

Subsistence and Welfare Rights:

The human right to food as a key element of the right to an adequate standard of living – law and policy in the Federal Republic of Germany

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1. Introduction

As an answer to the global food crisis, with more than 1 billion undernourished people worldwide, the right to food remains topical. According to the Food and Agriculture Organisation of the United Nations (FAO), at the beginning of the century ‘a *paradigm shift from an anti-hunger approach centred on food security to one based on the right to food*’ was invoked by the international community.¹ In 2002 during the World food summit, 179 states reaffirmed the right to food. Voluntary ‘right to food guidelines’ in the context of national food security strategies were adopted by the FAO Council in 2004.² Access to justice was recognised as a crucial component of the guidelines.

In December 2008 the Optional Protocol (OP) to the International Covenant on Economic, Social and Cultural Rights (ICESCR) was adopted so that the states also enshrined the principle by which all victims of a violation of human rights – no matter if it relates to civil, political, economic, social or cultural rights – are guaranteed the right of access to justice.

¹ Golay, *The right to food and access to justice*, FAO, *Right to Food Study*, 2009, 7, referring to Eide, ‘From Food Security to the Right to Food’ in Barth Eide, W, Kract, U (eds), 2005, 67-97.

² FAO, *Voluntary Guidelines to support the progressive realization of the right to adequate food in the context of national food security*, adopted by the 127th Session of the FAO Council, November 2004, available at: <http://www.fao.org/docrep/meeting/009/y9825e/y9825e00.htm> [accessed 6 February 2014].

On 5th of May 2013 the OP of the ICESCR entered into force. Germany is not yet one of the signatory parties.

The ICESCR provides two interrelated rights – the ‘right to adequate food’ (art 11(1)) and the ‘right to be free from hunger’ (art 11(2)). The latter opens the perspective to needs and duties beyond domestic affairs only, *‘taking into account the problems of both food-importing and food exporting countries, to ensure an equitable distribution of world food supplies (...)’*³ As both rights are included in one article and are closely linked to each other, they shall be discussed together under the name of ‘right to food’ in this essay.

In the following sections I shall first look at the substance of the right to food, before the law and policy in Germany related to the enforcement of the right to food is analysed.

2. Substance of the right to food

2.1. Art 11 ICESCR - the right to adequate food and to be free from hunger

The right to food has a history of more than 60 years – it was first recognised by the Universal Declaration of Human Rights (UDHR) of 1948. Article 25 UDHR provides:

*‘(Everyone) has the right to a standard of living adequate for the health and well-being of himself and his family, including food (...)’*⁴ This expression was further elaborated within

³UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3, available at: <http://www.refworld.org/docid/3ae6b36c0.html> [accessed 8 February 2014]. Article 11.

⁴ Universal Declaration of Human Rights [UDHR] art. 25(1), G.A. Res. 217A (III), U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (12 December 1948).

the International Covenant on Economic, Social and Cultural Rights (ICESCR) of 1966 with the right to adequate food (art 11 (1)) and the fundamental right to be free from hunger (art 11 (2)).⁵

The right to adequate food is embedded in the concept of the right to an adequate standard of living which is described as an aimed process of continuous improvement, which needs appropriate steps by states to ensure the realisation of this right. The right against hunger is described as fundamental – the only right within the ICESCR which is labelled as such. It requires State Parties to take immediate action *‘to mitigate and alleviate hunger (...) in*

⁵ UN General Assembly, International Covenant on Economic, Social and Cultural Rights, *ibid*.

Article 11 ICESCR says:

‘1. The States Parties to the present Covenant recognize 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 realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.

2. The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through 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 utilization 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.’

times of natural or other disasters'.⁶ Since 2010 the right to water is also acknowledged as part of the right to an adequate standard of living.⁷

During the World Food Summit in 1996 and the formulation of the Millennium Development Goals (MDG) to halve the number of undernourished people by 2015, the states called for a clarification of their obligations arising from the right to food.⁸ In 1999, the Economic and Social Council (ECOSOC) reacted with General Comment 12. Three key requirements for the right to food were set, i.e. to be available, accessible and adequate.⁹ It held that state

⁶ UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 12: The Right to Adequate Food (Art. 11 of the Covenant)*, 12 May 1999, Normative content of article 11, paragraphs 1 and 2, available at: <http://www.refworld.org/docid/4538838c11.html> [accessed 6 February 2014].

⁷ UN General Assembly, *The human right to water and sanitation: resolution / adopted by the General Assembly*, 3 August 2010, A/RES/64/292, available at: <http://www.refworld.org/docid/4cc926b02.html> [accessed 6 February 2014].

⁸ UN Office of the High Commissioner for Human Rights (OHCHR), Fact Sheet No. 34, *The Right to Adequate Food*, April 2010, No. 34, 1, available at: <http://www.refworld.org/docid/4ca460b02.html> [accessed 6 February 2014]

⁹ UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 12: The Right to Adequate Food*, *ibid*, para 6, available at: <http://www.refworld.org/docid/4538838c11.html> [accessed 6 February 2014].

