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Assessing the effectiveness of the right to food in the context of economic globalisation: The case of Mali in West Africa

Valutare l'efficacia del diritto al cibo nel contesto della globalizzazione economica: il caso del Mali in Africa occidentale

The research aimed to critically examine the effectiveness of the right to food in West Africa in the context of economic globalisation. It also sought to analyse the influence of market-driven policies, international trade regulations and domestic legal frameworks on food security, with a particular focus on Mali. Despite the anticipated benefits of globalisation, food insecurity remains a significant challenge in West Africa, characterised by widespread hunger and human suffering. This situation has been exacerbated by prevailing land and food governance models influenced by liberal trade policies and legal frameworks that prioritise market interests over social needs. The current market-oriented paradigm undermines local livelihoods and compromises prospects for sustainable development. Given the severity of the crisis, urgent interventions are required. Where it is not feasible to shield key resources such as land and food completely from market forces, it is crucial to strike a balance between economic objectives and social welfare in order to enhance food security for vulnerable populations.

Keywords: access to land, access to food, globalisation, food security, West Africa

L'obiettivo della ricerca è stato quello di analizzare in modo critico l'efficacia del diritto al cibo in Africa occidentale nel contesto della globalizzazione economica, esaminando come le politiche di mercato, le regolazioni del commercio internazionale e i quadri giuridici nazionali influenzino la sicurezza alimentare, con particolare attenzione al caso del Mali. Nonostante i benefici attesi dalla globalizzazione, la mancanza di sicurezza alimentare rimane una sfida cruciale in Africa occidentale, contraddistinta da fame diffusa e sofferenza umana. Tale situazione è aggravata dai modelli dominanti di governance delle terre e delle risorse alimentari, influenzati da politiche commerciali liberali e da sistemi giuridici che privilegia-

no gli interessi di mercato a scapito delle esigenze sociali. L'attuale paradigma orientato al mercato mina le fonti locali di sostentamento e compromette le prospettive di uno sviluppo sostenibile. Considerata la gravità della crisi, sono necessari interventi urgenti. Nei contesti in cui non è possibile proteggere completamente risorse chiave come la terra e il cibo dalle dinamiche di mercato, è essenziale trovare un equilibrio tra obiettivi economici e benessere sociale per rafforzare la sicurezza alimentare delle popolazioni vulnerabili.

Parole chiave: accesso alla terra, accesso al cibo, globalizzazione, sicurezza alimentare, Africa occidentale

Introduction

The right to food is recognised as a fundamental human right. It is defined as "the right of every individual, alone or in community with others, to have physical and economic access at all times to sufficient, adequate and nutritious food that meets their dietary needs and cultural identity, beliefs, traditions, eating habits and preferences. This food must be produced and consumed in a sustainable manner to preserve access for future generations."

This right has been formally articulated and clarified by the United Nations Committee on Economic, Social and Cultural Rights (CESCR) in General Comment No. 12 in which the essential components of this right has specified as being: the availability of food in sufficient quantity and quality, culturally appropriate and free from harmful substances; and the accessibility of such food, both physically and economically, secured in a sustainable manner that does not compromise the enjoyment of other human rights.

Notably, the right to food imposes certain binding legal obligations on States. These obligations are structured around three core duties: the obligation to respect, which involves refraining from any action that would hinder access to food; the obligation to protect, which involves preventing third parties, including private actors, from violating this right; and the obligation to fulfil, which involves adopting appropriate legislative, administrative and financial measures to ensure effective access to adequate food for all. Although this right is firmly anchored in international legal instruments, such as the International Covenant on Economic, Social and Cultural Rights,[1] and reinforced regionally by the African Charter on Human

[1] The International Covenant on Economic, Social and Cultural Rights, https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-economic-social-and-cultural-rights[accessed on 14.01.2025].

and Peoples' Rights,[2] its realisation in practice in West Africa remains a significant challenge. The persistent gap between the legal recognition of the right to food and its practical implementation highlights several structural barriers, many of which have been exacerbated by the dynamics of economic globalisation.[3]

Defined as a process of liberalisation of trade, investment, and capital flows, economic globalisation promotes a model of development based on free markets and reduced State intervention. Rooted in the classical economic doctrines of David Ricardo who developed the theory of comparative advantage, and Adam Smith who famously advocated for *laissez-faire*, *laissez-passer*, this model has shaped the architecture of global economic governance. In this paradigm, the expansion of international trade and capital flows is seen as a catalyst for growth and efficiency. In Francophone West Africa, the embrace of this model began with the implementation of Structural Adjustment Programs in the 1980s, promoted by the International Monetary Fund and the World Bank. These reforms, inspired by the principles of the Washington Consensus, marked a profound shift from State-led development strategies toward market-oriented policies. The reduction of the State's role in regulating economic activity, particularly in agriculture, coupled with integration into global economic frameworks, has reconfigured national food systems.

This transition has had profound implications for food security and rural livelihoods. The withdrawal of agricultural subsidies, the privatisation of public services, the liberalisation of food markets and the decreased investment of the public sector in rural infrastructure have weakened local agriculture and increased dependency on volatile global markets. Consequently, the right to food is increasingly being undermined, particularly for vulnerable populations whose access to adequate food is influenced by factors beyond their control. This situation raises a central question:

How can the imperatives of economic globalisation be reconciled with the effective realisation of the right to food in West Africa?

This article critically examines the impact of economic globalisation on the realisation of the right to food in West Africa and to identify the legal and institutional mechanisms capable of ensuring that this right is effectively

[2] African Charter on Human and Peoples' Rights, https://au.int/en/treaties/african-charter-human-and-peoples-rights [accessed on 14.01.2025].

