural indicators suggests that both regions appear not to have made adequate provisions for the RtF in their local and regional frameworks. Whilst the SSA legal framework seems to make greater provision for the protection of socioeconomic rights compared to the EU, the latter has taken steps to incorporate elements of the RBA to food security into its trade and policy regime (process). Thus, a comparative analysis of the process indicators of both regions vis-à-vis the WTO shows that the EU has taken steps well ahead of SSA and the WTO to incorporate elements of RBA through public participation, accountability, wellbeing considerations, periodic impact assessment as well as international cooperation and assistance for the progressive realisation of RtF into its framework and trade regime. This chapter thus highlights the lapses in the SSA trade regime and the areas of requisite cross-pollination with the EU in light of the situation in the WTO in order to enhance the realisation of RtF by incorporating socioeconomic rights in trade.

Chapter Nine: Conclusion

9.1 Introduction

Having examined structural, process and outcome indicators of the RtF in SSA in contrast to the situation in the EU, this chapter draws the conclusion to the study. It addresses the question of how the relationship between trade and socioeconomic rights could be leveraged to enhance the realisation of RtF in SSA through trade. This study critically examined the impact of agricultural trade liberalisation on access to food in SSA vis-à-vis the EU, demonstrating how socioeconomic rights could be incorporated into trade to augment the realisation of RtF in SSA through trade. This chapter recapitulates the main results of the thesis, reflects on the consequence of the findings and recommends practical ways of integrating the rights-based approach to food security into international trade in order to facilitate access to food in SSA through trade.

- To critically examine the regional trade and human rights regimes of SSA and the EU, demonstrating how regional trade could be leveraged to promote the realisation of RtF in light of the extraterritoriality of the RtF obligations.
- To examine the structural, process and outcome indicators of RtF in SSA, comparing it with the corresponding indicators in the EU to highlight how structural and process reforms could augment the outcome of adequate access to food.

9.2 Conclusion

This study is divided into two main sections- the first is the introductory chapters which include chapters 1 - 4 of this study. The second section is the analytical chapters which include chapters 5 - 8. The first section introduces the study, delineating the research objectives, contribution to knowledge, methodology, theoretical and legal framework *inter alia*. The second section examines the impact of trade liberalisation on the RtF in developing countries

of SSA vis-à-vis the EU, examine the indicators of RtF in SSA contrasting it with relative indicators in the EU, and critically analyses the trade regimes of both regions in light of their world trade commitments and highlights possible ways of incorporating socioeconomic rights into the respective trade regimes to facilitate the realisation of RtF through trade.

This study conducts a qualitative analysis of the ICESCR and other relevant instruments on the RtF to establish the fundamental elements, obligations, and the test of fulfilment or violation of the RtF. In determining the violation and fulfilment of the RtF, this study adopts socio-legal and comparative research methods, examining the prevalence of poverty and food insecurity in SSA and comparing it with the situation in the EU in light of the world trade laws. It compares the legal framework, social state and trade regimes of the EU and SSA to demonstrate the extent of violation/realisation of RtF in both regions in light of the trade liberalisation laws of the WTO. Through this comparison, it highlights areas of possible legal transplant from the EU system into the SSA and WTO regimes to augment the realisation of RtF in SSA. It also adopts a multidisciplinary approach which supports the use of legal and economic principles to analyse violations of RtF in the research area and to canvas for legal cross-pollination to integrate socioeconomic rights in trade.

This study examined the right to food (RtF) as a socioeconomic right. It examined the legal nature of the right, its justiciability and enforceability based on the provisions of Article 11 ICESCR. It found that the RtF is a legal right and is particularly enforceable in jurisdictions where it has been recognised in the local laws and constitution of the States. With proactive judicial activism, the courts have also recognised its legality, enforcing it as a component of other protected rights, such as the right to life and health in jurisdictions where the RtF is not expressly protected in the fundamental laws.

This study further examined the nature of obligations flowing from the RtF and the duty of the State as the primary duty bearer to act independently and through international cooperation

to progressively realise this right. It examined the extraterritoriality of the right in light of the duty of States to cooperate internationally to achieve the progressive realisation of the RtF. It also examined the impact of international trade regimes on the realisation of RtF, particularly in SSA and the EU. It took into account certain international trade liberalisation agreements, especially the WTO Agreement on Agriculture and its impact on access to food in SSA vis-à-vis the EU. It also examined the impact of other free trade agreements, particularly the EU Free Trade Agreement with the ACP Countries (which includes all SSA Countries), in facilitating access to food. It also examined the impact of international economic unions of the EU and SSA in facilitating the realisation of the RtF in their respective regions. It found that although the State is the primary duty bearer, international organisations and world trade liberalisation regimes play a vital role in realising the RtF in the respective Member countries.

The indicators used for assessing the realisation of RtF in this study are the structural, process and outcome indicators based on the UN list of illustrative indicators. Using the benchmark of the FAO guidelines on the RtF, this study rates the level of constitutional protection of RtF in the research area as low, medium or high.¹⁴¹¹ High-level protection includes explicit protection of the RtF in the constitution of a State.¹⁴¹² Medium-level protection includes an implicit recognition of the RtF as a component of other socioeconomic rights, such as the right to an adequate standard of living, and social security, *inter alia*. Low-level protection is found where the RtF is completely absent from the relevant laws of the State, or it may only be remotely inferred from other rights which are recognised by the State or where elements of RtF are contained in policy guidelines which are not justiciable.

Examining the structural indicators of the RtF in SSA vis-à-vis the EU, this study found that the level of protection accorded the RtF by virtue of its inclusion in the domestic laws of

¹⁴¹¹ FAO, 'Right to Food Guidelines; Information Papers and Case Studies' (n 988)

¹⁴¹² Ibid

the various SSA countries is relatively high, but the legal enforcement of this right by the domestic courts is generally low. Thus on the average, the structural indicators of the RtF in the domestic laws of SSA States guarantee medium-level protection. The RtF is not expressly recognised in the regional legal framework of SSA, particularly the AU Charter and the Banjul Charter. However, the courts have enforced this right by inferring it from other socioeconomic rights recognised in the Framework, such as the right to life and health. This study, therefore, finds that the legal framework of SSA does not make adequate provision for the protection of RtF because this right is not expressly protected in the fundamental laws of the region, thus limiting its enforceability as a legal right and creating a *prima facie* evidence of the violation of RtF in the region. This finding is hinged on the understanding that the inclusion of the RtF in the fundamental laws of any jurisdiction is vital for the enforcement of the said right.

Assessing the structural indicators of the RtF in the EU takes a slightly different tone because the EU trade and human rights mechanisms are a shared legislative space between the Union and the States. The power of the individual Member States to legislate in these areas is limited to the legislative provisions of the Union. Member States are required to give effect to EU rules, except where the rules are silent, inadequate, or do not cover the broader scope of the obligations/requirements on any given issue. Thus the powers of the States to act independently is subject to their obligations under the EU treaties. However, an assessment of the legislative provisions of the Union and its 27 Member States against the benchmark of the FAO guidelines on the RtF tends to suggest that the level of constitutional protection of RtF in the EU is low because neither the regional nor State laws expressly protect the RtF. The courts seem to derive jurisdiction by extending the provisions of the EU treaties and UN human rights conventions, thus creating a dual system of human rights protection. However, there is no case law on the RtF in the EU, signifying a low level of protection of the RtF in the EU framework, which is indicative of a violation of the RtF. This study, therefore, finds that the legal

framework of the EU does not make adequate provision for the protection of RtF because this right is not expressly protected in the fundamental laws of the region and its Member States, thus limiting its enforceability as a legal right and creating a *prima facie* evidence of the violation of RtF in the region.

An examination of the outcome indicators of RtF shows that SSA appears to be the most food-insecure region with the fastest-growing population of undernourished persons in the world. This is indicative of widespread violation of RtF in SSA. On average, most SSA countries are not able to achieve the sustainable development goals of poverty eradication and are either regressing or stagnating in progress towards achieving this goal by 2030. Almost all SSA countries face very high levels of food insecurity, evident in widespread undernourishment, stunting, wasting and regression in achieving the sustainable development goal of zero hunger by 2030. This is indicative of widespread violations of the RtF.

An assessment of the outcome indicators of the RtF in the EU shows that the prevalence of undernourishment is generally low in the EU compared to other regions of the world. Over half of the EU Member States are achieving or progressing towards achieving the sustainable development goal of zero hunger. No EU country is stagnating or regressing in achieving the sustainable development goal of poverty eradication, thus indicating progressive realisation of RtF. EU has relatively low levels of food insecurity, evident in widespread undernutrition, adult malnutrition, infant stunting, wasting and mortality. Although no EU country is on track towards achieving the sustainable development goal of zero hunger by 2030, there is no indication of regressivity, thus signifying progressive realisation of the RtF.

Assessing the process indicators of the RtF, this study found that trade liberalisation agreements have a significant impact on the ability of States to ‘take appropriate steps’ to achieve the progressive realisation of RtF in compliance with Article 11 of the ICESCR. This is because various trade obligations relating to the import and export of food place legal

constraints on the ability of States to take certain economic measures to address food shortages and combat food insecurity. This study found that there are overlapping interests in human rights and trade regimes such as welfare, development, food security, equity and fairness. Whilst there might not be any outright conflict between the legal framework/structure of the human rights and international trade regimes, there are inconsistencies in the process, such as the application of the laws, the nature of obligations they create, and the objectives they set out to achieve *inter alia*. These processes significantly impact the realisation socioeconomic rights and, indeed, the outcome indicators of RtF. This necessitates the incorporation of socioeconomic rights into world trade to facilitate access to food in SSA through trade.

Examining the process indicators of the RtF in this study thus involves an examination of the relevant trade laws of the WTO, EU and SSA to demonstrate how the application of world trade liberalisation laws impact the realisation of RtF in the EU and SSA. Examining the market access and subsidy regimes of the AoA, this study found that in comparison to the impact on food-exporting countries, certain trade rules such as tariffication and comparative advantage tend to limit the ability of net food-importing countries (including all SSA countries) to fulfil their RtF obligations by expanding methods of production, conservation and distribution of food. This is because the AoA requires State Parties to concentrate on producing the foodstuffs in which they have comparative advantage and open up their market to other products; at the same time, State Parties are required to convert all non-tariff bindings to tariffs and gradually eliminate the tariffs. These policies tend to have an adverse impact on access to food in SSA countries because it exacerbates overreliance on food importation. Although the WTO allows some flexibilities/exceptions to mitigate the harshness of trade liberalisation rules on vulnerable States, the strict interpretation of these exceptions by the Dispute Settlement Body requires State Parties to adopt the least trade-restrictive measure rather than the most effective measure, even for food security purposes. This requirement tends to limit the

‘available resources’ open to a State to take ‘adequate measures’ to realise the RtF under Article 11 ICESCR because the least trade restrictive measure may not be most effective for promoting access to food. This way, agricultural trade liberalisation under the WTO tends to limit the ability of States to progressively realise the RtF.

