

Human Rights, the Right to Food, and WTO

Global Constitutionalisation and the Example of Bioenergy

On the occasion of the current European and global controversy over the (poverty-and climate) ambivalences of bioenergy with regard to poverty and climate protection, this article examines the following questions: (1) Is there a human right to food in public international law? (2) Is it possible to derive human rights as “general principles of law” within the meaning of public international law, which are independent from contractual agreement or recognition by States?(3) What exactly would such a right to food comprise? (4) What effects do human rights have on the interpretation of e.g. WTO law? (5) Is there a constitutional rank relationship evolving between human rights and public international law which might affect the interpretation of, e.g., WTO law? (6) How can conflicting considerations be balanced (the need for which is often overlooked in public international law), if WTO law is interpreted in accordance with human rights – and what are the general rules for balancing human rights?¹

A. The current challenge of the right to food by the ambivalent expansion of bioenergy

Climate change and world poverty are perhaps the two biggest political challenges of the early 21st Century. The search for concepts solving these problems or at least in a “Pareto efficient sense” address one without increasing the other, has led to a controversial debate about bioenergy (in the form of electricity, heat, or fuel). By and large, and in addition to attempts to increase energy efficiency and sufficiency, the use of renewable energy reduces greenhouse gas emissions. In the very case of bioenergy, however, the record is ambivalent for several reasons. Firstly, the cultivation of plants to produce energy (at least in large quantities) is a problem for the world food situation. Secondly, the production of energy from plants is so far quite inefficient as they carry very limited energy per unit. Taking into account the energy necessary for cultivation, processing, and transportation, the climate record of biofuels is often little better (if not worse) than fossil fuels.² Thirdly, an increased use of bioenergy might result in a quantitative exacerbation of the already existing problems of conventional agriculture.³

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¹ Even though we support the idea of universal human rights (that are applicable in every State of the world) this does not necessarily mean that they are absolute, i.e. they always prevail without considering conflicting interests. There is a basic misunderstanding that accepting this need for balancing is per se a utilitarian approach. This shall be clarified in the course of this article (see especially chapter G).

² The launch of the second generation of bioenergy plants, in which the entire plant and not just parts of it will be used to generate energy, will probably improve the record. Moreover, one might not forget that the production and transportation of, for example, oil and gas, also emits greenhouse gases.

³ Cf. for an overview of the ambivalences of bioenergy and possible solutions Ekardt/ von Bredow, *Managing the Ecological and Social Ambivalences of Bioenergy – Sustainability Criteria versus Extended Carbon Markets*, in: Leal (ed.), *The Economic, Social, and Political Aspects of Climate Change*, 2010 (forthcoming); Ekardt, in: Frenz/ Müggenborg (eds), *Kommentar zum Erneuerbare-Energien-Gesetz*, 2009, introduction; on sustainability criteria in the EU in Germany see also Ekardt/ Hennig, *Zeitschrift für Umweltrecht* 2009, p. 543 et seq.

Bio-electricity, -heat, and -fuel form an economic opportunity, particularly for developing countries. Their use, however, will likely benefit primarily better-off segments of the population, while the tightening of global food supply would meet the very poorest. This, plus the climate problem and other environmental issues suggests that we should limit the use of bioenergy, and that we should favour only uses with a good carbon balance. It was, however, repeatedly shown elsewhere that “sustainability criteria”⁴ are a currently used, but ultimately sub-optimal way to pursue these aims. This is due to (a) problems of enforcing the law, and (b) relocation effects (the farmers can simply exchange the land for feed and bioenergy plants). But it is also (c) the impossibility to transform an important factor such as the world food situation into a criterion that could be applied for specifically testing the individual bioenergy plant. We would rather recommend a consistent global greenhouse gas reduction, which includes the use of primary energy and the overall land use and connects them with a “complete” global market on carbon emission.⁵

Nevertheless, some countries in the world have to decide now whether they can ban or otherwise restrict exports or imports with regard to the problem of food security.⁶ Of course, one can doubt the suitability of such measures that go even beyond “sustainability criteria”: After all, there is not simply a food supply in a single State which allegedly needs protection but, in fact, a world food market exists.⁷ For this reason, the EU decided not to provide a food sustainability criterion for bioenergy so far. However, a human right to food could possibly justify restrictions on trade. Therefore, we need a more detailed analysis on this human right whose scope of application and content is not yet clear. Such an analysis necessarily includes the question of balancing with other conflicting rights and the issue of a hierarchy within public international law. Finally, this leads to the question of how a human right to food could affect WTO judgments on trade restrictions.⁸

B. The Existence of a Right to Food in Public International Law

As a first step, we need to analyse whether in public international law a right to food exists at all.⁹ Therefore, we consider international treaties, in particular human rights treaties. These agreements address a right to food only implicitly. The Universal Declaration of Human Rights (UDHR) is in itself not a treaty under public international law.¹⁰ Nevertheless, it will

⁴ Those are regulatory requirements for bioenergy imports. For example, the EU can ban plants that were cultivated on former rainforest land because of their negative climate balance as a result of forest clearance.

⁵ Cf. the literature, *supra* note 3. The specific concepts for a truly global carbon market (differing from the previous reluctant approaches in Kyoto 1997 and Copenhagen 2009) are further developed in Ekardt/ von Hövel, Carbon & Climate Law Review 2009, p. 102 et seq.; Ekardt/ Exner/ Albrecht, Carbon & Climate Law Review 2009, p. 261 et seq.; Ekardt, Cool Down, 2009, chapter 19-22.

⁶ On the global factual situation of food security see the Report of the special rapporteur on the Right to Food, Jean Ziegler, to the Human Rights Council (19/01/2007).

⁷ Likewise, this doubtful suitability can form a problem in the sense of economic basic rights and WTO law respectively.

⁸ The common WTO-test of ecologically-socially motivated trade restrictions related to Articles III, XX GATT might mainly refer to Ekardt/ Schmeichel, Critical Issues in Environmental Taxation 2009, p. 737 et seq. (discussing climate policy, GATT, and Border Adjustments); Ekardt/ Meyer-Mews/ Schmeichel/ Steffenhagen, Welthandelsrecht und Sozialstaatlichkeit, Böckler-Arbeitspapier No. 170, 2009.

⁹ Regarding national legislation, see e.g. a case from India: People's Union for Civil Liberties v. Union of India & Ors, In the Supreme Court of India, Civil Original Jurisdiction Writ Petition (Civil) No. 196 of 2001.

¹⁰ Stein/ von Buttlar, Völkerrecht, 2005, No. 1007; Heilbronner, in: Graf Vitzthum (ed), Völkerrecht, 2007, third section, No. 223; Kempen/ Hillgruber, Völkerrecht, 2007, chapter 10, No. 21; Herdegen, Völkerrecht, 2008, § 47 No. 3.

be dealt with under this section. Later on, we will discuss the question whether such a human right as the right to food could (also) be derived from the well known but less clear concept of “general principles of law”.

I. UN Charter, the ICCPR, and the Right to Development

We start our analysis with a look at the Charter of the United Nations. Under Article 55 a), 56 of the UN Charter, all Members “pledge themselves to take joint and separate action in co-operation with the United Nations” to “promote . . . higher standards of living” in order to “[create such] conditions of stability and well-being which are necessary for peaceful and friendly relations among nations”. This seems to imply at least a minimum standard which provides basic needs.¹¹ To improve the standard of living (e.g. in poorer countries) a sufficient access to adequate food is necessary. Accordingly, the obligation to improve living standards includes an obligation to provide access to food. Even though the UN Charter is legally binding for the UN Members¹² it does not grant subjective rights to individuals and its provisions are too broadly defined¹³ to derive from them specific duties to act. Rather, the rules can be seen as describing purposes which shall be achieved.¹⁴ Thus, the UN does not provide for a right to food.

Yet, the right to food could represent a subset of the right to development, at least as far as emerging and developing countries are concerned. The right to development is reflected in numerous resolutions since 1977.¹⁵ However, there is a debate, whether the right to development is an individual, collective or even individual-collective right and whether it is a general principle rather than a specific right.¹⁶ While some scholars describe the right to development as a mandatory part of the existing body of international law and, therefore, as an independent right,¹⁷ others see it as a principle with an alterable / ever changing / without a definite content.¹⁸ The latter group point to the fact that in contrast to traditional human rights the right to development has multiple dimensions, which refer to the individual or to the collective. Thus there is an inherent tension between the right to development’s (at least in parts) collectivist idea and the individualistic nature of human rights. Furthermore, resolutions of the UN General Assembly are sole recommendations.¹⁹ If the source is not binding, it is impossible to derive a binding right from it. Therefore, a legally binding right to food cannot be inferred from the right to development.