[3] A. Diabaté, *Les droits fondamentaux à l'épreuve de la marchandisation de la terre et de l'aliment dans un contexte de mondialisation économique en Afrique de l'Ouest*, "Revue internationale de droit et science politique" 2024, vol. 4, no. 11, pp. 96–127.

upheld, despite the structural constraints imposed by global market integration. To address this issue, the analysis has been structured in two parts: first, it assesses the adverse effects of globalisation on the enjoyment of the right to food in the West African context (Part I); and second, it explores the normative and institutional responses designed to strengthen the effective implementation of this right (Part II).

1. Obstacles to the effectiveness of the right to food in West Africa

The right to food in West Africa is largely hindered by a legal framework shaped by market-oriented logics (A). At both the international and domestic levels, the norms governing economic activities related to land and food tend to prioritise liberalisation and investment promotion over protecting the rights of local populations (B).

1.1. Obstacles arising from market-oriented logics

International economic law appears to be primarily designed to ensure the effectiveness of free trade and to guarantee the protection of the interests of economic operators in international trade, without paying much attention to non-market objectives, such as ensuring local populations access to land and food.

1.1.1. The primacy of free trade objectives

The primary objective of the international law that governs economic activities relating to land and food is not to ensure global food security. Rather, it essentially pursues economic ends and is based on two principles: the full sovereignty of States over their natural resources, and free trade for international commerce.[4]

On 12 December 1974, the UN General Assembly adopted the Charter of Economic Rights and Duties of States, enshrining the principle of "full and permanent sovereignty of States over natural resources."[5] According to

[4] F. Collart Dutilleul, *The law in the service of the food stakes of the exploitation and trade of natural resources*, 2011, https://hal.archives-ouvertes.fr/hal-00925749 [accessed on 14.01.2025].

[5] Article 2 of General Assembly Resolution 3281 (XXIX): Charter of Economic Rights and Duties of States, Official Records of the General Assembly: Twenty-Ninth Session, Supplement No. 31 (A/9631).

this principle, no State is obliged to admit investors to its territory. However, once an investment has been admitted, the State must comply with international trade law, particularly with regard to the freedom of movement and the numerous rules that protect foreign investment.

Free trade was institutionalised by the General Agreement on Tariffs and Trade (GATT) and subsequently by the World Trade Organization (WTO), which gradually established a comprehensive legal framework consisting of numerous multilateral trade agreements aimed at ensuring the effective opening of markets and guaranteeing free trade on a global scale. At the forefront of this arsenal is the Agreement on Technical Barriers to Trade (TBT), one of the WTO's agreements aimed at eliminating such barriers. Article 2 of the TBT Agreement stipulates that "Members shall ensure that the preparation, adoption, or application of technical regulations does not have the object or effect of creating unnecessary obstacles to international trade. To this end, technical regulations shall not be more trade-restrictive than is necessary to fulfil a legitimate objective, considering the risks which non-fulfilment would entail."

Pursuing the same aim, the Agreement on Trade-Related Investment Measures (TRIMs), the WTO agreement that protects the interests of foreign investors, prohibits "all measures that limit the right to use imported products or compel the purchase of products of national origin or limit the right to export locally produced goods."

The multilateral trade system under the WTO is essentially geared towards promoting and safeguarding free trade and free competition. Like other human rights, the right to food "appears as an external value belonging to another system – that of human rights." "An analysis of the WTO's foundational principles reveals the reasons underlying the neglect of this fundamental right. The agreements form a legal system – a set of rules with its own logic and guiding principles – established with the sole aim of establishing a global competitive order. This leaves little or no room for external rationalities."[6] However, the fate of the right to food within WTO law could have been different if the logic of the 1948 Havana Charter had been maintained.[7] This charter has not yet come into force, but it remains a benchmark in the field because it was the first to expressly establish a link

[6] C. Jourdain-Fortier, V. Pironon, *La sécurité alimentaire dans le droit de l'OMC – Analyse critique et prospective*, in: F. Collart Dutilleul, Th. Bréger (eds.), *Penser une démocratie alimentaire*, vol. I, San José.

[7] F. Collart Dutilleul, *La charte de la Havane. Pour une autre mondialisation*, Courbevoie 2018, p. 136.

between trade and human rights. Article 1a of the Havana Charter sets out the purpose of trade: "To achieve the objectives set out in the Charter of the United Nations, in particular the improvement of living standards, full employment, and conditions of progress and development." Thus, the organisation's general aims and objectives can only be realised through economic activities supported by States that promote human rights, such as the rights to employment and social security and income creation. The Havana Charter also defines "basic products" (such as wheat, rice and millet) as special products that cannot be considered ordinary goods. Article 27 of the Havana Charter states that "a system designed to stabilise the domestic price or gross revenue of a commodity, independently of export price fluctuations, which sometimes results in that commodity being sold for export at a lower price than that charged to domestic buyers, shall not be considered an export subsidy." Clearly, the Havana Charter's logic was completely at odds with the commercial and free-trade principles of the current WTO. Having become the cornerstone of the new legal order for international trade, the WTO is said to be the "appropriate framework for the emergence of global economic law,"[8] affecting de facto national trade laws.[9] Consequently, West African States that have joined the WTO must act in accordance with WTO law, where the objective of free trade takes precedence over all others, including food security. The right to food, a fundamental right, is being sacrificed on the altar of free trade.

1.1.2. The pre-eminence of foreign direct investment protection

Arnaud de Nanteuil has defined investment as "the commitment of a sum of money over a certain period of time for the purpose of generating a profit or return, subject to the economic risk that such an operation naturally presents."[10] This clear and concise definition is not, however, reflected in the various bilateral investment promotion and protection treaties (BITs), which adopt a broader conception of investment.