This study also examined the Generalised System of Preference as one of the exceptions to the WTO trade liberalisation rules. It found that the GSP mechanism is loosely regulated by the WTO, leading to the inclusion of arbitrary trade terms by preference providers, which tend to adversely impact the realisation of RtF in the beneficiary countries. It examined the international trade agreements between the EU and SSA countries as a case study, highlighting the challenges of the EU external trade policy, which does not seem to prioritise the wellbeing of preference-receiving trade partners. These trade agreements include certain import/export requirements, which tend to impose legal constraints on the capacity of the preference-receiving States to fulfil their RtF obligations. This study found that an express recognition of socioeconomic rights as an exception to trade rules is fundamental to its inclusion in trade liberalisation regimes and the process of facilitating access to food through trade. This study, therefore, suggests trade rules should be interpreted in such a way that it gives life to the wider objective, taking into consideration the non-trade concerns of food security and S&D treatment of developing countries and establishing greater coherence between human rights treaties and international trade regimes to facilitate the realisation of RtF among vulnerable populations of SSA through trade.

An examination of the process indicators of RtF in SSA showed that the SSA, through its Free Trade Agreement (AfCFTA), has taken some steps to promote the Rights-Based Approach to food security in trade by imbibing certain elements of the Voluntary Guidelines for the realisation of RtF in terms of food security such as capacity building and wellbeing considerations in trade. However, much is to be desired in terms of incorporating public

participation, periodic impact assessment, wellbeing considerations and State accountability. Thus, it appears that the AfCFTA trade regime has not made adequate provisions for incorporating socioeconomic rights into its processes to help realise the RtF through trade. Thus, this lapse necessitates this study on practical ways of incorporating socioeconomic rights into trade liberalisation regimes to facilitate the realisation of RtF in SSA.

Assessing the process indicators of the RtF in the EU, this study found that an important feature of the EU governing system is that both human rights and trade systems are governed by a single governing system, and the obligations flowing from both regimes are enforceable in the same courts. Although the RtF is not expressly protected in the State and regional framework of the EU, the EU established a governing system which is founded on the values of freedom, democracy, equality, the rule of law and respect for human rights. It also established fundamental rules such as the non-regression clause, which requires Member States not to derogate from the recognised human rights standards or to allow others to engage in activities that could violate the socioeconomic rights of the people. It also incorporates the ‘non-regression’ clause into various Directives and Agreements, including its external trade mechanism, thus forbidding its trade partners from reneging on their basic human rights commitments. The EU system also encourages public participation through the Parliament. It also prioritises wellbeing in trade and establishes an impact assessment mechanism to monitor the implementation of its values and ensure that the objectives of all policies (including trade policies) are coherent with existing guidelines, including respect for human rights. It thus facilitates access to food by discouraging agricultural trade liberalisation measures which could impair the ability of Member States to take appropriate measures to progressively realise the RtF.

Further to the comparison of the realisation of RtF in SSA with the EU, this study recommends the transplant of certain processes from the EU system into world trade and SSA

regimes to augment the progressive realisation of RtF in SSA. Recognising the possible challenges of legal transplant due to the legal, economic and sociocultural differences between the EU and SSA, this study reinforces the voluntary guidelines for the realisation of RtF in terms of food security because these guidelines are of universal application and are useful for adaptive legal transplant from EU to SSA. These recommendations are explained below.

9.3 Recommendation

In light of the analysis above, this study suggests the inclusion of socioeconomic rights into world trade to facilitate access to food in net food-importing countries of SSA. This could be achieved by including socioeconomic rights as express exceptions to trade laws, through proactive judicial activism and by adopting the right-based approach (RBA) to food security in trade. Adopting the RBA to food security in trade involves integrating elements of public participation, periodic impact assessment, State accountability and wellbeing considerations in trade. These recommendations are in line with the Report on Indicators for Promoting and Monitoring the Implementation of Human Rights, which requires that over and above food availability, emphasis should be placed on indicators that capture the nature of access to such goods and services that allow an individual to enjoy his/her rights.¹⁴¹³ These food security recommendations are discussed below.

9.3.1 Integrating Socioeconomic Rights in Trade Framework

Integrating socioeconomic rights in the legal structure of any State or organisation is essential to the realisation of relevant human rights objectives in any jurisdiction. Agricultural trade laws should provide negotiating directives, clarify the priorities and set clear objectives

¹⁴¹³ See OHCHR, 'Report on indicators for monitoring compliance with international human rights instruments' (n 230) para 10

for the proposed trade agreement. These objectives should include clear provisions for non-trade concerns such as food security and human rights considerations in trade. These objectives should apply in a manner which recognises human rights considerations as a valid exception to adverse trade obligations. It should also include clear directives on how the human rights exceptions will apply to the entirety of the agreement. For instance, the food security objective of the WTO Agreement on Agriculture (AoA) and the AfCFTA should be accompanied by directives that specify how this objective will be achieved through the respective agreements. It should also set benchmarks which will be useful for evaluating the extent of realisation of this objective when necessary.

In terms of the structural, process and outcome indicators of the realisation of RtF through the various trade regimes, the AoA and the AfCFTA recognise food security among the objectives of the respective Agreements. However, these Agreements fail to incorporate tenets of food security into the body of the agreement (structure). Food security is also not included in the relevant policies and processes of the Agreements. The impact is that the outcome of trade liberalisation under these regimes tends to undermine the RtF, and it does not seem to encourage Member States to fulfil their RtF obligations. On the contrary, the EU market strategy sets clear goals for its import and export tariffs to support the presence of European businesses in other countries, encourage domestic agricultural production and improve an adequate standard of living in the region. It establishes a direct link between the Member States and European businesses, and endorses various strategies which promote market access and realisation of food security through agricultural trade. This study, therefore, proposes that explicitly articulating non-trade concerns of wellbeing, food security and human rights in the framework of trade agreements (structural indicators) and the respective trade policies and processes (process indicators) would help facilitate the realisation of RtF through trade in its outcome (outcome indicators).

9.3.2 Adopting the Rights-Based Approach (RBA) to Food Security in Trade

As earlier discussed, the RBA realises the aims of trade while incorporating elements of the process and outcome of human rights through public participation, impact assessment, accountability, wellbeing considerations, and non-discrimination *inter alia*.¹⁴¹⁴ It encourages embedding trade within society and thus maintaining trade as a means to an end, which end is achieving an adequate standard of living for everyone, including food.¹⁴¹⁵ To effectively integrate the RBA to food security in trade, the relevant elements should be expressly included in the legal framework of the trade organisation. It also requires that the element of RB to food security in trade, including public participation, periodic impact assessment, accountability, and wellbeing considerations, *inter alia*, be included in the trade processes. These elements of the RBA are discussed in further detail below.

Public Participation in Trade

This study recommends market strategies that promote public participation as a means of incorporating the RBA to food security in trade. Processes which allow grassroots involvement tend to protect minority interests and lend legitimacy to the relevant rules. Public participation in this study relates to all aspects of public administration as well as the formulation and implementation of policies at international, national, regional and local levels. It is a 'procedural right' pursuant to Article 25 ICCPR 1966 and forms the basic element of the RtF and several other substantive human rights.

This study found that although international trade regimes tend to limit certain policy choices of their Member States under international law, their negotiations are often conducted in closed meetings with minimal public participation. This is the situation, particularly with the

¹⁴¹⁴ Morten Broberg and Hans-Otto Sano (n 210) 664-680

¹⁴¹⁵ ICESCR 1969, Article 11

WTO and AfCFTA. Despite the binding effect of its agreements, the WTO trade liberalisation regime does not make provisions for individual victims of adverse trade rules to challenge these rules or engage in the dispute settlement system of the organisation. Only States (not individuals) have direct participatory rights in the WTO negotiations and dispute settlement processes. The involvement of NGOs and Civil Society Organisation is limited to informal briefings, while intergovernmental organisations like the FAO are only accorded observer status. Similarly, in the AfCFTA, it appears that there are so far no calls for public inputs or reports on grassroots involvement in the negotiations of the main agreement or its protocols, and there are currently no precedents to assess the extent of public participation. Under the AfCFTA trade negotiations, most States are represented by economic experts and politicians with limited public involvement through referendums, opinion polls or elected representatives. Human rights experts appear to have very little involvement in these trade regimes.

On the contrary, the EU trade regime under the Lisbon Treaty provided for extensive public involvement in trade negotiations and policy-making. It empowers the EU Parliament to be involved in the Union's trade policymaking without directly taking part in negotiation processes. Under this regime, the Council is required to carry the Parliament through all stages of trade negotiation processes, and the Council must obtain the consent of the Parliament before it concludes certain treaties under Article 218 TFEU. The Parliament thus reserves the power to veto or reject certain international trade agreements and render them unenforceable in the EU. Through this system, the EU maintains effective public involvement as well as checks and balances in trade policymaking.

Therefore, this study recommends transplanting laws and systems from the EU system into the WTO and AfCFTA to promote the RBA to food and facilitate the realisation of RtF through trade. The substantive laws and agreements of the WTO and AfCFTA should evolve to include provisions for the allocation of powers, public representation at international trade

negotiations, and a clear means by which individual citizens may exercise their right to participate in trade negotiation and public affairs. This study suggests that trade regimes should establish protocols which incorporate public participation through opinion polls, referendums and legislative approval of trade agreements before they become enforceable in the region. Similar to the EU, AfCFTA should establish processes that form direct partnerships with market participants and working groups for specific products. Through such Partnerships, the organisation could derive direct information from market participants about the challenges in the wider market. The States could utilise such information in negotiating the AfCFTA protocols. It could also influence the position of the SSA countries in world trade negotiations and WTO Dispute Settlement. Additionally, information derived through such partnerships create the database on which indicators and benchmarks could be developed for assessing the realisation of food security objectives. It could also help to develop regulatory instruments and mechanisms to tackle food insecurity, thereby promoting the realisation of RtF through responsive trade liberalisation.

Wellbeing Considerations in Trade

This study recommends the transplant of market access strategies which prioritise wellbeing as a means of incorporating the RBA to food security in trade. This study proposes that for wellbeing to be achieved through trade, it ought to be included in the relevant legal framework of the organisation. It found that, on the one hand, the WTO and AfCFTA trade regimes do not seem to adequately incorporate this element of the RBA because wellbeing is not expressly included among their trade objectives. The TEU, on the other hand, expressly includes wellbeing and constant improvements of the peoples' living and working conditions among its objectives. The EU framework sets out structural and common indicators to measure the achievement of these objectives, including economic performance, employment, research,

innovation and education, economic reform, social cohesion, and poverty reduction *inter alia*.

This way, it establishes wellbeing as an objective of the Union and a fundamental indicator of the achievement of Union objectives.

This study, therefore, proposes that including wellbeing objectives and indicators in the legal framework of the respective trade regimes will help ensure that wellbeing is prioritised in the various protocols and policies of the organisation. Trade liberalisation agreements ought to maintain human beings and wellbeing as the end, and trade/development as a means to achieving this end. This study recognises the interconnectivity between wellbeing and public participation. Thus it reinforces the importance of enhanced grassroots involvement in trade liberalisation processes to help articulate wellbeing needs and incorporate wellbeing considerations into trade liberalisation regimes. These elements work together to facilitate the realisation of RtF through trade.

