THE RIGHT TO FOOD

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The Right to Food and Access to Natural Resources

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RIGHT TO FOOD STUDIES

The Right to Food and Access to Natural Resources

Using Human Rights Arguments and Mechanisms to Improve Resource Access for the Rural Poor

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Right to Food Studies

Right to Food Studies are a series of articles and reports on right to food related issues of contemporary interest in the areas of policy, legislation, agriculture, rural development, biodiversity, environment and natural resource management.

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Right to Food Studies are available at www.fao.org/rightofood. For those without web access, mail or paper copies may be requested from the Right to Food Unit, FAO, Viale delle Terme di Caracalla 00153, Rome, Italy, righttofood@fao.org. Readers are encouraged to send any comments or reactions they may have regarding a Right to Food Study.

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The Right to Food and Access to Natural Resources

List of Acronyms

ACHPR	African Charter on Human and Peoples' Rights
ACHR	American Convention on Human Rights
BIT	Bilateral Investment Treaty
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CESCR	UN Committee on Economic, Social and Cultural Rights
CNCR	Conseil National de Consultation Rurale, National Rural Consultative Council (Senegal)
CNOP	Coordination Nationale des Organisations Paysannes, National Coordination of Farmer Organizations (Mali)
ECHR	European Convention on Human Rights
ECOWAS	Economic Community of West African States
EID	Espace d'Intervention Democratique, Democratic Question Time
FAO	Food and Agriculture Organization of the United Nations
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
IIED	International Institute for Environment and Development
ILO	International Labour Organization
LOA	Loi d'Orientation Agricole, Agriculture Policy Act (Mali)
LOASP	Loi d'Orientation Agro-Silvo-Pastorale, Agro-Sylvo-Pastoral Policy Act (Senegal)
NGO	Non-governmental organization
UDHR	Universal Declaration of Human Rights
UN	United Nations
WAEMU	West African Economic and Monetary Union
WFP	World Food Programme

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Introduction

Lorenzo Cotula

Overview

In 1948, the Universal Declaration of Human Rights (UDHR) affirmed the right of everyone to an adequate standard of living, including adequate food. The right to food was subsequently reaffirmed and clarified by several other international human rights instruments. Lastly, the Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security, adopted by the Food and Agricultural Organization of the United Nations (FAO) Council in 2004 ("Right to Food Guidelines"), spelt out the implications of the right to food for a range of policy areas.

Sixty years after the first affirmation of the right to food, much remains to be done to make this a reality. In 2006, FAO's *State of Food Insecurity in the World* report estimated the number of undernourished people at 820 million – down by only 3 million compared to 1990–92. While reductions in undernourishment have been achieved in regions like Asia and Latin America, in sub-Saharan Africa the number of undernourished people has increased from 169 to 206 million between 1990 and 1992 and 2001 and 2003 (FAO, 2006a).[1] One-third of Africa's population suffers from chronic hunger (FAO, 2006). Paradoxically, undernourishment significantly affects food producers in rural areas (Berthelot, 2005).

In the rural areas of many developing countries, natural resources are an important source of food, both through direct consumption and through providing the basis for income-generating activities (e.g. cash crops, forest products) that enable people to purchase food. Because of this, measures to improve access to resources are an important element of strategies for the progressive realization of the right to food.

Yet, for a long time, human rights and resource-access literatures and practitioners operated in a compartmentalized way. Human rights arguments were the reserved domain of lawyers and human rights campaigners, and prioritized civil and political rights like freedom from torture or freedom of expression. Resource-access issues were traditionally tackled through diverse combinations of technical interventions and political mobilization — more rarely through human rights arguments.

[1] Because population has grown faster than the number of undernourished people, however, sub-Saharan Africa has experienced a decline in the share of undernourished population – from 35% to 32% (FAO, 2006).

As for the literature, a vast body of work documents lessons learnt from policies and programmes to improve access to natural resources, including measures to improve security of tenure and redistributive measures to increase access to resources for poorer and more vulnerable groups. Only rarely has this literature engaged with human rights arguments and mechanisms — although there has been a growing engagement with other international instruments, including provisions on access to information, to justice and to decision-making under principle 10 of the 1992 Rio Declaration on Environment and Development. On the other hand, a separate literature spells out the obligations stemming from human rights treaties, including provisions concerning the right to food and related human rights. But only rarely does this literature consider the national and local tenure systems through which rural groups gain access to resources, and/or the practical challenges of securing or increasing resource access for poorer and more vulnerable groups.

In more recent years, human rights arguments and efforts to improve access to resources have converged to a much greater extent. Human rights language has been used to support resource-access claims, and rights-based approaches have been pursued as a means for empowerment. For instance, international alliances of rural producers' organizations have used human rights language to back up political claims, namely with regard to the concept of food sovereignty and to demands that local producers and family farmers be given priority over large-scale, foreign-owned agribusiness (see e.g. the 2007 Nyéléni Declaration on Food Sovereignty). Advocacy organizations have campaigned for a "human right to livelihood and land",[2] and/or documented human rights violations in large-scale investment projects, including through negative impacts on resource access for local groups.

In addition, international tribunals have been more prepared to use human rights instruments with regard to resource-access disputes, and in several cases they have linked government action undermining resource access for vulnerable groups to human rights violations — for instance with regard to human rights cases upholding the land rights of indigenous peoples (e.g. the cases *Mayagna [Sumo] Awas Tingni v Nicaragua, and Maya Indigenous Communities of the Toledo District v Belize*).

At the national level, some recent natural resource legislation has placed greater emphasis on empowerment, public participation, community-based management, transparency and accountability — concepts that are in line with human rights approaches to development (e.g. on common pool resources, see Lindsay, 2004). Several development agencies have sought to "mainstream" a "rights-based approach" in their work — including in their resource-access programmes (e.g. Sida, 2007).

While the human rights and resource-access agendas are converging, some have raised concerns as to the empowerment potential of human rights approaches. Concerns include the perception that human rights approaches constitute a one-size-fits-all solution presented in neutral and "apolitical" terms, which does not tackle imbalances in the distribution of wealth, status and power (Kennedy, 2002); and that those approaches put the state (and state obligations) at the centre of the emancipatory process, although in many contexts the state is a threat to the realization of human rights rather than a benevolent regulator pursuing it (Kennedy, 2002; Mitlin and Patel, 2005). Some have

[2] See for instance the website of the People's Movement for Human Rights Education (PDHRE): *http://www.pdhre.org/rights/land.html*

also argued that legal processes may in themselves be disempowering, as they shift control away from beneficiaries to legal professionals through use of complex language and procedures (Mitlin and Patel, 2005). Efforts to use human rights arguments and mechanisms in order to improve access to resources must come to terms with these concerns and demonstrate that they can be addressed.

However, beyond enthusiastic appropriations of human rights language and sceptical critiques of those, there is little understanding of the relationship between internationally recognized human rights and access to natural resources. Some human rights claims made in support of resource access are based on shaky legal grounds, while other concerns raised about human rights approaches to resource access are based on an incomplete understanding of what those approaches actually entail.

It is necessary to clarify the relationship between human rights and access to natural resources. This requires combining sound legal analysis with an understanding of resource-access dynamics at local and national levels. It entails tackling questions like: What are the implications of the international recognition of the right to adequate food for natural resource policies, laws and programmes? Can human rights arguments and mechanisms support the resource-access efforts of poorer and more vulnerable groups, and if so, how?

This study seeks to address these questions. It explores the relationship between human rights — particularly the right to adequate food — and access to natural resources — particularly land. It does so through a conceptual analysis based on international treaties and instruments, and through two country studies — one from Mali (which includes a comparison with legislation from Senegal) and the other from the United Republic of Tanzania. While human rights arguments are universal in nature and while the issues tackled by this study are of global relevance, special attention is paid to sub-Saharan Africa, where as discussed the challenge of realizing the right to food is particularly acute.

Key concepts

Access to natural resources

Access to natural resources is broadly defined here as the processes by which people, individually or collectively, are *able* to use natural resources, whether on a temporary or permanent basis. These processes include participation in both formal and informal markets; resource access through kinship and social networks, including the transmission of resource rights through inheritance and within families; and resource allocation by the state and other authorities with control over natural resources.[3]

Resource *access* is therefore broader than resource *rights* in a legalistic sense. Resource rights do contribute to shaping access — not only rights of full ownership but also a much wider range of entitlements (e.g. various types of use rights). Nonetheless, access to resources is also shaped by social relations, including control over markets, capital and technology; relations of power, authority and social identity; and relations of reciprocity, kinship and friendship. These factors may entail a disconnection between having a legal

[3] This definition is based on Cotula et al., 2006, with adaptations.

right to use natural resources and being *able* to claim and enjoy that right in practice (Ribot and Peluso, 2003).

This disconnection is particularly marked in contexts where legislation struggles to be implemented on the ground. In much of Africa, lack of financial resources and of institutional capacity in government agencies, lack of legal awareness and, often, lack of perceived legitimacy of official rules and institutions all contribute to limiting the outreach of state legislation in rural areas. On the other hand, local ("customary") resource-tenure systems are often applied even where not backed by (or inconsistent with) legislation, because they tend to be more accessible to rural people.

"Customary" systems claim to draw their legitimacy from "tradition", as shaped both by practices over time and by systems of belief. However, they have been profoundly changed by decades of colonial and post-independence government interventions, and are continually adapted and reinterpreted as a result of diverse factors such as cultural interactions, population pressures, socio-economic change and political processes. While local tenure systems are extremely diverse, resources are usually held by clans or families on the basis of assorted blends of group to individual rights, accessed on the basis of group membership and social status, and used through complex systems of multiple rights (Cotula, 2007).

Therefore, while there may be a significant degree of overlap between resource *rights* and resource *access*, the two concepts are distinct. While some groups may hold legal rights over natural resources they may not be able to use those resources because of a lack of legal awareness, power asymmetries or other factors. On the other hand, some groups may not hold any legal rights over natural resources and yet enjoy resource access through other mechanisms such as social relations of kinship, alliance and reciprocity, or local tenure systems that are not backed by legislation but are perceived as "legitimate" in the eyes of the local population.

Improvements in resource access may entail *more secure* access to resources, for instance through stronger protection of existing legal or other entitlements for access to resources (for instance, through greater legal recognition of resource rights perceived as legitimate on the ground); or increased access to resources, for instance through land-redistribution programmes.

Although this study considers access to natural resources, and although different resources and different resource rights are closely interrelated,[4] the focus is on access to land. Access to related resources such as water, grazing and forests is also touched upon. Subsoil resources, fisheries and genetic resources are also of great relevance but are outside the scope of this study owing to time and space constraints.

Human rights

Human rights are the fundamental rights and freedoms to which all human beings are entitled. By affirming these rights and freedoms, human rights law aims to protect human dignity.

The Universal Declaration of Human Rights (UDHR), adopted by the United Nations General Assembly in 1948, is the cornerstone of international human rights law. The

[4] E.g., on the relationship between land and water rights, see Hogdson, 2004 and Cotula, 2006.

human rights affirmed in the UDHR are spelt out in a set of legally binding treaties. Key treaties include the 1966 International Covenant on Civil and Political Rights (ICCPR) and its Protocols, the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR), the 1965 International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the 1979 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the 1989 Convention on the Rights of the Child (CRC).

In addition, human rights are protected by regional treaties: in Europe, the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and its Protocols, and the European Social Charter; in the Americas, the 1969 American Convention on Human Rights (ACHR) and its Additional Protocol on economic, social and cultural rights; and in Africa, the 1981 African Charter on Human and Peoples' Rights (ACHPR) and its Protocols (including the 1998 Protocol on the Establishment of an African Court on Human and Peoples' Rights).

For each human right, states have an obligation to "respect" (i.e. to refrain from undertaking activities that affect the enjoyment of that right negatively), to "protect" (i.e. to prevent individuals and groups from impinging on the rights of others), to "facilitate" (i.e. to implement policies, laws and programmes that promote the realization of that right, particularly for vulnerable groups), and to "provide" (i.e. to provide support where individuals or groups are unable to fend for themselves).[5] States must also refrain from discriminating among different groups or individuals in the enjoyment of human rights.

The focus here is on the right to adequate food — a human right recognized in several of the regional and global human rights instruments mentioned above. Given the interdependence between all human rights, the study also considers other relevant human rights (e.g. the right to property).

Plan of the study

In addition to this introduction, the study is organized in a conceptual chapter to explore the relationship between the right to food and access to natural resources, mainly drawing on human rights treaties and other international instruments (Chapter 1); in two chapters providing case studies further to illustrate that relationship in light of the experience of Mali (Chapter 2) and the United Republic of Tanzania (Chapter 3); and in a conclusion summarizing key findings and outlining implications for action at local, national and international levels.

[5] This classification of legal obligations was developed in "General Comments" adopted by UN human rights bodies to provide guidance on the interpretation of human rights treaties (e.g. General Comments 12 and 15 of the UN Committee on Economic, Social and Cultural Rights, on the right of food and the right to water, respectively). It was also followed by the African Commission for Human and Peoples' Rights in the case *SERAC* v *Nigeria* (2001) AHRLR 60.