The CESCR clarified:

'8. (...) the core content of the right to adequate food implies: The availability of food in a quantity and quality sufficient to satisfy the dietary needs of individuals, free from adverse substances, and acceptable within a given culture; The accessibility of such food in ways that are sustainable and that do not interfere with the enjoyment of other human rights.

9. Dietary needs implies that the diet as a whole contains a mix of nutrients for physical and mental growth, development and maintenance, and physical activity that are in compliance with human physiological needs at all stages throughout the life cycle and according to gender and occupation. (...)

10. Free from adverse substances sets requirements for food safety and for a range of protective measures by both public and private means to prevent contamination of foodstuffs through adulteration and/or through bad environmental hygiene or inappropriate handling at different stages throughout the food chain; (...)

11. Cultural or consumer acceptability implies the need also to take into account (...) perceived non nutrient-based values attached to food and food consumption and informed consumer concerns regarding the nature of accessible food supplies.

12. Availability refers to the possibilities either for feeding oneself directly from productive land or other natural resources, or for well-functioning distribution, processing and market systems that can move food (...) to where it is needed in accordance with demand.

13. (...) Economic accessibility implies that personal or household financial costs associated with the acquisition of food for an adequate diet should be at a level such that the attainment and satisfaction of other basic needs

parties are obliged to ensure *'physical and economic access at all times to adequate food or means for its procurement'* and clarified that this obligation is *'inseparable from social justice, requiring the adoption of appropriate economic, environmental and social policies, at both the national and international levels, oriented to the eradication of poverty and the fulfilment of all human rights for all.'*¹⁰ The obligations further on imply that the supply of food must be sustainable, i.e. that it will be *'accessible for both present and future generations.'*¹¹

The obligations can be categorised in the obligations to respect, to protect and to fulfil (meaning *to facilitate* but also *to provide*).¹² The FAO offered further clarifications how this could work in reality, first with regard to the term 'respect': *'(...) denying food assistance to political opponents is prohibited. States cannot suspend legislation or policies that give people access to food (e.g. social welfare legislation, nutrition-related programmes), unless fully justified. States should ensure public institutions (...) do not undermine people's access to food by, for example, (...) destroying farmland or through forced evictions. States should*

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.

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, (...). Victims of natural disasters (...)'s and other specially disadvantaged groups may need special attention and sometimes priority consideration with respect to accessibility of food. A particular vulnerability is that of many indigenous population groups whose access to their ancestral lands may be threatened.'

¹⁰ Ibid, para 10.

¹¹ Ibid, para 7.

¹² Ibid, para 15 .

also regularly review their national policies and programmes related to food to ensure that they effectively respect the equal right of everyone to food.’¹³

The ‘obligation to protect’ refers against violations by third parties, which includes groups, but also private enterprises. E.g. *‘(...) States should prevent third parties from destroying sources of food by, (...) polluting land, water and air with hazardous industrial or agricultural products or destroying the ancestral lands of indigenous peoples to clear the way for mines, dams, highways or industrial agriculture.’¹⁴*

For the ‘obligation to fulfil’ states should pro-actively work on food security and strengthen people’s access to resources and means to ensure their livelihood. *‘Typical measures include the implementation of agrarian reform programmes or minimum income regulations. When adopting food policies, Governments would also need to balance carefully investment in cash crops for export and support for domestic food crops.’¹⁵*

2.2. Justiciability and legal remedies

The development of services and policies to implement the ESC rights certainly are a task for the political field. For decades there was a passionate debate as to whether litigation and judicial interpretation should be another means through which ESC rights should be

¹³ UN Office of the High Commissioner for Human Rights (OHCHR), *Fact Sheet No. 34, The Right to Adequate Food*, *ibid*, 18.

¹⁴ *Ibid*.

¹⁵ *Ibid*. 19.

advanced.¹⁶ Arts 16 and 17 ICESCR regulate the duty of state parties to submit reports to the CESCR informing about the adopted measures and the progress made in respecting, protecting and fulfilling the rights of the ESCR. However, a complaint mechanism was not part of the ICESCR. In 2000, appointed by the Human Rights Council, a special rapporteur on the right to food was established. His function is to examine and report on 'a country's situation, or a specific human rights theme'.¹⁷ The special rapporteurs Ziegler, Eide and de Schutter all have published on the right to food and certainly contributed to more public awareness for the topic.

In 1998 ECOSOC presented a General Comment on the domestic application of the ICESCR. A differentiation was made between norms which are self-executing (*'capable of being applied by courts without further elaboration'*) and justiciability (*'which refers to those matters (...) resolved by the courts'*).¹⁸

Since 5th of May 2013 the OP has formally entered into force. However, many countries, including Germany, have not yet ratified it. The OP provides a complaint mechanism and gives groups and individuals the opportunity to bring cases to the CESCR for violation of their ESC rights when access to justice is denied or not available in their own countries.