The BIT between Canada and Mali, known as the Agreement on the Promotion and Protection of Investments which came into force on 8 June

[8] L. Boy, *Le déficit démocratique de la mondialisation du droit économique et le rôle de la société civile*, "Revue internationale de droit économique" 2003, no. 3, p. 471.

[9] G. Rabu, *Law and Globalization: Macro-Elements of Convergence between Legal Orders*, "Revue internationale de droit économique" 2008, no. 3, pp. 335–356.

[10] A. De Nanteuil, *Le droit international des investissements*, Paris 2017, p. 182.

2016 is a perfect example. Article 1 of the Agreement defines "investment" as "a share or other interest in the capital stock of an enterprise; a bond, debenture, or other evidence of indebtedness of an enterprise; a loan to an enterprise; [...] a loan or evidence of indebtedness of a financial institution; [...] If it is considered regulatory capital by the Party in which the financial institution is located; an equity interest in an enterprise that gives a right to a share of the enterprise's earnings or profits; or a loan to an enterprise; a loan or evidence of indebtedness of a financial institution if it is considered regulatory capital by the Party in whose territory the financial institution is located; an equity interest in an enterprise that gives the right to a share of the enterprise's revenues or profits; an equity interest in an enterprise that gives the right to a share of the enterprise's assets on dissolution; or interest arising from the commitment of capital or other resources in the territory of a Party for an economic activity carried on in that territory."[11]

Contracts also tend to define the concept of investment quite broadly, ensuring that investors' interests are protected as comprehensively as possible. The formula immediately entitles foreign investors to seek compensation from the host state if their interests are harmed. In Mali's case, the agreement with Canada stipulates that foreign investors will receive fair and equitable treatment and the right to repatriate their profits, which cannot be expropriated. Foreign companies cannot be nationalised except in the public interest, in which case adequate compensation will be provided. Furthermore, under the WTO Agreement on Trade-Related Investment Measures (TRIMs), Mali is also bound by numerous other obligations under international investment law.

The ACP-EU Free Trade Agreement and the Bilateral Investment Treaty (BIT) that Mali concluded with Canada also contain two original obligations that are very seldom found in international investment treaties and agreements. One provides for the establishment of an insurance scheme in the host country covering potential risks arising from armed conflict or civil war, for example. The other places an obligation on the host country to compensate losses suffered by the investor for the same reasons. Article 77 of the Cotonou Agreement[12] provides for the establishment of "reinsurance schemes to cover foreign direct investment by eligible investors against legal

[11] Agreement between Canada and Mali for the Promotion and the Protection of Investments of 8 June 2016, Treaty series 2016/5 Receuil des Traités, http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/mali/fipa-apie/index.aspx?lang=fra [accessed on 14.01.2025].

[12] Partnership agreement 2000/483/EC between the members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member

insecurity, expropriation, restrictions on the transfer of foreign exchange, war, civil disturbance and breach of contract." Article 7 of the BIT concluded between Mali and Canada stipulates, for its part, that "Each Party shall accord to investors of the other Party, and to the investments concerned, non-discriminatory treatment with respect to measures it adopts or maintains relating to compensation for losses suffered by investments made in its territory as a result of armed conflict, civil war or natural disaster."

As a result of the above agreements being signed, the adopted legal framework requires host countries to guarantee the utmost protection of FDI, even at the expense of the food security of their local populations.

1.2. A balance distorted by non-binding national economic rights

The State has a primary responsibility to guarantee its citizens access to land and food. This requires the establishment of legal mechanisms to ensure the effective realisation of this right and the attainment of food security. These obligations are now binding on all West African States. Unfortunately, their national economic legislation governing economic activities linked to land and food does not seem sufficiently concerned with improving people's access to land and food (1). The same is true of agricultural investment contracts (2).

1.2.1. A non-binding legal framework

The question that arises is whether a State may adopt measures to guarantee better access to land and food on its territory without infringing the rules of international economic law. Such measures could include expropriating a foreign investor, temporarily restricting food exports, or limiting or prohibiting foreign investors' access to agricultural land.

At first glance, international economic law does not preclude such measures, provided that the State complies with certain conditions. In the case of expropriation, for instance, international law outlines the conditions under which a State can legally expropriate a foreign investor.[13] Essentially, there

States, of the other part, signed in Cotonou on 23 June 2000 – Protocols – Final Act – Declarations (OJ CE L 317, 15 December 2000; hereinafter: Cotonou Agreement).

[13] S. Manciaux, *Les règles du droit des investissements internationaux s'opposent-elles aux politiques de sécurité alimentaire?*, "Revue internationale de droit économique" 2012, no. 4, pp. 60–61.

are four conditions that must be satisfied: the expropriation must be justified on public interest grounds; it must not be discriminatory; the expropriated investor must receive fair and equitable compensation; and finally, the expropriation measure must not be contrary to a provision of national law or a specific agreement that guarantees that the foreign investor will not be expropriated once the investment has been made.[14]

Based on the example of Mali, one might ask whether it would be possible to expropriate or temporarily ban exports to ensure food security for local populations. The answer is no, since Malian economic law excludes such a possibility. This is particularly evident in the 27 February 2012 law on the investment code and its implementing decree, which are exceptionally generous towards investors at the expense of food security for local populations.[15] Furthermore, in addition to the many privileges granted to investors, the law provides them with a robust guarantee against any infringement of their property rights. According to Article 7 of this law, investors are protected against nationalisation, expropriation or requisition of their business, unless it is for reasons of public utility." In such cases, investors shall be entitled to compensation in accordance with applicable laws and regulations."[16] This provision makes it virtually impossible to expropriate an investor's property, even in the event of a national food crisis, since the only possible exception (expropriation for public utility) is subject to a penalty (compensation) that exceeds the financial capabilities of a developing country. The question to ask now may be whether Malian national economic law at least authorises the country to prohibit or limit foreign investors' access to agricultural land, reserving its use for local farmers.