Another possible source for a right to food is Article 6 para. 1 sentence 1 of the International Covenant on Civil and Political Rights (ICCPR) which affirms every human being’s inherent right to life. One could imagine that this right consists not only of a defensive aspect (let live)

¹¹ Cf. Rott, *Patentrecht und Sozialpolitik unter dem TRIPS-Abkommen*, 2002, p. 88 et seq.

¹² Currently 192 States are Members of the United Nations.

¹³ Vgl. Kempen/ Hillgruber, *Völkerrecht*, 10. Kap. No. 13, fn. 20; Reimann, *Ernährungssicherung im Völkerrecht*, 2000, p. 140.

¹⁴ See the language in Art. 56 UN Charta; cf. also Kempen/ Hillgruber, *Völkerrecht*, chapter 10, No. 13.

¹⁵ Cf. in particular UN Doc. Resolution A/41/128, 4/12/1986 and UN Doc. A/48/935, 06/05/1994, especially No. 3: “Development is a fundamental human right”; see also Odendahl, *Das Recht auf Entwicklung*, 1996, p. 289.

¹⁶ Auprich, *Das Recht auf Entwicklung als kollektives Menschenrecht*, 2000, p. 212; Odendahl, *Recht*, p. 193 et seq.

¹⁷ Statt vieler Odendahl, *Recht*, p. 289.

¹⁸ Scharpenack, *Das Recht auf Entwicklung*, 1996, p. 277; to be distinguished thereof is the opinion which characterises the right to development as a „right in progress“ („Recht im Werden“), which is in a process of “normative substantiation” („normativer Verdichtung“); cf. Auprich, *Recht*, p. 216.

¹⁹ See Odendahl, *Recht*, p. 279.

but also of an active element (secure a living). Such an understanding would necessarily include the right to food. However, there is a structural limit to this interpretation: Article 6, paragraph 1, sentence 3 ICCPR stipulates that “[n]o one shall be arbitrarily deprived of his life.” The other paragraphs of Article 6 ICCPR are concerned with limitations on capital punishment and genocide, both acts of active killing. The similar provision in Article 2 paragraph 1 ECHR stipulates that [e]veryone’s right to life shall be protected by law. The further qualification in Article 2, paragraph 1, sentence 2 and paragraph 2 ECHR clarifies, however, that the right to life protects only against intentional killing (save in the exemptions made in Article 2 ECHR, i.e. a court sentence or the necessary use of force under certain circumstances). This meaning of Article 2 ECHR together with the context in which Article 6 ICCPR has to be read, makes it more plausible not to read Article 6 paragraph 1 sentence 1 ICCPR independently of sentences 2 and 3 and the following paragraphs. Therefore, the structural interpretation has implications for the literal interpretation and a broad reading of the notion of “life” in this case would be doubtful. Accordingly, a right to food cannot be inferred from Article 6 paragraph 1 sentence 1 ICCPR either.

Yet the right to food could be linked to other classical human rights in the ICCPR. For example Article 9, paragraph 1, sentence 1 ICCPR guarantees personal liberty and security of person. Freedom, as commonly understood, means the absence of coercion, in particular, the absence of physical coercion. A broad understanding of physical coercion could consider not only external force but also internal factors, e.g. sickness due to insufficient or inadequate food. Such a wide interpretation, as we have seen with regard to Article 6 paragraph 1 sentence 1 ICCPR might encounter structural concerns supporting a narrow approach instead. First of all, the right to personal liberty is granted together with the right to security of person. The latter, however, means the security of every individual to be protected from government interference. This is illustrated by Article 6 paragraph 1 sentence 2 ICCPR which prohibits arbitrary arrest or detention. This somehow suggests to interpret personal liberty not independent of but in connection with security. The conjunction “and” in this sentence makes such an understanding even more plausible. A broad definition, as described above, would therefore not comply with the spirit and purpose of the norm. Thus, Article 9, paragraph 1 sentence 1 ICCPR, too, probably does not grant a right to food. It could only be asked whether the notion of “personal freedom” can be interpreted in the sense of a general freedom of action, and whether it would include the basic requirements necessary to exercise this right, e.g. food. We leave this question unanswered here. We will indirectly come back to it in part C when we take a closer look at universal freedom and its basic conditions under the notion of “general principles of law”.

II. Article 25 UDHR

Another source for a right to food could be the Universal Declaration of Human Rights. Article 25 UDHR states that “[e]veryone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food” As such, Article 25 UDHR explicitly grants a right to food. It is, however, doubtful that this right is legally binding.

On 10 December 1948, the UDHR was adopted by the UN General Assembly as a resolution. It contains not only civil and political rights but also social rights, which are founded on hu-

man dignity.²⁰ Resolutions, unlike decisions of the Security Council²¹, are non-binding recommendations²² which promulgate general objectives.²³ This also follows from the wording of resolution 2200 (XXI) of the General Assembly. The resolution's Article 1 shows that the UDHR was only adopted by the General Assembly, thus not being legally binding.²⁴ Nevertheless, there is a wide discussion in the literature on the binding effect of the UDHR, with a significantly negative trend, though.²⁵ The minority position is based on the fact that the UDHR is referred to in numerous declarations and decisions²⁶, that it is recognised as definition and interpretation of the rights in Articles 55, 56 UN Charter, which shall be promoted by the UN²⁷, and that it is mentioned for example in the preamble to the ECHR. The German Federal Court of Justice has also referred to the UDHR in its judgment concerning the homicide of a refugee from the former German Democratic Republic by two GDR soldiers at the inner-German border.²⁸ It stated that "even if the binding effect of the UDHR is not clear, it certainly has a high degree of legal significance, since it expresses the will of the international legal community to implement human rights and the fairly accurate content of these human rights as a legal conviction common to all nations and founded on the value and dignity of men."²⁹ "Common convictions" might, of course, more adequately be expressed by other sources of international law than a UN resolution (like the UDHR), namely by international customs and general principles of (international) law. We will return to these elements *infra*.

In addition, it should be noted that the argument regarding the international community is sketchy, since initially only 48 States had adopted the UDHR³⁰ and since the rights formulated in the UDHR have been merged almost verbatim into binding international treaty law in the International Covenants of 1966, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), which even concretise the UDHR.³¹ This suggests applying the respective treaty as *lex specialis* instead of the *lex generalis* UDHR. This would also comply more adequately with the nature of the resolution which has been selected for the UDHR. Accordingly, even though Article 25 UDHR does contain a right to food, it is not legally binding.

²⁰ See the preamble of the UDHR.

²¹ A resolution of the General Assembly has to be distinguished from decisions of the Security Council, cf. Article 25 UN-Charta, which mentions decisions in the context of the Security Council. In addition, recommendations are possible; cf. Article 36 UN-Charta.

²² This already follows from the fact that, according to Article 13 paragraph 1 UN-Charta, the General Assembly merely makes recommendations; cf. Stein/ von Buttlar, *Völkerrecht*, No. 1007; Herdegen, *Völkerrecht*, § 47 No. 3; Kempen/ Hillgruber, *Völkerrecht*, chapter 10, No. 20; according to Articles 10, 12 UN-Charta decisions of the Security Council are prior to resolutions of the General Assembly. Unlike recommendations, decisions of the Security Council are legally binding.

²³ Resolution 2200 (XXI); Kempen/ Hillgruber, *Völkerrecht*, chapter 10, No. 20.

²⁴ Heilbronner, in: Graf Vitzthum, *Völkerrecht*, third section, No. 223; German Federal Constitutional Court, Vol. 41, p. 88 (106); German Federal Criminal Court, Vol. 40, p. 241 (246); Rott, *Patentrecht*, p. 89.

²⁵ This discussion ranges from mere political sentences to *jus cogens* for fundamental – or even all – human rights; cf. Heilbronner, in: Graf Vitzthum, *Völkerrecht*, No. 236; Rott, *Patentrecht*, p. 90.

²⁶ Cf. German Federal Constitutional Court, Vol. 31, p. 58 (68) as well as the decisions in the cases of *Texaco Overseas Petroleum Company and California Asiatic Oil Company vs. The Government of the Libyan Arab Republic*, ILR 53, 420 (491); *Libyan American Oil Company vs. The Government of the Libyan Arab Republic*, ILR 62, 140 (189).

²⁷ Cf. Heilbronner, in: Graf Vitzthum, *Völkerrecht*, third section, No. 223.

²⁸ German Federal Criminal Court, Vol. 40, p. 241.

²⁹ German Federal Criminal Court, Vol. 40, p. 241 (247).

³⁰ Kempen/ Hillgruber, *Völkerrecht*, chapter 10, No. 20. By now, 162 States have signed and ratified Pact on Civil Rights and 159 States the Pact on social rights.

³¹ Vierdag, NYIL 1978, p. 69 (82); Rott, *Patentrecht*, p. 93; see also Stein/ von Buttlar, *Völkerrecht*, No. 1008.