¹⁶ Curtis, The Right to Food as a Justiciable Right: Challenges and Strategies, *Max Planck Yearbook of United Nations Law* 11 (2007), 318-319

¹⁷ UN Office of the High Commissioner for Human Rights (OHCHR), *Fact Sheet No. 27*, available at: <http://www.ohchr.org/Documents/Publications/FactSheet27en.pdf> [accessed 6 February 2014]

¹⁸ CESCR General Comment No.9, The domestic application of the Covenant: 03/12/98. E/C.12/1998/24, available at: <http://www.unhcr.ch/tbs/doc.nsf/0/4ceb75c5492497d9802566d500516036?Opendocument>, [accessed 6 February 2014]

Courtis and Golay both have analysed the current and potential justiciability of the right to food.¹⁹ They both criticise the often raised argument that ESC rights are different by their nature from civil and political rights and as such are not suitable as subjects for judicial enforcement. Both hint at empirical evidence through comparative case law, however, there are only a few cases. Golay points to the fact that in most regional and domestic systems the right to food as part of the ESC rights is not granted a complaint mechanism, such as those the jurisdictions of the European and the Inter-American Courts of Human Rights reflect; furthermore, the doctrine of non-justiciability of ESC rights is still prevalent among judges.²⁰

Nevertheless, here again are signals of change. It has to be mentioned that in some countries the right to food is acknowledged by national case law (Famine Code of 1962 and landmark judgments in India; Supreme Court-interim order in 2008 for food aid in Nepal) and by constitutional recognition in South Africa (1996).²¹

For many years protection of the right to food has mainly been channelled through its interconnection with civil and political rights, or through general human rights regimes – such as the prohibition of discrimination.²² Until 2013 only three treaties offered quasi-judicial functions and mechanisms to receive individual communications, launch inquiries

¹⁹ Golay, *ibid.*, and Courtis, *ibid.*, 317-337.

²⁰ Courtis, *ibid.*, 328.

²¹ UN Office of the High Commissioner for Human Rights (OHCHR), *Fact Sheet No. 34, The Right to Adequate Food*, *ibid.*, 32.

²² Other related human are e.g. the right to life (art 6), the right of detained (art 10), the right to work (art 6) and to social security (art 9)), the right of minorities to their own culture (art 27), the right to non-discrimination (art 26) and freedom from torture, cruel, inhuman or degrading treatment (art 7).²² The right to food is also recognized implicitly through other rights guaranteed by the ICCPR (i.e. the protection of the right to life requires States to adopt positive measures, such as measures to eliminate malnutrition).

and initiate urgent action processes: the International Covenant on Civil and Political Rights (ICCPR) and the Convention on the Elimination of Discrimination against Women (CEDAW) through their Optional Protocols;²³ and the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) through art. 14.²⁴

Owing to the limited options, the Human Rights Committee has issued opinions on only a few right to food cases, limited to such groups as prisoners and indigenous people.²⁵ As to the interstate complaints before the International Court of Justice (ICJ), the FAO states that jurisprudence on the right to food is 'extremely limited'.²⁶ In 2004, with the issuing of an Advisory Opinion on the legal consequences of the construction of the wall in the Occupied Palestinian territory, for the first time the ICJ ruled on the violation of the right to food and its justiciability.²⁷ Although the Advisory Opinion produced limited domestic action, the recognition of the right to food for the victims of that case was considered '*an important step forward in international law*'.²⁸

²³ UN General Assembly, *Optional Protocol to the International Covenant on Civil and Political Rights*, 19 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: <http://www.refworld.org/docid/3ae6b3bf0.html> [accessed 9 February 2014] and UN General Assembly, *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*, 6 October 1999, United Nations, Treaty Series, vol. 2131, p. 83, available at: <http://www.refworld.org/docid/3ae6b3a7c.html> [accessed 9 February 2014]

²⁴ UN General Assembly, *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, United Nations, Treaty Series, vol. 660, p. 195, available at: <http://www.refworld.org/docid/3ae6b3940.html> [accessed 6 February 2014].

²⁵ Golay, *ibid*, 34.

²⁶ Golay, *ibid*, 33.

²⁷ *Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, International Court of Justice (ICJ), 9 July 2004, available at: <http://www.refworld.org/docid/414ad9a719.html> [accessed 6 February 2014].

²⁸ Golay, *ibid*, 25, citing Scheinin, 'Justiciability and the Interdependence of Human Rights' in, 2005.

The European Social Charter as a further regional framework does not mention the right to food, but rather interdependent rights, such as the right to social security, to social assistance, and to protection against poverty and social exclusion, along with aims at special protection of vulnerable groups.²⁹ In 1998 a collective complaints system was established. The Protocol gives the European Committee on Social Rights the competence to examine complaints by social partners and NGOs. Procedural aspects have been criticised, particularly the lack of remedial powers and the significant role played by the committee of Ministers.³⁰

2.3. Private actors and extraterritorial duties related to the right to food

Two issues that have caused a longstanding debate in IHRL are highly relevant for many ESC rights - the role of private actors and the question of extraterritorial applicability. In many countries multinational corporations hold control over the production, processing and distribution of food. Privatisation of public goods in some places has resulted in private control of resources, such as water supply.³¹ Ganesh has analysed the right to food and trade law such as competition law. Within their obligation to protect, the states should regulate the interface of human rights law and competition law: *'States must intervene where acts committed by private parties, whether individuals, groups or legal persons,*

²⁹ Council of Europe, *European Social Charter (Revised)*, 3 May 1996, ETS 163, available at: <http://www.refworld.org/docid/3ae6b3678.html> [accessed 6 February 2014].