The answer is still no, due to the combined effects of the Investment Code, the Agricultural Policy Law and the Law on Agricultural Land in Mali. These various pieces of legislation open the door wide to investors, particularly those investing in agricultural land. The Agricultural Policy Act adopted in 2006,[17] followed by the National Agricultural Investment Pro-

[14] Agreement on Trade-Related Investment Measures (TRIMs), WTO, https://www.wto.org/english/docs_e/legal_e/18-trims.pdf [accessed on 14.01.2025].

[15] F. Collart Dutilleul, A. Diabaté, *La sécurité alimentaire et le droit à l'alimentation à l'épreuve des investissements internationaux en Afrique de l'Ouest: les risques d'une désillusion*, 2013, hal-04618678v1 [accessed on 14.01.2025].

[16] Law no. 2012-016 of 27 February 2012 on the Investment Code, https://investment-policy.unctad.org/investment-laws/laws/258/mali-code-des-investissements [accessed on 14.01.2025].

[17] Law no. 06-40/AN-RM of 16 August 2006 on agricultural policy, http://loa-mali.info/IMG/pdf/LOA_VOTEE.pdf [accessed on 14.01.2025].

gramme,[18] have even made agriculture a priority sector in which foreign investment may be made and benefit from numerous privileges. This opening-up had been continued with the amendment of the law of 19 August 2005 on investments[19] and the adoption on 27 February 2012 of a new law on the Investment Code. This exceptionally generous code makes it much easier for foreign investors to acquire and invest in agricultural land. It offers them several guarantees and substantial tax and customs benefits.[20] Adopted on 7 October 2021, it amends and ratifies Ordinance no. 2020-014/PT-RM of 24 December 2020 on the Domanial and Land Law,[21] following the same logic as the previous texts. There are no restrictions, let alone prohibitions, on the acquisition of agricultural land by foreign investors.

On this last point, the laws of Côte d'Ivoire and Benin establish mechanisms that offer promising solutions which deserve to be highlighted.

Under Ivorian law, Act no. 98-750 of 23 December 1998 on the Rural Land Code amended by the Act of 28 July 2004[22] closes off completely the access to agricultural land ownership to foreign investors. Article 1er of this law states that "the Domaine Foncier Rural comprises all land, whether developed or not, and regardless of the nature of the development. It is a national asset to which any natural or legal person may have access. However, only the State, public authorities, and Ivorian individuals may own it." Under this provision, private legal entities, particularly companies, are also denied the right to own rural land.

This reflects the Ivorian legislator's fear that multinational companies might use a company or body governed by Ivorian law to disguise themselves and monopolise large areas of agricultural land.[23] This could not be

[18] Plan National d'Investissement dans le Secteur Agricole (PNISA), https://climate-laws.org/documents/national-agricultural-sector-investment-plan-2015-2025-and-national-investment-plan-in-the-agricultural-sector-pnisa_772c?id=national-agricultural-sector-investment-plan-2015-2025-and-plan-national-dinvestissement-dans-le-secteur-agricole-pnisa_ea26 [accessed on 14.01.2025].

[19] Act No. 05-050 of 19 August 2005 amending Act No. 91-048/AN-RM of 26 February 1991 on the Investment Code.

[20] F. Collart Dutilleul, A. Diabaté, *La sécurité alimentaire...*

[21] Law no. 2021-056 of 7 October 2021 amending and ratifying Ordinance No. 2020-014/PT-RM of 24 December 2020 on the law governing property and land ownership (Journal Officiel du Mali No. 31 of 22 October 2021).

[22] Law no. 98-750 of 23 December 1998 on the Rural Land Code, amended by the law of 28 July 2004 (Journal Officiel de la Côté d'Ivoire of 14 January 1999).

[23] S. Boni, *Understanding the spirit of Law No. 98-750 of 23 December 1998 on the Rural Land Code in Côte d'Ivoire*, 2015, https://shs.hal.science/hal-01116550/ [accessed on 14.01.2025].

a better expression of the desire to guarantee the "right to land," which is a prerequisite for food security for local populations.[24]

Such solutions are also established by Beninese law, albeit to a lesser extent. Since the adoption of Law No. 2013-001 on the Land and Property Code, only Beninese nationals have had access to agricultural land. According to Article 14 of this law, "any individual or legal entity of Beninese nationality may acquire real estate or land in the Republic of Benin." Therefore, only individuals and legal entities of Beninese nationality can acquire agricultural land. However, while non-nationals cannot acquire agricultural land, the law does authorise them to "acquire real estate in urban areas" and enter into "commercial, industrial or residential lease agreements." It should be noted here that, in contrast to Ivorian law, a legal entity of Beninese nationality is entitled to acquire agricultural land. Consequently, there is nothing to prevent a foreign investor from acquiring agricultural land through a company incorporated under Beninese law. However, this measure is not sufficiently restrictive to protect local farmers and guarantee food security for local populations. This brief presentation demonstrates that the problem originates from the lack of constraints within the legal framework governing access to land and food. The cases of Mali and, to a lesser extent, Benin, clearly illustrate this. However, the frequent occurrence of food crises in West Africa, coupled with the phenomenon of land grabbing, particularly with regard to agricultural land, necessitates a more cautious approach to foreign investors and warrants a more restrictive framework.