III. Article 11 paragraph 1 sentence 1 ICESCR

This immediately takes us to Article 11 paragraph 1 sentence 1 ICESCR which explicitly grants a right to food.³² The language of this provision is similar to Article 25 UDHR: “The States Parties . . . recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food.” Unlike the UDHR, the ICESCR does represent international treaty law and is thus legally binding.³³ It was the Parties’ aim to transfer the content of the UDHR, merely programmatic in nature, into binding treaty law. For this purpose a committee was created that divided the rights included in the UDHR into two covenants, the ICCPR and the ICESCR. Both treaties came into force in 1976.³⁴ Therefore, in principle, the ICESCR is legally binding on the States which have signed (ratified?) it.³⁵

However, there is a controversy in the literature as to the binding effect of rights under the ICESCR.³⁶ It is essentially based on the commonly perceived difference between rights under the ICCPR and those under the ICESCR. The first alleged difference is the nature of the respective rights. The ICESCR, in terms of the common international law terminology, contains mainly “second generation rights”.³⁷ Unlike “first-generation human rights” they are not classical defensive rights (*Abwehrrechte*), i.e. rights *against* State interference, but rather protection rights (*Schutzrechte*) and beneficial rights (*Leistungsrechte*), i.e. rights to *demand* State interference.³⁸ It is argued that social human rights were linked to a State’s availability of resources and depended on the respective State’s changing conditions.³⁹ Moreover, their aim was to gradually achieve the standards aspired in the ICESCR.³⁶ For Article 2 paragraph 1 ICESCR requires that each State “undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.” This formulation seems to indicate an undefined commitment to take certain actions subject to financial ability.⁴⁰ “Second generation human rights” were mere

³² Scholars often distinguish the right to food in Article 11 paragraph 1 sentence 1 ICESCR from the right to be protected from hunger/ starvation in Article 11 paragraph 2 ICESCR. We will only analyse Article 11 paragraph 1 sentence 1 ICESCR because we want to show that a right to food already exists in this provision. Article 11 paragraph 2 with its minimum level is already included in Article 11 paragraph 1 sentence 1; see also Engbruch, *Das Menschenrecht auf einen angemessenen Lebensstandard. Ernährung, Wasser, Bekleidung, Unterbringung und Energie*, 2008.

³³ Herdegen, *Völkerrecht*, § 48 No. 1, 6; Kempen/ Hillgruber, *Völkerrecht*, chapter 10, No. 21; Stein/ von Buttlar, *Völkerrecht*, No. 1008; Reimann, *Ernährungssicherung*, p. 140; Wimalasena, *KJ* 2008, p. 2 (4).

³⁴ McCorquodale/ Dixon, *Cases and Materials on International Law*, 2003, p. 194; Kempen/ Hillgruber, *Völkerrecht*, chapter 10, No. 21.

³⁵ Vgl. Rott, *Patentrecht*, p. 94.

³⁶ Vierdag, *NYIL* 1978, p. 69 et seq.; Rott, *Patentrecht*, p. 93; Wimalasena, *Kritische Justiz* 2008, p. 2 (4); Eide/ Kracht, *Right*, Vol. 1, chapter 4, p. 3; Bleckmann, *Völkerrecht*, 2001, No. 982; Reimann, *Ernährungssicherung*, p. 15; see also Fritzsche, *Menschenrechte*, 2004, p. 92.

³⁷ Stein/ von Buttlar, *Völkerrecht*, No. 1002, 1014.

³⁸ Stein/ von Buttlar, *Völkerrecht*, No. 1002; Reimann, *Ernährungssicherung*, p. 160; Auprich, *Recht*, p. 38; Rott, *Patentrecht*, p. 93. Some authors have also identified a third generation which (cumulatively or alternatively) includes environmental or collective rights. However, this has not yet reached any practical relevance; cf. Donnelly, in: Brölmann/ Lefeber/ Ziek (ed), *Peoples and Minorities in International Law*, 1993, p. 119 et seq.

³⁹ Wimalasena, *KJ* 2008, 2 (9-10); Heilbronner, in: Graf Vitzthum, *Völkerrecht*, 3. Abschnitt, No. 226; Vierdag, *NYIL* 1978, p. 69 (81-82).

⁴⁰ Heilbronner, in: Graf Vitzthum, *Völkerrecht*, 3. Abschnitt, No. 226; Dommon, in: Abott/ Foster, *International Trade and Human Rights*, *The WT Forum*, Vol. 5, p. 124; Eide/ Kracht, *Right*, Vol. 1, chapter 4.

political sentences.⁴¹ Accordingly, many authors see a difference between “absolute” defensive rights and “relative” protection and benefit rights.⁴² Where a State’s duties to protect are recognized in some cases, they are then often seen as subordinate to defensive rights.⁴³ The common notion of “obligations” rather than “rights” also shows that the subjective quality of such rules is doubted.⁴⁴

However, all these arguments can be convincingly refuted. First, it should be noted that any substantive openness of Article 11 paragraph 1 sentence 1 ICESCR is being addressed by the Committee on Economic, Social and Cultural Rights which uses General Comments to concretize any obligation or right.⁴⁵ But most notably the basic theses are not convincing: classical libertarian rights are not more certain than as social rights and they are not “more absolute” in the sense of “more resistant to balancing” than social rights. Specifically:

1. The human rights liberties should unambiguously be interpreted to include the basic physical preconditions of freedom - which implies a right to food. For without such a mere subsistence and without health and life there is no freedom.⁴⁶ Hence, the right to food can be inferred from the very general concept of freedom as described in the IC-CPR. German case-law⁴⁷ and scholarship⁴⁸ instead often refer to human dignity or the welfare principle, since individuals without food or subsistence degenerate into a mere object.⁴⁹ However, the classification of human dignity as a subjective right is doubtful⁵⁰, in case of the welfare state principle even positively impossible.⁵¹ Therefore, the existence of a *subjective right* to subsistence as argued by the majority in the German jurisprudence remains doubtful.⁵² Another argument against an inference from human

⁴¹ Wimalasena, *Kritische Justiz* 2008, p. 2 (8); Vierdag, *NYIL* 1978, p. 69 (83).

⁴² Bleckmann, *Völkerrecht*, No. 983; Wimalasena, *Kritische Justiz* 2008, p. 2 (8); Vierdag, *NYIL* 1978, p. 69 (80); Reimann, *Existenzsicherung*, p. 157; Pieroth/ Schlink, *Grundrechte. Staatsrecht II*, 22 ed. 2006, No. 58; Kannengießer, in: Schmidt-Bleibtreu/ Klein (ed), *Grundgesetz-Kommentar*, 9 ed. 1999, Introduction before Art. 1 No. 5; von Münch, in: von Münch/ Kunig, *Grundgesetz-Kommentar*, Introduction before Art. 1-19 No. 16; Sachs, in: Sachs, *Grundgesetz-Kommentar*, Introduction before Art. 1 No. 26; see also German Federal Constitutional Court, Vol. 7, p. 198 (204).

⁴³ For the conventional position cf. Jarass, in: Jarass/ Pieroth (ed), *Grundgesetz-Kommentar*, 9 ed. 2007, Introduction before Art. 1 No. 6; Kannengießer, in: Schmidt-Bleibtreu/ Klein, *Grundgesetz-Kommentar*, Introduction before Art. 1 No. 5, 2c.

⁴⁴ See, e.g., German Federal Constitutional Court, Vol. 39, p. 1; Vol. 88, p. 203; Vol. 49, p. 89 (141); Vol. 53, p. 30 (57); this problem is overlooked by Couzinet, *Deutsches Verwaltungsblatt* 2008, p. 760 et seq., as well as in some of the articles cited by her; critical Vosgerau, *Archiv des öffentlichen Rechts* 2008, p. 346 et seq. and Schwabe, *Juristenzeitung* 2007, p. 134 et seq.

⁴⁵ According to Riehle, *ZFSH/ SGB* 2008, p. 643 (644), the effect of General Comments can be compared to national judgements. See chapter E. for further details.

⁴⁶ Therefore, the tendency in international law towards „social“ fundamental rights with regard to the various aspects of subsistence has a theoretical foundation, too. This “constitution of international law” can be derived even without reference to the International Covenant on Economic, Social, and Cultural Rights through the “general principles of law” (cf. Article 38 ICJ Statute); cf. Ekardt/ Meyer-Mews/ Schmeichel/ Steffenhagen, *Welthandelsrecht*, p. 42 et seq.

⁴⁷ German Federal Constitutional Court, Vol. 40, p. 121 (133); Vol. 45, p. 187 (228); Vol. 48, p. 346 (361); German Federal Administrative Court, Vol. 1, p. 159 (161).