Periodic Assessment of the Social Impact of Trade Liberalisation

This study further recommends incorporating socioeconomic rights in trade through periodic assessment of the social impact of trade liberalisation rules. It proposes that periodic impact assessment is also essential for the infusion of wellbeing considerations in trade liberalisation regimes. It appears that the WTO and AfCFTA trade regimes do not make adequate provisions for periodic assessment of the social impact of its trade liberalisation agreements and protocols. There is no platform in the WTO to monitor the impact of its trade agreements or the decision of the DSB on the masses. There is also no provision for individuals to challenge adverse trade agreements. This study particularly criticises the coercive system of implementing DSB decisions using countermeasures and countervailing measures. This method of enforcement does not seem to take into account the impact of the countermeasures on the wellbeing of the masses and may thus expose vulnerable populations to trade sanctions

which may lead to regressivity and a further violation of the RtF. Likewise, in SSA, there seems to be little indication that human rights impact assessment is being carried out as part of the negotiation of the AfCFTA Agreement and its protocols.

However, the EU trade mechanism tends to maintain an integrated system of free trade and human rights. Under this system, both human rights and trade are governed by the same executive body, and the respective laws require parliamentary assent to gain legality. The CJEU hears both human rights and trade claims, and court judgments are enforced through guidance, dialogue and cooperation. This way, the system engages all parties to the case, taking note of the socioeconomic concerns and challenges of enforcing trade agreements. Thus, it balances the relationship between international trade and human rights. Without periodic impact assessment and access to courts, trade laws may hamper access to food among the poor and yet remain unchanged, thus leading to regressivity and a continued violation of the RtF. This study recommends that trade agreements should include clear directives for periodic impact assessment.

Impact assessment directives may require States to carry out impact assessment when negotiating trade agreements or ratifying trade laws/policies. Such directives must be clear and explicit, addressing specific trade objectives and emphasising the social impact of trade obligations. Trade agreements should be set for a fixed term, after which the States will conduct impact assessments to determine the plausible terms of renewal of trade agreements. Legislative proposals and trade policies should be based on impact assessment reports and feedback from opinion polls to check the perpetuation of adverse trade policies. It will also help to ensure that socioeconomic rights considerations are incorporated into trade laws to facilitate the realisation of RtF through trade. This study goes to show that the elements of RBA are interconnected. Therefore, human rights impact assessment could be strengthened by an effective public participation system, and it will help to identify and address wellbeing

concerns and facilitate the incorporation of socioeconomic rights in trade to augment the realisation of RtF in SSA.

International Cooperation and Assistance

This study suggests that trade liberalisation ought to create opportunities for international cooperation among States to facilitate the realisation of RtF among import-reliant countries of SSA pursuant to Article 11 ICESCR 1976. Preferential trade agreements amongst SSA countries and with developed countries should encourage the inclusion of common assistance and cooperation objectives to promote food aid in cases of food shortage and other market access strategies which ease access to food in SSA. Such assistance may be granted on reciprocal terms which restrict export tariffs on agricultural products and raw materials between trading partners. Such common assistance and cooperation measures will help achieve the sustainable development goals (SDGs), particularly SDG 1 of poverty eradication and SDG2 of eliminating hunger.

This study recommends selective transplant from the EU system to include clear goals in the WTO and AfCFTA framework for reducing poverty, fighting hunger and supporting social development. Like the EU, trade liberalisation under the AfCFTA and WTO should include development cooperation instruments that promote food security and provide economic support to developing and least-developed countries. Agricultural trade agreements should specifically incorporate food security thematic programmes under which it carries out a number of development programmes among developing countries. Under this framework, the AfCFTA may provide food directly to vulnerable populations in times of famines and extreme food shortages.

Similar to the EU, the framework of the WTO and the AfCFTA should establish ancillary trade obligations which reiterate human rights obligations and require Member States

to ratify a number of human rights conventions, particularly the UDHR, ICCPR and the ICESCR. It should include explicit exceptions which encourage Member countries to pursue objectives that promote human rights, sustainable development and food security as part of their trade objectives. Thus, even beyond the provisions of the ICESCR, countries will undertake legitimate obligations to facilitate the realisation of RtF through international trade cooperation. The respective trade organisations may also cooperate with multilateral institutions like the UN, FAO, and World Food Programme for research and provision of food aid to vulnerable countries. This way, it would facilitate the realisation of RtF through international cooperation and assistance.

9.4 Final Statement

This study has established that there are areas of overlapping interest between international trade and human rights law and that agricultural trade liberalisation invariably affects the progressive realisation of RtF, particularly among food-importing countries of SSA. This highlights the need for greater coherence between trade and human rights to facilitate the realisation of RtF in SSA through trade liberalisation. A comparative analysis of the structural and outcome indicators of RtF in SSA and the EU shows that although SSA has a more protective legal framework explicitly recognising the RtF, the outcome indicators show that the EU is thriving better than SSA in achieving the progressive realisation of RtF. A comparative analysis of the process indicators of the RtF in both regions vis-à-vis the WTO suggests that the EU has taken steps ahead of SSA and the WTO to incorporate socioeconomic rights into its trade regime resulting in the inclusion of non-trade concerns of human rights and food security in trade. These advanced steps appear to align with Article 11 ICESCR requirements for appropriate measures through international cooperation and assistance to achieve the progressive realisation of RtF. A deeper examination of the EU trade regime tends

to suggest that incorporating socioeconomic rights into trade liberalisation systems, particularly the WTO and the AfCFTA, will augment the realisation of RtF in SSA.

A fundamental step towards incorporating socioeconomic rights in trade is expressly protecting the RtF in the fundamental laws of the State and recognising it as the basis for all State measures, including trade. Socioeconomic rights may also be integrated into trade processes through enhanced public participation, periodic impact assessment of trade on human rights, wellbeing considerations in trade and international cooperation to improve methods of production, conservation and distribution of food, particularly among food-importing countries, to ensure an equitable distribution of world food supplies in relation to need. Hopefully, the outcome of this study will contribute to a better understanding of the need to prioritise human rights considerations in trade liberalisation regimes to facilitate sustainable development and ease access to food in SSA. It would hopefully inspire further research into the development of the AfCFTA and its various protocols to demonstrate how elements of the Rights-based approach is incorporated into the AfCFTA trade regime to facilitate the realisation of RtF in SSA. Further research on the progress towards achieving SDGs 1 and 2 of zero hunger and poverty eradication by 2030 is also encouraged, to demonstrate how the SDGs may be facilitated by the incorporation of socioeconomic rights into international trade regimes.

Bibliography

Primary Sources

Case Law

- *Abdulla and others v Deutschland* [2010] Joined Cases C-175 – 179/08
- *Amrita Thapa Magar and Others v Office of the Prime Minister and Council of Ministers and Others* Writ no. 0139 [2008] 2065/1/4
- *Brazil: Measures Affecting Imports of Retreaded Tyre* [2007] Report of the Appellate Body WT/DS332/AB/R
- *Buendía and others v Peru* [2009] Inter-American Court of Human Rights Series C No. 198
- *Canada: Measures Affecting the Export of Civilian Aircraft* [1999] Report of the Appellate Body WT/DS70/AB/R
- *Centre for Minority Rights Development (Kenya) and another v Kenya* [2010] ACHPR Communication No 276/2003
- *Chakroun v Minister van Buitenlandse Zaken* [2010] Case C-578/08
- *Chile: Price Band System and Safeguard Measures Relating to Certain Agricultural Products* [2002] Report of the Appellate Body WT/DS207/AB/R
- *China: Measures Related to the Exportation of Various Raw Materials* [2012] WT/DS395/AB/R
- *China: Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum* [2015] WT/DS/431/AB/R
- *Detiček v Sgueglia* [2009] ECJ C 43/09
- *EC: Measures Concerning Meat and Meat Products* [1997] Report of the Panel WT/DS26/R/USA
- *EC: Regime for the Importation, Sale and Distribution of Bananas* [1997] Report of the Panel WT/DS27/R/ECU, WT/DS27/R/GTM, WT/DS27/R/HND, WT/DS27/R/MEX, and WT/DS27/R/USA
- *EC: Regime for the Importation, Sale and Distribution of Bananas* [1997] Report of the Appellate Body WT/DS27/AB/R
- *EC: Measures Concerning Meat and Meat Products* [1998] Report of the Appellate Body WT/DS26/AB/R and WT/DS48/AB/R

- *EC: Export Subsidies on Sugar—Report of the Panel* [2004] WT/DS283/R, WT/DS266/R and WT/DS265/R
- *EC: Measures Prohibiting the Importation and Marketing of Seal Products* [2014] Report of the Appellate Body WT/DS400/AB/R and WT/DS401/AB/R
- *EC v Kingdom of Belgium* [2019] C-543/17 and 2017/C 374/32
- *Federal Republic of Germany v EC* [2011] ECJ Case T-576/08
- *G v An Bord Uchtala and Others* [1980] IR 32
- *Golder v United Kingdom* [1975] App No 4451/70, A/18, 1EHRR 524 ECHR, IHRL 9
- *Indonesia: Certain Measures Affecting the Automobile Industry* [1998] Report of the Panel WT/DS54/R WT/DS55/R WT/DS59/R WT/DS64/R
- *Kadi and Another v Council of the EU and Commission* (2008) C-402/05
- *Korea: Measures Affecting Imports of Fresh, Chilled and Frozen Beef* [2000] Report of the Appellate WT/DS161/AB/R, WT/DS169/AB/R
- *Magar and Others v Office of the Prime Minister and Council of Ministers and Others* [2008] Writ no. 0139, 2065/1/4
- *Minister for Health v Treatment Action Campaign* [2002] South Africa Constitutional Court 10 BCLR 1033 1033
- *Morales and others v Guatemala* [1999] Inter-American Court of Human Rights Ser C No. 63
- *Mwanza and another v Attorney General* [2019] Appeal No. 153/2016 SC Selected Judgment No. 33
- *Nold v Commission* [1974] ECR 491 Case 36/75,
- *Opuz v Turkey* [2009] No. 33401/02
- *Osman v UK* [1998] ECHR 1998-VIII no. 23452/94
- *P v S and Another* [1996] CC [1996] ECR I-2143
- *Parliament v Council* [2006] ECR I-5769 Case C-540/03
- *Peru: Additional Duty on Imports of Certain Agricultural Products* [2014] Report of the Panel WT/DS457/R
- *PUCL v Union of India* [2001] Petition No. 196/2001
- *R v Cote* [1996] Supreme Court of Canada 138 DLR (4) 385
- *Rantsev v Cyprus and another* [2010] No. 25965/04
- *Rutili v Minister for the Interior* [1975] ECR 1219 Case C-13/94,
- *Scialacqua v Italy* [1998] ECHR App no. 34151/96

- *SERAC and Another v Nigeria* [2001] ACHPR Communication No. 155/96
- *Sharma and Others v GON and Others* [2008] SCN Writ No 065
- *South Africa v Grootboom and others* [2000] (CCT11/00) ZACC 192001, (1) SA 46 (CC) 66 (S. Afr.) (CCT 11/00)
- *Stauder v Ulm* [1969] ECR 4119, Case C-4/73 28 C-29/69
- *US: Section 337 of the Tariff Act of 1930* [1989] Report of the Panel 36S/345
- *US: Restrictions on Imports of Tuna* [1994] Report of the Panel GATT BISD DS29/R
- *US: Standards for Reformulated and Conventional Gasoline* [1996] Report of the Appellate Body WT/DS2/AB/R
- *US: Import Prohibition of Certain Shrimp and Shrimp Products* [1998] Report of the Appellate Body WT/DS58/AB/R
- *US: Measures Affecting the Cross-Border Supply of Gambling and Betting Services* [2005] Report of the Appellate Body WT/DS285/AB
- *Villagran Morales and others v Guatemala* (the ‘Street Children’ case) [1999] Inter-American Court of Human Rights, Series C No. 63
- *YATAMA v Nicaragua* [2005] Inter-American Court of Human Rights Ser C No 127