Photo by A. Proto

1. The Right to Food and Resource Access Conceptual Links

Lorenzo Cotula

1.1 The legal sources of the right to food

Several international instruments affirm the right to adequate food. These include:

- The **Universal Declaration of Human Rights (UDHR)**, Article 25 of which states: "everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food [...]".
- The **International Covenant on Economic, Social and Cultural Rights (ICESCR)**, which recognizes "the right of everyone to an adequate standard of living for himself and his family, including adequate food [...]" (Art. 11(1)); and "the fundamental right of everyone to be free from hunger" (Art. 11(2)). The meaning of these provisions has been clarified by the UN Committee on Economic, Social and Cultural Rights (CESCR) in its **General Comment No. 12** of 1999. Other General Comments are also relevant to the right to food (e.g. General Comments 3 of 1990 and 15 of 2000). While not binding per se, General Comments constitute the authoritative interpretation of legally binding treaty provisions, issued by the UN body responsible for monitoring the application of the treaty.
- The **Convention on the Rights of the Child (CRC)**, which recognizes "the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development" (Art. 21(1)). The CRC requires states to combat child malnutrition (Art. 24(2)(c)); and to "take appropriate measures" to assist parents in fulfilling their primary responsibility to implement children's right to an adequate standard of living, "particularly with regard to nutrition" (Art. 27(3)).
- The **Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW)**, which requires states to ensure that women have "adequate nutrition during pregnancy and lactation" (Art. 12(2)); and to "take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular [...], to enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications" (Art. 14(2)(h)).

The normative content of the right to adequate food has been clarified further by the Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate

Food in the Context of National Food Security — adopted by the FAO Council in 2004 ("**Right to Food Guidelines**"). While the Right to Food Guidelines per se are not legally binding, some of them reflect binding international law (for instance, the references to the Geneva Convention provisions on the protection of civilians within armed conflict; Guideline 16.2); while other parts are intended to provide states with guidance on how best to pursue the progressive realization of the right to adequate food. While General Comment 12 is authoritative because it has been adopted by the UN body responsible for overseeing the implementation of the ICESCR and because it is based on sound legal reasoning, the Right to Food Guidelines are authoritative because they have been adopted by states and express the political commitment of these to the realization of the right to food.

With regard to Africa's regional human rights system, the **African Charter on Human and People's Rights** (ACHPR), the main legal instrument underpinning that system, does not refer explicitly to the right to food. However, in the case SERAC v Nigeria (the "Ogoni" case), the African Commission on Human and People's Rights held that the right to food is "implicit" in the Charter, particularly in light of its provisions on the rights to life (Art. 4), to health (Art. 16) and to development (Art. 22). Further, the 2003 ACHPR Protocol on the Rights of Women in Africa affirms women's "right to food security" (Art. 15).

At the national level, the right to adequate food is stated explicitly in some **African constitutions** — as a fully fledged and self-standing right (e.g. South Africa[6]) or as part of "directive principles of state policy" or similar principles, which require the state to "endeavour" to achieve, or to "actively promote", food security (e.g. Ethiopia,[7] Malawi,[8] Namibia,[9] Uganda[10]).

In addition, the right to adequate food is linked to several other human rights, as these may be instrumental to the realization of the right to food. This is in line with the principle that all human rights are interdependent and interrelated, stated by the 1993 UN Vienna Declaration on Human Rights (para. 5). Particularly relevant are:

[6] "Everyone has the right to have access to […] sufficient food and water […]. The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of each of these rights" (Arts 27 (1) and (2)).

[7] "Every Ethiopian shall be entitled, within the limits of the country's resources, to food, clean water, shelter, health, education, and security of pension" (Art. 90(1)). Although this provision is included among the "Principles of National Policy", its formulation ("shall be entitled") entails a fully-fledged right.

[8] "The State shall actively promote the welfare and development of the people of Malawi by progressively adopting and implementing policies and legislation aimed at achieving the following goals […] to achieve adequate nutrition for all in order to promote good health and self-sufficiency" (Art. 13). See also Article 30(2) on access to food as a means to realize the right to development.

[9] "The State shall actively promote and maintain the welfare of the people by adopting, inter alia, policies aimed at the following: […] consistent planning to raise and maintain an acceptable level of nutrition and standard of living of the Namibian people and to improve public health […]" (Art. 95).

[10] "The State shall endeavour to fulfil the fundamental rights of all Ugandans to social justice and economic development and shall, in particular, ensure that:
all developmental efforts are directed at ensuring the minimum social and cultural well-being of the people and all Ugandans enjoy rights and opportunities and access to education, health services, clean and safe water, work, decent shelter, adequate clothing, food security and pension and retirement benefits" (Art. XIV).

- The **right to property**, which is of direct relevance to efforts to secure natural resource rights, and other "substantive" human rights such as the **right to housing**, peoples' "**right to a generally satisfactory environment favourable to their development**",[11] and **peoples' right to freely dispose of their natural resources**.
- Rights of public participation, including **freedom of expression, assembly and association** and "**procedural rights**" that enable resource users to have greater say in decisions affecting their access to resources (e.g. rights of access to information and of public participation in decision-making).
- Rights aimed at ensuring legal protection of other human rights, particularly the **right to a remedy**.

1.2 The normative content of the right to food

In its General Comment 12, the CESCR clarified that "the right to adequate food is realized when every man, woman and child, alone or in community with others, has physical and economic access at all times to adequate food or means for its procurement" (para. 6). This definition was further developed by the UN Special Rapporteur on the Right to Food. For the Special Rapporteur, the right to food is "the right to have regular, permanent and unrestricted access, either directly or by means of financial purchases, to quantitatively and qualitatively adequate and sufficient food corresponding to the cultural traditions of the people to which the consumer belongs, and which ensure a physical and mental, individual and collective, fulfilling and dignified life free of fear".[12]

According to General Comment 12, the realization of the right to adequate food requires:

- the *availability* of food in sufficient quantity and quality;
- food *accessibility*, i.e. the ability of individuals and groups to gain access to adequate food, both economically and physically (paras 8 and 13).

This way of conceptualizing the normative content of the right to food builds on the concept of food security. Food security is achieved "when all people, at all times, have physical and economic access to sufficient, safe and nutritious food to meet their dietary needs and food preferences for an active and healthy life" (Rome Declaration on World Food Security, 1996).

The concept of food security has evolved significantly over the past few decades. While in the 1970s emphasis was on the *availability* of food, since the 1980s this has shifted to a focus on economic and physical access to food. This partly resulted from research showing that some of the worst famines occurred in contexts of abundant food supply — and were caused by people's lack of entitlements to gain access to available food (Drèze and Sen, 1989). In referring to both food accessibility and availability, the normative content of the right to food builds on these insights.

Article 11 of the ICESCR makes a distinction between the right to adequate food and the right to be free from hunger (paras 1 and 2, respectively). The right to be free from

[11] Article 24 of the ACHPR.

[12] *www2.ohchr.org/english/issues/food/index.htm*

hunger ensures a minimum daily nutritional intake and the survival of the person. The right to adequate food goes beyond freedom from hunger to include also an "adequacy" standard. This means that food must be in "a quantity and quality sufficient to satisfy the dietary needs of individuals, free from adverse substances, and acceptable within a given culture" (para. 8 of General Comment 12, which presents "adequacy" as a third pillar of the right to food, together with availability and accessibility).

While the right to adequate food is to be realized progressively (see below), the right to freedom from hunger requires "more immediate and urgent steps" (General Comment 12, para. 1). Some have argued that while for the right to adequate food status of customary law is "premature", a "particularly strong argument" can be made that the right to be free from hunger "has already achieved the status of customary international law" (Narula, 2006:791).

1.2.1 The obligation to take steps

The right to adequate food does not mean that individuals and groups (the "right holders") have a general entitlement to be provided food. It is primarily interpreted as the right to feed oneself in dignity, through economic and other activities. In other words, individuals and groups are responsible for undertaking activities that enable them to have access to food.

Nonetheless, the state has an important role to play in supporting these efforts. Under the ICESCR, states must "take steps [...] to the maximum of [their] available resources, with a view to achieving progressively the full realization of the [right to food] by all appropriate means" (Art. 2(1)). In other words, the key obligation of states is to "take steps" towards the progressive realization of the right to food. This concept was clarified by the CESCR in paragraph 9 of its General Comment 3:

> *The concept of progressive realization constitutes recognition of the fact that full realization of all economic, social and cultural rights will generally not be able to be achieved in a short period of time. […] Nevertheless, the fact that realization over time, or in other words progressively, is foreseen under the Covenant should not be misinterpreted as depriving the obligation of all meaningful content. […The Covenant…] imposes an obligation to move as expeditiously and effectively as possible towards that goal. Moreover, any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources.*

In other words, the obligation to take steps entails restrictions on measures that would worsen enjoyment of the right to food ("non-retrogression principle"); and the duty to take measures that improve enjoyment of that right.

This duty to take steps is further concretized by the wording of the ICESCR:

- The expression "to the maximum of […] available resources", which limits state discretion in resource allocation, and directs states to prioritize the realization of the rights recognized in the Covenant over other policy goals.

- The expression "by all appropriate means", which leaves states with wide discretion in deciding which measures to take but establishes a standard of "appropriateness" with which such measures must comply.[13]

1.2.2 Respect, protect, fulfil

The nature of the steps that states must take is defined by a well-established analytical framework followed by General Comment 12 (and subsequently developed further by the CESCR, e.g. in its General Comment 15 on the right to water). According to this framework, states must take three sets of steps: (i) "respect", (ii) "protect" and (iii) "fulfil". In turn, fulfil includes two sets of steps — (i) "facilitate" and (ii) "provide".

The obligation to respect requires states to refrain from taking measures that affect access to food negatively. This obligation reflects the fact that the right to adequate food is primarily to be realized by right holders themselves through their economic and other activities. States have a duty not to unduly hinder the exercise of those (lawful) activities, and not to arbitrarily undermine existing access to food.

The obligation to protect requires states to take measures to ensure that third parties (e.g. individuals, enterprises) do not deprive right-holders of their access to food. This means that the state could be held liable for violations of the right to food committed by third parties where it shows "lack of due diligence to prevent the violation or to respond to it".[14]

The obligation to fulfil/facilitate requires states to support the efforts of individuals and groups to gain access to adequate food. It is exemplified by Article 11(2) of the ICESCR, which reads: "the States Parties to the present Covenant [...] shall take [...] the measures [...] which are needed [...] to improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilisation of natural resources [...]".

The obligation to fulfil/provide requires states to provide food "whenever an individual or group is unable, for reasons beyond their control, to enjoy the right to adequate food by the means at their disposal" (General Comment 12, para.15). This may entail establishing effective social safety nets, for instance for natural disasters.

States must also refrain from discriminating among different groups or individuals in their access to food. Specific non-discrimination obligations apply in relation to particular

[13] The case *Government of the Republic of South Africa and Others v Grootboom and Others*, decided by the Constitutional Court of South Africa, provides insights on how courts may review compliance with the "appropriateness" standard. The case concerned the right to housing, which is protected under the South African Constitution. The latter requires the state to take "reasonable" measures to realize the right to housing progressively. On the basis of this provision, the Constitutional Court reviewed whether legislation and programmes for realizing the right to housing complied with the "reasonableness" standard – and found that they did not. In its judgment, the Court clarified the specific requirements flowing from the "reasonableness" standard (including e.g. addressing both short- and long-term needs). Although the South African Constitution (and hence the case) refers to "reasonableness" rather than to "appropriateness", the two standards are in practice similar and require courts to perform similar roles (as argued by Golay, 2002).

[14] The quotation is from the case *Velásquez Rodríguez v Honduras*, which did not concern violations of the right to food directly (para. 172). On state responsibility for human rights violations by third parties, see also the case *Delgado Paez v Colombia*.

groups. For instance, the CEDAW prohibits gender discrimination and requires states to adopt measures to ensure gender equality (articles 3 and 5).

These state obligations are of a different nature. The obligations to respect and not to discriminate require states to refrain from doing something ("negative obligations"), and are of immediate effect. The obligations to protect, to facilitate and to provide require states to take action ("positive obligations"), and may have important resource implications (e.g. the obligation to provide). They are therefore to be realized progressively and to the maximum of available resources — although for the very minimum core of freedom from hunger these obligations are of immediate effect.

1.3 Broader implications of the right to food

1.3.1 Food security through a human rights lens

Seeing food security through a right-to-food lens entails a change in perspective. In a rights-based perspective, taking steps to achieve food security is not a matter of policy discretion but a legal obligation. Moreover, in line with recent shifts in emphasis in the concept of food security, a rights perspective is based on the understanding that the realization of the right to food is not only a function of improving the *availability* of key livelihood assets such as food or the means to procure it. It is also a function of institutions and processes that address power imbalances and ensure access to those assets for the poorer and more vulnerable groups. This has implications for the formulation of policies, laws and programmes — in terms of both content and process.

As for content, a rights perspective provides benchmarks for evaluating policies and programmes — such as non-discrimination and "non-retrogression" (see above). These entail that action resulting in loss of access to food for some would need to be properly justified in order for it to be lawful. In other words, a human rights approach does not provide normative guidelines on the merits of strategic policy choices — for instance, on the model of agricultural development. But it does require that certain basic principles be respected — such as non-discrimination; and that, whatever the policy choice, measures must be taken to ensure that those who lose out have access to reliable, alternative sources of support.

As for process, a rights perspective requires decision-making processes (from policy formulation to law-making down to administrative acts) to comply with participation, accountability, non-discrimination, transparency, human dignity, empowerment and rule of law (following the "PANTHER" framework developed by FAO, 2006b). Participation requires that everyone have the right to subscribe to decisions that affect them (FIAN, 2007). Accountability requires that politicians and government officials be held accountable for their actions through elections, judicial procedures or other mechanisms (FIAN, 2007). Non-discrimination prohibits arbitrary differences of treatment in decision-making. Transparency requires that people be able to know processes, decisions and outcomes. Human dignity requires that people be treated in a dignified way, while empowerment requires that they are in a position to exert control over decisions affecting their lives. Finally, rule of law requires that every member of society, including decision-makers, must comply with the law.