⁴⁸ Kunig, in: von Münch/ Kunig (ed), *Grundgesetz-Kommentar*, Bd. I, 5 ed. 2000, Art. 1 No. 30, 36; Schmidt-Liebig, *Betriebsberater* 1992, p. 107 (107 and 115); Wallerath, *Juristenzeitung* 2008, p. 157 (159); Starck, *Juristenzeitung* 1981, p. 457 (459); Sartorius, *Das Existenzminimum im Recht*, 2000, p. 15.

⁴⁹ German Federal Administrative Court, Vol. 25, p. 23 (27); Dürig, *Grundgesetz*, 2003, No. 43. The „object formula“ was introduced in German case law in German Federal Administrative Court, Vol. 1, 159 (161); later on German Federal Constitutional Court, Vol. 9, p. 89 (95); Vol. 27, p. 1 (6); Vol 50, p. 166 (175); Böckenförde, *Juristenzeitung* 2003, p. 809 et seq.

⁵⁰ Wallerath, *Juristenzeitung* 2008, p. 157 (162); Schulte/ Trenk-Hinterberger, *Sozialhilfe*, 2 ed. 1986, p. 4.

⁵¹ See only Jarass, in: Jarass/ Pieroth, *Grundgesetz-Kommentar*, Art. 20 No. 103.

⁵² Bachof, *Veröffentlichungen der Vereinigung der deutschen Staatsrechtslehrer*, 37 et seq. and Jarass, in:

dignity is that dignity⁵³ according to provisions like Article 1, paragraph 2 German Basic Law or the preambles of many human rights catalogues is the reason for human rights and liberties and, therefore, provides for what can be called the general idea of liberties and human rights: the respect for the autonomy of the individual.⁵⁴ In contrast, the prohibition to treat a human being merely as an object, often quoted as the core of human dignity, appears as unfounded, even in the word “dignity” untraceable postulate – notwithstanding the additional inherent question *when* someone is “made into a mere object”. Thus, if human dignity is more of the common basic reason for human rights, human dignity is not only *not* a basic right but also rather not independently applicable to specific cases.⁵⁵ This means: Elementary preconditions for freedom (such as food security, drinking water, a stable global climate, etc.) are necessarily contained in the notion of freedom. Thus, the right to food can at least not be subordinated to the “traditional freedom”.

2. Every kind of human right needs to be balanced, not only “second generation rights”. That is why constitutions and human rights catalogues always subject even classical defensive rights to restrictionability. Moreover, the general need to *balance* already follows from the multipolarity of human rights, i.e. their nature of being not only defensive rights:
3. The content of the basic principle of freedom, as embodied in basic rights, is the protection of freedom where there is danger. Because basic rights in their function of fundamental rights shall give specific protection to typical dangers for freedom. Such threats do not only evolve from the State but also from private actors (and from market activities created by the latter, such as bioenergy). But this implies that freedom must always include a right to demand (state) protection against fellow citizens and not only in exceptional circumstances. Such protection of individual freedom and its preconditions *by the State against fellow citizens* could for example target environmental destruction – and it would not be subordinate to classical defensive rights.⁵⁶ This “protection” may also consist in a benefit, such as cash to ensure minimum level of food.

The third point can be called “multipolarity of freedom”. It follows, as we have just shown, from the very idea of freedom itself, which is at the centre of liberal-democratic constitutions.⁵⁵ This alone shows that (a) protection rights exist, that (b) they are equal to defensive rights, and that (c) the notion of protection *rights* is preferable to protection *duties* as otherwise, the equality would not be recognized. There are further reasons:

Multipolarity also becomes visible in rules such as Article 2 paragraph 1 German Basic Law

Jarass/ Pieroth (ed), Grundgesetz-Kommentar, 9 ed. 2007, Art. 2 No. 69 [trying to find such a right based on the general notion of freedom or on the right to life]; similar Brockmeyer, in: Schmid-Bleibtreu/ Klein, Grundgesetz-Kommentar, Art. 20 No. 52.

⁵³ On the following see Ekardt/ Kornack, Kritische Vierteljahreszeitschrift für Gesetzgebung und Rechtswissenschaft 2006, p. 381 et seq.; Ekardt, Theorie der Nachhaltigkeit: Rechtliche, ethische and politische Zugänge, 2009, § 5; Ekardt, Die Verwaltung 2010, Vol. 1.

⁵⁴ With a similar notion but a different approach also Dreier, in: Dreier (ed), Grundgesetz-Kommentar, Bd. I, 2 ed. 2004, Art. 1 Abs. 1 No. 44.

⁵⁵ See also Enders, Die Menschenwürde in der Verfassungsordnung, 1997.

⁵⁶ The issue here is not, whether citizens can sue each other with regard to their liberties or human rights. This would render a trade-off very difficult since a court is not the appropriate authority to perform the necessary balance between a large number of rights or liberties involved. Such balancing is primarily in the competence and an obligation of the legislature, since this is the best way to protect freedom/ liberty.

(*Grundgesetz/ GG*), which stipulates that “everyone has the right to self-fulfilment insofar as he does not infringe the rights of others and does not violate the constitutional order or the moral law,” or Article 29 No. 2 UDHR, which gives everyone the right to „exercise . . . his rights and freedoms . . . subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.” Those rules specifically state that the general freedom to act in accordance with self-determination may be limited by the rights of others. Thus, at least these two rules assume that also human rights or basic rights may conflict with each other directly. Another argument for multipolarity is apparent from the wording of Article 1 paragraph 1 sentence 2 GG and the preamble to the UDHR, according to which public authorities have to “respect” and “protect” human dignity and thus liberties (which exist under Article 1 paragraph 2 GG (“therefore”) for dignity's sake and, hence, have to be interpreted in accordance with its structure). It is this double concept of respect and protection of human dignity (and thus liberties) that illustrates that freedom can be affected from different directions. Yet linguistically, the term 'to protect' would not make sense if it meant only that the State cannot exercise coercion against the citizens - the government could simply abstain from any action). Hence, “to secure” must rather mean that the addressee (the State) has to protect someone against others (the fellow citizens).

However, there is no rule in the ICESCR or the ECHR that shows the same aspects of protection and respect the German GG does. That in the ICESCR human rights are also inferred from human dignity is illustrated in the preamble. It mentions duties towards other human beings. This means that there must be some mechanism that was created to fulfil these obligations because otherwise they contained meaningless commitments. Therefore it might be assumed, that when someone fails to comply with these duties towards his fellow citizens, the State must interfere with that fellow-injurious behaviour. General Comment No. 12 to the ICESCR confirms that the right to food includes three types of obligations, namely “the obligations to respect, to protect and to fulfil.”⁵⁷ It follows that no one shall be deprived of their livelihood (right to respect), that the State shall *actively* protect its citizens from a withdrawal of their livelihood (right to protect) and that citizens in need have a minimum right to State assistance in their efforts to feed themselves (right to fulfil).⁵⁸ The parallel listing of these three factors is consistent with the aforementioned hypothesis that inferred from the right of food equal dimensions: a defensive, a protective and a beneficial one.

Meanwhile, the rights of the ICCPR can be enforced by other States or even by individuals (if the respective State is a Party to the Optional Protocol to the ICCPR).⁵⁹ Even though such an enforcement mechanism does not yet exist in the ICESCR⁶⁰ (so far as a template has not been adopted), this does not contradict the arguments for multipolarity just presented. Moreover, ICCPR decisions are not legally binding.⁶¹ Furthermore, it does not seem clear that all rights in the ICESCR are merely second generation human rights. Even the majority opinion concedes that some rights under the ICCPR are of a two-dimensional nature and that rights under

⁵⁷ General Comment 12, No. 15.

⁵⁸ General Comment 12, No. 15; Reimann, Ernährungssicherung, p. 175; Breining-Kaufmann, Right to Food and Trade in Agriculture, in: Cottier/ Paulwelyn/ Bonanomi (ed), Human Rights and International Trade, 2005, chapter 6, p. 363-364.

⁵⁹ See Heilbronner, in: Graf Vitzthum, Völkerrecht, third section, No. 228.

⁶⁰ The draft introducing a similar mechanism is not very likely to be adopted.

⁶¹ Cf. Stein/ von Buttlar, Völkerrecht, No. 1013 and 1015.

the ICESCR can also be defensive rights. Hence, it cannot be assumed that the right to food is not sufficiently certain or too susceptible to and indeterminate in balancing or lacks the necessary binding effect and enforceability to be valid.

C. “General principles of law” as a source of human rights - including the right to food?

There might be an additional source of the right to food that also targets the presented objections.⁶² Instead of relying on international treaties one could refer to the general principles of law which constitute a third source of international law in addition to international treaties and customs.⁶³ Additionally, we might ask, whether such general principles of law within the meaning of Article 53 WVRK can be regarded as *jus cogens*. This might result in some kind of “international constitutional law” giving an increased weight to the right to food.⁶⁴ In addition, the right to food would be valid even towards States which have not ratified the ICESCR.