International Conventions, Treaties and Trade Agreements

- African Charter on Human and Peoples’ Rights (Banjul Charter) 1986
- African Continental Free Trade Area (AfCFTA) Agreement 2019
- African Continental Free Trade Area (AfCFTA) Agreement 2019 Protocol on Trade in Goods
- Agreement (Marrakesh Agreement) Establishing the World Trade Organization (WTO) 1994
- Agreement on Agriculture (AoA) 1994
- Agreement on Safeguards Pursuant to Article XIX GATT 1994
- Agreement on Subsidies and Countervailing Measures of the Marrakesh Agreement Establishing the World Trade Organization (SCM Agreement) 1994
- Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement) 1995
- Charter of Fundamental Rights of the European Union (CFR) 2009
- Charter of the United Nations (UN Charter) 1945

- Constitutive Act of the African Union 2001
- Convention on the Rights of the Child (CRC) 1989
- Declaration on the Right to Development (DRD) 1986
- Dispute Settlement Understanding (DSU) 1994
- European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) 1950
- General Agreement on Tariffs and Trade (GATT) Marrakesh Agreement Establishing the World Trade Organization 1994
- International Covenant on Civil and Political Rights (ICCPR) 1976
- International Covenant for Social Economic and Cultural Rights (ICESCR) 1976
- Treaty Establishing the European Community (Consolidated Version) Rome Treaty 1957
- Treaty on European Union (TEU) 2009 OJ C115/13
- Treaty on the Functioning of the European Union (TFEU) 2009
- Universal Declaration on the Eradication of Hunger and Malnutrition (UDEHM) 1974
- Universal Declaration on Human Rights (UDHR) 1948
- Vienna Convention on the Law of Treaties (Vienna Convention) 1980
- Vienna Declaration and Programme of Action (Vienna Declaration) 1993

Other International Agreements

- Partnership Agreement between the members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other part 2000 (revised in 2005 and 2010)
- Arrangements for Effective Cooperation with Other Intergovernmental Organizations – Relations Between the WTO and the United Nations 1995
- Memorandum of Understanding Between the WTO and UNCTAD 2002

Country Legislations

- Basic Law of the Federal Republic of Germany 1949
- Belgium's Constitution of 1831 with amendments through 2014
- Constitution of the Federal Republic of Nigeria 1999
- Constitution of the Federal Republic of South Africa 1996

- Constitution of Ireland 1937 with amendments through 2020
- Constitution of Kenya 2010
- Constitution of the Kingdom of Spain 1978 with amendments through 2011
- Democratic Republic of the Congo Constitution of 2005 with amendments through 2011
- Employment Rights Act of the United Kingdom 1996
- Employment Tribunal Act of the United Kingdom 1996
- Equality Act of the United Kingdom 2010
- Food Act of Mauritius 1998 Act No. 1/1998 Proclamation No. 23 of 1999
- Freedom of Information Act of the United Kingdom, 2000
- Hungary's Constitution of 2011 with amendments through 2013
- Labour Act of Nigeria 2004 LFN Cap L1
- Malawi's Constitution 1994 with amendments through 2017
- National Industrial Court Act of Nigeria 2006
- Public Health Act of Mauritius 1925 Act 47/1925
- Zambia's Constitution 1991 with amendments through 2016

Secondary Sources

Textbooks

- Adams M and Griffiths J, 'Against comparative method: Explaining similarities and differences' In Adams M and Bomhoff J (Eds.), *Practice and theory in comparative law* (CUP 2012)
- Agi M, *René Cassin: Father of the Universal Declaration of Human Rights* (Fenixx digital re-edition 1997)
- Albisa C and Schultz J, 'The United States: A Ragged Patchwork' in Langford M (ed.) *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (CUP 2008)
- Alston P, 'International Law and the Human Right to Food' in Alston P and Tomaševski K (eds.), *The Right to Food* (Martinus Nijhoff Publishers 1984)
- _____ and Mégret F (eds), 'The Committee on Economic, Social and Cultural Rights' in *The United Nations And Human Rights: A Critical Appraisal* 2nd edn (OUP 1992)
- Anderson K, 'Agriculture Trade Liberalisation and the Environment: A Global Perspective' in Anderson K and Josling T (eds) *The WTO and Agriculture* (Vol. 2, Edward Elgar Publishing 2005)
- Bartels L, 'Trade and Human Rights' in Bethlehem D and others (eds) *The Oxford Handbook of International Trade Law* (OUP 2009)
- Bedjaoui M, 'The Right to Development' in Mohammed Bedjaoui (eds), *International Law: Achievements and Prospects*, (UNESCO 1991)
- Bhargava A, *Food, Economics and Health* (OUP 2008)
- Bhat P I, 'Comparative Method of Legal Research: Nature, Process, and Potentiality', *Idea and Methods of Legal Research* (Oxford Academic 2020)

- Bonzon Y, *Public Participation and Legitimacy in the WTO* (CUP 2014)
- Boyle A, 'Soft Law in International Law-Making' in Evans M (ed) *International Law* (5th Edn, OUP 2018)
- Brandtner B and Rosas A, 'Trade Preferences and Human Rights' in Philip Alston (ed.), *The EU and Human Rights* (OUP 1999)
- Cardwell M, *The European Model of Agriculture* (OUP 2004)
- Coppens D, *WTO Disciplines on Subsidies and Countervailing Measures* (CUP 2014)
- Cranston M, 'Human Rights: Real and Supposed' in Raphael D D (ed) *Political Theory and the Rights of Man* (Indiana University Press 1967)
- Craven M, *The International Covenant On Economic, Social, And Cultural Rights: A Perspective On Its Development* (Clarendon Press, 1995)
- De Schutter O and Cordes Y K (eds), *Accounting for Hunger: An Introduction to the Issues* (Hart 2011)
- Desta M G, *The Law of International Trade in Agricultural Products* (Kluwer Law International 2002)
- Eide A and Helgesen J, *The Future of Human Rights Protection in a Changing World: Fifty Years Since the Four Freedoms Address: Essays in Honour of Torkel Opsahl* (Norwegian University Press in association with the Norwegian Institute of Human Rights 1991)
- Ferguson R, *The Right to Food and the World Trade Organization's Rules on Agriculture, Conflicting, Compatible or Complimentary* (International Studies in Human Rights, Brill | Nijhoff 2018)
- Gaertner W, 'Amartya Sen: Capability and Well-being' in Nassbaum M and Sen A, *The Quality of Life* (OUP 1993)

- Gayi S K, 'Does the WTO Agreement on Agriculture Endanger Food Security in Sub-Saharan Africa?' in Basudeb Guha-Khasnobis B, Acharya S S and Davis B (eds), *Food Security; Indicators, Measurement, and the Impact of Trade Openness* (OUP 2007)
- Gonzalez-Pelaez A, *Human Rights and World Trade: Hunger in International Society* (Routledge 2005)
- Gruni G, *The EU, World Trade Law and the Right to Food: Rethinking Free Trade Agreements with Developing Countries* (Bloomsbury Publishing Plc 2018)
- Harrison J, *The Human Rights Impact of the World Trade Organisation* (Hart 2007)
- Haugen H M, *The Right To Food and the TRIPS Agreement* (Martinus Nijhoff Publishers, 2007)
- Herrmann M, 'Agricultural Support Measures in Developed Countries and Food Insecurity in Developing Countries' in Guha-Khasnobis B, Acharya S S and Davis B (eds), *Food Security; Indicators, Measurement, and the Impact of Trade Openness* (OUP 2007)
- Hestermeyer H, 'Economic, Social and Cultural Rights in the World Trade Organisation: Legal Aspects and Practice', in Riedel E and Giacca G, *Economic, Social and Cultural Rights: Contemporary Issues and Challenges* (OUP 2014)
- Howse R and Teitel R, 'Beyond the Divide: the International Covenant on Economic Social and Cultural Rights and the World Trade Organization' in Joseph S, Kinley D and Waincymer J (eds), *The World Trade Organization and Human Rights* (Edward Elgar Publishing 2009)
- Jalloh C C, Clarke K M and Nmehielle V O (eds), *The African Court of Justice and Human and Peoples' Rights in Context: Development and Challenges* (1st edn, CUP 2019)
- Jennings R and Watts A (eds), *Oppenheim's International Law* (9th ed., Vol 1, OUP 1992)

- Jonathan B, ‘Litigating for Social Justice in Post-Apartheid South Africa: A Focus on Health and Education’ in Gauri V and Brinks D (eds), *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World* (CUP 2008)
- Jones W and Elasri A, ‘Rising Food Prices: Causes, Consequences and Policy Responses’ in Karapinar B and Häberli C (eds) *Food Crises and the WTO; World Trade Forum* (CUP 2010)
- Joseph S, *Blame it on the WTO? A Human Rights Critique* (OUP 2011)
- Kelsen H, *General Theory of Norms* (OUP 1991)
- ———, *Introduction to the Problems of Legal Theory* (OUP 1992)
- Kirkpatrick J J, *Legitimacy and Force: State Papers and Current Perspectives: Political and Moral Dimensions* (1st edn, Routledge 1988)
- Langford M and King J A, ‘Committee on Economic, Social and Cultural Rights’ in Langford M (ed) *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (CUP 2008)
- McBeth A, *International Economic Actors and Human Rights* (Routledge 2010)
- McConville M and Chui W (eds), *Research Methods for Law* (Edinburgh University Press 2007)
- McGoldrick D, *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights* (2nd edn, OUP 1994)
- Mills M, *Comparative Methodology: Theory and Practice in International Social Research* (Sage Publishers 2006)
- Morrissey O and Sarris A (eds), *WTO Rules for Agriculture Compatible with Development*, (FAO 2007)
- Mullis K B, *The Unusual Origin of the Polymerase Chain Reaction* (Scientific American 1990)

- Narayan D and Walton M (eds), *Voices of the Poor: Can Anyone Hear Us?* (World Bank Publications OUP 2000)
- O'Neill O, 'The Dark Side of Human Rights' in Christiano T and Christman J (eds) *Contemporary Debates in Political Philosophy* (Blackwell Publishing 2009)
- Oti-Boateng P, *Losses and Wastes in the Food Chain* (FAO Rome 2001).
- Patel R, *Stuffed and Starved: The Hidden Battle for the World Food System* (Melville House Publishing 2007)
- ———, *The Value of Nothing: How to Reshape Market Society and Redefine Democracy* (Picador 2010)
- Pogge T, 'Severe Poverty as a Human Rights Violation', in Pogge T (ed), *Freedom from Poverty as a Human Right* (OUP and UNESCO 2007)
- Rakotoarisoa M A, Sharma R P and Hallam D (eds), *Agricultural Import Surges in Developing Countries—Analytical Framework and Insights from Case Studies*, (FAO 2011)
- Runciman G, *Relative Deprivation and Social Justice* (Routledge and Kegan Paul 1996)
- Sachs J D and others, *Sustainable Development Report 2021* (CUP 2021)
- Saul B, Kinley D and Mowbray J, *The International Covenant on Economic, Social and Cultural Rights Commentary, Cases, and Materials* (OUP 2014)
- Schanbacher D W, *Food as a Human Right: Combatting Global Hunger and Forging a Path to Food Sovereignty* (Praeger 2019)
- Sen A, *Poverty and Famines: An Essay on Entitlement and Deprivation* (OUP 1981)
- ———, 'The Right not to be Hungry' in Alston P and Tomaševski K (eds), *The Right to Food* (Martinus Nijhoff Publishers 1984)
- ———, *Poverty and Entitlement: An Essay on Entitlement and Deprivation* (OUP 1990)