From a legal point of view, these process-related principles flow from the recognition that taking steps to achieve food security is a legal obligation, and from the close

interdependence between the right to food and other internationally recognized human rights like rights of political participation — including freedom of expression,[15] freedom of assembly and association,[16] the right to receive information,[17] and the right to take part in the conduct of public affairs.[18] In addition, General Comment 12 emphasizes the importance of accountability, transparency, and participation for the formulation and implementation of strategies to realize the right to food (para. 23); while Right to Food Guideline 1 states that freedom of expression, assembly and association "enhances" the realization of the right to food.

In environmental matters, rights of public participation are also embodied in the "procedural rights" established by the 1992 Rio Declaration on Environment and Development and the 1998 Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters. The Rio Declaration states that "environmental issues are best handled with the participation of all concerned citizens"; requires states to grant "each individual" access to information and "the opportunity to participate in decision-making processes"; and calls for "effective access to judicial and administrative proceedings" (principle 10).

The Aarhus Convention develops the implications of principle 10 further, with a geographical focus on Europe.[19] In addition, the European Court on Human of rights has developed case law under the the right to respect for private and family life (recognized under Art. 17 of the ICCPR and Art. 8 of the ECHR). In *Guerra* v *Italy*, environmental pollution from a fertilizer factory located near the applicants' home was found to violate Article 8, as the Italian government had failed to inform local residents of the health risks posed by the emissions.[20]

A provision on access to information, public participation in environmental decision making and access to justice in environmental matters is also embodied in the 2003 Revised African Convention on the Conservation of Nature and Natural Resources (Art. XVI) — although this Convention, aimed at replacing the pre-existing 1969 Algiers Convention on the same topic, is not yet in force.

Within accountability, access to justice – courts, human rights institutions, alternative dispute resolution — is key to enforcing rights, obtaining redress for violations and holding violators to account. Despite longstanding academic debates on the "justiciability" of the right to food, it is now accepted that violations of this right can be brought before courts. This concerns both national and international institutions (such as, in Africa, the African Commission and Court on Human and Peoples' Rights). Justiciable violations include, for instance, discriminatory practices, disruption of existing access to food, and lack of diligence in protecting the food access of some from interference by others.

[15] UDHR, Art. 19; ICCPR, Art. 19; ECHR, Art. 10; ACHR, Art. 13; and ACHPR, Art. 9(2).

[16] UDHR, Art. 20; ICCPR, Arts 21–22; ECHR, Art. 11; ACHR, Arts 15– 16; and ACHPR, Arts 10–11.

[17] ACHPR, Art. 9(1).

[18] UDHR, Art. 21(1); ICCPR, Art. 25; ACHR, Art. 23; and ACHPR, Art. 13.

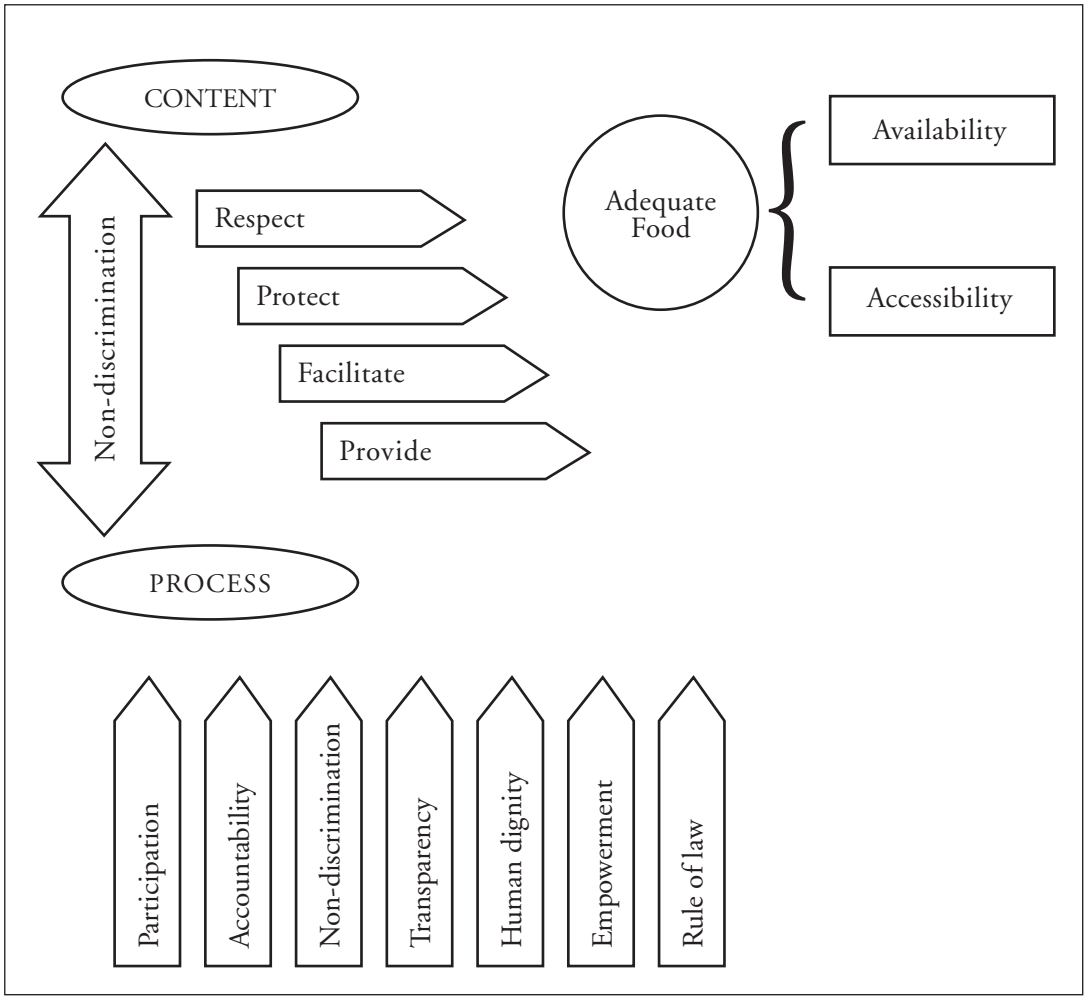
[19] The Convention was promoted by the UN Economic Commission for Europe, and is therefore applicable to the Northern hemisphere. However, "any other state […] that is a member of the United Nations may accede to the Convention upon approval by the meeting of the parties" (Art. 19(3)). While this provision opens the possibility that African states may one day accede to the Convention, this has not happened yet.

[20] On this case law, see Birnie and Boyle (2002).

The justiciability of the last two elements was specifically upheld in the ACHPR case *SERAC* v *Nigeria*. In this case, the African Commission on Human and Peoples' Rights found that the destruction of crops by the Nigerian security forces and the government's failure to protect locals from oil spillages and other negative effects of oil activities violated the government's obligations to respect and to protect the right to food.

Reliance on the right to food is much broader than justiciability, however. The legal recognition of the right to food and the state obligations associated with it provide people with an asset in political negotiations among different social groups — for instance, within the context of law-making processes. New legislation or amendments to existing legislation may not run counter the realization of the right to food. This "legal hook" can strengthen the negotiating position of weaker groups who may stand to lose from proposed reforms. Conversely, calls for legal reform favouring poorer and more vulnerable groups would be reinforced by legal provisions that require the state to legally realize the right to food of those groups.

FIGURE 1.1. THE RIGHT TO FOOD: STATE OBLIGATIONS



1.3.2 The right to food and food sovereignty

While the legal concept of right to food overlaps with and reshapes the concept of food security, it is also linked to the concept of "food sovereignty". The latter concept has been at the heart of the recent mobilization of peasant movements around the world.

The **Nyéléni Declaration on Food Sovereignty** adopted by the recent Food Sovereignty Forum (Sélingué, Mali, 27 February 2007) states that food sovereignty is "the right of peoples to healthy and culturally appropriate food produced through ecologically sound and sustainable systems". The Declaration is not a legal document but a manifesto adopted by the forum of civil society organizations.[21]

According to the Nyéléni Declaration, food sovereignty is the "right" of "peoples" to define their food and agricultural systems. Emphasis is on the international trade system and its implications for hunger and malnutrition in poorer countries. A central pillar of food sovereignty is therefore peoples' right to freely define food and agricultural policies that are best suited to them — irrespective of constraints deriving from the international trade system. Within this, food sovereignty prioritizes production for local and national markets over international trade. It also prioritizes family farming and peasants' access to land over agribusiness, and calls for democratic control over the introduction of technologies such as genetically modified organisms.

While the right to food is an internationally recognized and legally enforceable human right, food sovereignty is not. At present, it is essentially a political concept, and is advanced through the social mobilization of farmers' organizations worldwide (Windfuhr and Jonsén, 2005). Some of its core elements are linked to general international law and to human rights law, however. The freedom to define national policies is a key attribute of state sovereignty under international law. In addition, formulating "appropriate national development policies that aim at the constant improvement of the well-being of the entire population" is a *right* and a *duty* of states under the right to development (Art. 2(3) of the 1986 UN Declaration of the Right to Development).[22] The term "well-being" used in this formulation should be interpreted as the realization of internationally recognized human rights — including the right to food. Food sovereignty is also specifically linked to the right to food. For instance, the fact that international trade negotiations cannot violate the human rights obligations of states, including with regards to the right to food, makes this right a possible avenue for the promotion of food sovereignty (UNSR, 2004).

However, the normative content of the right to food and the concept of food sovereignty also present significant differences. The right to food is conceptualized as a right of individuals; food sovereignty is advocated as a peoples' right. The right to food is realized when people have access to food that meets specified adequacy standards — irrespective of whether that food is imported or produced domestically, or whether it is produced by family farmers or by agribusiness. Food sovereignty goes beyond availability and accessibility of adequate food to favouring food that is produced domestically by family farmers. In other words, while the right to food does not favour particular food security

[21] The Forum brought together some 600 delegates from some 80 countries, mainly from movements representing farmers, herders, fisherfolk, indigenous peoples, landless peoples, rural workers and other social groups. The concept of food sovereignty was first launched by the international farmers' movement Via Campesina back in 1996.

[22] The right exists vis-à-vis other states; the duty is vis-à-vis citizens (Orford, 2001).

policies (beyond creating a legal obligation to pursue those policies to the maximum of available resources, and to comply with basic principles such as non-discrimination), food sovereignty is linked to a more specific policy orientation — thought not to a readily made set of policies (Windfuhr and Jonsén, 2005). These differences have implications for the different emphasis placed on access to land and other natural resources — as will be discussed below.

1.4 Linkages between the right to food and resource access

1.4.1 Conceptual links

Food access through production or procurement

The normative content of the right to adequate food has major implications for access to natural resources. In much of Africa, access to natural resources is a main source of food for the majority of the rural population. Land and water are central to food production. Forest resources provide a basis for subsistence harvesting as well as for income-generating activities (e.g. through timber production). There is therefore an important relationship between realizing the right to food and improving access to natural resources. Both General Comment 12 and the Right to Food Guidelines tackle this relationship.

In both cases, the focus is on access to food – regardless of the form that such access takes. General Comment 12 states that the right to food may be exercised through direct food production; through income-generating activities (on- or off-farm) that enable procurement of food; or through combinations of both.

This approach emerges from the statement that the right to food is realized when individuals or groups "have physical and economic access […] to adequate food *or means for its procurement*" (para. 6 of General Comment 12; emphasis added). This applies to both food availability and accessibility. The availability of food may be assured through either direct food production or "well functioning distribution, processing and market systems that can move food from the site of production to where it is needed" (para. 12). Accessibility of food may be achieved through "any acquisition pattern or entitlement through which people procure their food" (para. 13); this would include both food production and food procurement.

A similar approach is taken in the Right to Food Guidelines. Guideline 8 ("Access to resources and assets") deals with access to natural resources such as land, water and genetic resources. Other natural resources (e.g. forests, grazing) must also be considered as included, however. This is in line with the more general wording of the first paragraph of Guideline 8 ("resources" and "assets", at 8.1) and with that of other Right to Food Guideline provisions (e.g. "productive resources" in Guideline 2, at 2.4).

Guideline 8 calls for measures to secure land rights and, "as appropriate", for agrarian reform to enhance land access for the poor (Guideline 8b). The Guideline also deals with income-generating activities in a food-procurement mode, however. It calls for measures to promote employment and self-employment (Guideline 8a). Similarly, Guideline 2 calls for a "holistic and comprehensive approach" to hunger resolution, including measures to ensure access to productive resources and to employment (Guideline 2.4).

These provisions clarify the meaning of Article 11 of the ICESCR, particularly its call for states "to improve methods of production, conservation and distribution of food", including "by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilisation of natural resources" (Art. 11(2)(a)). Both General Comment 12 and Guideline 8 clarify that improving access to natural resources is a key mechanism for the realization of the right to food.