³⁰ The authority of European committee on Social Rights is limited as they must submit its reports to the Committee of Ministers of the Council of Europe, which *'then renders a decision on whether to present the recommendations to the State in question'*, see Golay, *ibid*, 40. For a comprehensive analysis see Cullen, H. (2009) 'The Collective Complaints System of the European Social Charter: Interpretative Methods of the European Committee of Social Rights', *Human Rights Law Review* 9(1), 61-93.

³¹ Marks and Clapham, *International Human Rights Lexicon* (Oxford University Press, 2005), 172.

*threaten to violate those rights.*³² Concerning the role of the business sector the CESCR in 1999 reaffirmed that *'[as] part of their obligations to protect people's resource base for food, State parties should take appropriate steps to ensure that activities of the private business sector and civil society are in conformity with the right to food'*.³³

Concerning the question of extraterritorial applicability, for a long time action only within the jurisdiction of states was emphasised. The CESCR stipulated that *'(e)very State is obliged to ensure for everyone under its jurisdiction access to the minimum essential food which is sufficient, nutritionally adequate and safe, to ensure freedom from hunger.'* In 2000 a further suggestion was made that responsibility for violations of ICESCR *'are in principle imputable to the state within whose jurisdiction they occur'* and it was recommended to extend jurisdiction to foreign territory over which the state exercises *'effective control'*.³⁴

In 2008, the 'UN-Framework for Business and Human Rights' was presented which suggests regulation of extraterritorial duties of states and third parties and clearly states that also private actors have an obligation to 'respect' the right to food, which means they must

³² Ganesh, 'The Right to Food and Buyer Power', CRIDHO Working Paper Series, 2010/02, 1201, available at: http://works.bepress.com/aravind_ganesh/1, [accessed 6 February 2014] citing De Schutter, International Human Rights Law. Cases, Materials, Commentary, (Cambridge University Press, 2010), 365.

³³ UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 12: The Right to Adequate Food, *ibid* para 27.

³⁴ International Commission of Jurists (ICJ), *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, 26 January 1997, available at: <http://www.refworld.org/docid/48abd5730.html> [accessed 6 February 2014].

ensure, with due diligence, that their actions do not actively harm other individuals' rights.³⁵

Three years later, in 2011, the Framework was elaborated further into UN-Guiding principles which stated the need for change: *'At present States are not generally required under international human rights law to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction. (...) Within these parameters some human rights treaty bodies recommend that home States take steps to prevent abuse abroad by business enterprises within their jurisdiction.'*³⁶ The UN-Guiding principles were followed by the OECD Guidelines for Multinational Enterprises which aims at supporting the framework in developed countries.³⁷

3. Law and policy concerning the right to food in Germany

3.1. Human dignity, welfare and responsibility for the future – Constitutional principles related to the right to food in Germany

The right to adequate food or the right to freedom from hunger is not directly mentioned in the German 'Basic Law' (GG) of 1949. However, human rights play a fundamental role in the GG.

According to art. 1(1) human dignity is the unalterable foundation of the constitutional order, the

³⁵ UN Human Rights Council, *Protect, respect and remedy : a framework for business and human rights : report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie*, 7 April 2008, A/HRC/8/5, available at: <http://www.refworld.org/docid/484d2d5f2.html> [accessed 6 February 2014]

³⁶ UN Human Rights Council, Report of the Special Representative of the Secretary- General on the issue of human rights and transnational corporations and other business enterprises , 9 April 2010, A/HRC/14/27, available at: <http://www.refworld.org/docid/4c0759832.html> [accessed 6 February 2014].

³⁷ Organisation for Economic Cooperation and Development (OECD), *OECD Guidelines for Multinational Enterprises*, 27 June 2000, available at: <http://www.refworld.org/docid/425bd34c4.html> [accessed 9 February 2014]

fundamental rights have legally binding force; moreover, the binding effect of all human rights is expressly extended to the legislature by art. 1(3).³⁸

The acceptance of the inviolability of human dignity can be understood as a response against the Nazi Regime and its misuse of legal powers. Therefore *'the state is not only obliged to respect, but also to protect human dignity'*.³⁹ Furthermore, art. 19(2) regulates an ultimate limit to legislative measures to keep the essence of human dignity (Wesensgehaltsgarantie).⁴⁰

The 'Existenzminimum' (existential minimum) is a constitutional principle of welfare, comprising access to food, housing and social assistance to persons in need.⁴¹ The corresponding law on social benefits is part of the Second Book of the German Code of Social Law, and is based on the 'fundamental right to the guarantee of a subsistence

³⁸ Germany: Basic Law for the Federal Republic of Germany [Germany], 23 May 1949, available at: <http://www.refworld.org/docid/4e64d9a02.html> [accessed 6 February 2014].

Article 1 and 3:

Article 1 [Human dignity]

(1) Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.

(...) (3) The following basic rights shall bind the legislature, the executive, and the judiciary as directly applicable law.'