- _____, *Development as Freedom* (OUP 1999)
- _____, *Development as Capability Expansion* (OUP 2003)
- _____, *Commodities and Capabilities* (8th Impression, OUP 2004)
- Sengupta A, 'On the Theory and Practice of the Right to Development' (2002) 24 HumanRights Quarterly
- Shue H, *Basic Rights* (Princeton University Press, 1980)
- Ssenyonho M, *Economic, Social and Cultural Rights in International Law* (Hart Publishing 2009)
- Steiner H, Alston P and Goodman R, *International Human Rights in Context: Law, Politics, Morals* (3rd edn, OUP 2008)
- Stiglitz J E and Charlton A, *Fair Trade for All* (OUP 2005)
- Travers, M and Banakar, R (eds), *Theory and Method in Socio-Legal Research* (Hart Publishing 2005)
- Tridimas T, *The General Principles of EC Law* (2nd edn OUP 2007)
- UN, The Partnership Between the UN and EU 'The United Nations and the European Commission working together in Development and Humanitarian Cooperation' (UNDP 2006)
- Van Hoof G.J.H., 'The Legal Nature of Economic, Social and Cultural Rights: A Rebuttal of Some Traditional Views' in Alston P and Tomaševski K (eds), *The Right to Food* (Martinus Nijhoff Publishers 1984)
- Vincent J R. (ed), *Foreign Policy and Human Rights: Issues and Responses* (CUP 1986)
- WTO, WTO Analytical Index (Second Edition, Volume 1, CUP 2007)
- Ziamou T, *Rulemaking, Participation and the Limits of Public Law in the USA and Europe* (Ashgate 2001)

Journal Articles

- Agenor P, 'Does Globalization Hurt the Poor?' (2004) 1 International Economics and Economic Policy
- Alston P, 'Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann' (2002) 13 European Journal of International Law
- _____ and Quinn G, 'The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights' (1987) 9 Human Rights Quarterly
- Anderson K, 'Agriculture, Trade Reform and Poverty Reduction: Implications for Sub-Saharan Africa' (2002) 22 Policy Series in International Trade and Commodities Study Series (United Nations Publication contained in document UNCTAD/ITCD/TAB/24)
- Ballard T, Kepple A, and Cafiero C, 'The Food Insecurity Experience Scale: Development of a Global Standard for Monitoring Hunger Worldwide' (2013) Version 1.1, FAO Technical Paper
- Banerjee A and Duflo E, 'More Than 1 Billion People are Hungry in the World' (2011) Foreign Policy
- Bartels L, 'Article XX of GATT and the Problem of Extraterritorial Jurisdiction The Case of Trade Measures for the Protection of Human Rights' (2002) 36 Journal of World Trade
- Bhagwati J, 'Trade Liberalization and "Fair Trade" Demands: Addressing the Environmental and Labour Standards Issues' (1995) 18 World Economy (Blackwell Publishers 1995)
- Bignami F, 'Three Generations of Participation Rights Before the European Commission', (2004) 68 Law and Contemporary Problems
- Braimoh A (ed.), 'Food Access Deficiencies in Sub-Saharan Africa: Prevalence and Implication for Agricultural Interventions' (2019) Frontiers in Sustainable Food Systems

- Broberg M and Sano H, 'Strengths and Weaknesses in a Human Rights-Based Approach to International Development – an Analysis of a Rights-Based Approach to Development Assistance Based on Practical Experiences' (2018) 22(5) *The International Journal of Human Rights*
- Brüntrup M, 'Everything But Arms (EBA) and the EU-sugar Market Reform: Development Gift Or Trojan Horse?' (2006) Discussion Papers 10/2006, German Development Institute / Deutsches Institut für Entwicklungspolitik (DIE)
- Butler and De Schutter, 'Binding the EU to International Human Rights Law' (2009), *Yearbook of European Law*.
- Chaplin H and Matthews A, 'Coping with the Fallout for Preference Receiving Countries from EU Sugar Reform' (2006) 7(1) *The Estey Centre Journal of International Law and Trade Policy*
- Charnovitz S, 'The WTO and Cosmopolitics' (2004) 7 *Journal of International Economic Law*
- Collins H, 'Methods and Aims of Comparative Contract Law' (1991) 11(3) *Oxford Journal of Legal Studies*
- Conforti P and others, 'The European Union Preferential Trade with Developing Countries: Total trade restrictiveness and the case of sugar' (2007) Working Paper (Universita` Degli Studi del Molise).
- Coomans F, 'The Extraterritorial Scope of the International Covenant on Economic, Social and Cultural Rights in the Work of the United Nations Committee on Economic, Social and Cultural Rights' (2011) 11(1) *Hum Rts L Rev*
- Cotterrell R, 'Why Must Legal Ideas Be Interpreted Sociologically?' (1998) 25(2) *J. of Law & Society*

- De Schutter O, 'International Trade in Agriculture and the Right to Food' (2009) 46 Dialogue on Globalization (Friedrich-Ebert-Stiftung 2009)
- _____, 'The World Trade Organization and the Post-Global Food Crisis Agenda' 2011 Activity Report
- Denis A, Momoh E and Oladele A T, 'An Economic Analysis of the Production and Export of Cocoa in Sierra Leone' (2014) 5 Research Journal of Agricultural Science
- Diego J and others, 'Human Rights Conditionality in the External Trade of the European Union: Legal and Legitimacy Problems' (2001) 7 Columbia Journal of European Law
- Dommen C, 'Raising Human Rights Concerns in the World Trade Organization: Actors, Processes and Possible Strategies' (2002) 24 Human Rights Quarterly
- Dunoff J L, 'The Death of the Trade Regime' (1999) 10 European Journal of International Law
- Esty D C, 'The World Trade Organization's Legitimacy Crisis' (2002) 1 World Trade Review
- Feldman M and others, 'The Logic of Economic Development: A Definition and Model for Investment' (2016) 34 (1) Environment and Planning C: Government and Policy
- Fraval S and others, 'Food Access Deficiencies in Sub-Saharan Africa: Prevalence and Implication for Agricultural Interventions' (2019) 3(104) Frontiers in Sustainable Food Systems
- Garcia F, 'The Global Market and Human Rights: Trading Away the Human Rights Principle' (1999) 7 Brooklyn Journal of International Law
- _____, 'Globalization, Inequality & International Economic Law' (2017) 8(5) Religions (Boston College Law School)
- Giri A K, 'Rethinking Human Well-Being: A dialogue With Amartya Sen' (2000) 12 Journal of International Development

- Gotor E, 'The Reform of the EU Sugar Trade Preferences toward Developing Countries in Light of the Economic Partnership Agreements', (2009) 10 (2) The Estey Centre Journal of International Law and Trade Policy
- Gruša Matevžič, 'Crossing the Red Line- How EU Countries Undermine the Right to Liberty by Expanding the Use of Detention of Asylum Seekers upon Entry: Case Studies on Bulgaria, Greece, Hungary, and Italy' (2019) Hungarian Helsinki Committee Report
- Hardin G, 'Lifeboat Ethics: The Case Against Helping the Poor' (1974) Psychology Today
- Hawkes S and Plahe J K, 'Worlds Apart: The WTO's Agreement on Agriculture and the Right to Food in Developing Countries' (2012) 34(1) International Political Science Review (Sage Publishers)
- Headey D and Fan S, 'Reflections on the Global Food Crisis. How Did It Happen? How Has It Hurt? And How Can We Prevent the Next One?' (2010) International Food Policy Research Institute (IFPRI) Research Monograph
- Heltberg R, 'Malnutrition, Poverty, and Economic Growth'(2009) 18(1) Health Econ
- Hossain N and Dolf te Lintelo 'Common Sense Approach to the Right to Food' (2018) 10(2) Journal of Human Rights Practice (OUP 2018)
- Hutchinson T and Duncan N, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17(1) Deakin Law Review
- Iqbal K, 'The Declaration on the Right to Development and Implementation' (2007) 1/1 Political
- Kahn-Freund O, 'On Uses and Misuses of Comparative Law' (1974) 37 Modern Law Review
- Kelsey J, 'World Trade and Small Nations in the South Pacific Region' (2004–05) 14 Kansas Journal of Law and Public Policy

- Kennedy K C, 'The Generalized System of Preferences After Four Decades: Conditionality and the Shrinking Margin of Preference' (2012) 20 Michigan State International Law Review
- Kopp T, Prehn S, and Brümmer B, 'Preference Erosion – The Case of Everything But Arms and Sugar' (2016) 39(9) World Economy
- Liebenberg S, 'The Value of Human Dignity in Interpreting Socio-Economic Rights', (2005) 21 (1, 18) S. AFR. J. HUM. RTS
- Macleod A, 'Rights and Recognition: The Case of Human Rights' (2013) 44/1 Journal of Social Philosophy
- Marceau G, 'WTO Dispute Settlement and Human Rights' (2002) 13 European Journal of International Law
- Marks S, 'The Human Right to Development: Between Rhetoric and Reality' (2004) 17 Harvard Human Rights Law Journal
- Mechlem K, 'Food Security and the Right to Food in the Discourse of the United Nations' (2004) 10 European Law Journal
- Mertens E and Peñalvo J L, 'The Burden of Malnutrition and Fatal COVID-19: A Global Burden of Disease Analysis' (2021) 7 Frontiers in Nutrition (Institute of Tropical Medicine, Belgium)
- Mowbray J, 'The Right to Food and the International Economic System: An Assessment of the Rights-Based Approach to the Problem of World Hunger' (2007) 20(3) Leiden Journal of International Law (CUP 2007)
- Muffels R and Bruce H, 'Capabilities and Choices: Do They Make Sense for Understanding Objective and Subjective Well-Being? An Empirical Test on Sen's Capability Framework on German and British Panel Data' (2013) Soc Indic Res
- Neier A, 'Social and Economic Rights: A Critique' (2006) 13(2) Human Rights Brief

- Nelson P J, 'Human Rights, the Millennium Development Goals, and the Future of Development Cooperation' (2007) 35(12) World Development
- _____ and Dorsey E, 'At the Nexus of Human Rights and Development: New Methods and Strategies of Global NGOs' (2003) 31(12) World Development
- Niyaz Ö, 'The Evaluation of Food Security in European Union' (2016) 22(1) Mustafa Kemal University Journal of Agriculture Faculty
- Nogueras D J L and Martinez L M H, 'Human Rights Conditionality in the External Trade of the European Union: Legal and Legitimacy Problems' (2001) 7 Columbia Journal of European Law,
- Nussbaum M, 'Capabilities and Human Rights' (1998) 66(2) Fordman Law Review
- Offenheiser R and Holcombe S, 'Challenges and Opportunities in Implementing a Rights-Based Approach to Development: An Oxfam America Perspective' (2003) 32(2) Nonprofit and Voluntary Sector Quarterly
- Ozden C and Reinhardt E, 'The Perversity of Preferences The Generalized System of Preferences and Developing Country Trade Policies, 1976–2000' (2003) World Bank Policy Research Working Paper 2955 (World Bank 2003)
- Patel R, 'Food Sovereignty' (2009) 36/3 Journal of Peasant Studies
- Paul J R, 'Do International Trade Institutions Contribute to Economic Growth and Development?' (2003) 44 Virginia Journal of International Law
- Pedro S and others, 'Halving Hunger: It Can be Done, Summary Version of the Report of the Task Force on Hunger' (UNDP 2005)
- Peña J and Bacallao J, 'Malnutrition and Poverty' (2002) 22 Annual Review of Nutrition
- Pogge T, 'Recognized and Violated: the Human Rights of the Global Poor' (2005) 18 Leiden Journal of International Law