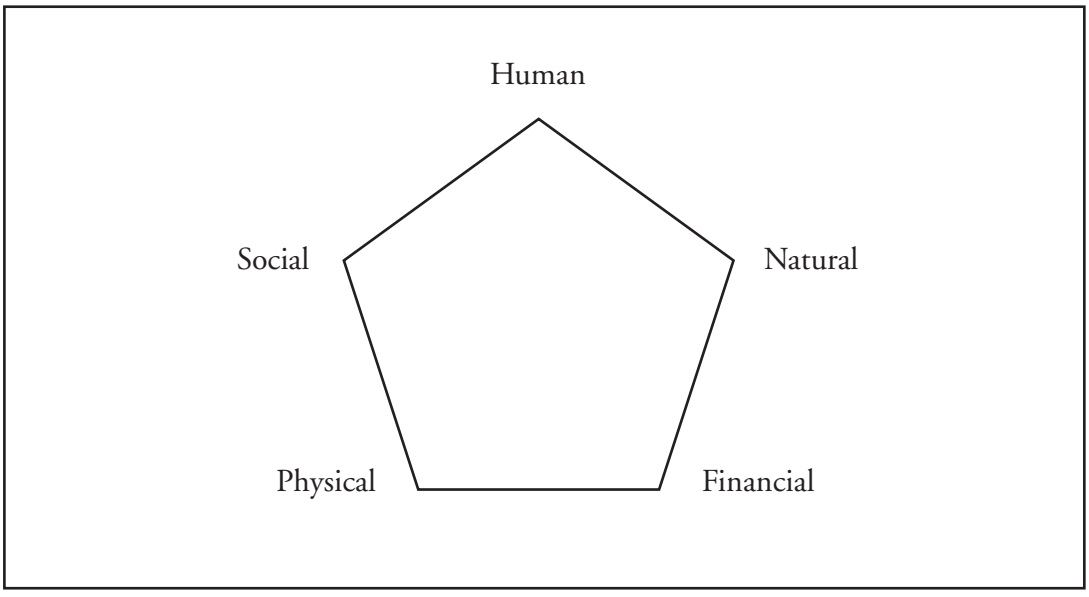
Access to natural resources as part of broader livelihood strategies

The wording of General Comment 12 and of Guideline 8 reflects the diversity of ways in which people gain access to food. In this regard, Drèze and Sen (1989) have used the concept of "entitlements" to analyse the ways people gain access to food. Entitlements are defined as the "set of alternative bundles of commodities over which a person can establish […] command" (p. 9). They may include income from employment, and access to resources for food production or income generation.

A useful way of conceptualizing the role of resource access within broader livelihood strategies is provided by the "sustainable livelihoods" framework (see e.g. Chambers and Conway, 1992; Carney, 2002; Moser and Norton, 2001). This defines livelihoods as the capabilities, assets and activities through which households make a living (Moser and Norton, 2001), including with regard to accessing food.

Among other things, the sustainable-livelihoods literature identifies five types of capital assets as the basis of household livelihoods: (i) financial capital (e.g. income from employment or self-employment, pensions, credit, remittances from relatives abroad or in urban areas); (ii) human capital (e.g. skills, knowledge); (iii) natural capital (e.g. land, forests, water, genetic resources); (iv) physical capital (e.g. equipment); and (v) social capital (e.g. networks of social relations). Household livelihoods depend on diverse and evolving combinations of these different assets (see Figure 1.2 below). In this context, access to natural resources is one of the five types of livelihood assets.

FIGURE 1.2. THE "CAPITAL ASSET PENTAGON"



It is submitted here that interpreting the right to food in light of the "sustainable livelihoods" framework provides useful insights on the implications of that right for protecting property rights over natural resources. Within that conceptual framework, realizing the right to adequate food requires ensuring that individuals and groups enjoy access to appropriate combinations of these different assets, so as to be able to obtain adequate food. What matters is the ability to ensure that sufficient food is available in a given area, whether because it is produced there or because it is imported from other areas; and the ability to gain access to available food, whether through direct production or through income generation for purchasing food.

Implications for the linkages between the right to food and resource access

The above entails that improving access to natural resources — as the basis for food production and income generation — is a key element of realizing the right to food. However, unlike other human rights such as the right to property (see below), protecting access to resources (access to natural capital, in the "sustainable livelihoods" framework) is not at the very core of the human right to food, but a means to an end — the production or procurement of food. This end may also be achieved through other (complementary or alternative) means, such as through income from employment.

For instance, governments may pursue the progressive realization of the right to food through policy interventions in areas other than resource access (e.g. through promoting off-farm diversification) if this is an effective strategy for improving the combinations of livelihood assets and their food access outcomes. However, not taking "appropriate" steps (to the maximum of available resources) to tackle resource access where this results in insufficient access to adequate food (because of a lack of alternative livelihood sources) would violate the right to food (as will be argued below).

In addition, where resource access is eroded, the right to food may still be realized if those who have lost access to resources for direct food production earn new income that enables them to purchase food. But loss of resource access would violate the right to food if it is not compensated for by improvements in access to other capital assets such as income from employment, compensation schemes or safety nets; and if this undermines the availability and/or accessibility of food.

In practice, the relative weight of resource access as a means to realize the right to food varies depending on socio-economic — rather than legal — factors. Where natural resources are the main source of food availability and accessibility, where there are limited off-farm livelihood opportunities, and where the ability of markets to ensure access to food is constrained, then improving access to natural resources is the focus of the obligations concerning the realization of the right to food. On the other hand, where income from employment or self-employment is the main mechanism through which the majority of the population gains access to food, the relative importance of resource access diminishes considerably.

Thorny issues may arise when development processes entail the loss of resource access for some and the generation of employment for others. This may include transitions from subsistence to commercial agriculture, infrastructure development, urban expansion and other processes. In these cases, important trade-offs may arise between the right to food of different people, and possibly between different human rights (e.g. between

the right to food and the right to work). In these cases, the right to food requires at the very minimum that losses in resource access be incurred only through meaningfully participatory decision making, and be offset by improvements in access to other livelihood assets, so that those who lose out have access to at least the same quantity and quality of food as before the intervention.

Food sovereignty and access to natural resources

Because of its different conceptual underpinnings, the political (rather than legal) concept of food sovereignty places more specific emphasis on access to resources. Because food sovereignty "empowers peasant and family farmer-driven agriculture", it requires "genuine and integral agrarian reform that guarantees peasants full rights to land, defends and recovers the territories of indigenous peoples, ensures fishing communities' access and control over their fishing area and ecosystems, [and] honours access and control by pastoral communities over pastoral lands and migratory routes" (Nyéléni Declaration on Food Sovereignty).

In other words, the food sovereignty framework provides more far-reaching ammunition than the right to food for calls to improve resource access. It entails not just a focus on access to adequate food, however produced, but also a policy priority for specific mechanisms for food access — namely, those based on local production by smallholders through access to natural resources. On the other hand, although less far-reaching in scope, the resource-access arguments based on the right to food enjoy the greater authority flowing from the fact that this right is enshrined in binding international law; and that taking steps to realize such a right is a legal obligation of states.

Other human rights and access to natural resources

While under the right to food-improving resource access is a means to an end (ensuring access to adequate food for all), together with other means such as improving access to other livelihood assets (e.g. employment), other human rights create state obligations specifically concerning access to natural resources as such — i.e. the "natural asset" corner of the livelihood asset pentagon (see Figure 1.2).

Most relevant among these is the **right to property**, recognized by the Universal Declaration of Human Rights (Art. 17), at the global level;[23] and, at the regional level, by the European Convention on Human Rights (Protocol 1, Art. 1), the American Convention on Human Rights (Art. 21) and the African Charter on Human and Peoples' Rights (Art. 14).[24] Other relevant human rights include **procedural rights, peoples' right to freely dispose of their natural resources, peoples' right to a generally satisfactory environment, the right to housing and the right to a legal remedy**. In addition, **procedural rights** such as access to information, to justice and to public participation can also be used to improve access to natural resources for poorer groups.

[23] Article 17 of the UDHR states: "everyone has the right to own property alone as well as in association with others" (Art. 17(1)); and "no one shall be arbitrarily deprived of his property" (Art. 17(2)). This provision includes both individual and collective property ("alone as well as in association with others").

[24] Article 14 of the ACHPR reads: "The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws".

Respect, protect, fulfil and non-discrimination in resource access

Each of the obligations stemming from the right to food (respect, protect and fulfil, plus other cross-cutting obligations such as non-discrimination) has implications for access to natural resources. These implications are interwoven with those flowing from the obligation to respect, protect and fulfil other human rights — such as the right to property. The next few sections explore these implications in more detail.

1.4.2 The obligation to respect

Right to food

The obligation to respect the right to food requires states not to arbitrarily deprive people of their existing resource access. In other words, the impairment of existing resource access as a result of state action would violate the obligation to respect if it negatively affects the ability of individuals and groups to gain access to adequate food.

As noted above, in *SERAC* v *Nigeria*, the African Commission on Human and Peoples' Rights found that the destruction and contamination of food sources (e.g. water, soil and crops) by the Nigerian government and by the Nigerian state oil company violated the right to food of the Ogonis.

In its Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the International Court of Justice (ICJ) found that the construction of a wall and the related destruction and requisition of property (together with restrictions on freedom of movement) had serious repercussions for agricultural production, and impeded the realization of the right to an adequate standard of living (of which the right to food is part).

Deprivation of resource access that impairs access to food violates the obligation to respect where such deprivation is arbitrary — i.e. discriminatory, not (adequately) compensated or without due process (as in the *SERAC* v *Nigeria* case). In addition, a case may be made that, under certain circumstances, deprivation of existing resource access may violate the obligation to respect even if it formally complies with domestic legislation. From a domestic-law perspective, this is particularly the case where the national constitution affirms the right to food — whether directly (e.g. in South Africa, Ethiopia, Malawi, Namibia and Uganda; see above) or indirectly, though other related human rights. This is because in most jurisdictions constitutional rules prevail over ordinary legislation.

A concrete example may illustrate this. In many large-scale, state-owned irrigation systems in the Sahel, land is owned by the state, managed by a para-statal agency and accessed by farmers through use-rights based on licences or contracts. In several cases, payment of the annual water fee is a condition for the farmers' continued access to irrigated land under national law and under the farming contracts (e.g. see Mali's Decree 96—188 of 1996, regulating the Office de Niger irrigation scheme). In these cases, if farmers default on their obligation to pay the water fee, their irrigated plot is withdrawn and reallocated — irrespective of how long they have cultivated it for.

This deprivation of resource access is fully consistent with domestic legislation. However, even here, the right to food requires states to make sure that those who have lost their irrigated plot as a result of non-payment are in a position to fend for themselves through alternative livelihood sources. Where they are not, the state is under an obligation to "provide" social

safety nets "to the maximum of its available resources" (see below, Section 2.2.1).[25] In this regard, useful insights may be drawn from case law on the right to housing. In the case *Government of the Republic of South Africa and Others v Grootboom and Others*, the South African Constitutional Court held that measures aimed to promote cheap housing (and in that sense to realize the right to housing) violated the constitutional right to housing of people who had illegally occupied an area of land and who were forcibly evicted from it in order to implement the housing programme. Although these people had no legal claim on the land, the housing programme failed to consider their immediate and "desperate" need for shelter (see Box 1.1).

BOX 1.1. The Grootboom case

Ms Grootboom and her community — some 390 adults and 510 children — were homeless and illegally occupying a piece of land, where they lived in shacks. The land area was privately owned and earmarked for construction of low-cost housing for the poor — as part of a government housing programme. Therefore, on the basis of a magistrate's order, the local municipality forcibly evicted the community. As a result, they were left with no shelter. They then filed a lawsuit to enforce their right to adequate housing, protected by the South African Constitution. The Cape High Court ordered the government to provide them basic shelter.

Upon appeal, the Constitutional Court examined whether the measures adopted by the government under its housing programme were "reasonable" for the progressive realization of the right to adequate housing — as required by the South African Constitution. The Court noted that the programme catered for medium- to long-term housing needs. However, it did not consider the short-term housing needs of those "in desperate need". Therefore, it was not "reasonable", and as such unconstitutional. The Court ordered the government to design and implement a comprehensive housing programme capable both of responding to long-term needs and of addressing the immediate needs of the most desperate.

Besides cases where loss of resource access impairs access to food, the obligation to respect is also relevant in the reverse situation — where deprivation of food is used as an eviction strategy. In the Botswana case *Sesana, Setlhobogwa and Others v Attorney General*, the High Court of Botswana found that the government's refusal to issue hunting permits to San groups living in a game reserve, coupled with its termination of basic services (including food rations) in the reserve, was unlawful. The measures aimed to relocate the San outside the reserve. In a separate opinion, Phumaphi J. explicitly stated that the measures were "tantamount to condemning the remaining residents of the [reserve] to death by starvation" (para. 137); and found that such measures violated the San's constitutional right to life.

[25] This abstract scenario is inspired by the recent evictions for failure to pay the water fee that occurred in Mali's Office du Niger irrigation scheme.

The right to property

The obligation to respect the right to food is reinforced by the obligation to respect other human rights, particularly the right to property. The latter requires states to refrain from arbitrarily interfering with existing property rights. It entails that loss of property rights may only occur where appropriate conditions are satisfied — depending on the formulation of the right-to-property provision: public purpose, non-discrimination, due process and payment of compensation. In Africa, the ACHPR requires public purpose and non-discrimination (Arts 14 and 2), but not due process and payment of compensation. These aspects are to be regulated by domestic law. Lack of compensation requirements significantly weakens the ACHPR protection of the right to property in comparison to its European and American counterparts. However, it may be argued that a duty to pay compensation flows from the prohibition of "arbitrary" deprivations of property embodied in Article 17 of the UDHR. Given that in Africa much of the land is owned formally by the state, and accessed by local users on the basis of "customary" rules, a key issue is whether right-to-property guarantees apply not only to ownership rights backed by legal title but also to "customary" resource-use rights.

While the African Commission has not yet clarified this issue, several factors justify a broad interpretation of Article 14 of the ACHPR — as including not only private ownership based on legal title but also a wider range of resources-use rights established under customary or statutory law. First, this interpretation is consistent with the very broad wording of Article 14. Second, it prevents Article 14 being effectively useless, given the small share of land held under formal tenure in the continent. Indeed, only between 2 and 10 per cent of the land in the continent is held under "formal" tenure (Deininger, 2003). Third, it is in line with the case law developed under other regional human rights systems. This includes the ACHR cases *Mayagna* (Sumo) *Awa Tingni* and *Maya Indigenous Communities of the Toldeo District*. It also includes the ECHR cases *Matos E Silva LDA and Others v Portugal*, in which the European Court held that the notion of "possessions" under Protocol 1 of the ECHR has an autonomous meaning, and applies to the unchallenged exercise of rights over disputed land — irrespective of whether a right of ownership exists under domestic law; and *Holy Monasteries v Greece*, in which the Court held that "possessions" include untitled land rights acquired through adverse possession.