1.2.2. Drawing up unbalanced contracts

In recent years, driven by financial and strategic interests agribusiness multinationals, investment funds and even some governments have shown a particular interest in arable land in Africa. As a result, they have entered into two types of contract: either with private parties (farmers, family or village groups, and sometimes even land speculators), or with the host State. In both cases, the contracts are most often legally classified as business contracts (e.g. sale, lease, loan, integration contract, faire-valoir contract), which are governed by the terms and conditions included in the agreements and by the binding rules of international law.

[24] F. Collart Dutilleul, *Ways of improving food security in a context of trade globalisation*, in: F. Collart Dutilleul, Th. Bréger (eds.), *Penser une démocratie...*, vol. I.

Examining contracts between investors and private individuals reveals an excessive economic imbalance, most notably in the disproportionate obligations between the contracting parties, often to the detriment of the vital interests of local populations.

In his 2011 study of twelve land acquisition contracts in Africa, Lorenzo Cotula notes with concern that most contracts are "short, unspecific documents granting long-term rights over vast tracts of land and, in some cases, priority rights over water, in exchange for meagre and vague promises of investment and/or employment."[25] Most of the contractual provisions relate to the identity and place of residence (village or neighbourhood) of the contracting parties, the area in question and its location, the duration of the contract, the transaction amount, the identity of the witnesses, the identity of the village administrator, and the date on which the contract was drawn up.[26] Clauses that allow the contractual balance to be re-established in the event of excessive economic imbalance or force majeure circumstances that seriously alter the living conditions of local populations (such as drought, famine or a serious economic crisis) are rarely found. This is because including such clauses would necessitate the inclusion of others that allow for the renegotiation of financial compensation, the suspension of contract performance or even the termination of the contract.[27] Clearly, farmers who lack contractual skills and are committed to adhesion contracts tailored to the needs of profit-obsessed investors cannot be expected to act differently. The result is imbalanced contracts that pay insufficient attention to the interests of local populations. Are the contracts signed between the State and foreign investors any better? Nothing is less certain.

To illustrate this, consider the investment agreement signed by Mali and the Libyan company Malibya Agricole in May 2008.[28] This agreement covers a total area of 100,000 hectares granted to Malibya Agricole for a renewable period of 50 years (Article 6 of the Malibya agreement). Under the

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[25] L. Cotula, *Land acquisitions in Africa: what do the contracts say?*, London 2011, p. 66.

[26] Ph. Lavigne Delville, J.-Ph. Colin, I. Ka, M. Merlet, *Étude régionale sur les marchés fonciers ruraux en Afrique de l'Ouest et les outils de leur régulation*, UEMOA/IPAR, 2017; L. Cotula, *Land acquisitions in Africa...*

[27] P.-E. Bouillot, A. Diabaté, F. Garcia, *Le droit des contrats: outil de sécurité alimentaire dans le commerce et les investissements internationaux?*, in: F. Collart Dutilleul, Th. Bréger (eds.), *Penser une démocratie alimentaire*, vol. II: *Proposition Lascaux entre ressources naturelles et besoins fondamentaux*, San José 2014.

[28] For a detailed study of this agreement: F. Collart Dutilleul, A. Diabaté, *La sécurité alimentaire...*

terms of the agreement, the State of Mali has made various commitments to Malibya Agricole, undertaking, among other things, to offer the land free of any legal obstacles arising from individual or collective ownership that might prevent its use. It also has committed to finalising all administrative procedures required for the provisional approval of the land grant within one month of the Libya submitting the application. Furthermore, the State of Mali undertakes to formally and definitively allocate the land based on the findings of the technical and economic feasibility studies" (Article 5 of the Malibya agreement).

The State of Mali also undertakes to offer Malibya agricole all licences to use water from the Macina Canal and to use groundwater in accordance with the needs of the project as determined by the economic feasibility study. To this end, the State of Mali guarantees Malibya agricole unrestricted access to the required quantity of water for its operations from June to December each year. Between January and May, when the River Niger is at its lowest, Malibya will cultivate less water-intensive crops, such as wheat, millet, maize, soya, and various vegetables. The State of Mali will then supply the necessary water for these crops from the same Macina Canal (Article 8 of the Malibya agreement). Through this agreement, the Libyan investor obtained from the State of Mali an unqualified entitlement to water use throughout the year, with particular reference to the period spanning January to May. Such a condition is not without flaws and seems to have serious consequences for Mali's food security. In fact, the period from January to May is the low-water period of the River Niger which waters almost the entire Office du Niger zone, which is the provider of the bulk of Mali's agricultural production where also the areas granted to the Libyan company are located.

At this time of year, the River Niger is at its lowest level and consequently its capacity to supply water to the canals that irrigate the cultivated land is significantly reduced. As a result, in the event of severe low-water conditions – which are easily triggered given the country's rainfall issues – only some of the developed agricultural areas will be served. However, in accordance with the State of Mali's contractual commitments, priority will be given to agricultural areas operated by the Libyan company. Consequently, if severe low water occurs, Mali will lose a significant proportion of its agricultural production. This will mean that many farmers will not be able to feed themselves, and many consumers will suffer from food shortages on the national market.

What financial compensation does the agreement provide for Mali? Firstly, it should be noted that the 100,000 hectares allocated to the Malibya agri-

cultural company for a renewable period of 50 years carries no compensation. The Malibya agreement makes this explicit in Article 17, which states that "the two parties have agreed that the land allocated to the project will be free of charge." In fact, the financial compensation is only a few CFA francs for the annual water fee. Article 8 of the agreement provides for a water royalty to be collected by the State of Mali. However, this fee is limited to 2,470 CFA francs/ha for annual sprinkler irrigation and 67,000 CFA francs/ha for annual gravity irrigation. The agreement adds, however, that these rates may be revised annually, but only by negotiation between the two countries. Does this agricultural investment agreement provide any measures to ensure food security for local populations? No, because the Malibya agreement does not require the Libyan investor to sell any of their produce on the Malian market. Including such a provision in the agreement would have made it possible to oblige the investor to supply part of their production to the Malian market, thereby helping to ensure food security for the local population. However, there is nothing in the contract to this effect. Therefore, it can be concluded that this agreement is highly unbalanced in terms of benefits for the Malian State and may even be predatory.