- _____, 'World Poverty and Human Rights' (2005) 19(1) Ethics and International Affairs 1
- Prebisch R 'Terms of Trade: Raul Prebisch and the Challenges of the Development of XXI Century' (2012) Economic Commission for Latin America and the Caribbean
- Raponi S, 'A Defense of the Human Right to Adequate Food' (2017) 23(1) Res Publica Dordrecht 99
- Raustiala K, 'Rethinking The Sovereignty Debate In International Economic Law' (2003) 6 Journal of International Economic Law
- Raz J, 'Human Rights in the Emerging World Order' (2010) 1 Transnational Legal Theory
- Robert McCorquodale, 'An Inclusive International Legal System' (2004) 17 Leiden Journal of International Law
- Robertson R E, 'Measuring State Compliance with the Obligation to Devote the "Maximum Available Resources" to Realizing Economic, Social, and Cultural Rights' (1994) 16 Human Rights Quarterly
- Scott C and Macklem P, 'Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution' (1992) 141 U PL Rev.
- Sen A, 'Elements of a Theory of Human Rights' (2004) 32(4) Philosophy and Public Affairs
- Setboonsarng S 'Child Malnutrition as a Poverty Indicator: An Evaluation in the Context of Different Development Interventions in Indonesia' (2005) 21 ADB Institute Discussion Paper
- Sibanda O S, 'The Advent of the African Continental Free Trade Agreement as a Tool for Development' (2021) Foreign Trade Review 56(2)
- Siddiqui F and others, 'The Intertwined Relationship Between Malnutrition and Poverty' (2020) 8 Frontiers in Public Health

- Simo R Y, Trade in Services in the African Continental Free Trade Area: Prospects, Challenges and WTO Compatibility (2020) 23 (1) J Int Economic Law
- Skogly I S, 'Is There A Right Not To Be Poor?' (2002) 2(1) Human Rights Law Review
- Smaller C and Murphy S, 'Bridging the Divide: a Human Rights Vision for Global Food Trade' (2008) Confronting Global Food Challenge: Institute of Agriculture and Trade Policy, Geneva
- Sohn L B, 'The New International Law: Protection of the Rights of Individuals Rather Than States' (1982) 32(1) American University Law Review
- Swaminathan M S, 'Food: A Basic Human Right' (2013) 7(2) Indian Journal of Human Development (Sage Publishers 2013)
- Thuo-Gathii J, 'Re-Characterizing the Social in the Constitutionalization of the WTO: A Preliminary Analysis' (2001) 7 Widener Law Symposium Journal
- Tsikata N, 'The Rights-Based Approach to Development: Potential for Change or More of the Same' (2009) 35(4) Institute of Development Studies Bulletin
- Ulrich A, 'Export-Oriented Horticultural Production in Laikipia, Kenya: Assessing the Implications for Rural Livelihoods' (2014) 6(1) Heidelberg University Sustainability Journal
- UNDP, 'Asia Pacific Human Development Report 2006: Trade on Human Terms' (2006) UNDP
- _____, 'Poverty Reduction and Human Rights: A Practice Note' (2003) UNDP
- Vandenhoe W, 'Third State Obligations under the ICESCR: A Case Study of EU Sugar Policy' (2007) 76(1) Nordic Journal of International Law
- Walson J L and Berkley J A, 'The Impact of Malnutrition on Childhood infections' (2018) 31(3) Current Opinions in Infections

- Wenaart B, ‘Enforceability of the Human Right to Adequate Food; a Comparative Study’ (2013) 8 European Institute for Food Law Series
- Whelan D J and Donnelly J, ‘The West, Economic and Social Rights and the Global Human Rights Regime: Setting the Record Straight’ (2007) 29 Human Rights Quarterly
- Wilke M, ‘The Litmus Test: Non-Trade Interests And WTO Law After Seals’ (2014) 8(7) Boires- International Centre for Trade and Sustainable Development
- Young G C, ‘A Critical Review Of Cross-Retaliation As A Justiciable Countermeasure; With Reference To The EC – Bananas III (Article 22.6 – EC) Case And (EC – Regime For The Importation, Sale And Distribution Of Bananas (WT/DS27 – Ecuador))’ 4 (2013) Nnamdi Azikiwe Journal of International Law and Jurisprudence
- _____, ‘Understanding The Legal Fundamentals of Project Finance Contracts’ 5 (2014) Nnamdi Azikiwe Journal of International Law and Jurisprudence
- Young K G, 'The Minimum Core of Economic and Social Rights: A Concept in Search of Content' (2008) 33 Yale J Int'l L

Web Sources

- AU, ‘AfCFTA Secretariat’ <<https://afcfta.au.int/en>>
- _____, ‘State Parties Ratification Status’ (2020) <<https://afcfta.au.int/en/documents/2020-12-28/state-parties-ratification-status-list>>
- _____, ‘The African Continental Free Trade Area’ <<https://au.int/en/african-continental-free-trade-area>>
- AU-AfCFTA, ‘State Parties’ <<https://au-afcfta.org/state-parties/>>
- De Schutter O ‘A Rights Revolution: Implementing the Right to Food in Latin America and the Caribbean’ (2012) Briefing Note 6, United Nations Special Rapporteur on the

Right to Food <www.srfood.org/images/stories/pdf/otherdocuments/note06-septembre2012-en-v2.pdf>

- GATT, 'Import Duties and Internal Charges on Natural Rubber' <www.wto.org/gatt_docs/English/SULPDF/90310214.pdf>
- Europa, 'Development' <<https://ec.europa.eu/trade/policy/countries-and-regions/development/>>
- _____, 'EU Trade Policy' <[https://www.europarl.europa.eu/RegData/etudes/IDAN/2019/642229/EPRS_IDA\(2019\)642229_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/IDAN/2019/642229/EPRS_IDA(2019)642229_EN.pdf)>
- _____, 'Europe 2020', <<https://ec.europa.eu/eu2020/pdf/COMPLET%20EN%20BARROSO%20%2020007%20-%20Europe%202020%20-%20EN%20version.pdf>>
- _____, 'European Parliament Rejects ACTA' <<https://www.europarl.europa.eu/news/en/press-room/20120703IPR48247/european-parliament-rejects-acta>>
- _____, 'European Union Agency for Fundamental Rights' <<https://fra.europa.eu/en/about-fra>>
- _____, 'European Union Agency for Fundamental Rights: Housing conditions of Roma and Travellers in the European Union: Comparative Report' (2009), 12-14. <https://fra.europa.eu/sites/default/files/fra_uploads/703-Roma_Housing_Comparative-final_en.pdf>
- _____, 'Eurostat: Living Conditions in Europe- Material Deprivation and Economic Strain' <https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Living_conditions_in_Europe_-_material_deprivation_and_economic_strain#Material_deprivation>

- _____, ‘Evaluation of the Market Access Partnership’
<https://trade.ec.europa.eu/doclib/docs/2013/april/tradoc_150847.pdf>
- _____, ‘Everything But Arms’ <<https://trade.ec.europa.eu/access-to-markets/en/content/everything-arms-eba>>
- _____, ‘Food Prices: EU Food Prices up by 7.1% year-on-year in April 2008; Impact on Total Inflation Differs Between Member States’ (2008)
<https://ec.europa.eu/commission/presscorner/detail/en/STAT_08_76>
- _____, ‘Impact Assessment’ <https://ec.europa.eu/info/law/law-making-process/planning-and-proposing-law/impact-assessments_en>
- _____, ‘Implementation of the European Union’s Strategy on the Rights of the Child: State of Play’ (2009) < <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32009G1219%2801%29>>
- _____, ‘Market Access Database User Guide’,
<http://madb.europa.eu/userguide/EN_def.pdf>
- _____, ‘Member States’ Compliance with EU Law’
<https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1389>
- _____, ‘Negotiations and Agreements: Implementing EU Agreements’
<https://ec.europa.eu/trade/policy/countries-and-regions/negotiations-and-agreements/index_en.htm#:~:text=Published%20in%20November%202020%2C%20and%20main%20preferential%20trade%20agreements>
- _____, ‘Types of EU Laws’ https://ec.europa.eu/info/law/law-making-process/types-eu-law_en
- _____, ‘The EU Sugar Sector’
<[www.europarl.europa.eu/RegData/etudes/BRIE/2020/652040/EPRS_BRI\(2020\)652040_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2020/652040/EPRS_BRI(2020)652040_EN.pdf)>

- FAO, 'Agriculture, Trade and Food Security Issues and Options in the WTO Negotiations from the Perspective of Developing Countries, Country Case Studies' (Volume II, 2004) <www.fao.org/docrep/003/x8731e/x8731e00.htm#TopOfPage>
- _____, 'Data: Suite of Food Security Indicators' (2021) <www.fao.org/faostat/en/#data/FS>
- _____, 'FAO in Kenya' <www.fao.org/kenya/fao-in-kenya/kenya-at-a-glance/en/>
- _____, 'Fifteen years implementing the Right to Food Guidelines; Reviewing Progress to Achieve the 2030 Agenda' (2019) <www.fao.org/3/ca6140en/ca6140en.pdf>
- _____, 'Hunger and Food Insecurity' <www.fao.org/hunger/en/>
- _____, 'Import Surges: What are they and how can they be identified?' (2006) 1 <[ftp://ftp.fao.org/docrep/fao/009/j8671e/j8671e00.pdf](http://ftp.fao.org/docrep/fao/009/j8671e/j8671e00.pdf)>
- _____, 'Right to Food Guidelines; Information Papers and Case Studies' <www.fao.org/3/a0511e/a0511e.pdf>
- _____, 'The Food Insecurity Experience Scale' <www.fao.org/in-action/voices-of-the-hungry/fies/en/>
- _____, 'The Right to Food Within the International Framework of Human Rights and Country Constitutions' <www.fao.org/3/a-i3448e.pdf>
- _____, 'The State of Food and Agriculture- Social Protection and Agriculture: Breaking the Cycle of Rural Poverty' (2015) <www.fao.org/3/i4910e/i4910e.pdf>
- _____, 'The State of Food Insecurity in the World' (2001) <www.fao.org/3/y1500e/y1500e00.htm>
- _____, 'The State of Food Insecurity and Nutrition in the World' (2022) <www.fao.org/3/cc0639en/online/sofi-2022/food-security-nutrition-indicators.html>
- _____, 'The State of Food Security and Nutrition in Europe and Central Asia,' <www.fao.org/3/i8194e/i8194e.pdf>