This broad interpretation is also supported by recent developments in the domestic law of some African countries, including legislation protecting "customary" rights and case law developed under domestic constitutions. For instance, in the Tanzanian case *Attorney General v Akonaay, Lohar and Another*, the Tanzanian Court of Appeal held that although customary land rights do not amount to full ownership, they are nevertheless "real property" protected by Article 24 of the Tanzanian Constitution (which protects the right of every person to acquire and own property and to have such property protected). Therefore, the Court held that expropriation of customary land rights requires payment of "fair" compensation, as required by Article 24(2) of the Constitution.[26] the United Republic of Tanzania's Land Act 1999, adopted after this landmark case, states that lawful land occupation under customary tenure is deemed as "property" (section 4(3)), while the Village Land Act 1999 states that customary rights of occupancy have "equal status and effects" to statutory rights (section 18(1)). Similarly, in Botswana, the High Court held that customary hunting rights were protected by the

[26] The case involved a legal challenge to expropriation without compensation of customarily held land within the context of Operation Vijiji, which entailed widespread reallocation of land within and between villages. In the case, the attorney general had argued that customary land rights do not constitute "property" under Article 24 of the Constitution. In so doing, he relied on colonial-era case law stating that customary rights do not constitute property rights, and on the provisions of Tanzanian legislation vesting land ownership with the president. In addition, the attorney general had argued that customary rights could not be considered full-fledged property rights because they are typically not exclusive and non-transferrable.

constitutional provisions on the right to property (*Sesana Sethlobogwa* and *Others v Attorney-General*).

Compared to the obligation to respect with regards to resource access flowing from the right to food, the right to property entails a different and complementary entry point. On the one hand, it protects resource access irrespective of its contribution to food security: natural resource rights are protected under the right to property even if they do not contribute to access to food. This differs from the right to food angle, whereby compressions of resource access are restricted insofar as they have implications for the availability or accessibility of food.

On the other hand, the right to food goes beyond the protection offered by the right to property. While the right to property requires compensation for assets lost (and in fact the ACHPR does not contain any compensation requirements at all), the right to food requires that those who lose access to resources be placed at least in the same food-access position as they were before the loss. In some cases, compensation for loss of resource rights may not be enough to achieve this aim. For instance, cash compensation based on market value is widely considered as complying with the right to property; yet, in contexts where local land markets are constrained, it may not enable recipients to purchase alternative land of equivalent value. If this negatively affects availability or accessibility of food, it would not be enough to meet the international standards flowing from the right to food.

In addition, in several African countries loss of access to state-owned land attracts compensation only for the "improvements" made by local resource users (buildings, crops, fences, wells, etc.). It has been argued above that the right to property would protect "customary" resource rights on state land even if these have no legal backing under domestic law. Even if this argument was not accepted, lack of compensation for loss of "customary" resource rights would violate the right to food should it result in loss of availability or accessibility of food.

Peoples' right to freely dispose of their natural resources

Peoples' right to freely dispose of their natural resources is affirmed in both the ICCPR and the ICESCR.[27] It is linked to the principle of permanent sovereignty over natural resources, which is stated in UN General Assembly Resolution 1803 of 1962 ("Permanent sovereignty over natural resources"),[28] and in the 1974 Charter of Economic Rights and Duties of States.[29] While Resolution 1803 is not binding per se, it is widely seen as reflecting customary international law. At the regional level, the right of peoples to freely dispose of their natural resources does not feature in the ACHR and the ECHR but has been further developed in Article 21 of the ACHPR.[30]

[27] Article 1 of both Covenants affirms the right of all peoples to self-determination and states: "All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence."

[28] UN General Assembly Resolution 1803 of 1962 on Permanent Sovereignty of States over Natural Resources. Article 1 of the Resolution reads: "The right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the State concerned."

[29] Article 2(1) of the 1974 Charter of Economic Rights and Duties of States reads: "Every State has and shall freely exercise full permanent sovereignty […] over all its wealth, natural resources and economic activities."

[30] Article 21 of the African Charter states:
"1. All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it.
2. In case of spoliation, the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation. […]"
The principle of permanent sovereignty over natural resources is further discussed below, Section 2.2.3.

The exact meaning, scope and content of these provisions has been hotly debated — particularly from the 1960s through to the early 1980s, when newly independent developing countries claimed permanent sovereignty over natural resources as part of their revendications for a New International Economic Order — revendications that were resisted by industrialized countries.

None of the above provisions defines "peoples", the designated holders of this right. While General Assembly Resolution 1803 refers to the permanent sovereignty of "peoples", the 1974 Charter of Economic Rights and Duties of States refers to "every state". As for the ACHPR, while sections (1) and (2) of Article 21 refer to "peoples", section (4) refers to this right being exercised by "states parties".

In practice, the principle of permanent sovereignty has been mainly interpreted as referring to states — and was one of the key instruments used by developing countries in the 1960s and 1970s to assert their claims vis-à-vis industrialized countries and foreign investors. This predominant interpretation reflected the political will of developing country governments to assert control over natural resources not only vis-à-vis outsiders but also vis-à-vis their own people. Use of the term "sovereignty", traditionally associated with statehood in international law, seemed to support this interpretation.[31]

However, the requirement that sovereignty over natural resources be exercised in the interest of the "well-being of the people" (Art. 1 of Resolution 1803) adds another dimension. Not only do states have a right vis-à-vis other states and foreign investors, they also have a duty towards their own citizens to use that sovereignty in pursuit of their well-being. Such "well-being" is to be interpreted in the light of internationally recognized human rights,[32] which include the rights to food and to property. In addition to its "external" dimension concerning relations between the host states and outsiders, the principle of permanent sovereignty has an "internal" dimension concerning relations between the host state and its citizens.

This internal dimension is illustrated by the ACHPR case *SERAC* v *Nigeria*. In this case, the African Commission on Human and Peoples' Rights found that the government of Nigeria had violated Article 21 of the the ACHPR because it failed to protect the right of the Ogoni people to freely dispose of their wealth and natural resources vis-à-vis interferences from third parties — namely from oil companies. According to the Commission, "the Nigerian Government has given the green light to private actors, and the oil Companies in particular, to devastatingly affect the well-being of the Ogonis" — in violation of Article 21 (para. 58).

The *SERAC* v *Nigeria* decision applies peoples' right to freely dispose of natural resources, as stated in the ACHPR, to groups *within* an independent state — the Ogoni people of Nigeria. It therefore tackles a different level compared to the dominant construction of "permanent sovereignty" — not relations between the state and outside entities, but relations between the state and its citizens. Peoples' right to freely dispose of natural resources has also been invoked with regard to protecting local land rights from government interference in the ACHPR case *Bakweri Land Claims Committee v Cameroon* — although this complaint was declared inadmissible due to non-exhaustion of domestic remedies. It is this double level of operation that makes peoples' right to freely dispose of their natural resources a valuable international reference for efforts to secure access to natural resources in Africa.

[31] The principle of permanent sovereignty over natural resources is further discussed below, Section 2.2.3.

[32] As argued by Leader (2006).

However, the content and implications of the "internal dimension" of peoples' right to freely dispose of their natural resources remain unclear. While this aspect of the *SERAC* v *Nigeria* decision is centred on the obligation to "protect", it may be argued that peoples' right to freely dispose of their natural resources also entails obligations to "respect" and "fulfil". With regard to the obligation to respect, Article 21(2) of the ACHPR explicitly states that this right entitles peoples to "lawful recovery" and "adequate compensation" in case of "spoliation" of their natural resources.

Besides reinforcing obligations concerning the realization of the right to food, peoples' right to freely dispose of their natural resources also presents a degree of convergence with some aspects of the political (rather than legal) concept of food sovereignty, which was briefly discussed above. This includes the very concept of "sovereignty" as the ability to decide on local food/resource tenure systems, and its conceptualization as a peoples' right.

Overall, however, the normative content and the legal implications of peoples' right to freely dispose of their natural resources remain less clear and less developed than those of the right to property — partly because of its more recent emergence and of the dearth of case law on this. Much remains to be done to clarify key elements of this right — from the nature of the right holder (what group can qualify as "people" and hold its government responsible for violations of this right?) to its normative content (what degree of local control over natural resources vis-à-vis their government are "peoples" entitled to?). This indeterminacy undermines the effectiveness of peoples' rights to freely dispose of their natural resources as a tool for strengthening international protection of local resource rights.

Rights of public participation

Rights of public participation, such as freedom of expression, freedom of assembly and association, and "procedural rights" such as access to information, public participation in decision-making and access to justice (see above, Section 1.3.1) are the foundations of a vibrant civil society and the cornerstone of principles like accountability, transparency and empowerment. Evidence suggests that countries where these rights are enjoyed are less likely to suffer famines, owing to the pressure to act that public oversight and accountability tend to put on governments (Drèze and Sen, 1989).

With specific regard to resource access, rights of public participation contribute to protecting access to natural resources from arbitrary interference, by giving local resource users greater say over decisions affecting their resource rights. They reinforce the obligation to respect the right to food and its corollary that losses in resource access be incurred only through meaningfully participatory decision-making.

1.4.3 The obligation to protect

Right to food

The obligation to protect the right to food (and other rights such as the right to property and peoples' right to freely dispose of their natural resources) requires states to take steps to ensure that action by private entities does not negatively affect resources access for others, and thereby impair their ability to gain access to food. In *SERAC* v *Nigeria*, for instance, the African Commission on Human and Peoples' Rights found the government of Nigeria to be liable not only for the destruction of food sources such as crops it had caused directly; but also for the environmental degradation caused by private oil companies.

Such liability was based on the government's failure to regulate and oversee the activities of oil companies within its territory — in breach of its obligation to protect.

1.4.4 The obligation to fulfil

Right to food

The obligation to fulfil the right to food requires states to take steps to improve access to natural resources. This may include securing existing access through improving legal protection of natural resource rights; and increasing access to natural recourses, e.g. through restitution, redistribution and/or other programmes. In this respect, the obligation to fulfil is linked to the call for agrarian reform in Article 11(2)(a) of the ICESCR (on which see above).

Given the highly sensitive and political nature of these measures, states enjoy a large margin of appreciation in determining strategies for ensuring access to food (e.g. with regard to different combinations of access to natural resources and to the other livelihood assets identified above); and, where improving access to natural resources is an element of those strategies, in identifying measures to improve resource access. This margin of appreciation is considerably broader for the obligation to fulfil than for the obligations to respect and to protect (which require respecting/protecting existing resource access from undue interference, rather than improving access).

Because of this broad margin of appreciation, courts are unlikely to play a significant role in this — e.g. through judicial review and other processes. However, the margin of appreciation is qualified by the standard of "appropriateness" required by the ICESCR (discussed above, Section 1.2.1): under the ICESCR, states must take steps to realize the right to food "by all appropriate means". This standard opens the door for citizens to challenge and for courts to scrutinize whether the measures adopted by the government are appropriate.

Due to the political issues at stake, courts and (even more so) international human rights institutions are likely to display deference to governments in applying the "appropriateness" standard. But the South African *Grootboom* case illustrates how judicial scrutiny may nevertheless have significant practical implications (see above). In that case, the South African Constitutional Court held that the standard of "reasonableness" embodied in the South African Constitution required the government to prioritize the needs of poorer and more vulnerable groups, and to cater for short-term as well as medium- to long-term housing needs. Government food security strategies that do not tackle issues of resource access adequately in contexts where this is the main source of food for the majority of the rural population may be subject to scrutiny along these lines under the "appropriateness" standard required by the ICESCR.

In addition, the ICESCR commits states to pursue measures for realizing the right to food "to the maximum of their available resources" — which may also provide an entry point for civil society scrutiny of government action.

Outside the African context, the issue of land restitution was tackled in the ACHR case *Yakye Axa (Indigenous Community)* v *Paraguay*. The case concerns the land restitution claim of an indigenous community that was unwillingly deprived of its ancestral lands in the nineteenth century. The Inter-American Court of Human Rights found that by

unduly delaying the restitution process, the government of Paraguay had violated the right to life recognized by Article 4 of the American Convention on Human Rights (ACHR). According to the Court, the right to life must be interpreted in the light of international obligations concerning other human rights, including the right to food. As a result, it entails a right to a minimum standard of living "consistent with human dignity"; and it requires states to take proactive measures to ensure the realization of that minimum standard (paras 162–3). In this case, the Court found that the community's lack of resource access due to the non-completion of the restitution process, coupled with insufficient sources of livelihoods in the area presently occupied by the community, had a negative impact on access to food, and hence violated the right to life. In other words, while the right to food does not entail a general obligation for states to improve access to resources through redistribution/restitution programmes, it may require the speedy implementation of such programmes where not doing so would result in compressions of food access for more vulnerable groups.

The reasoning followed in this case suggests that although the right to food does not entail a general obligation for states to provide access to resources (as access to food may be achieved by other means, such as employment), it nevertheless does create an obligation for states to improve, to the maximum of their available resources and by all appropriate means, access to natural resources where not doing so would result in people not being able to access food because of a lack of alternative livelihood sources.

Right to property

Under the right to property, the obligation to "fulfil/facilitate" requires states to implement policies, laws and programmes that promote security of property rights. In other words, states must not only refrain from arbitrarily interfering with property rights, they must also take proactive steps to improve security of those rights through individual titling, registration of use rights and/or of collective rights, and/or other arrangements. This is illustrated by the ACHR case *Mayagna (Sumo) Awas Tingni Community* v *Nicaragua*. In that case, although Nicaraguan legislation protected the resource rights of indigenous peoples, absence of specific procedures to secure these rights and lack of titles actually issued were deemed to violate the right to property.