³⁹ Limbach, How a constitution can safeguard a Democracy: The German Experience, **29 January 2003**, available at: <http://www.law.hku.hk/ccpl/Docs/JuttaLimbach.pdf>, [accessed 6 February 2014]

⁴⁰ Germany: Basic Law for the Federal Republic of Germany [Germany], *ibid.*

⁴¹ Courtis referring to different cases for example, German Federal Constitutional Court (BVerfG) and German Federal Administrative Court (BVerwG), BVerfGE 1, 97 (104 et seq.); BVerwGE 1, 159 (161); BVerwGE 25, 23 (27); BVerfGE 40, 121 (134); BVerfGE 45, 187 (229)

minimum' which derived from the declaration of human dignity in art 1(1) GG and art 20(1) ('social state principle') GG.

Art 20a GG further on specifies the responsibility towards future generations as, '*Mindful (...) of its responsibility (...) the state shall protect the natural basis of life by legislation and, in accordance with law and justice (...)*'.⁴²

Whereas the federal states are generally responsible for legislation, articles on refugees (art 74(6)), public welfare (art (74(7)) and 'labour law, including social security (art 74(12)) fall under the concurrent legislation. The Federal Constitutional Court (FCC) is endowed with the power of judicial review, and decides on the interpretation and application of the federal constitution with final binding force.⁴³

The concept of welfare finds many examples in the German legislation and policy. German Chancellor Otto von Bismarck in the 1840s created the first concept of modern welfare.⁴⁴ Following his concept, a pension system was created as well as insurance and medical care. After WW II, German social policy has been substantially transformed. What started as

⁴² Germany: Basic Law for the Federal Republic of Germany [Germany], *ibid.*

⁴³ Germany: Basic Law for the Federal Republic of Germany [Germany], *ibid.*, interpreted by Limbach, *ibid.*

⁴⁴ Leisering, The Welfare State in Postwar Germany – Institutions, Politics and Social Change, April 2000, available at: <http://www.uni-bielefeld.de/soz/pdf/welfare.pdf> [accessed 6 February 2014].

social insurance for limited groups of workers, and with low benefits, gradually grew into a comprehensive network of social services based on the principle of equality.⁴⁵

In terms of case law related to adequate standard of living, different cases were related to the claim and recognition of basic income, and the adequacy of this income in terms of its sufficiency to cover food requirements.⁴⁶ In some of these cases the discussion concerned the maintenance of a certain level of income necessary to cover, inter alia, food needs, against degradation caused by factors such as the increase of the cost of living. In several cases the courts held that *'the state tax power cannot extend to the material means necessary to cover the 'existential minimum' which includes food needs. Thus, the legislature has a duty to respect the means for basic livelihood, and cannot impose taxes beyond these limits'*.⁴⁷

In the 1990s, owing to the financial crisis, a number of cuts were made within the welfare sector; the unemployment benefits and the social allowance as 'standard benefits' paid to secure one's livelihood level were lowered. The so called 'Hartz IV legislation' lowered the calculated existential minimum and affected 6.7 million people who received social support. In 2010, the GCC issued a ruling on the so-called 'Hartz IV legislation' declaring the German system of social benefits to be unconstitutional. The main reasoning was that the Court

⁴⁵ Current key features of the welfare provision in Germany are e.g. social insurance (financed by contributions from employers and employees), for the old-age-insurance supplemented from general taxation, health and employment insurance, employment insurance and well as need-based benefits, such as benefits for all those in need, including working poor (excluding refugees), asylum seekers benefit – reduced social assistance for refugees, social assistance (special needs support), cash and kind for the disabled, housing benefit – help with rent or maintenance of own home, educational benefit and other.

⁴⁶ E.g. German Federal Constitutional Court, BVerfGE 82, 60 ('Steuerfreies Existenzminimum') (85), BVerfGE 87, 153 ('Grundfreibetrag').

⁴⁷ Courtis, *ibid*, 331.

found the procedure used to determine the subsistence minimum to be in violation of the GG.⁴⁸

In the case of asylum seekers, the existential minimum and the social support in practice was lower than the social support through Hartz IV. In 2012 GCC ruled that the amounts granted to asylum seekers were insufficient to guarantee a dignified minimum existence.⁴⁹

The Court explicitly placed the right to a dignified minimum existence in the context of IHRL by pointing to the ICESCR: *'Migration-policy considerations of keeping benefits paid to asylum seekers and refugees low to avoid incentives for migration [...] may generally not justify any reduction of benefits below the physical and socio-cultural existential minimum. Human dignity may not be relativized by migration-policy considerations.'*⁵⁰

Other laws show that the question of 'adequacy and affordability' of food plays an important role in Germany e.g. the tax reduction for basic food stuffs which also refer to art

⁴⁸ Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] 9 Feb. 2010 (*Hartz IV*), 125 Entscheidungen des Bundesverfassungsgerichts, [BVERFGE] 175, 1 BvL 1/09, para. 1–220, 2010 (Ger.), available at: http://www.bverfg.de/entscheidungen/ls20100209_1bvl000109.html [accessed 6 February 2014].