So, could there be general principles of international law granting minimum social standards (in terms of a right to food) as human rights⁶⁵ independent of State (“multilateral”) approval?⁶⁶ First, we need to consider what general principles of law truly are? Linguistically, it sounds like a “law behind the law”, a higher system of justice which determines certain basic ideas regardless of whether the particular political and state system is willing to respect them or not. The relation of legal principles to some kind of system of the law of reason (*Vernunftrecht*)⁶⁷, however, remains unclear in the tradition international law debate. Meanwhile, the notion of general principles of law could import the concept of the general theory of justice into the law, even where the international treaty law does not provide comprehensive rules. In a modern Kantian, liberal-democratic theory of law or justice this would be represented by human dignity, impartiality, freedom, protection of (especially elementary) conditions of freedom as well as the expansion of freedom in an inter-generational and global dimension. In effect, this could lead to a catalogue of fundamental rights like the European Charter of Fundamental Rights or as included in the German GG or in treaties of international law.⁶⁸ This

⁶² On the following see Ekardt/ Meyer-Mews/ Schmeichel/ Steffenhagen, *Welthandelsrecht*, chapter 4.3.3; see also (partially) Herrlich, *Internationale Menschenrechte als Korrektiv des Handelsrechts*, 2005; Faden, *Menschenrechte und Handelsregeln*, 2007, p. 46 et seq.

⁶³ Mentioned in Article 38 ICJ Statute.

⁶⁴ See Chapter D.

⁶⁵ Somehow abrupt Rott, *Patentrecht*, p. 103-104.

⁶⁶ Cf. Voigt, *Sustainable Development as a Principle of International Law*, 2009; Maurmann, *Rechtsgrundsätze im Völkerrecht – am Beispiel des Vorsorgeprinzips*, 2008; more reluctant Durner, *Common Goods*, 2001, p. 21 et seq., who seems to understand the principles as a mere systematic compendium of contents which are doubtlessly valid international law without being a separate source of law. Schollendorf, *Die Auslegung völkerrechtlicher Verträge in der Spruchpraxis des Appellate Body der WTO*, 2005, p. 353 et seq., shows that the WTO case law (e.g. with regard to precaution or sustainability) only seemingly makes reference to general principles of international law and in fact refers to international environmental treaties and general practices; this is not sufficiently clear in Thiedemann, *WTO and Umwelt*, 2005, p. 31 et seq. Regarding the principle of co-operation, however, which is based on Article XX GATT the case law seems to assume a general principle of international law – which is not without problem as will immediately be shown.

⁶⁷ Today the notion of “natural law” is no longer meaningful as it misleadingly suggests that it were possible to derive from the empirical „nature of men“ (however it should be determined) something of normative importance. This, of course, would mean to (im Wege eines Sein-Sollen-Fehlschlusses). Therefore, the Kantian tradition uses the notion of the law of reason or philosophy of justice behind the law; cf. Ekardt, *Theorie*, § 1.

Cf., also for the specific ratio, Ekardt, *Theorie*, § 3.

⁶⁸ Id.

would certainly be a universalist - and globalist⁶⁹ - law of reason.

However, commonly general principles of law are rather seen as concepts which are (purely factually) recognised by the States – or a “representative” selection of States – established principles. Therefore, the starting point to substantiate these principles is usually not international law itself but the national law of these States.⁷⁰ Should we now count how many States explicitly recognized a right to food⁷¹ - or maybe only implicitly as Germany arguably does? Should the “representative” selection of States be based on the nationality of the ICJ judges? Then, of course, we would face the question whether the term “recognized” “general principles of law” in Article 38 of the ICJ Statute is consistent at all. For what distinguishes the law of reason or “nature” and its general principles (at least since Thomas Aquinas) is the fact that its ideas are independent of a *de facto* positivist recognition by any authority or majority. Although the theoretical basis may have slightly changed due to the shift from the law of nature to the law of reason (and perhaps now from the old Kantian to a modern-Kantian rational discourse-founded law), yet this very result has remained as such. The controversy can be solved by considering the words “recognized by civilized nations“. They indicate that the existence of a general principle does not depend on “every nation’s” factual recognition but rather on the perspective of civilization as such. If the notion of “civilized nations” is supposed to have any meaningful content, it must refer to what man rightfully has to recognise; it describes acceptability not factual acceptance. Consequently, the term “civilized nations” in former times was related to western („law of reason“) democracies and their legal philosophy.

The biggest problem of the previously accepted opinion on the general principles of law, however, is the following: If legal principles (just to mention, this is true for customary law as well) shall have a true meaning in addition to international treaty law, even representatives of the traditional conception of international law (despite their reference to the States) feel the need to postulate principles of law which not all States factually recognise or practice. This is illustrated in key words such as “comparative review” and “representative selection of States” which are often used in the determination of such “legal principles”. The crucial issue is, however, (a) how to select those States whose legal state of mind is supposed to be “representative” and should therefore prove the recognition of certain principles (What would be representative? Which countries are representative for instance for Africa / Europe / South America?), (b) how in doing this total arbitrariness of the legal user “to get to the desired result”

⁶⁹ Universalist means valid in every State/ system of law. Globalist means also valid in a cross-border situation (e.g. against foreign powers or in the framework of international organisations). This difference is often overlooked in the international law discourse (as well as in the philosophical global justice discourse).

⁷⁰ Cf. Verdross/ Simma, *Völkerrecht*, p. 384; Weiss, *Archiv des Völkerrechts* 2001, 398 (408); Heintschel von Heinegg, in: Ipsen, *Völkerrecht*, 2004, p. 231, No. 3; Kimminich/ Hobe, *Einführung in das Völkerrecht*, 2004, p. 183.

⁷¹ A FAO report analysing which States grant a right to food shows that only seven States have expressly established the right to food under this heading in their constitutions. Those are the Democratic Republic of the Kongo (cf. Article 34 of its constitution), Ecuador (Article 19), Haiti (Article 22), Nicaragua (Article 63), South Africa (Article 27), Uganda (Article 14) and Ukraine (Article 48). Bangladesh (Article 15), Ethiopia (Article 90), Guatemala (art. 99), India (Article 47), Iran (Article 3 & 43), Malawi (Article 13), Nigeria (Article 16); Pakistan (Article 38), Seychelles (Preamble), and Sri Lanka (Article 27) have made it a national objective. Brazil (Article 227), Guatemala (Article 51), Paraguay (Article 53), Peru (Article 6), and South Africa (Article 28) have also established a right of children to adequate food; cf. FAO, *Implementation of the right to food in national legislation*, <http://www.fao.org/docrep/w9990e/w9990e11.htm#TopOfPage>, No. 13. The Convention on the Rights of the Child (Article 24) also mentions nutrition of children within the framework of international public law. Regarding national legislation, see also a case from India: *People's Union for Civil Liberties v. Union of India & Ors*, In the Supreme Court of India, Civil Original Jurisdiction Writ Petition (Civil) No. 196 of 2001.

can be avoided, and (c) how the whole idea of States being bound against their will⁷² goes in line with the traditional idea of the sovereignty of States, which is the ratio for the commitment to the “factual recognition of principles by the States”.⁷³

This is even more problematic since one *may* well verify whether a legal principle X is actually recognized in “all” systems of law (or by all States in international law respectively). Sometimes referring to a selection of “representative” States despite this (foregone) possibility might even allow postulating a legal principle which is clearly not recognised in a majority of States. Hence, the traditional view of “general principles of international law” gives leeway for international law practitioners, which were hard to reconcile with the concepts of legal certainty, balance of power, a clear division of competences and so on.

We can still go further: International law in its previous interpretation is already quite subjectivist - in other terms, at the discretion of sovereign States, which may more or less arbitrarily form any contract. Both, from the point of view of the law of reason as well as the needs for a more rational and objective global legal system in this age of globalization, this is an instance, that must be overcome in the medium term.⁷⁴ The traditional view of general principles of international law, however, leads to a paradox which was already indicated above: On the one hand, the position of sovereign nation States is weakened, since they are confronted against their will with a somehow more globalist idea of law. On the other hand, the arbitrariness of nation States is not answered with an objectivist, formal application of law at the global level, but with an element of arbitrariness in favour of legal users. This arbitrariness does not only concern the application of the law but also provides a further element of voluntarism to rule-making, since the legal principles here are methodologically unclear and slightly arbitrarily “set” and then “applied”. Practitioners (who ultimately also make law) may now (whether committed in good faith whatever defined) avow themselves to legal principles derived from the desired outcome and therefore may instead of a devotion to the rational application of the law be carried away rather emotionally. As a result, the traditional understanding of general principles of international law does not lead to a more formalised, rationalised and objectified international legal order (as is desirable), but perhaps even to a new stealth mechanism behind which hides, on closer inspection, not the rational idea of justice, but the trimmed voluntarist “Gorgon's power” (Hans Kelsen). The only difference to some idea of “total state sovereignty” is that now the power is vested in individual practitioners, such as the WTO courts and not so much in nation States.⁷⁵

⁷² That is what it is all about, otherwise, a State X, e.g. in case of a dispute before the WTO dispute settlement bodies, would not deny the validity of a legal principle Y.