Nevertheless, it is accepted widely that the right to property does not entail a right to gain access to property rights that an individual or group does not have (in line with an obligation to "fulfil/provide").[33] Some campaigning organizations have recently sought to broaden the right to property to a right to access property, so as to strengthen arguments for redistributive reform. At a philosophical level, this "access to property" dimension is linked to the thought of Hegel, who saw access to property as part of the process of personal development to which everybody is entitled (on this, see Waldron, 1988). In terms of positive law, an "access to property" dimension is explicit in a few regional and national-level right-to-property provisions — particularly outside the African context.

At a regional level, for instance, the 1948 American Declaration of the Rights and Duties of Man affirms the "right to own such private property as meets the essential needs of decent living" (Art. XXIII). This is the only international formulation of the right to

[33] For instance, in *Marckx v Belgium*, the European Court on Human Rights held that the right to property protects existing property rights and does not entail a right to acquire possessions (para. 50).

property that suggests a right to own a minimum level of property. It is worth noting, however, that this formulation was not followed in the subsequent (and legally binding) American Convention on Human Rights. This formulates the right to property in its more conventional "no arbitrary deprivation" dimension (Art. 21).

Some constitutional provisions on the right to property also emphasize the role of the state in promoting access to property "for all" (e.g. Art. 42(2) of the Italian Constitution)[34] or "on an equitable basis" (e.g. Art. 25(5) of the Constitution of South Africa).[35]

The "fulfil" dimension of the right to property is strengthened by the linkages between this and other rights, particularly the right to food and the call for "agrarian reform" embodied in Article 11(2) of the ICESCR (see above).

On the whole, however, it must be recognized that the right to property is primarily centred on the obligations to respect, protect and fulfil/facilitate. This is clear from the textual analysis of relevant treaty provisions (see above), and from the historical development of the legal concept of right to property. In most cases, the right to property is likely to constrain, rather than facilitate, redistributive land reforms. This is because it protects the property rights of landowners, imposing restrictions on takings of property for redistributive purposes.

That said, another aspect of the right to food/right to property nexus deserves to be highlighted. As discussed, under the right to property states can only take property rights for a "public purpose". It is recognized widely that the realization of human rights can be considered such a purpose. This was explicitly affirmed in an ACHR case, *Sawhoyamaxa Indigenous Community v Paraguay*, in which the Inter-American Court of Human Rights found that the restitution of ancestral lands to indigenous communities that had been unwillingly deprived of those lands constituted a public purpose under the expropriation provision of the Germany-Paraguay bilateral investment treaty (BIT).[36] In other words, the realization of the right to food provides a basis for takings of property aimed at improving resource access for poorer groups (for instance, within the context of agrarian reform programmes).[37]

This reasoning may prove a double-edged sword, however. In some cases, governments have deprived weaker groups of resource access for the "public purpose" of improving food security through large-scale agricultural production (e.g. in the Tanzanian *Ako Gembul* case, discussed in Chapter 3).

[34] "Private ownership is recognized and guaranteed by laws determining the manner of acquisition and enjoymend and its limits, in order to ensure its social function and to make it accessible to all."

[35] "The state must take reasonable legislative and other measures, within its available resources, to oster conditions which enable citizens to gain access to land on an equitable basis."

[36] In that case, land restitution entailed the taking of land interests protected under the BIT; and the expropriation clause in the BIT was used by Paraguay as a justification to resist restitution. The Court clarified that the protection of property rights under investment treaties "should always be compatible with the American Convention [on Human Rights]", which generates rights for individuals that cannot be sold off by states (para. 140).

[37] Similar conclusions were reached with regard to the right to housing in the Indian case *Chameli Singh v State of U.P.* That the public purpose of requirements may be met even where the property taken is transferred not to the state but other private factors in order to pursue "social justice" was explicitly recognized in the ECHR case *James v UK.*

Securing resource access in environmental treaties

An environmental treaty that explicitly refers to securing resource access is the UN Convention to Combat Desertification, particularly its Annex I on Africa. Article 4(2)(b) of the Annex calls on African state parties to strengthen reform towards "greater decentralisation and resource tenure". In addition, the National Action Programmes that each country is to adopt in order to address desertification issues are to include measures like decentralization in natural resource management and law reform "to provide security of land tenure for local populations" (Art. 8(3)(c)(ii) and (iii) of Annex I).

1.4.5 Non-discrimination

In addition to the obligations to respect, protect and fulfil, states must not discriminate in the enjoyment of human rights — including the right to food, the right to property and other relevant human rights. This obligation flows from the combined application of provisions on the right to food and other rights with non-discrimination provisions included in international human rights treaties (UDHR, Art. 2; ICCPR, Art. 2(1); ICESCR, Art. 2(2); ECHR, Art. 14; ACHR, Art. 1(1); ACHPR, Art. 2).

In its General Comment 18 of 1989, the UN Human Rights Committee defined discrimination as "any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms" (para. 7). The Committee also clarified that "not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant" (para. 13).[38]

The principle of non-discrimination has important implications for access to natural resources, as it prohibits states from differentiating arbitrarily in resource access on prohibited grounds such as gender, race or political opinion. This entails, for instance, non-discriminatory treatment in agrarian reform programmes — although preferential treatment for disadvantaged groups aimed at achieving equality is fully consistent with the principle of non-discrimination (see for instance, on gender equality, Art. 4 of the CEDAW).

1.5 Conclusion

The right to adequate food is an internationally recognized human right. It is affirmed in several international instruments, including the UDHR and the ICESCR. It is reinforced by its interlinkages with other human rights.

The realization of the right to food depends on diverse livelihood strategies based on combinations of different assets — natural, financial, human, physical and social capital. In much of rural Africa, access to natural resources is a main livelihood source. Taking steps to improve resource access — for example, through securing the entitlements

[38] See also the ECHR case *Van Raalte v The Netherlands*, which defined discrimination as "a difference in treatment… [that] has no objective and reasonable justification" (para. 39).

through which people gain access to resources — is therefore an important element of strategies to realize the right to food. This requires states to refrain from arbitrarily undermining resource access ("respect"); to protect the resource access of some against interference from others ("protect"); and to take measures to secure and improve resource access ("fulfil"). It also requires states not to discriminate in access to natural resources.

Constructing food security and resource access in terms of human rights obligations entails a significant change in perspective. Measures to promote these goals are not just a matter of political goodwill, they respond to specific government obligations — the obligation to take steps "by all appropriate means" and "to the maximum of […] available resources". These obligations have implications both for the content of natural resource policies (e.g. non-discrimination, non-retrogression) and for the process through which such policies are formulated and implemented (e.g. participation, accountability).

Individuals and groups who feel that these obligations are being violated can seek redress through human rights remedies at national and international levels (national courts and human rights commissions; regional and UN human rights institutions). Discrimination in resource access, failure to respect existing resource access and/or to protect it from third parties, and measures to improve resource access that fall short of the "appropriateness" standard can all be grounds for judicial action — although shortcomings in the effectiveness of international legal remedies available for human rights claims have been noted (Cotula, 2007). Namely, under human rights law, domestic remedies must be exhausted before filing petitions with regional institutions. Groups and individuals that feel that their human rights have been violated may complain before domestic courts, and, only failing that, before international human rights institutions (Art. 56 of the ACHPR). Exhaustion of domestic remedies requirements are particularly taxing in Africa, where access to courts is often constrained by long, costly and cumbersome procedures, by limited independence and/or effectiveness of courts and human rights institutions, and by limited geographical and economic access to such institutions for the majority of the rural population.

In addition, until the creation of the African Court on Human and Peoples' Rights in 2006, successful ACHPR cases only led to the non-binding decisions of the African Commission on Human and Peoples' Rights. Even after the establishment of the Court, the Commission is likely to continue to play a key role owing to limits in access to the Court for individuals and groups. The judgements of the African Court are binding — but sanction mechanisms for state non-compliance remain unclear (for more on this, see Cotula, 2007).

Beyond the issue of justiciability, tackling resource access as a right-to-food issue can provide resource-dependent groups with an asset to be used in political processes and in negotiations with other social groups.

The next two chapters further develop these ideas with regard to two country studies — a study on Mali and one on the United Republic of Tanzania.

Photo by J. Van Acker

2. The Agriculture Policy Act (LOA) of Mali- Great Potential for Realizing the Right to Food through Equitable Access to Land and Natural Resources

Moussa Djiré

2.1 Introduction

The problem of hunger and malnutrition in developing countries in general, and in Africa in particular, is not linked fundamentally and solely to a lack of food. It stems in part from the fact that a large proportion of the population does not have access to the food that is available because of poverty and in part from the shortage of agricultural production resources and the inadequacy of land, trade and social policies.

Several documents point out, correctly, that the right to adequate food should not be interpreted in the narrow and restrictive sense of the right to receive a minimum intake of calories and proteins but, rather, as the creation of the conditions needed for each individual and community to have physical and economic access at all times to sufficient food and the means to procure it. In that sense, states have a basic obligation to adopt measures to combat hunger, in accordance with Article 11.2 of the ICESCR, and to elaborate and implement corresponding policies and strategies, as instructed by the Right to Food Guidelines.

Unlike a number of countries that have enshrined the right to food in their constitutions, this right was not explicitly stated in the Constitution of Mali of 25 February 1992. Nor has it been explicitly formulated in subsequent legislation. Nonetheless, issues relating to the availability of sufficient food to the population have always been a central concern of successive governments since national independence in 1960. These were first addressed from a perspective of "food self-sufficiency" aiming to ensure there was enough domestic production to satisfy national needs. Following recurring drought and the recommendations of the World Food Summit of 1996, this concept then evolved towards "food security", which is to be interpreted as existing "when all people, at all the times, have physical and economic access to sufficient, safe and nutritious food to meet their dietary needs and food preferences for an active and healthy life.[39] This development led to the establishment of a Commission on Food Security.

[39] World Food Summit Plan of Action, 1996 (FAO 1997)

More recently, in September 2006, Mali adopted an Agricultural Policy Act (Loi d'orientation agricole, LOA)[40] which explicitly refers to the right to food (Art. 8), to food security and above all to food sovereignty (Art. 3), which is defined as "the right of a State to define and implement an independent food and agriculture policy guaranteeing sustainable agriculture based on local production and the accountability of producers who dispose of the appropriate resources to that effect, notably land, water, credit and markets" (Art. 7). As this text gives legal recognition to the concepts of right to food, food security and food sovereignty, we are entitled to query its juridical and practical implications, especially concerning access to land and natural resources.

Our query is all the more important as secure access to land and natural resources constitutes a prerequisite for the realization of the right to food for a majority of the Malian population that earns the bulk of its income from land and natural resources. It is also an important factor in ensuring the supply of agricultural products to the rest of the population.

In addition, given that Senegal had adopted its Agro-Silvo-Pastoral Policy Act (Loi d'Orientation Agro-Silvo-Pastorale, LOASP) two years before in June 2004, with several similar provisions to those of the LOA (without however specific reference to the right to food or to food security), it is interesting to examine the commonalities and the differences between the two legal instruments.

This case study seeks, on the one hand, to present and examine the link between the right to food and access to land and natural resources in the LOA, in the light of the provisions of the Right to Food Guidelines and under an optic of comparison with the LOASP of Senegal and, on the other, to examine the practical and juridical implications. Under this perspective, we will therefore successively cover:

- the context and historical background of the LOA;
- the LOA and the LOASP provisions relating to access to land and natural resources;
- the implications of the legal recognition of the right to food, in particular concerning access to land and natural resources.

2.2 Context and historical background

The LOA was elaborated in a context of extreme precariousness of agro-silvo-pastoral production systems, in spite of potentialities, and of a manifest political will for rural renewal.

2.2.1 Major agricultural potentialities but highly precarious agricultural production systems

Mali is a Sahelian country endowed with major agro-silvo-pastoral, fisheries and aquaculture potential. Its overall production potential is estimated to cover 46.6 million hectares, including 12.2 million of agricultural land, 30 million of pasture, 3.3 million of game reserve and 1.1 million of forest reserve. It has vast arable floodlands (2.2 million hectares), significant water resources (2,600 km of river), extensive biodiversity,

[40] In the LOA, Agriculture with a capital "A" covers everything relating to the subsectors of agriculture, livestock, fisheries and forestry. This paper uses the same designation.

considerable forest and wildlife resources and a sizeable livestock population, made up of 7.1 million cattle, 19 million sheep/goats, 0.6 million camels and 25 million poultry (Ministry of Agriculture, General Secretariat, 2006).

Those engaged in agro-silvo-pastoral, fisheries and aquaculture culture activities account for 80 percent of the total population and work on some 600 000 agricultural holdings. The country is currently engaged in a process of democratization and decentralization that promotes the participation of all stakeholders.

In spite of those resources and potential, and despite efforts deployed and reforms since independence, domestic production does not match national needs. Negative trends in rural development include a persistent deficit in cereal production, heavy dependence on food imports, underdevelopment of agribusiness, limited community access to basic socio-economic services, significant disparities within and between regions, ongoing degradation of natural resources and encroachment of desert, together with an acute fragility of ecosystems and an agricultural system heavily dependent on the weather (Ministry of Agriculture, 2006).

The rural world exists in a state of extreme precariousness and its population suffers the most from hunger and malnutrition. It was to reverse those trends and to radically change the living and production conditions of rural inhabitants that the country's top authorities introduced the LOA.

Senegal faces similar problems even though its position as a maritime state constitutes an asset for its development.