⁴⁹ Bundesverfassungsgericht [BVerfG], 18 July 2012, 1 BvL 10/10, 1 BvL 2/11, Shortened and translated version: Constitutional Court Press Release no. 56/2012 of 18 July 2012, available at: <http://www.bundesverfassungsgericht.de/en/press/bvg12-056en.html> [accessed 6 February 2014].

This finding referred to section 3 paragraph 2 of the Asylum Seekers Benefit Act and was based on the fact that the cash benefits according to the law had not been increased since 1993, even though the cost of living in Germany went up by at least 30% in that time. As a result, the relevant provisions of the Asylum Seekers Benefit Act were declared unconstitutional. Basic benefits under the Asylum Seekers Benefits Act must now be calculated based on general provisions applicable to all persons who receive social benefits.

⁵⁰ Ibid.

2(2) and art 20(1) GG.⁵¹ The question of adequacy of food is regulated in German and European consumer law and the Common Agricultural Policy (CAP) of the EU. Genetically Modified Organism (GMO) food production must be authorised by the EU, and all food which contains greater than 0.9% of approved GMOs must be labelled. In 2009 Germany announced an immediate halt to cultivation and marketing of genetically modified maize under the safeguard clause.⁵²

3.2. Compliance with IHRL and the role of CESCR reporting for the government and Non-Governmental Organisations (NGOs) in Germany

The Federal Republic of Germany ratified the ICESCR (in 1973) as well as other relevant treaties, such as the ICCPR, CAT, CEDAW, CERD, however not yet the OP of the ICESCR.⁵³ In 2000 Germany, in its state parties report to the CESCR, underlined that in general *‘the availability of individual complaints procedures is an apt way of strengthening the legal status of those involved, as well as their awareness of their rights, and of encouraging the State parties to implement their obligations’*. However Germany added that it is primarily the task of states to guarantee that international law obligations are fulfilled.⁵⁴ In 2001 the

⁵¹ Bundesministerium für Justiz und Verbraucherschutz, BGBl. I 2006, 2897 - 2901; 2 UStG Liste der dem ermäßigten Steuersatz unterliegenden Gegenstände, available at: http://www.gesetze-im-internet.de/ustg_1980/anlage_2_83.html, [accessed 6 February 2014].

⁵² Severin and Hogan, ‘Germany to ban cultivation of GMO maize’, Reuters, 14 April 2009, available at: <http://www.reuters.com/article/2009/04/14/grain-germany-gmo-idUSLE16356920090414>, [accessed 6 February 2014].

⁵³ Acceptance of individual complaints procedures for Germany include CAT, art.22, CCPR-OP1, CCPR-OP1, CEDAW-OP, CERD, art.14, CRC-OP-IC, see http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Countries.aspx?CountryCode=DEU&Lang=EN, [accessed 6 February 2014].

⁵⁴ UN Committee on Economic, Social and Cultural Rights, E/C.12/Q/GER/2, List of Issues, Substantive session of 2000, Implementation of the international Covenant on Economic, Social and Cultural Rights, Fourth periodic report submitted by States parties under articles 16 and 17 of the Covenant, Addendum,

German National Institute for Human Rights (DIMR) was established; albeit, it has no mandate to deal with human rights violations on an individual level.

Direct implications of the ratification of ICESCR concerning the right to food are hard to trace. For the immediate action needed to secure the right to be free from hunger Germany might have considered that this is not relevant for a developed state and therefore no constitutional change or law regulating that is needed. However, in the case of *'Mundraub'* (*'stealing by mouth'*) the opposite development was the case.⁵⁵ In 1975 the penal law, which until then had categorised stealing food for immediate consumption in the case of emergencies as a minor crime, was changed towards stricter legislation.⁵⁶

For progressive improvement related to the right to adequate standard of living the list of issues raised by CESCR and the periodic state reports answering to the CESCR are a meaningful source of information. Related to art 11 the CESCR addresses concerns and encouraged improvements. Examples of the sessions in 2001 are how Germany justifies their overall reduction in official development assistance (ODA); how social assistance to young victims of domestic violence is assured; and how a poverty threshold is defined in order to provide reports in fulfilment of obligations under article 11.⁵⁷

available at:

http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Countries.aspx?CountryCode=DEU&Lang=EN,b
[accessed 6 February 2014].

⁵⁵ See also *'Verbrauchsmittelentwendung'*, (§ 370 (1) Nr. 5 StGB a.F.). The fine for *'Mundraub'* was 500 DM or 6 weeks arrest.

⁵⁶ *Ibid.*

⁵⁷ UN Committee on Economic, Social and Cultural Rights, E/ C.12/2001/SR.49, Summary Records and E/C.12/1/Add.68, Concluding observations, available at:

The responses come seven years later, with a two-year delay. Related to art 11 ICESCR the fifth periodic report of Germany explains its commitment related to housing and homeless and gives a definition of the concept of poverty and the issue of social benefits. In many parts, compliance with international law, the European Social Charter and other measures are stressed; observations and suggestions of the CESCR are discussed but hardly really considered for policy change. The way that Germany reports on its current ODA commitment shows that Germany considers itself an important player in development cooperation and poverty eradication worldwide.⁵⁸

It can be deduced from the profoundly increased number of parallel reports, that German NGOs perceive the reporting to ICESCR as important leverage against their own government. The question of whether art 20(1) social state principle and the concept of a minimum standard of living really offer a framework for the right to an adequate standard of living, including adequate food, is increasingly questioned by NGOS.