- _____, 'The State of Food Security and Nutrition in the World 2017: Building resilience for peace and food security'. <www.fao.org/3/I7695e/I7695e.pdf>
- _____, 'Trade Reforms and Food Security: Conceptualizing the Linkages' (2003) <www.fao.org/3/a-y4671e.pdf>
- _____, 'What happened to World Food Prices' (2009) <www.fao.org/3/i0854e/i0854e01.pdf>
- FAO, IFAD, UNICEF, WFP and WHO, 'The State of Food Security and Nutrition in the World; Safeguarding against economic slowdowns and downturns' (2019) <https://docs.wfp.org/api/documents/WFP-0000106760/download/?_ga=2.164821436.2073472821.1593507669-1903512177.1593507669>
- _____, 'The State of Food Security and Nutrition in the World 2021: Transforming Food Systems for Food Security, Improved Nutrition and Affordable Healthy Diets for All', <<https://doi.org/10.4060/cb4474en>>
- FRA, 'Housing Conditions of Roma and Travellers in the EU; Comparative Report' (2009) https://fra.europa.eu/sites/default/files/fra_uploads/703-Roma_Housing_Comparative-final_en.pdf
- GHI, 'Global Hunger Index 2019: The Challenge of Hunger and Environment' <www.globalhungerindex.org/pdf/en/2019.pdf>
- _____, 'Global Hunger Index: Kenya' (2021) <www.globalhungerindex.org/kenya.html#:~:text=In%20the%202020%20Global%20Hunger,See%20overview%20of%20GHI%20calculation%5D>
- _____, 'Global Hunger Index: Sierra Leone' (2021) <www.globalhungerindex.org/sierra-leone.html>

- _____, 'Global, Regional and National Trends' (2020)
<www.globalhungerindex.org/trends.html>
- _____, 'Global, Regional and National Trends' (2021)
<www.globalhungerindex.org/trends.html>
- _____, 'Hunger and Food Systems in Conflict Settings' (2021)
<www.globalhungerindex.org/pdf/en/2021.pdf>
- International Association for Public Participation, 'Spectrum of Public Participation'
<https://cdn.ymaws.com/www.iap2.org/resource/resmgr/pillars/Spectrum_8.5x11_Print.pdf>
- ILO, Report of the World Commission on the Social Dimension of Globalisation 'A Fair Globalization: Promoting Opportunities for all' (ILO 2004)
<www.ilo.org/wcmsp5/groups/public/---dgreports/---integration/documents/publication/wcms_079151.pdf>
- Kombo B K, 'Emerging Voices: Doing Regional Integration Better? The Possibility of Reinvigorating the Relationship Between International Human Rights Law and International Economic Law Through the African Continental Free Trade Area'
<<http://opiniojuris.org/2019/08/12/emerging-voices-doing-regional-integration-better-the-possibility-of-reinvigorating-the-relationship-between-international-human-rights-law-and-international-economic-law-through-the-african-contine/>>
- Lamy P, 'Towards Shared Responsibility and Greater Coherence: Human Rights, Trade and Macroeconomic Policy' Speech at the Colloquium on Human Rights in the Global Economy, Co-organized by the International Council on Human Rights and Realizing Rights, Geneva (2010) <www.wto.org/english/news_e/sppl_e/sppl146_e.htm>

- OCHA, 'Food Insecurity and Hunger in Africa' Information Bulletin (2021)
<<https://reliefweb.int/report/angola/food-insecurity-and-hunger-africa-information-bulletin-april-2021>>
- Office of the United States Trade Representative, 'U. S. Generalized System of Preference Guidebook' 17
<https://ustr.gov/sites/default/files/gsp/GSPGuidebook_0.pdf>
- OHCHR, 'Report: The Continental Free Trade Agreement in Africa, A Human Right Perspective'
<www.ohchr.org/Documents/Issues/Globalization/TheCFTA_A_HR_ImpactAssessment.pdf>
- _____ 'Status of Ratification' <<https://indicators.ohchr.org/>>
- _____, 'The European Union and International Human Rights Law'
<https://europe.ohchr.org/Documents/Publications/EU_and_International_Law.pdf>
- _____, 'The Right to Adequate Food', Fact sheet no. 34
<www.ohchr.org/Documents/Publications/FactSheet34en.pdf>
- Prebisch R 'Terms of Trade: Prebisch Raul and Economic Commission for Latin America and the Caribbean and the challenges of the development of XXI Century' (2012) Economic Commission for Latin America and the Caribbean'
<https://biblioguias.cepal.org/ld.php?content_id=31791956>
- SDG UN, 'Transforming our World: The 2030 Agenda for Sustainable Development' (2015) <<https://sustainabledevelopment.un.org/post2015/transformingourworld>>
- SDG UN, 'United Nations Sustainable Development Goals Knowledge Platform' (2015)
<https://sustainabledevelopment.un.org/content/documents/2051AAAA_Outcome.pdf>

- SDSN and IEEP, ‘Europe Sustainable Development Report 2019’
<https://s3.amazonaws.com/sustainabledevelopment.report/2019/2019_europe_sustainable_development_report.pdf>
- Stoeckel A and Reeves G, ‘Agricultural Trade Policy Made Easy: Making Sense of Trade Policy for Farmers, Policymakers and the Public’
<www.wto.org/english/forums_e/ngo_e/posp46_cie_e.pdf>
- UN, ‘Country Classification’ (2014)
<www.un.org/en/development/desa/policy/wesp/wesp_current/2014wesp_country_classification.pdf>
- —, ‘Creating a Seat at the Table for Stakeholder Engagement for the 2030 Agenda,’
<www.unescap.org/sites/default/files/Stakeholder%20Engagement%20Indicator%20Framework%20Brochure_180518_0.pdf>
- —, ‘Envision 2030 Goal 2: Zero Hunger’
<www.un.org/development/desa/disabilities/envision2030-goal2.html>
- —, ‘Human Rights-Based Approach to Development Programming’ (2012)
<<https://unsdg.un.org/resources/human-rights-based-approach-development-programming-note-prepared-undgdoco>>
- —, ‘Human Rights Law’ <www.un.org/en/sections/universal-declaration/human-rights-law/>
- —, ‘Member States of the UN and Member States of Specialised Agencies’
<<https://sustainabledevelopment.un.org/memberstates.html>>
- —, ‘Sustainable Development Goals Report’ (2018)
<<https://unstats.un.org/sdgs/files/report/2018/TheSustainableDevelopmentGoalsReport2018-EN.pdf>>

- _____, ‘Sustainable Development Goals Report’ (2021)
<<https://unstats.un.org/sdgs/report/2021/>>
- _____, ‘Sustainable Development Goals’
<www.un.org/sustainabledevelopment/sustainable-development-goals/>
- _____, ‘Sustainable Development Goals: Goal 2: Zero Hunger’
<www.un.org/sustainabledevelopment/hunger/>
- _____, ‘The Human Rights Based Approach to Development Cooperation Towards a Common Understanding Among UN Agencies’
<https://unsdg.un.org/sites/default/files/6959-The_Human_Rights_Based_Approach_to_Development_Cooperation_Towards_a_Common_Understanding_among_UN.pdf>
- UN Sustainable Development Group, ‘The Human Rights-Based Approach to Development Cooperation Towards a Common Understanding Among UN Agencies’
<https://unsdg.un.org/sites/default/files/6959-The_Human_Rights_Based_Approach_to_Development_Cooperation_Towards_a_Common_Understanding_among_UN.pdf>
- UNCTAD, ‘About UNCTAD’ <<https://unctad.org/en/Pages/aboutus.aspx>>
- UNICEF, ‘Levels and Trends in Child Malnutrition’ (2021) <<https://data.unicef.org/wp-content/uploads/2021/07/JME-2021-United-Nations-regions-v2.pdf>>
- UNICEF, WHO, and World Bank, ‘Joint Child Malnutrition Estimates’ (2021)
<<https://data.unicef.org/resources/dataset/malnutrition-data/>>
- WFP, ‘World Food Program – European Union (WFP – EU) Partnership Report’ (2015)
<https://www.europarl.europa.eu/meetdocs/2014_2019/documents/deve/dv/wfp-eu_partnership_factsheet_2015/wfp-eu_partnership_factsheet_2015_en.pdf>

- Wolff A W M, ‘AfCFTA and WTO Can Help “Knit Together” Africa in Peace and Prosperity’ (2021) <www.wto.org/english/news_e/news21_e/ddgaw_04mar21_e.htm>
- World Bank, ‘Covid-19 to Add as Many as 150 Million Extreme Poor by 2021’ (2020) <www.worldbank.org/en/news/press-release/2020/10/07/covid-19-to-add-as-many-as-150-million-extreme-poor-by-2021>
- _____, ‘Currency Depreciation Risk Intensifying Food, Energy Crisis in Developing Economies’ (2022) <<https://www.worldbank.org/en/news/press-release/2022/10/26/commodity-markets-outlook>>
- World Bank, ‘Fact Sheet: An Adjustment of Global Poverty Line’ (2022) <www.worldbank.org/en/news/factsheet/2022/05/02/fact-sheet-an-adjustment-to-global-poverty-lines#2>
- _____, ‘Focus: Sub-Saharan Africa’ <<https://openknowledge.worldbank.org/pages/focus-sub-saharan-africa>>
- _____, ‘Global Progress in Reducing Extreme Poverty Grinds to a Halt’ (2022) <www.worldbank.org/en/news/press-release/2022/10/05/global-progress-in-reducing-extreme-poverty-grinds-to-a-halt>
- _____, ‘“Indicators” Employment in Agriculture (% of total employment)’ <<https://data.worldbank.org/indicator/SL.AGR.EMPL.ZS>>
- _____, ‘Indicators’ (2019) <<https://data.worldbank.org/indicator>>
- _____, ‘Measuring Poverty’ (2021) <www.worldbank.org/en/topic/measuringpoverty>
- _____, ‘Poverty’ <www.worldbank.org/en/topic/poverty>
- _____, ‘Putting Africa at the heart of Food Security and Climate Resilience’ (2022) <www.worldbank.org/en/news/immersive-story/2022/10/17/putting-africans-at-the-heart-of-food-security-and-climate-resilience>

- WHO, 'Child Growth Standards' <www.who.int/tools/child-growth-standards/standards>
- _____, 'Children: Reducing Mortality; Fact Sheet' (2016)
<www.who.int/mediacentre/factsheets/fs178/en>
- _____, 'Healthy Diet', <www.who.int/news-room/fact-sheets/detail/healthy-diet>
- _____, 'Malnutrition' <www.who.int/health-topics/malnutrition#tab=tab_1>
- _____, 'Measurement of and target-setting for well-being: an initiative by the WHO Regional Office for Europe'
<www.euro.who.int/_data/assets/pdf_file/0003/180048/E96732.pdf>
- _____, 'Wasting Among Children under 5 Years of Age'
<www.who.int/data/gho/indicator-metadata-registry/imr-details/302>
- WTO, 'Agriculture Agreement: Explanation, Market Access' (2016)
<www.wto.org/english/tratop_e/agric_e/ag_intro02_access_e.htm#prohibition>
- WTO, 'Agriculture Explanation: Domestic Support'
<www.wto.org/english/tratop_e/agric_e/ag_intro03_domestic_e.htm>
- _____ 'Chronological List of Disputes Cases'
www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm
- _____, 'Differential and More Favourable Treatment Reciprocity and Fuller Participation of Developing Countries' (Decision of 28 November 1979) L/4903
<www.wto.org/english/docs_e/legal_e/enabling1979_e.htm>
- _____, 'Domestic Support in Agriculture – the Boxes'
<www.wto.org/english/tratop_e/agric_e/agboxes_e.htm>
- _____, 'Glossary' (2016) <www.wto.org/english/thewto_e/glossary_e/glossary_e.htm>
- _____, 'Handbook on Ascension to the WTO'
<www.wto.org/english/thewto_e/acc_e/cbt_course_e/intro_e.htm>