2.2.2 Process of elaboration of the LOA

The LOA is the result of an initiative of Mali's Head of State who, in a speech given on 7 February 2005, underlined his ambition to improve the performance of the agricultural sector through a series of reforms to be grounded in a policy act. Rural associations were fully involved in the formulation of that Act so that it reflected their aspirations. Thus, the National Coordination of Farmer Organizations of Mali (Coordination Nationale des Organisations Paysannes, CNOP) piloted the process of farmer consultation to canvass the viewpoints of producers on different subjects and to identify proposals to be included in agricultural policy and its underlying law. The consultation process extended from local to national level. The process of elaboration of the LOA also involved other stakeholders, including trade guilds, NGOs and resource persons who provided their contributions, the technical services of the state, former ministers and national directors, who gave their comments on the formulated proposals.

Finally, a national synthesis workshop was held on 16, 17 and 18 September 2005 for all stakeholders to discuss the rural and technical proposals, which produced the draft LOA submitted to the government. This was adopted by the National Assembly on 16 August 2005 and promulgated by the Head of State on 5 September 2006.

The process leading to the adoption of the LOASP followed a similar course, the only difference being that the National Rural Consultation Council (CNCR) was invited to discuss an already existing draft text. The LOASP was unanimously adopted by the National Assembly on 25 May 2004 and was promulgated on 4 June of the same year by the Head of State.

The two Acts reflect compromises between farmer movements and public administration. Thus, the proposals put forward by Mali's farmers on the identification and registration of customary laws were discarded in favour of a provision postponing settlement of this issue to a later date. In return, the farmer organizations obtained legal recognition of the strategic option favouring family farming.

In contrast, the LOASP did not come down so decisively in favour of this sector. Some of its provisions even indicate a preference for the development of commercial farming. This difference can no doubt be attributed to the significant room for manœuvre that Mali's farmer organizations had in comparison to their Senegalese counterparts. The CNCR was in fact required to organize consultations on a pre-existing draft text, while Mali's farmer organizations were called upon to formulate the draft law themselves, with support from the technical services. Through their mobilization, Senegal's farmer organizations were able to introduce amendments to a text that had originally tended towards agribusiness, but were unable to secure a priority for family farming.

The impact of the different participation of the farmer associations in the formulation of the two Acts is also evident in the different treatment given to food sovereignty. Both Acts contain provisions aimed at ensuring food security through reduced dependence on imports and different forms of support to the rural sector. But the LOASP makes greater reference to compliance with community decisions and international agreements than does the LOA.

2.2.3 Objectives and principles of the LOA and the LOASP

The LOA, like the LOASP, sets the orientations of national agricultural development policy. Both acts are comprehensive and cover all rural activities as broadly understood: notably agriculture, livestock, fisheries and fish farming; but also forestry and wildlife activities and peri-agricultural activities[41], including processing, transport, marketing, distribution and related services, together with their social and environmental functions (Arts.2 of the LOA and the LOASP).

They reaffirm the objectives of poverty reduction, social equity, food security, sustainable management of natural resources and protection of the environment (Arts 10, LOA, 3 and 5 LOASP). They constitute unifying instruments intended to enable the profound changes needed for the agricultural sector to take off and drive the national economy.

Those options led the Malian and Senegalese legislatures to emphasize the following principles: social equity; the right to food security in a targeted context of food sovereignty; accountability of all players intervening in agricultural development; withdrawal of the state from production and commercial functions; solidarity and partnership between players. In a perspective of decentralization and player accountability, the two Acts favour subsidiarity, complementarity and promotion of farmers, the private sector and the non-profit sector. They also advocate the promotion of partnerships and the creation of common markets within major subregional, regional and international economic blocs.

Emphasis on these principles is all the more important as rural producers in the two countries had suffered in the past, and indeed continue to suffer, from low incomes linked

[41] The LOA designates as peri-agriculture everything relating to activities aimed explicitly at facilitating/optimizing an agricultural activity: supply of inputs and agricultural materials, processing, conservation, storage and marketing of agricultural products.

to low productivity and continuous degradation of natural resources, glaring inequality with urban areas and a total absence of social welfare and protection against unfair competition and agricultural risk. More specifically, the two Acts help guarantee better access to land and agricultural resources, especially for poor and vulnerable groups.

2.3 Equitable access to land and natural resources

Equitable access to land and natural resources is an essential element of the right to food for rural populations in general and for vulnerable and marginalized groups in particular (see Chapter 1).

2.3.1 Equality of citizens and positive discrimination in favour of women and other vulnerable groups — the terms of equitable access

The principle of equal access to resources and non-discrimination is a basic principle resulting from the principle of juridical equality of citizens enshrined in Article 2 of Mali's Constitution of 25 February 1992. This article proclaims the equality of all citizens before the law and prohibits all forms of discrimination based on social origin, colour, language, race, sex, religion and political opinion.

In this spirit, the LOA enshrines the right to food for all and equal access to land and natural resources. Article 8 emphasizes that agricultural development policy seeks to ensure the promotion of women and men in the agricultural sector under terms of equity, especially between rural and urban areas. This provision is consolidated in Article 83 which affirms the state's commitment to ensuring equitable access to agricultural land by the different categories of farmer and agricultural operator.

At the same time, aware of the precarious existence of women and other marginalized groups, the Malian Legislature has made provisions to facilitate their access to land and other resources. In the same vein, Article 24 stresses that the state favours the establishment of youth, women and vulnerable groups as farmers, in particular by facilitating their access to production factors and by providing specific mechanisms of technical and financial support.[42] This provision is reinforced by Article 46 which specifies that the incorporation of youth in agricultural occupations is a priority of the state and local authorities.

In the same spirit, when allocating plots of land in areas developed with public funds, preference is given to women, youth and formally recognized vulnerable groups.[43]

The LOASP also places the promotion of social equity in the rural sector at the heart of its land policy and dedicates a whole chapter to the subject (Ch. 12). Thus, in addition to special measures intended to correct the imbalances between urban and rural areas (Art. 53), the state undertakes to ensure parity of women's and men's rights in the rural sector, particularly on the agricultural holding. In addition, it will grant women facilities of access to land and credit. Similarly, the inclusion of youth in agricultural occupations is declared a priority of the state and local authorities (Art. 54).

[42] This article defines as vulnerable group any population group overwhemingly made up of households or individuals suffering from or exposed to food insecurity.

[43] The criteria for the allocation of plots and official recognition of vulnerability are determined by regulatory text.

Itinerant herders are also taken into account, particularly in Title V of the LOA on production and market and, more specifically, in Chapter 2 which deals with animal production. This category of livestock producers has many difficulties in several countries of the Sahel, particularly in relations with farmers and technical services. Article 142.2 contains favourable provisions for itinerant herding, including the promotion of pastoral herding through the development of rangeland, the control of diseases, the installation of water points, pastoral perimeters and livestock infrastructure.

However, under Article 142.3, the state, local authorities and farmer organizations seek to intensify animal production through different forms of crop/livestock integration and the enhancement of animal husbandry parameters, and focus on market competitiveness and higher returns. This provision which favours intensive livestock production is tempered by Article 143 which states that the priority given to the modernization of livestock production should accommodate traditional systems, such as transhumance. This is recognized as a necessary activity for the optimal use of rangeland.

As such, it should be taken into account in land-use planning in accordance with the provisions of the law on the pastoral bill of rights. At the same time, the state seeks to establish a transboundary system of transhumance and sharing of pastoral resources that is fair and equitable, based on conventions with third-party states. In collaboration with local authorities and farmer organizations, it takes measures to protect the livestock, in particular during transhumance and export.

These concerns also feature in the LOASP which deals with livestock development policy in Chapter 9. Like the LOA, it recognizes that pastoralism serves to develop rural land and natural resources. Pastoral activities should be exercised with respect to the environment and other agricultural, forestry and rural activities (Art. 44). However, while the LOA refers to the provisions of the pastoral bill of rights, a law promulgated in 2001, the LOASP states that pastoralism will be specifically dealt with in the announced law on agrarian reform and envisages an updating of Decree 80-268 of 10 March 1980 on grazing land.

2.3.2 Access to land and security of tenure

Agricultural land tenure is an important element of Title IV of the LOA on production factors and is dealt with in Chapter 2. Article 75 establishes four key strands to land policy: (i) secure tenure of farm and farmers; (ii) promotion of public and private investment; (iii) equitable access to land resources; and (iv) their sustainable management.

This focus is not coincidental: insecure land tenure in rural areas derives from several factors, including a misalignment of customary and statutory law, land speculation and abusive customary appropriations (see Djiré, 2006a and 2006b). The poor and marginalized groups are those that suffer most from this situation which also undermines private investment. The LOA envisages several remedial measures.

These include, first, the recognition of customary laws in the conditions determined in the texts in effect. In accordance with Article 76, the state, the local authorities and the chambers of agriculture proceed to draw up an inventory of land-related habits and customs per region or per agro-ecological or socio-cultural zone. This inventory seeks to identify formally the existence and extent of individual or collective rights to land

and needs to be validated by the parties concerned. However, we might question the practical results of such an inventory as the juridical modalities of identification and registration of customary rights still remain to be formulated in the framework of the law on agricultural land tenure.

Second, this entails the introduction of modalities for the settlement of disputes that are likely to promote security of land tenure by placing greater emphasis on local bodies. Article 80 states that the parties to an agricultural land dispute should first submit their dispute to arbitration by the agricultural land commissions before addressing the courts. When a dispute is settled, the land commission draws up a reconciliation report that is certified by the competent judge at the request of the claimant.

Finally, the provisions of Article 81 on the need to previously register land developed with the supervision and financial assistance of the state or local authority also help secure customary rights, as registration cannot take place without due redemption of those rights.

In addition, as securing a land title can prove to be such an ordeal (see Djiré, 2007), Article 82 commits the state to introducing measures to facilitate, among other matters, the acquisition of land titles by national farmers. Provisions should be taken to lessen the cost and simplify procedures for establishing land titles and rural concessions, and for concluding long-term leases for farmers. Agricultural land policy and the subsequent law to be drawn up by the state in collaboration with farmer organizations will aim to combat speculation in transactions, land tenure and abusive customary appropriations. Article 79 establishes a land commission in each municipality to anchor reforms in the ongoing decentralization.

The LOASP is more reticent than the LOA on the subject of access to land. It has only two articles on the subject (Arts 22 and 23) in Chapter 6 (Title 3) dealing with land reform (a term not used by the Malian Legislature). Article 22 emphasizes that "the definition of land policy and reform of the law on the national estate constitute essential levers for agro-silvo-pastoral development and the modernization of agriculture". The projected reform has some objectives similar to those of the LOA (security of farm tenure, stimulation of private investment in agriculture, easing of land constraints to rural development) and others that are more specific (providing the state and local authorities with sufficient financial resources and qualified personnel).

The principles of land policy also have many similarities (protection of farming rights of rural players, controlled transferability of land, successional transmissibility, etc.) and certain precisions on the Senegalese side that favour private investment (arrangements for land transferability to permit the land mobility that is supposed to favour the creation of more viable holdings, the use of land as collateral for credit).

In accordance with Article 23 of the LOASP, the new land policy will be defined and a land reform law will be submitted to the National Assembly within two years, following its promulgation.

2.3.3 Access to water and other natural resources

Key LOA production factors include the control, harnessing and use of water resources. Article 84.2 highlights water control as a way of helping release agricultural production from climate uncertainties, making water resources available in sufficient quantity and quality to satisfy farmer needs, but only to the extent that agricultural activities are compatible with the principles of sustainable and integrated management of water resources. This provision is reinforced by Article 85 which stresses that the state, local authorities and farmer organizations together draw up a blueprint for water-resource management and national policy on the control of agricultural water.

The above blueprint and policy should observe the principles of accountability of all stakeholders, of appropriation of the process of identification, implementation and management of investment by beneficiaries and of sustainable and optimal management of water resource works. This policy combines support to the modernization of existing abstraction and irrigation systems with a concern to save water, to intensify and diversify agricultural production and to develop lowland areas. It is an integral part of national policy on the sustainable and integrated management of water resources. Article 86 of the LOA states that all uses of water for agricultural purposes should comply with the technical standards of environmental impact studies and the rules of use, protection and management laid down in the water code.

Article 90 advocates integrated management by emphasizing that the state, local authorities and farmer organizations monitor the coherence of works carried out in the areas of irrigation, livestock, fisheries, aquaculture, forestry, and rural roads and tracks.

Thus, the general provisions of the LOA relating to water and other natural resources focus less on access than on the sustainable protection of ecosystems. In doing so, they conform with Directive 8 E (Item 8.13) on this subject and with Article 15 of the 1992 Constitution, which states that protection of the environment and promotion of quality of life is the duty of every individual and the state. In this perspective, Article 22 of the LOA stresses that farms should contribute to the sound management of natural resources and to the protection of the environment.

The state and local authorities can provide farms with subsidies and support to encourage them in this task. As part of the fight against desertification and the rehabilitation of desert agricultural land, the state and the local authorities concerned formulate and implement a rehabilitation programme for those areas, notably through proactive investment for the enhancement of living conditions, the integrated and sustainable management of natural resources and the development and promotion of agricultural production and products in those areas. There are specific measures to facilitate the settlement of farmers, especially young farmers, in rehabilitated desert areas. Farmers and their organizations need to implement production techniques that conserve the environment.

Local authorities and farmer organizations can receive state support for the implementation of programmes aimed at the conservation of biodiversity (Art. 73). The provisions of Articles 86 and 87 relating to mandatory environmental impact studies before the start of any water-resource-development or irrigation project aim to ensure the sustainable management of water resources. The same applies to Article 88 on the elaboration of

regulations on the design and management of land perimeters and land-use planning, river basins and aquifers to ensure the rational and sustainable management of land and water resources.