FIAN Germany lists examples for the evidence of the '*return of food insecurity in Germany*' such as the growing dependence of people on food banks, which offer the left-overs from

http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Countries.aspx?CountryCode=DEU&Lang=EN, [accessed 6 February 2014].

⁵⁸ UN Committee on Economic, Social and Cultural Rights , E/C.12/DEU/Q/5/ADD.1, Replies by the Government of Germany to the list of issues (E/C.12/DEU/Q/5) to be taken up in connection with the consideration of the fifth periodic report of Germany (E/C.12/DEU/5) 5 April 2011, available at:

http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Countries.aspx?CountryCode=DEU&Lang=EN [accessed 6 February 2014].

supermarkets, providing 1.5 million people with food.⁵⁹ Further on, FIAN criticises social security benefits for children as being insufficient for well-balanced nutrition and not correctly adjusted after the Hartz-IV ruling of the FCC in 2010.⁶⁰ The third example refers to the above mentioned Asylum Seekers Benefits Act.⁶¹ FIAN also criticises the fact that the legislative authority decides whether the 'dignified minimum existence' is guaranteed in cash, or in kind – the latter obviously in breach of the definition of ECOSOC that adequate food should be culturally acceptable.⁶² FIAN ends its report with strong recommendations: it calls on the German government to implement a comprehensive anti-poverty programme as suggested earlier by the CESCR; calls for a new calculation of the basic income benefits; and finally, recommends abolishing the Asylum Seekers Benefit Act.

Germany has not yet responded to the recommendation to develop a comprehensive anti-poverty programme, nor to the suggestions made by NGOs. It fits into this line that Germany so far has shown no great interest in expanding the complaint system as foreseen through the OP of the ICESCR.

⁵⁹ FIAN Germany, NGO Submission, UPR on the Federal Republic of Germany, October 2012, available at: http://www.institut-fuer-menschenrechte.de/fileadmin/user_upload/PDF-Dateien/UN-Dokumente/UPR_zu_Deutschland/UPR2013_germany_FIAN_en.pdf, [accessed 6 February 2014].

⁶⁰ Ibid.

⁶¹ Bundesministerium für Justiz und Verbraucherschutz, *Asylbewerberleistungsgesetz, AsylbLG*, available at: <http://www.gesetze-im-internet.de/asylblg/> [accessed 6 February 2014].

⁶² UN Committee on Economic, Social and Cultural Rights, General Comment No. 12, *ibid.*

3.3. The policy of Germany concerning international obligations to ensure the right to food

The Common Agricultural Policy of the European Union (CAP) and the European Social Charter influence the German legislation and policy making process. Subsidies and market regulating mechanisms are key elements of the CAP; nevertheless criticism remains that a significant number of small cooperatives are allegedly driven out of the market, leading to food supply dependency and instability of food security within importing countries.

In 2011 a German NGO coalition presented the first parallel report on extraterritorial state obligations of Germany.⁶³ The coalition emphasises that the CAP supports dumping strategies; this is one of the main factors for developing countries to become net food importers.⁶⁴ Subsequently, in April 2013, German NGOs presented a petition calling on the EU to enshrine the Right to Food in its policies.⁶⁵ The petition calls for the EU to draft a new independent article in its Common Agricultural Policy on the Right to Food. So far neither the German Government, nor other EU-members strongly supported the idea and agricultural subsidies remain an important part of the CAP.

Meanwhile, the German government took a clear position against extraterritorial jurisdiction. In 2012 in the case of *Kiobel v. Royal Dutch Petroleum* Germany, without being

⁶³ FIAN Germany, Parallel report in response to the 5th Periodic Report of the Federal Republic of Germany on the International Covenant on Economic, Social and Cultural Rights, Extraterritorial State Obligations, submitted by Brot für die Welt, FIAN Deutschland et al, FIAN, March 2011, available at: http://tbinternet.ohchr.org/Treaties/CESCR/Shared%20Documents/DEU/INT_CESCR_NGO_DEU_46_8542_E.pdf [accessed 6 February 2014].

⁶⁴ Ibid.