⁷³ The same problems present in the traditional reading of the general principles of law arise incidentally, if one assumes, that the “high rate of ratification of human rights treaties” (that is the ratification by many States) transfer the treaties per se into general principles of law. After all, this would be quite inconsistent as well.

⁷⁴ For the possibility to rationally justify a universalist and globalist law, see Alexy, *Recht, Vernunft, Diskurs*, 1995, p. 127 et seq. (on universalism); Ekardt, *Wird die Demokratie ungerecht?*, 2007, chapters III and IV; Ekardt, *Theorie*, §§ 3, 4, 5, 7 (on universalism and globalism); similar but with important differences Habermas, *Faktizität und Geltung*, 1992, p. 109 et seq.; Rawls, *A Theory of Justice*, 1971.

⁷⁵ By no means we want to support the radical positivist Kelsenian legal concept. We rather propose a universalist and globalist, argumentatively renewed rationalist foundation (also) of (international) law. Nor is it our aim to foster the (unreachable) goal to make courts and administrations absolutely pure “users” of the law. For lawmaking must be (and it is in fact) a process based on the separation of powers, see Ekardt/ Beckmann, *Verwaltungsarchiv* 2008, 241 ff - The debate about the issue of principles of law has so far been little clear. This might be due to a vague use of the notion of justice. Instead of simply defining it as the overarching “correctness of the social order” in a very broad sense it is often substantiated with a few among the many normative questions of life. See, e.g. Maurmann, *Rechtsgrundsätze*, p. 12 (fn. 46) and 58. At the same time, it is overlooked that the law is just a special case of the theory of justice/ ethics/ morality – with a unique concreteness and enforcement through

The idea that what is “generally” recognized can be determined (using rather arbitrary methodology) by single aspects (“representative comparative law”), is also linguistically at odds with the term “general” which means “regarding all” – and only “general” principles of law are mentioned in Article 38 ICJ Statute as a source of law.⁷⁶ This results in the same frictions as the use of the terms “common welfare”, “common good” or “general public interest” in the law, which in turn is susceptible to disguising that the intended aim does not always serve “all”.⁷⁷

Hence, the idea of general principles of law is doomed to remain out of place in the prevalent, nation-centred international law. It will always be limited to trivial principles which could as well be classified as international customs.⁷⁸ Accordingly, rejecting the existing legal practice would yield the opposite result. Not least, the seemingly backward notion of “civilized nations” illustrates that legal principles of law are part of a law of reason which is independent of mere factual recognition. The term “principles of law” itself fits into the reason of law terminology. If a term like civilized nations shall have any meaning, then certainly mere “de facto recognition” of something is not enough. It rather assumed a system of principles with the coordinates “right / wrong” as the basis of an international legal order. In that spirit, we can embrace the following, derived from the general theory of justice: There is a universal and global system of principles of justice (human dignity, impartiality, freedom / freedom condition, separation of powers and democracy). This system is prior to “simple” law. As part of it, the guarantees of freedom/ human rights might be “general principles of law recognized by civilized nations” (perhaps more than has been the conventional wisdom in international law). How these principles can be derived in a logically rigorous way as contents of a virtual law of reason was shown elsewhere. That reason is the theoretical foundation of human dignity, which in turn is the basis for human rights then, is also expressed in norms such as Article 1 of the German Basic Law or Article 1 UDHR and its preamble.

Therefore, a right to food can be based on the ICESCR as well as on general principles of law. It is important to note that freedom and its basic conditions also have an intergenerational⁷⁹ and global⁸⁰ dimension. For the right to equal freedom must point into that direction where it is threatened - and these threats in a technological, globalised world occur increasingly across generations and across national borders. Consequently, they are also relevant for typic-

sanctions; cf. Alexy, *Theorie der juristischen Argumentation*, 2 ed. 1991.

⁷⁶ However, this is not the most important aspect, since Article 38 ICJ Statute is not the legal basis of the existence of the different sources of law but only cites them.

⁷⁷ These and other frictions are well-known to justice philosophy from disputes with contextualist and preference based approaches. – Regarding the concept of a “common welfare” or “common good” (*Gemeinwohl*), the solution might be to retire the concept at all. For the overarching aim of any legal order including its impartiality the concept of justice already exists. For a further description of normative interests beyond individual rights, the notion of common welfare is too less substantiated and too susceptible to manipulation; cf. Ekardt, *Demokratie*, chapter III B. and IV E.

⁷⁸ Regarding customary law the paradoxes just described with respect to principles of law could simply be repeated. The conclusion, however, would be that principles and customary law are clearly distinguishable and that customary law should be limited. In any event, the clear distinction between customary law and principles is another argument in favour of our position. This as well as the general tension between the concept of customary law and the idea of a modern law based on and established in due process is overlooked by the majority opinion; cf. e.g. again Maurmann, *Rechtsprinzipien*, passim.

⁷⁹ With somehow similar arguments see also Unnerstall, *Rechte*, p. 422 et seq.; the basic tendency without further reasons e.g. Kloepfer, in: Gethmann/ Kloepfer/ Nutzinger (ed): *Langzeitverantwortung im Umweltstaat*, 1993, p. 22 (26 et seq.); Murswiek, *Die staatliche Verantwortung für die Risiken der Technik*, 1985, p. 212; more detailed Ekardt, *Theorie*, §§ 4, 5; those arguments are overlooked by Eifert, *Kritische Justiz* 2009, p. 211 et seq., who thus incorrectly states a lack of reasons.

⁸⁰ Similar Giegerich, *EuGRZ* 2004, p. 758 et seq.

al conflicts of international law, i.e. cross-border conflicts, such as bioenergy import prohibitions. With all this said, it may remain undecided whether such general principles of law come into play even if the law of contracts itself deals exhaustively with the respective question.⁹ For this is, as we have seen, controversial.

D. A right to food's scope of application

We still need to clarify what subsistence (or “food”) is and how it can be calculated. According to General Comment No. 12 of the Committee on Economic, Social and Cultural Rights, the right to food is to be understood as follows: It includes two distinct elements: accessibility and availability. The access element can be subdivided into an economic and a physical criterion.⁸¹ Availability must be given in both respects, qualitatively and quantitatively.⁸² Economically, access to food is ensured, if the costs of food are not precusively high so that they prevent the purchase of other essentially important items.⁸³ Physical access exists when adequate food is available for every person and every group.⁸⁴ Food is available in quantitative terms, if everyone has the opportunity to feed upon either agricultural or other products or on the basis of a functioning economic market, in which the produced goods are (physically) taken within everyone's reach.⁸⁵ In accordance with the given ratio we might also say that food must be available in such a manner that guarantees a life of dignity⁸⁶ or freedom respectively.

Thus, the right to food has certain content and is not left to the legislature's discretion (notwithstanding that need to balance). It is also no valid objection that the minimum subsistence level cannot exactly be determined.⁸⁷ This rather reflects the application of a well-known philosophical phenomenon attributed to Eubulides of Miletus, the *sorites paradox* or paradox of the heap. It illustrates that even though the exact threshold might be indeterminable there is still a good reason for differentiation. Consider a man 1.50 m tall and another one 2.00 m tall. There would be agreement that while the first man is small, the second man is tall. How about a man standing 1.70 m? The threshold for when a man is small or tall (or respectively when a number of grains is a heap or just a pile or where exactly the subsistence minimum in euro) is hard to determine. Yet, that does not render it useless. The remaining questions must be answered in a democratic process, through legislative, executive and judicial branches.⁸⁸

Furthermore, it does not contradict the idea that sometimes autonomy is to be reached through active State interference, by means of benefits, or at least protective measures. For autonomy is only facilitated without imposing certain behaviour.⁸⁹ No one is legally forced to eat - even if there is a popular misconception regarding the contents of protection or performance / beneficial rights.

⁸¹ General Comment 12, No. 6.

⁸² General Comment 12, No. 8.

⁸³ General Comment 12, No. 13.

⁸⁴ General Comment 12, No. 13.

⁸⁵ General Comment 12, No. 12

⁸⁶ German Federal Administrative Court, Vol. 25, 23 (27); see also Riehle, ZFSH/ SGB 2008, p. 643 (644).

⁸⁷ See, for example, the language of Article 11, Paragraph 1 ICESCR: “adequate standard of living” (emphasis added).

⁸⁸ Ekardt, Demokratie, p. 88; Luthe/ Dittmar, SGB 2004, p. 272 (274).