Food security is thus being sacrificed for the sake of free trade and the interests of international trade operators.

2. Balancing the interests of globalisation players with local imperatives

The need for land and food security in Africa requires an urgent and appropriate response. This does not mean sacrificing the interests of economic operators in international trade. Rather, we must find ways to strike a balance that considers the vital interests of local populations more effectively. Legal instruments are the first port of call for action. The voluntary guidelines drawn up by the African Union and the UN could be useful in this regard, as they propose solutions aimed at protecting the land and food security of vulnerable communities.

2.1. Legal instruments

Of the legal instruments available, two can be mobilised because they contain actionable provisions that can be implemented to protect local interests: human rights and public order.

2.1.1. Human rights

Human rights form part of a virtuous circle that ensures the effectiveness of various subjective rights, such as the right to food, health, life, dignity, property and security. As they are intended to promote and guarantee this circle, human rights cannot remain indifferent to issues relating to access to land and food. This is why human rights must be used to identify and implement the rules that can substantially improve and protect the food security of local populations in an era of economic globalisation. First, we should examine international human rights law, which contains numerous legal instruments that have established the right to food as an inalienable and universal right. Here, we will focus on the two legal instruments that have directly and explicitly contributed to the global recognition of the right to food. The first is the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the second is the Universal Declaration of Human Rights (UDHR).

The ICESCR was adopted by the United Nations General Assembly in Resolution 2200 A (XXI) on 16 December 1966, and it entered into force on 3 January 1976. The ICESCR enshrines the right to food, elevating it to the level of a fundamental right and obliging States to contribute to its realisation. Article 11.1 of the ICESCR states that States Parties to the present Covenant "recognise the right of everyone to an adequate standard of living for themselves and their families, including adequate food, clothing and housing, and to continuous improvement in living conditions. The States Parties will take appropriate steps to ensure the realisation of this right, recognising the essential importance of voluntary international cooperation in this regard." It should be noted that the ICESCR achieves more than merely enshrining the right to food and obliging States to take appropriate measures to ensure its realisation. It also indicates the measures necessary for the realisation of this right and the possible causes of a State violating the right to food. Article 11.2 of the ICESCR states that "The States Parties to the present Covenant, recognising the fundamental right of everyone to be free from hunger, will take, individually and through international cooperation, the necessary steps, including specific programmes: (a) To improve methods of production, conservation, and distribution of food, making full use of technical and scientific knowledge by disseminating the principles of nutrition education and by developing or reforming the agrarian systems in such a way as to ensure the most efficient development and utilisation of natural resources; (b) to ensure an equitable distribution of the world's

food resources in relation to needs, taking into account the problems of both food-importing and food-exporting countries."

The Committee on Economic, Social and Cultural Rights (CESCR)[29] in its General Comment No. 12, It defines possible causes of a State violating the right to food as including: "the repeal or formal suspension of legislation necessary for the permanent realisation of the right to food; the adoption of legislative measures or policies that are manifestly incompatible with pre-existing legal obligations relating to the right to food; the failure of the State to regulate the activities of individuals or groups so as to prevent them from violating the right to food of others; the failure of the State to take into account its international legal obligations in relation to the right to food when entering into agreements with other States or international organisations."[30]

Similarly, the Universal Declaration of Human Rights (UDHR), adopted by the United Nations General Assembly on 10 December 1948, recognises the right to food as fundamental. Article 25 states that "everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and necessary medical care and social services." Thus, this provision emphasises the right to food and its corollary, the right to food security, as fundamental human rights. Like the ICESCR, the UDHR does not explicitly state the measures that States should take to guarantee food security. However, this is not a weakness of the UDHR, since Article 56 of the United Nations Charter states that States are obliged to take all necessary measures to implement human rights fully.

At the regional level in Africa, African human rights law also seeks to improve and protect food security.[31] There are many provisions in this law that explicitly or implicitly enshrine the right to food. These include the African Charter on the Rights and Welfare of the Child, which states that States must "ensure the provision of adequate food and drinking water" (Article 14.2 (c)). There is also the Protocol to the African Charter on Human

[29] Made up of independent experts, the Committee on Economic, Social and Cultural Rights is responsible for monitoring the application of the International Covenant on Economic, Social and Cultural Rights by the States parties. The Committee was established in 1985 by a resolution (1985/17) of the Economic and Social Council to carry out the monitoring tasks entrusted to the Council under Part IV of the ICESCR. Cf. http://www.fao.org/worldfoodsummit/french/newsroom/news/8580-fr.html [accessed on 14.01.2025].

[30] Committee on Economic, Social and Cultural Rights, General Comment 12, "The right to adequate food" (art. 11), EC/C.12/1999/5, point 19, 12 May 1999.

[31] A. Soma, *The human right to food and food security in Africa*, Geneva – Zurich – Basel Schulthess 2010, p. 561.

and Peoples' Rights on the Rights of Women, which provides that "States shall ensure that women have the right of access to adequate and safe food,"[32] and the African Charter on Human and Peoples' Rights, which, although not explicitly mentioning the right to food, nevertheless does enshrine a number of rights (the right to life, the right to health and the right to economic, social and cultural development) the effectiveness of which requires the realisation of the right to food. This was eloquently recalled by the African Commission on Human and Peoples' Rights in its emblematic "Ogoni" jurisprudence in the following terms: "the right to food is inextricably linked to human dignity and is therefore essential to the enjoyment and realisation of other rights..."[33] This brief presentation demonstrates that human rights legislation already contains many provisions that could significantly improve and protect the food security of local populations in the context of globalised trade.