- _____, 'How the Negotiations are Organised',
<www.wto.org/english/tratop_e/dda_e/work_organize.htm#:~:text=Single%20undertaking%3A%20Virtually%20every%20item,and%20cannot%20be%20agreed%20separately.&text=Participation%3A%20The%20negotiations%20are%20open,or%20intending%20to%20negotiate%20membership>
- _____, 'Members and Observer'
<www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm>
- _____, 'NGOs and the WTO' <www.wto.org/english/forums_e/ngo_e/ngo_e.htm>
- _____, 'Principles of the Trading System' (2016)
<www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm>
- _____, 'Safeguard Measures' <www.wto.org/english/tratop_e/safeg_e/safeg_e.htm>
- _____ 'Special and Differential Treatment Provisions'
<www.wto.org/english/tratop_e/devel_e/dev_special_differential_provisions_e.htm>
- _____, 'Subsidies and Countervailing Measures: Overview, Agreement on Subsidies and Countervailing Measures'
<www.wto.org/english/tratop_e/scm_e/subs_e.htm#fntext2>
- _____, 'The Case for Open Trade'
<www.wto.org/english/thewto_e/whatis_e/tif_e/fact3_e.htm>
- WTO, 'Understanding the WTO: Developing Countries, Some Issues Raised'
www.wto.org/english/thewto_e/whatis_e/tif_e/dev4_e.htm
- _____, 'Understanding the WTO: The Agreements, Agriculture: fairer markets for farmers' (2015) <www.wto.org/english/thewto_e/whatis_e/tif_e/agrm3_e.htm>
- _____, 'World Trade Report 2006' (World Trade Organization 2006)
<https://www.wto.org/english/res_e/booksp_e/anrep_e/world_trade_report06_e.pdf>

Other Secondary Sources

Council Decisions, Committee Reports And Interpretative Instruments

- CESCR General Comment No 3: The Nature of States Parties Obligations Art. 2 [1990] E/1991/23
- ____ General Comment No. 4: The Right to Adequate Housing Art 11 (1) [1991] E/1992/23
- ____ General Comment No 9: The domestic application of the Covenant, Adopted at the Nineteenth Session of the Committee on Economic, Social and Cultural Rights [1998] E/C.12/1998/24
- ____ Statement on Globalisation and its Impact on the Enjoyment of Economic, Social and Cultural Rights [1998] E/C.12/1998/26
- ____ General Comment No 12: The Right to Adequate Food Art. 11 (1999) E/C.12/1999/5
- ____ General Comment No 14: The Right to Highest Attainable Standard of Health Art 12 [2000] E/C.12/2000/4
- ____ Substantive Issues Arising in the Implementation of the ICESCR: Poverty and the International Covenant on Economic Social and Cultural Rights [2001] E/C.12/2001/10
- ____ Consideration of Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant: Concluding observations of the Committee on Economic, Social and Cultural Rights [2002] E/2002/22 E/C.12/2001/17
- ____ General Comment No 15: The Right to Water Arts 11 and 12 [2003] E/C.12/2002/11
- ____ Evaluation of the Obligation to Take Steps to the ‘Maximum of Available Resources’ Under an Optional Protocol to the Covenant [2007] E/C.12/2007/1

- ____ Consideration of Reports Submitted by States Parties Under Articles 16 and 17 of the ICESCR regarding Kenya: Concluding Observations adopted after consideration of the Initial Report of Kenya E/C.12/KEN/1 [2008] E/C.12/KEN/CO/1
- EC Communication: Towards the Full Integration of Co-operation with ACP Countries in the EU budget [2003] COM (2003) 590 final
- ____ Europa Methodology for systematic and rigorous monitoring of compliance with the Charter of Fundamental Rights in Commission legislative proposals [2005] COM/2005/0172 final
- ____ Global Europe- Competing in The World, a Contribution to the EU's Growth and Jobs Strategy [2006] COM/2006/0567 final 2
- ____ Towards an EU Strategy on the Rights of the Child [2006] COM(2006) 367
- ____ Global Europe: a Stronger Partnership to Deliver Market Access for European Exporters [2007] COM(2007) 183 final
- ____, Commission staff working document accompanying the Proposal for a Council Regulation amending Regulations (EC) N°. 1290/2005 on the financing of the common agricultural policy and (EC) No. 1234/2007 establishing a common organisation of agricultural markets and on specific provisions for certain agricultural products (Single CMO Regulation) as regards food distribution to the most deprived persons in the Community: Impact Assessment [2008] SEC(2008) 2436/2
- ____, 'The Raw Materials Initiative—Meeting our Critical Needs for Growth and Jobs in Europe' [2008] COM (2008) 699 final
- ____ Impact Assessment Guidelines [2009] SEC (2009) 92 1.1
- ____ Policy Coherence for Development—Establishing the policy framework for a whole-of-the-Union approach [2009] COM(2009) 458 final

- ____ Report on the Practical Operation of the Methodology for a Systematic and Rigorous Monitoring of Compliance with the Charter of Fundamental Rights [2009] COM (2009) 205 final
- ____ A Twelve-Point Action Plan in Support of Millennium Development Goals [2010] COM(2010) 159 final
- ____ Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union [2010] COM (2010)
- ____ An EU Agenda for the Rights of the Child [2011] COM (2011) 60 final
- ____ Proposal for a Directive on the right to information in criminal proceedings [2011] COM(2010) 392 final 2010/0215 (COD)
- ____ 'Better Regulation Guidelines' [2021] SWD(2021) 305 final
- EC Decision 1999/468/EC with regard to the regulatory procedure with scrutiny Adaptation — Part Two OJ L 087
- EC Regulation No 168/2007 establishing a European Union Agency for Fundamental Rights [2007] OJ L 53, 22.2.2007, 1
- EC Regulation No 657/2008 on the School Milk Scheme [2008] OJ L 183, 17
- EC Regulation No 1337/2008 of the European Parliament and of the Council of 16 December 2008 establishing a facility for rapid response to soaring food prices in developing countries between 2008 – 2010 [2008] OJ L354/62
- EC Regulation No. 219/2009 adapting a number of instruments subject to the procedure referred to in Article 251 of the Treaty [2009]
- EC Regulation No 288/2009 on the School Fruit Scheme [2009] OJ L 94, 38
- EC Regulation No. 960/2009 amending Regulation (EC) No. 1905/2006 of the European Parliament and of the Council establishing a financing instrument for development cooperation [2009] OJ L270
- EC Regulation No 978/2012 applying a scheme of generalised tariff preferences and repealing Council Regulation [2012]

- EC Regulation No. 233/2014 established a financing instrument for development cooperation for the period of 2014-2020 [2014]
- EC Opinion of the Court (Full Court) pursuant to Article 218(11) TFEU' (2017) Document 62015CV0002(01)
- European Parliament Directive 2012/13/EU on the Right to Information in Criminal Proceedings [2012] COM(2010) 392 final 2010/0215 (COD)
- European Parliament Joint Statement by the Council and the Representatives of the Governments of the Member States Meeting within the Council, the European Parliament and the European Commission on European Union Development Policy (2006) OJ C46/1
- European Parliament Resolution on the Annual Report on Human Rights in the World 2008 and the European Union's Policy on the Matter 92009] P6_TA(2009)0385
- FAO, Rome Declaration of the World Food Summit 1966
- FAO, 'Voluntary Guidelines to Support the Progressive Realisation of the Right to Food in the Context of Food Security' <www.fao.org/3/a-y7937e.pdf>
- GATT, Decision on *Generalized System of Preferences* [1971] L/3545
<www.wto.org/gatt_docs/English/SULPDF/90840258.pdf>
- Limburg Principles 1987: Note Verbale from the Permanent Mission of the Netherlands to the United Nations Office [2005] E/CN.4/1987/17
- International Commission of Jurists, Maastricht Guidelines on Violations of Economic, Social and Cultural Rights [1997] Reissued in 2000 by the CESCR UN Doc E/C.12/2000/13)
- OHCHR Report of the Special Rapporteur, Paul Hunt, on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health: Mission to the World Trade Organization' [2004] E/CN.4/2004/49/Add.1
- OHCHR Report of the UN Commissioner on Human Rights: Analytical study of the High Commissioner for Human Rights on the Fundamental Principles of Non-Discrimination in the Context of Globalization [2004] E/CN.4/2004/40

- ____ Report of the Special Rapporteur, Jean Ziegler, on the Right to Food [2004] E/CN.4/2004/10
- ____ Report of the Chairpersons of the Human Rights Treaty Bodies on Indicators for Monitoring Compliance with International Human Rights Instruments prepared in response to the request of the seventeenth meeting A/60/278 [2006] HRI/MC/2006/7
- OHCHR Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest Attainable standard of physical and mental health [2006] UN Doc. E/CN4/2006/48
- ____ Report the OHCHR on Indicators for Monitoring Compliance with International Human Rights Instruments prepared by in response to a request from the inter-committee meeting of treaty bodies (ICM) in June 2006 asking the Secretariat to undertake validation of the approach on the use of statistical information in States parties' reports HRI/MC/2006/7 [2008] HRI/MC/2008/3
- ____ Statement on the World Food Crisis [2008] E/C.12/2008/1
- ____ Report of the Special Rapporteur, Olivier De Schutter, on the Right to Food: Addendum - Mission to the World Trade Organisation [2009] A/HRC/10/5/Add.2
- ____ Report of the Special Rapporteur, Philip Alston, on Extreme Poverty: Mission to Ghana [2018] A/HRC/38/33/Add.2
- ____ Report of the Special Rapporteur on the Right to Food [2020] A/HRC/43/44
- UNCTAD, 'Least Developed Countries Report' (2006) UNDoc A/HRC/10/5/Add.2
- UN Economic and Social Council, 'Report of the High Commissioner for Human Rights on implementation of Economic, Social and Cultural Rights' (2009) E/2009/90
- UN Committee on the Elimination of Discrimination Against Women (CEDAW) General Recommendation No. 19: Violence Against Women [1992] CEDAW/C/GC/35
- UNGA, The Right to Food Resolution [2006] A/RES/60/165

- UNGA Optional Protocol to the ICESCR [2008] A/RES/63/117
- UN HRC General Comment No 25: The right to participate in public affairs, voting rights and the right of equal access to public service (Article 25) [1996] CCPR/C/21/Rev.1/Add.7
- UN HRC General Comment No 36 ICCPR: Article 6 (Right to Life) [2019] CCPR/C/CG/36
- UN HRC, General Comment No 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant [2004] CCPR/C/21/Rev.1/Add.1326
- UN International Law Commission Report of the Study Group of the International Law Commission on Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law' [2006] A/CN.4/L.682
- UN Yearbook of the International Law Commission Part 2/1 [1977] A/CN.4/SER.A/1977/Add.1
- WTO Ministerial Decision on Export Competition [2015] WT/MIN(15)/45, WT/L/980
- WTO Ministerial Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least-Developed and Net Food-Importing Developing Countries (NFIDC Decision) [2020] G/AG/W/42/
- WTO Special Safeguard Mechanism for Developing Country Members – Ministerial [2015] WT/MIN(15)/43 – WT/L/978