⁸⁹ Neumann, Neue Zeitschrift für Verwaltungsrecht 1995, p. 426 (426); Ekardt, Die Verwaltung 2010, Beiheft 1.

E. Human rights in the law of the WTO - the example of bioenergy

We now turn to the question whether the right to food as just described can justify trade restrictions on bioenergy. Generally, do human rights have an impact on the interpretation of WTO law?⁹⁰ World trade law does not explicitly refer to human rights.⁹¹ Still many demand their application in this area of international law.⁹² However, WTO case law refuses the application of human rights.

A general prohibition of or a quantitative limitation on the use of bioenergy in the interest of securing sufficient food should only be a WTO concern, if it implied any (legal or factual) discrimination against foreign bioenergy.⁹³ Furthermore, Articles XI:2 a) GATT and other similar provisions quite clearly allow developing countries to restrict bioenergy *exports* with regard to food security. A latent conflict still arises if the import of bioenergy *from certain countries* is specifically limited or made subject to conditions. In this case, there would be need for a justification which might be based on human rights.

Therefore, the question is whether human rights can or even must be considered in interpreting WTO law (regardless of whether this should be done with respect to Article 11 ICESCR or to general principles of law). Our opinion is that they have to be considered for the following reasons: Firstly, Article 3 No. 2 DSU states that the WTO dispute settlement system clarifies WTO law “in accordance with customary rules of interpretation of international law.” Secondly, according to Article 31 of the 1969 Vienna Convention on the Law of Treaties (VCLT) when a treaty is interpreted any relevant rules of international law applicable in the relations between the parties shall be taken into account. Since the right to food, as we have seen, is not only established in the ICESCR, but can also be derived from the general principles of law, it does not matter whether all States are party to the ICESCR. Moreover, it is irrelevant that at the time of the adoption of the GATT 1947 human rights were certainly not assumed to have a direct influence on international trade law. Accordingly, the Appellate Body correctly held in its Shrimp decision that (in terms of Article XX g) GATT) the focus of legal interpretation is not its historic origin.⁹⁴ Taking into account human rights will also not “overburden” WTO law but rather provide an adequate balance of various spheres of freedom in a complex globalised world. Furthermore, it has to be noted that most States have ratified the international human rights treaties of 1966. At the same time, the obligation to respect human rights when interpreting treaties would make it easier for the contracting parties to comply with international law. Neither would an alleged cultural imperialism be a valid objection: If human rights catalogues are global and universal, then, by definition, they apply everywhere. Whether they are *factually* applied is a somewhat different debate which we leave to

⁹⁰ See von Bernstorff, *Verfassung und Recht in Übersee* 2009,

⁹¹ Cf. for the starting point of the debate Hilf/ Oeter, *WTO-Recht*, 2005, § 34 No. 1; Hermann/ Weiß/ Ohler, *Welthandelsrecht*, 2 ed. 2007, No. 1095.

⁹² Cf. Herrlich, *Menschenrechte*, passim; Faden, *Menschenrechte*, p. 46 et seq.; Ekardt/ Meyer-Mews/ Schmeichel/ Steffenhagen, *Welthandelsrecht*, chapter 4.3; see also von Bernstorff, *Verfassung und Recht in Übersee* 2009,, more reluctant Hilf/ Oeter, *WTO-Recht*, § 34 No. 27, 28; Hermann/ Weiß/ Ohler, *Welthandelsrecht*, No. 1107; on the discussion also Guzman, *Harvard International Law Journal* 2004, p. 303 et seq.; McGinnis/ Movsesian, *Harvard International Law Journal* 2004, 353 et seq.; Petersmann, *Leiden Journal for International Law* 2006, p. 633 et seq.

⁹³ Regarding the question of equal protection and discrimination, see in detail Ekardt/ Hennig/ Steffenhagen, *JbUTR* 2010, i.E.

⁹⁴ Cf. Report of the Appellate Body: *US – Shrimp*, p. 48 No. 129; for a general overview of the doctrine of interpretation Ekardt/ Beckmann, *Verwaltungsarchiv* 2008, p. 241 et seq.

the cited literature.⁹⁵ Thus we come to the conclusion that the right to food plays an important role in WTO law in general and specifically in the context of bioenergy. But where exactly are the starting points for this?

Article III GATT prohibits the discriminatory treatment of foreign goods such as import bans of foreign goods which are no different from domestic goods.⁹⁶ Article XX GATT, however, states general exceptions, where such measures are for instance “necessary to protect public morals” (Article XX a) GATT) or “human life” (Article XX b) GATT). The human right to food can concretise those vague terms. Therefore, it may serve as a justification for trade restrictions (e.g. on bioenergy). Of course, further requirements for the justification of trade restrictions under Article XX GATT must always be met. The human right to food might still prove helpful with regard to those requirements, namely the attempt to find multilateral solutions together with other States before imposing unilateral trade restrictions: The right to food shows that certain principles exist which bind other States anyway (through the ICESCR or general principles of law) without the need for further multilateral negotiations. For the same reasons, the regularly contested point whether extra-territorial interests might be protected (e.g. rights of starving people outside the State banning imports, in fact in developing countries) might be answered in the affirmative.⁹⁷

Another fundamental problem of bioenergy import restrictions remains which an application of the right to food may solve only partly. This is both, a political and legal problem. The justification under Article XX GATT finally depends on whether the measure was “appropriate and necessary.” Yet that is not easy to assess. Assuming a world food market exists, it would be hard to prove the necessity to protect a certain State’s food production in order to guarantee sufficient food. Even if the respective measure could still be justified under Article XX GATT, from a political point of view it seemed more sensible to take the right to food as a foundation not for unilateral import restrictions, but for an overall quantitative restriction (but not sustainability criteria control) of bioenergy, as was indicated earlier in chapter A.

F. Hierarchy within international law? Jus cogens and constitutionalisation

The idea of having general principles of law besides international treaty law, which might impose legal obligations even on States disagreeing with the respective principle, leads us to the question of whether or not general principles, then, should be considered as a kind of “constitution of international law”. Taking the concept of principles of law seriously would thus necessarily result in a new hierarchy within international law. This would further exacerbate the doubts towards national sovereignty (which, in addition, has often evolved in a non democratic process). It is well-known, that the legal practice is reluctant towards a hierarchy within international law or between different legal levels (e.g. national, European, international law).⁹⁸ Yet, sometimes a hierarchy between legal levels is recognized though not always in favour of international law, sometimes a dualistic model is applied in which different legal sys-

⁹⁵ See fn. 91-92.

⁹⁶ Regarding the specific test of Articles III and I GATT when applied to bioenergy Ekardt/ Hennig/ Steffenhagen, *Jahrbuch des Umwelt- und Technikrechts* 2010 (forthcoming); in general on these provisions in the context of climate see Ekardt/ Schmeichel, *Critical Issues in Environmental Taxation* 2009, p. 737 et seq.

⁹⁷ Regarding extra-territoriality and multilaterality in WTO law in the context of bioenergy see Ekardt/ Hennig/ Steffenhagen, *Jahrbuch des Umwelt- und Technikrechts* 2010, i.E.

⁹⁸ See in detail Herdegen, *Völkerrecht*, § No. 1 et seq.; Kunig, in: Graf Vitzthum, *Völkerrecht*, ..., p. 83, No. 28 et seq.

tem or regimes stand side by side. The latter case, of course, obstructs any idea of legal hierarchy. Meanwhile, the European Court of First Instance (CFI) in 2005 and 2006, has adopted three heavily discussed decisions.⁹⁹ From the combined effect of Articles 25, 48, paragraph 2, 103 UN Charter, Article 27 VCLT, and Articles 307, 297 EC the CFI established a supremacy of parts of international law towards European Community law (and national law), i.e. (a) a monistic concept of legal levels.¹⁰⁰ At the same time, the CFI must have assumed (b) a kind of higher-ranking “constitutional” law within international law. Finally, human rights were a part of the latter.¹⁰¹ Only the first, but not the second, for our analysis crucial point, was overruled by the ECJ.¹⁰²

The primacy of certain standards in international law is already determined by Article 53 VCLT. The only question is whether its *jus cogens* consists of only a few rules (such as *pacta sunt servanda*) leaving wide discretion to the States or, as the CFI-ruling seems to suggest, whether especially human rights (and not just the prohibitions of torture, slavery, and genocide) successively, as *jus cogens*, can be interpreted as a kind of “world constitution”. The latter would be particularly convincing if one assumes that the sovereign State is not an end in itself or an expression of any vague collective interests, but rather a means to protect the individuals and their opportunities to develop. As we have seen, this would not necessarily be limited to a protection *against* public powers, but it would also result in a protection *by* the public powers against fellow citizens. If political systems ought to serve freedom and its basic conditions (i.e. human rights) political institutions must exist where and how it is necessary to serve freedom optimally. But if such a protection of freedom cannot be secured through national law or international treaty law inspired by self-interest, it is necessary to consider truly global institutions which could provide for policy-making beyond consensus and nation States’ self-interests as well as effective enforcement. And that the law must be focused on freedom of the autonomous individual could be derived from the law of reason, as indicated above. Yet, to refer to the States as “masters of the Treaties” and therefore masters of international law is not a valid objection. For if the individual is the true yardstick of the law, the position of the nation State is limited to what is beneficial to the individuals.¹⁰³

G. Balancing human rights?

After all, we still need to consider whether and how the human right to food is subject to a balancing of conflicting interests, such as the economic freedom of bioenergy producers. That such balancing¹⁰⁴ is inevitable is not only shown in the wording of Article 11 ICESCR but

⁹⁹ European Court of First Instance, *Ahmed Ali Yusuf and Al Barakaat International Foundation v. Council and Commission*, Judgment of 21/09/2005, T-306/01 21/09/2005, EuGRZ 2005, p. 592 et seq.; see also Arnould, *Archiv des Völkerrechts* 2006, p. 201 et seq.