2.1.2. Public policy

As its purpose is to safeguard and maintain the collective interest by preserving the fundamental requirements necessary to do so, public policy acts as a barrier against the will of individuals to protect the fundamental values it safeguards from harm. Public policy is a "peremptory norm from that individuals cannot deviate from either in their behaviour or their agreements"[34] and it "covers interests that extend beyond the private or individual sphere. It enables social, philosophical or collective values that are important to be protected."[35] Public policy thus demonstrates its commitment to protecting the collective interest. This is particularly evident in the international and national legal frameworks that govern access to land and food. As one author rightly pointed out, international trade cannot be the exclusive domain of private or commercial interests. It must also promote values that benefit everyone, including states and their populations.[36]

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[32] Article 15 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women, https://www.ohchr.org/sites/default/files/Documents/Issues/Women/WG/ProtocolontheRightsofWomen.pdf [accessed on 14.01.2025].

[33] Decision of 27 October 2001 of the African Commission on Human and Peoples' Rights, Communication no. 155/96 The Social and Economic Rights Action Center and Center for Economic and Social Rights v. Nigeria.

[34] G. Cornu (ed.), *Vocabulaire juridique Association Henri Capitant*, Paris 2022.

[35] J.-B. Racine, Th. Bréger, *Ordre public alimentaire*, in: F. Collart Dutilleul, J.-P. Bugnicourt (eds.), *Dictionnaire juridique de la sécurité alimentaire dans le monde*, Bruxelles 2013.

[36] X. Boucobza, *La méthode de promotion de la sécurité alimentaire. Une application de la lex publica?*, "Revue internationale de droit économique" 2012, no. 4, pp. 71–85.

There are many exceptions and possible derogations to the rules of free international trade. More specifically, Article XX of the GATT (General Agreement on Tariffs and Trade) on General Exceptions authorises a state to take measures to protect "public morals" (a) and "human, animal or plant life or health" (b)[37] notwithstanding any provision of the General Agreement. Similarly, a State may derogate from this by taking measures to prohibit or temporarily restrict exports "in order to prevent a critical situation due to a shortage of foodstuffs;" and prohibitions or temporary restrictions may also be imposed "in order to prevent a critical situation due to a shortage of foodstuffs." This also includes prohibitions or restrictions on imports or exports that are necessary for the application of standards or regulations concerning the classification, quality control or marketing of products intended for international trade; restrictions on the import of an agricultural product that restrict the quantity of the equivalent domestic product sold or produced; restrictions on the import of a product of animal origin that depend on the imported product; or restrictions on the production of a product of animal origin that depend on the imported product.[38] WTO law thus provides Member States with occasional exceptions to resort to restrictive measures to enable them to deal with difficult situations that are often unpredictable and beyond their control.[39] Furthermore, the TRIPS Agreement explicitly allows public policy to consider non-market values. Article 27(2) of the Agreement states the following: "Members may exclude inventions from patentability if preventing their commercial exploitation in their territory is necessary to protect public order or morality, including protecting human, animal or plant life or health, or avoiding serious environmental damage, provided such exclusion is not based solely on their law prohibiting exploitation."

Even if the legal framework in domestic law is moving towards greater protection of investors' individual interests and the promotion of free trade, concern for the collective interest is clearly stated in Investment Codes and many Bilateral Investment Treaties (BITs) in the form of "public interest conditionality." For example, Article 7 of the Malian Investment Code of 27 February 2012 states that nationalisation, expropriation or requisition of an enterprise is lawful if it is taken "in the public interest" and that "the investor is guaranteed against any measure of nationalisation, expropriation or requisition of its enterprise, except in the public interest. In such a case,

[37] Article XX of the GATT, https://www.wto.org/english/res_e/booksp_e/gatt_ai_e/art20_e.pdf [accessed on 14.01.2025].

[38] F. Collart Dutilleul, *Ways of improving food security...*, p. 213.

[39] X. Boucobza, *La méthode de promotion...*

the investor shall receive compensation in accordance with the applicable laws and regulations." Similarly, the BIT between Mali and Canada on the promotion and protection of investments states that a measure of expropriation or dispossession is lawful if it is in the collective interest, as defined by the parties as "public interest purposes." Article 10 of the BIT states that "neither Party may nationalise or expropriate a covered investment, directly or indirectly, through measures amounting to nationalisation or expropriation ('expropriation'), unless it is for a public purpose." Article 17 on general exceptions also states that, for the aforementioned reasons, the parties may implement measures deemed necessary for "the protection of human, animal or plant life or health" or "the conservation of exhaustible natural resources, whether biological or non-biological." Therefore, the public policy reserve offers opportunities to address the issues faced by local populations.

2.2. Voluntary guidelines

The voluntary guidelines adopted by the African Union and those drawn up by the Food and Agriculture Organization of the United Nations (FAO) contain numerous recommendations for improving the legal instruments of African states in order to better protect the rights of local populations.