⁶⁵ GCAP Germany: 'The Right to Food should not be a game of chance', 19 Apr 2013, available at: <http://www.whiteband.org/en/news/gcap-germany-right-to-food>, [accessed 6 February 2014].

involved in the case, wrote an *Amicus Curiae* brief to the US Court of Appeals in support of the respondents.⁶⁶ In this case, Royal Dutch Petroleum was accused of supporting the torture and execution of environmental activists who protested against oil exploration in the Niger Delta. In its statement, Germany mainly criticised the extraterritorial reach of the American Tort Claim Act (ATCA). It emphasised: *'...Germany has consistently maintained its opposition to overly broad assertions of extraterritorial civil jurisdiction arising out of aliens' claims against foreign defendants for alleged foreign activities that caused injury on foreign soil. ... Germany believes that overbroad exercises of jurisdiction are contrary to international law and create a substantial risk of jurisdictional conflicts with other countries.'*⁶⁷

Thus it is no surprise that it remains difficult to hold enterprises accountable for human rights violations caused abroad – this is also true for the case of German enterprises, or even development aid agencies. For example, in 2010 a complaint was filed against employees of the German company Lahmeyer at the public prosecution in Frankfurt. Lahmeyer constructed the Merowe dam in Northern Sudan. The criminal complaint accused the two employees of displacing over 4,700 families by flooding 30 villages and destroying their livelihood. The NGO ECCHR considers the case a

⁶⁶ Brief of the Federal Republic of Germany as in support of Respondents, *Kiobel v. Royal Dutch Petroleum Co.*, 132 S.Ct. 1738 (2012), No. 10-1419,

available at: http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs/10-1491_respondentamicufederalrepublicofgermany.authcheckdam.pdf [accessed 6 February 2014].

⁶⁷ *Ibid.*

violation of the IHRL, including art 11 ICERSC.⁶⁸ However, the criminal liability referred only to the German Criminal Code and consequently individuals, and not the company itself, was accused.⁶⁹

A second example is Germany's role in a land titling project in Cambodia. FIAN in additional information to the CESCR, criticised the German government for their development aid having a negative effect on tenure security, access to land and natural resources, with special regards to the most vulnerable groups.⁷⁰

With the new government there are signs of change, at least concerning the right to food. The coalition agreement of the newly elected German Government emphasises world food security and the right to food - the FAO Voluntary Guidelines on the Responsible Governance of Tenure⁷¹ will be implemented, speculation on food prices will be curbed (which most recently have been regulated by the EU)⁷² and development cooperation in the field of rural areas will be intensified.

⁶⁸European Center for Constitutional and Human Rights (ECCHR), Deutsche Ingenieursarbeit ohne Rücksicht auf Verluste, 3 Juni 2013, available at: <http://www.ecchr.de/index.php/lahmeyer.html> [accessed 6 February 2014].

⁶⁹ Ibid.

⁷⁰ FIAN Germany, Additional information presented by FIAN Germany to the Committee on Economic, Social and Cultural Rights, 46th session, May 2nd 2011 Germany's Human Rights Obligations in Development Cooperation Access to Land and Natural Resources and Germany's support of the Land Sector in Cambodia, available at: http://tbinternet.ohchr.org/Treaties/CESCR/Shared%20Documents/DEU/INT_CESCR_NGO_DEU_46_8544_E.pdf [accessed 6 February 2014].

⁷¹ Koalitionsvertrag zwischen CDU, CSU und SPD, Deutschlands Zukunft gestalten, 18. Legislaturperiode, available at: <http://www.tagesschau.de/inland/koalitionsvertrag136.pdf> [accessed 6 February 2014].

⁷² EURACTIV, press release 'EU moves Curb food price bets by traders', 17. Januar 2014, available at: <http://www.euractiv.com/development-policy/eu-moves-curb-food-price-bets-tr-news-532857>, [accessed 6 February 2014].

Finally, the parties demand more responsibility of private actors for social, cultural and ecological rights. In order to strengthen the efforts of the German business sector in foreign countries the government promises to strive for the application of the OECD Guidelines for Multinational Enterprises.⁷³

4. Conclusion

As it has been shown, the right to food is interrelated with many other rights and treaties. The ICESCR and its reporting mechanisms are actively used by the CESCR and NGOs to encourage progression and adjustments in German law and practice. No complaint is made that German constitutional law does not respect the human right to food. Some criticism remains in terms of protection and fulfilment of the right concerning social aid schemes, especially for vulnerable groups.

It has been shown that the prevalent discussion concerning the right to food from the perspective of German policy makers is, to a lesser extent, a need to fulfil international obligations towards domestic citizens; but to a much wider extent a challenge which tackles questions of extraterritorial rights and duties of subjects of international law. In the case of access to markets for farmers of developing countries, food subsidies, impact of infrastructure projects, development aid and other matter, Germany does not comply with

⁷³ Koalitionsvertrag zwischen CDU, CSU und SPD, *ibid*, 16.

the criteria to respect, protect and fulfil the right to food as it is defined in CESCR Comment No 12.⁷⁴

It can only be hoped that the German Government will stick to its commitments of the coalition agreement related to rules for multinational actors. But also the OP to the ICESCR could have a crucial influence on the right to food in German policy and law: *'If the Committee recognizes the justiciability of the right to food in terms similar to those developed in the first part, specifically the justiciability of the totality of violations of the right to food, its contribution to protecting the right to food could be extraordinary....'*⁷⁵

Here Germany is less progressive than many other countries. For NGOs the task will remain to continue lobbying for the signature under the OP, for the right to food as part of the Common Agricultural Policy (CAP) and as part of a global strategy to combat hunger and poverty worldwide.

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⁷⁴ UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 12: The Right to Adequate Food*, *ibid.*, for analysis see chapter 2.

⁷⁵ Golay, *ibid.*, 34.