¹⁰⁰ Cf. Maczynski, *Europäische Zeitschrift für Wirtschaftsrecht* 2006, 459 (460); Epiney, *Europäische Zeitschrift für Wirtschaftsrecht* 1999, p. 5 (6).

¹⁰¹ Cf. CFI, *Yusuf*, No. 277.

¹⁰² Cf. European Court of Justice,; this rejection of a true monism goes in line with European case law on the relation of European law and WTO law; cf. European Court of Justice, *Case 21/72, Int’l Fruit Co. v. Produktschap voor groenten en fruit*, 1972 E.C.R. 1219 (1972), No. 21 ff.; *Case C-280/93, Germany v. Council*, 1994 E.C.R. I-4973, No. 103 et seq.

¹⁰³ In the affirmative e.g. Kokott, *Veröffentlichungen der Vereinigung der deutschen Staatsrechtslehrer* 20...., 7 (36); Ekardt/ Lessmann, *Kritische Justiz* 2006, p. 381 et seq. (with further explanations on the dualism between monism and dualism; It is shown that in contrast to a common opinion the German Basic Law provides for a monism in favour of international law; already today in favour of the ECHR and in favour of the whole international law at least if human rights have been recognised worldwide.

¹⁰⁴ See in greater detail Susnjari, *Proportionality, Fundamental Rights, and Balance of Powers*, 2009, i.E. and Ekardt, *Die Verwaltung* 2010, Beiheft 1.

also became clear in our former general discussion in Chapter B. The current international human rights discourse seems to ignore this fact since it either attributes human rights with an absolute character defying every attempt to balance or, conversely, characterises them as meaningless due to their need for balancing (as is sometimes true for the right to food).¹⁰⁵

The basic principle, on which balancing is founded, can be described as follows: The right is primarily meant to adjust conflicting interests. The result of this legislative adjustment is “written down” in the law. In democracies, the underlying balancing of conflicting spheres of freedom is initially made by a parliament. The framework for this regulatory balancing is often referred to as the test of proportionality. In a more abstract way, we can think of “rules of balancing” or simply a framework, which must not be exceeded by the legislature. The administration, at least where the legislature has made use of its power, is more or less limited to the interpretation of the rules, the legislature created as an expression of its balancing authority. The administration is more flexible where the legislature has not considered the respective interests so far but has left it partially for the administration to decide. In Germany, this is called discretion (*Ermessen*) or (planning) assessment (*planerische Abwägung*). This concept seems sensible *cum grano salis* without regard to the respective level of law (e.g. national, European or international law). The role of courts in each case is not to make an own consideration, but rather to verify whether the competent legislative or executive body has complied with the limits of balancing (or of interpretation of norms). The limits of balancing arise from the rules of balancing as they can be derived from the affected interests.

The idea of “balancing” is sometimes hard to accept, since under certain circumstances it might result in death. However, without some kind of balancing the Industrial Society would per se be in violation of human rights. Therefore, the very rules of balancing are paramount. Finally, we briefly mention a few key aspects:

- Anyone’s freedom should not be restricted if this does not benefit another one’s freedom. Against this background, with regard to bioenergy it must always be closely examined whether the reduction of economic freedom actually increases the food security.
- The factual basis for balancing is crucial. Accordingly, measures restricting bioenergy trade must be based on a thorough determination of the food market.
- Two others are rules provide that there must not be an evident one-way derogation of one concern in favour of the other- and that the impact on the relevant concern has to be considered. Both aspects follow from the idea that overall freedom should be maximized.
- Although balancing in general is inevitable, we must consider (especially for a fundamental right such as the right to food) whether under certain circumstances balancing is limited. The central problem of bioenergy is it that when it comes to tightening up the world food situation this could be fatal for a number of people. In abstract terms: it is inherent to the right to food (such as to the right to life) that impairments of these elementary preconditions of freedom more or less inevitably kill the affected people.

¹⁰⁵ These frictions become visible e.g. in Gibson, *Saskatchewan Law Review* 1990, p. 5 et seq.; Nickel, *Yale Law Journal* 1993, p. 281 (282); more positively e.g. Kiss, in: Kromarek (ed), *Environnement et droits de l’homme*, 1987, p. 13 et seq.; Donnelly, in: Brölmann/ Lefebvre/ Ziek, *Peoples*, p. 119 et seq. That the Anglo-Saxon debate lacks sufficient notice to balancing is even illustrated in a differentiated study like the one of Hiskes, *The Human Right to a Green Future*, 2009.

That this does not categorically prohibit balancing was demonstrated in Chapter B. However, it shows that the right to food will tend to outbalance economic freedom and may be subordinated only under extraordinary circumstances. A total prohibition on balancing, though, would be difficult to justify. The usual reference to the innocent human life and human dignity¹⁰⁶ does not change this conclusion. Human dignity, as we have seen in chapter B, is not a rule applicable to specific cases. Moreover, the difference between certain and uncertain encroachments of human rights does not lead to any kind of total prohibition of balancing (this will be explained in the next point).¹⁰⁷

- However, one might think that the relation between bioenergy and sufficient food is still “uncertain” and, therefore, the right to food is not relevant at all in this context. (One might further imagine, as a complement, that in “certain” situations balancing would totally be prohibited). In Germany, instances of precaution, i.e. uncertain interference with human rights, are usually considered irrelevant in terms of human rights.¹⁰⁸ Such threats are not based on a single cause, but cumulatively with our conditions cause damage and may also occur only over a longer period. Thus, it appears more appropriate to consider those uncertain infringements to human rights indeed relevant. Because even if the damage to each individual is uncertain, statistically in the medium term damage to a certain number of people can be expected, if e.g. food resources are decreased through increased use of bioenergy. If this “uncertain” interference (as in the case of the right to food) is considerable and at the time of occurrence is expected to be irreversible, then this shows that balancing must also account for “uncertain” human rights infringements.¹⁰⁹
- Finally, it is impossible to *quantify* balancing: While economists like to present balancing as a cost-benefit analysis, in which not only a framework of balancing rules applies, but rather an exact mathematical calculation determines the proper balance. However, the conflicting rights do not have a mathematically specifiable weight.¹¹⁰ It is therefore unavoidable that there is some leeway for balancing.

¹⁰⁶ German Federal Constitutional Court, *Neue Juristische Wochenschrift* 2006, p. 751 (757 et seq.); Menzel/Pierlings/Hoffmann, *Völkerrechtsprechung*, 2004, p. 511; Hong, *Folterverbot und der Menschenwürdegehalt der Grundrechte – eine verfassungsrechtliche Betrachtung*, in: Beestermöller/ Brunkhorst (ed), *Rückkehr der Folter*, 2006, p. 24 (34).

¹⁰⁷ A total prohibition of balancing appears possible if it can be justified by other reasons. Regarding the prohibition of torture, it could probably be based that torture might threaten the liberal nature of the system as a whole.

¹⁰⁸ Cf. e.g. German Federal Administrative Court, *Neue Zeitschrift für Verwaltungsrecht* 1995, 995 et seq.; not recognised in Couzinet, *Deutsches Verwaltungsblatt* 2008, p. 760 et seq.; in greater detail on the discourse over danger defence and the precaution Ekardt/Schmidtke, *Die öffentliche Verwaltung* 2009, 187 et seq.

¹⁰⁹ Cf. Ekardt/Schmidtke, *Die öffentliche Verwaltung* 2009, 187 et seq. (also to the further problem that the majority opinion in Germany refers to the average citizen thus not accounting for weaker fellow citizens, e.g. pregnant women, the elderly, or children); cf. also Böhm, *Der Normmensch*, 1996.

¹¹⁰ Cf. Ekardt/Wilke, *The Limits to Climate Economics* (forthcoming).