2.2.1. Voluntary guidelines adopted by the African Union

In July 2009, the African Union Commission adopted a reference document entitled Framework and Guidelines on Land Policies in Africa.[40] These voluntary guidelines aim to help African states develop the best possible land legal instruments to "secure land rights, improve productivity, and enhance the living conditions of the majority of the continent's population." To this end, the Commission has recommended nine guidelines based on a set of fundamental principles, including: (i) respect for human rights and local communities; (ii) contribution to the sustainable development of agriculture; (iii) respect for the principles of good land governance; (iv) respect for women' rights. These complementary guidelines outline the primary operational processes that countries should adhere to when formulating their land policies or legal instruments. The first step is to develop participatory and inclusive

[40] Framework and Guidelines on Land Policy in Africa, Land Policy in Africa: A Framework to Strengthen Land Rights, Enhance Productivity and Secure Livelihoods, https://au.int/sites/default/files/documents/30239-doc-framework_and_guidelines_on_land_policy_in_africa.pdf [accessed on 14.01.2025].

processes. The Commission recommends clarifying and considering the interests and roles of all stakeholders in the land sector, particularly traditional institutions, land users, and civil society organisations, before launching the process. This prerequisite should be complemented by serious consultations with the population on the major issues to be addressed by the land policy (guidelines 1 and 2).

The second stage suggests that, when developing land policies and legal instruments, the role of local institutions and traditional systems in recognising new land rights should be considered. The Commission therefore recommends "recognising the legitimacy of endogenous land institutions and systems, improving their role and functioning, and providing the necessary interface between these systems and state land management and administration." The guidelines at this stage suggest that "the formulation of detailed policies and legislative and institutional reforms should take place through a progressive and iterative process rather than a sequential linear model." Where parliamentary scrutiny and approval are required to validate and legitimise the outcomes of the policy development process, the guidelines recommend that civil society organisations (CSOs) and other interest groups be given the opportunity to contribute further at this stage. This ensures that their initial contributions are not ignored in the final draft policy document.

The guidelines also recommend building the capacity of public or state-sector land tenure institutions to develop land tenure policies or, if necessary, restructure them to address issues such as dispersed land registers with limited access, weak internal communication systems, outdated operating procedures, overlapping and uncertain missions, conflicts of competence, duplication of efforts and responsibilities, and wasted resources. Finally, the guidelines recommend that existing policies or legal instruments should serve as a "basis for further policies in related sectors and sub-sectors, such as agriculture, livestock, energy, mining, water, wildlife, forestry, and human settlements)."

2.2.2. Voluntary guidelines drawn up by UN bodies

Various initiatives have been adopted within the UN to help countries, particularly developing countries, to draw up better legal instruments for land and food security. These include the voluntary guidelines for responsible governance of land tenure systems adopted by the FAO, and the guidelines on the impact of trade and investment agreements on human rights. The Voluntary Guidelines for Responsible Governance of Tenure of Land,

Fisheries and Forests in the Context of National Food Security[41] adopted in May 2012 contain recommendations aimed at both non-state actors and host states. In the eyes of the FAO, the notion of non-state actors covers both international and national investors, multinationals and companies. According to the FAO, the term "non-state actors" refers to international and national investors, as well as multinational companies. The guidelines recommend that non-state actors respect human rights and legitimate land rights, and act with due diligence to avoid encroaching on the fundamental rights and legitimate land rights of others. They should therefore implement appropriate risk management systems to prevent and address violations of human rights and legitimate land rights. Additionally, non-state actors must identify and assess any potential or actual violations of human rights or legitimate land rights in which they may have been involved.

The guidelines recommend that States, in accordance with their international obligations, ensure access to effective remedies in cases of infringement of human rights or legitimate property rights by business enterprises. In the case of transnational corporations, the guidelines recommend that States of origin aid as well as host States ensure that these corporations do not contribute to violations of human rights or legitimate land rights. Finally, the FAO recommends that states take additional measures to prevent violations of human rights and legitimate land rights by state-owned or state-controlled companies, or those receiving significant support or services from public bodies. The purpose of the guiding principles is to serve as "operational" tools to help states conclude agreements that comply with their human rights obligations.

Conclusion

This study concludes that the current legal framework governing economic activities related to land and food in West Africa, and particularly in Mali, does not adequately protect the food security of local populations. The permissiveness of domestic legal systems, coupled with the prioritisation of commercial interests over non-commercial concerns in international trade law, significantly undermines local communities' ability to access essential land and food resources. This legal orientation exacerbates inequalities in

[41] Voluntary Guidelines for Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security, Rome, 11 May 2012, Spec. item 3.2 CFS, 37th Session, Rome 17–22 October 2011, http://www.fao.org/docrep/meeting/023/mc122f.pdf [accessed on 14.01.2025].

land tenure and food distribution, and reinforces structural vulnerabilities that place local populations in a precarious position with regard to their fundamental right to food.

In an era where globalisation appears to be an irreversible force with an overwhelming emphasis on market-driven values, prospects for improvement remain uncertain. The prevailing economic paradigm, which prioritises liberalisation, privatisation and the commodification of essential resources, further limits the regulatory capacity of national governments to implement protective measures for local populations. However, the devastating consequences of food insecurity, such as widespread malnutrition, the erosion of livelihoods and increasing socio-economic instability, demand an immediate and decisive response from national and international stakeholders alike. The plight of communities weakened by chronic hunger and economic marginalisation is an urgent call to action. Therefore, if there is no political will to protect vital resources such as land and food from the mechanisms applied in the global market, it becomes imperative to establish a sustainable balance between market-oriented principles and non-market values. This equilibrium must ensure that economic liberalisation does not infringe upon fundamental human rights, especially the right to food and equitable access to land. To achieve this balance, a comprehensive and inclusive approach is required that reconciles the interests of global economic actors with the urgent needs and priorities of local populations. Only through such a reconfiguration of legal and economic frameworks can effective and sustainable solutions be successfully implemented to address the pressing issue of food insecurity in West Africa.

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