The imperative of sustainable environmental management is also taken into account in the provisions on the production and harnessing of energy which need to be compatible with the principles of sustainable management and conservation of the environment and after prior environmental impact studies. The legislation stipulates that the state is to ensure control of input quality and use not only to foster production but also to conserve the environment and the quality of soil and water.

The development and conservation of fishery resources are presented as primary objectives of the LOA. Article 152 states that the policy of development of fishery and aquaculture production aims to provide security to sectoral operators and to ensure the availability, diversification and conservation of fishery and aquaculture resources. Through research programmes, the state carries out periodic evaluations of fishery and aquaculture resources, drawing upon the empirical knowledge of agricultural producers working in the fisheries subsector (Art. 154). In collaboration with the local authorities, it draws up strategies for the management of fisheries and of fishery and aquaculture production, taking care to comply with conventions on all water bodies and to safeguard biodiversity and ecological balances (Art. 155). The state and all sector stakeholders are responsible for combating the contamination of waters and introducing appropriate measures to restore degraded ecosystems.

There are similar measures in Article 158 (Title V, Chapter 4 on forestry and wildlife resources and production), which specifies that agricultural development policy takes into account national policy on environmental protection, which in turn takes into account forestry and wildlife policy, and policy on wetland areas.

The state, through its forestry and wildlife policy based on participatory and sustainable management of forests and wildlife for economic development and enhanced quality of life, seeks to increase forest cover, reserved forest and protected areas. In collaboration with farmer organizations and local authorities, it draws up a national catalogue of wildlife species, identifying those that are endangered, maintains genealogical books and pursues a policy of conservation and development of wildlife resources (Art. 160).

Thus, the LOA provisions consolidate policy documents and existing legislation on the protection of the environment, ecosystems and biodiversity.

These concerns also lie at the heart of the LOASP provisions on water and other natural resources. Here too, the focus is on the development of rural water resources and on the definition and implementation of irrigation policy and operational programmes (Arts 47 and 48). This policy and these programmes are based on the principles of integrated water resource management and socio-economic returns from investment in irrigation. However, the LOASP dwells less on ecosystem protection than the LOA. Chapter 8 on forestry and forest development refers to the provisions in the forest code relating to the protection of forest areas.

The above therefore points to considerable similarities between Mali's LOA and Senegal's LOASP as regards access to land and natural resources, with any substantive differences

applying mainly to livestock. The two Acts emphasize equitable access to land and resources, with special measures for women and youth. As regards water and natural resources, the two texts deal less with access than with their protection and sustainable management.

2.4. Practical implications

The implications of the LOA and the LOASP can be analyzed on two levels: the legal and the institutional.

2.4.1. Legal implications

The LOA, like the LOASP, is a framework law but adopted as an ordinary law. The provisions enacted do not therefore have the juridical validity of constitutional provisions or those of constitutional laws which are superior to those of other laws. In addition, as these provisions are sometimes very general, we might question their justiciability and ask ourselves to what extent they could be used to permit judicial recourse for the right to food and its access to resources component.

While the LOASP and the LOA are ordinary laws, their provisions are nevertheless superior to those of other ordinary laws. This is not because they are policy laws (they can be abrogated, completed, amended by other ordinary laws), but in particular because they contain provisions abrogating contrary provisions in previous laws that need to be aligned with the new policy orientations they define.

Thus, Article 199 of the LOA stresses that the laws governing the agricultural sector, which includes agriculture, water, fisheries, livestock, the environment, forestry, hunting, rural land, social protection, crop protection, animal health, seeds and soils, will be reviewed and as necessary amended in accordance with its principles and orientations. In accordance with standard practice, Article 200.2 of the LOA and Article 80 of the LOASP abrogate all prior legislation countering the said Acts, which therefore have supremacy over all previous laws.

As already underlined, the LOA and LOASP constitute genuine agrarian reform programmes. The first envisages a law on agricultural land tenure aimed at ensuring greater security of tenure for rural producers, while the second envisages a review of national land laws.

As regards the justiciability of the stated rights, we need to start by recalling that this expression was defined by Golay (2002:6) as the possibility for a law "to be invoked by an individual or a group before a judicial or quasi-judicial body that can determine its content in a concrete case and decide the measures needed to remedy its violation, if there has been a violation".

On a strictly juridical level, the concept of quasi-judicial body presents problems of comprehension, but the author clarifies his position in a footnote in which he explains that justiciability does not have exactly the same meaning at national level and at international level, as at national level the control body needs to be a judicial body, which is not the case at international level.

He illustrates this by citing the example of the Human Rights Committee, which monitors the observance by states of their obligations under the International Covenant on Civil and Political Rights and thus constitutes a quasi-judicial body. This body can receive complaints from individuals, apply the provisions of the Covenant in concrete cases laid before it and issue a finding, but not a decision with force of law as in the case of a judge in domestic law.

At national level, in order to evoke the justiciability of a law, jurisprudence refers first to the inclusion of that law in the legislative arsenal of the country concerned or to a convention that has been duly signed and ratified and whose provisions are mandatory, then to the competence of the court appointed to hear and determine that law, and finally to the ascertainment of infringement of that law.

As the right to food is not stated expressly in the Malian Constitution, it would be difficult to invoke it to counter contrary prescriptions. But even if such were the case, the Malian Constitution restricts referrals to the Constitutional Court to a limited number of institutions (selected constitutional institutions and one-tenth of deputies of the National Assembly): as a result, the juridical means available to citizens to defend their constitutional rights are relatively constrained.

Those reservations aside, we should note that some constitutional principles that are also elements of the right to food are also fundamental principles of law and can be heard and determined by different courts, in particular by administrative courts. This applies to the principle of juridical equality and the subsequent principle of non-discrimination. A citizen who considers that this principle has not been respected by the public authority, in a measure relating to the right to food or any other domain, can have that measure annulled by administrative justice.

Without wishing to negate the theoretical and practical validity of the issue of justiciability of the right to food, we feel that the discussion should centre more on its enforceability, in other words on its "invocability". A right is enforceable when it can be invoked by a person to suspend or annul the application of a contrary decision or obtain the application of a favourable decision. This invocation can be carried out equally before the courts (justiciability) or before other bodies, including non-judicial bodies (appeal, political intervention, lobbying, etc.). The notion is therefore broader than that of justiciability. In this perspective, the provisions of the LOA are enforceable against all actions likely to run counter to it.

First, the various laws that are formulated are justiciable. Each time the government or any other administrative authority adopts a regulatory measure that runs counter to the provisions of the LOA, the farmer organizations or any other person concerned can turn to the administrative jurisdiction to annul that measure (Supreme Court or administrative tribunal, depending on the type of measure). Thus, a woman or an association promoting women's rights could resort to the administrative tribunal to request the annulment of an administrative decision on the distribution of land developed by the state, if that decision fails to grant specific rights to women.

Besides recourse to the courts, farmer organizations could justifiably invoke the LOA provisions in the formulation of policy documents, the establishment of bodies and the implementation of programmed actions.

The mechanisms of the Democratic Question Time (Espace d'Interpellation Démocratique, EID)[44] can be used by citizens and associations to denounce the government's failure to adopt measures to promote the right to food, especially in the framework of implementation of the LOA.

However, the more clearly a right is expressed in law, the more easily it is justiciable and invocable. In the light of this consideration, some LOA provisions seem easier to invoke before the courts or certain non-judicial bodies than some of those of the LOASP which are more general.

But could reference to food sovereignty in the two acts constitute an element of justiciability, particularly concerning access to resources? This concept inspired by Via Campesina (see Chapter 1 above) is not defined by the LOASP, whereas it is by the LOA. The latter envisages measures, in the case of need, to protect the domestic market and only refers to the subregional bodies in two articles (Arts 3.3 and 111). Article 36 of the LOASP also specifies that, in the case of need, the state can adopt protection measures or provide subsidies to reduce or remove distortions in external trade, within the West African Economic and Monetary Union (WAEMU) and the Economic Community of West African States (ECOWAS), but in compliance with the agreements of the World Trade Organization. Seven of its articles confirm the compliance of its provisions with international and subregional conventions.

This difference in the two legislations can be explained by the fact that the Malian farmer organizations took up food sovereignty and family farming as their battle cries and were able to learn from two years of application of the LOASP. It translates the reservations of farmer organizations towards the dynamics of integration based solely on market rules and testifies to their ability to have had it incorporated into the law.[45] Mali's farmers could use those provisions to request the government to take measures to protect the country's agriculture. But the outcome of such a request would be more political than juridical, as the Malian Constitution allows the country to renounce part or all of its sovereignty for the cause of African unity.

2.4.2. Implications at institutional level

The two Acts have strong implications at the institutional level. They set up a number of structures that will change the institutional landscape of rural development and open up a hive of legislative and regulatory reforms.

Thus, to ensure implementation and follow-up of their provisions, the LOA and the LOASP install new structures in virtually all domains, including policy, training, credit, equipment and market access. These structures and bodies are headed by the Higher Council on Agriculture and the Higher Council on Agro-Silvo-Pastoral Policy established respectively by Chapter 1 of Title IV of the LOA and Article 75 of the LOASP. These two councils are charged with monitoring implementation of the act and issuing

[44] The EID is an event organized each 10 December. On that day the citizens who consider that their rights have been infringed by the authorities can arraign the government before an honourary jury. After the arraignments, the honourary jury assesses government progress in human rights and puts forward recommendations.

[45] According to the president of CNOP, Mr Ibrahim Coulibaly, the results of the WAEMU Agricultural Policy (PAU) have been mixed because of the technocratic and highly liberal approach of WAEMU officials, far removed from farmer reality on the ground.. (personal communication)

advisory opinions on agro-silvo-pastoral development matters. In both cases, the council is presided over by the President of the Republic and the secretariat is provided by the Minister of Agriculture. Representatives of farmer organizations sit on both councils.

Mali's Higher Council on Agriculture has a national executive committee chaired by the Prime Minister and regional executive committees. While LOASP also introduces a regional committee on agro-silvo-pastoral policy at regional governor level (Art. 76). It makes no mention of a national executive committee. On the other hand, the two Acts establish an annual forum of discussion: Farmer's Day in Mali and the Annual Agricultural Conference in Senegal.

The structures and forums that are instituted by the two acts give farmer organizations a great opportunity to influence the process of definition and implementation of rural development policies, in particular those relating to access to land and natural resources. However, the effectiveness of the prescribed measures will depend on several factors, including the political will of the governments to successfully conclude the envisaged reforms, the combativeness of the farmer organizations and the availability of financial resources.

Given the existence of often conflicting interests, strong political will is in fact needed to initiate the intensive legislative and institutional activity that the two Acts permit. By way of illustration, the LOA implementing texts have been calculated to include: 35 policy documents, 5 legal texts, 60 decrees and other texts, not to mention the updating of pre-existing regulatory texts — at a total estimated cost of CFA 1.5 billion over two years.

In Mali, the fact that the government has adopted a strict timetable for the formulation of those texts and the establishment of all institutions augurs well for a successful conclusion of the process.[46] In Senegal, on the other hand, no implementing order has yet been prepared two years after adoption of the LOASP. In a memorandum published online in August 2006, the CNCR refers to the difficult situation faced by farmers and criticizes the delay in its application. Instead of its implementation, the government has adopted a new agricultural development plan entitled Plan REVA (Retour Vers l'Agriculture, Return to Agriculture)[47] whose provisions are considered unrealistic by the CNCR.

2.5. Conclusion

The LOA and the LOASP represent significant progress towards the realization of the premises needed for food security and comprehensive enjoyment of the right to food. They announce the reforms needed for an equitable access to land and natural resources by rural inhabitants, in particular weak and marginalized groups. Beyond this aspect, which is of course important albeit insufficient to trigger genuine rural development, they announce measures regarding other factors of production (including equipment, access to credit, training, agricultural research) and marketing of agricultural products. These measures also cover legal status for farm holdings, prevention and mitigation of agricultural risk, social security for rural producers, and so forth.

Reference to the right to food in the two Acts cannot be invoked in the same manner as constitutional law, but several provisions can be invoked to oblige the authorities to

[46] The first implementation orders were adopted a few months after the law was passed.

[47] Concerning the REVA plan, see.: http://www.senswiss-far.org/pub/pol/2006_reva.pdf

adopt measures aimed at facilitating that right. Thus, provisions relating to equity, positive discrimination of women and youth and others can be invoked before the courts, in the case of infringement. Administrative measures contradicting those provisions can be annulled by the courts. But several other provisions cannot be brought to court, either because they are too broad or because they need to be regulated through subsequent law.

Nevertheless, the LOA and the LOASP constitute formidable instruments for citizens and farmer organizations to lobby and influence government decisions through the coordination frameworks and participatory structures put in place and through consultative institutions such as the Economic, Social and Cultural Council and "Democracy Question Time".

Those who do not claim or invoke their rights have no right! Realizing the potential of the LOA and the LOASP for achieving the right to food for all, especially for rural producers, will depend on the ability of farmer organizations to monitor and, if necessary, to impose the envisaged reforms and to use all legal means to see that the prescribed measures are implemented fully.

Photo by I. Balderi

3. The Right to Food and Security of Pastoral Resource Rights in the United Republic of Tanzania

Ringo W. Tenga

In Tanzania, indigenous minorities are subject to a myriad of rights denials as they regularly face land alienation, discrimination, denial of justice, violation of cultural rights, lack of constitutional and legislative recognition, marginalisation of social services, as well as denial of rights to political recognition, representation and participation, to health and medical attention, to existence, to education and to their own development.
(LHRC, 2007:93)

3.1 International instruments and trends in domestic legislation

The United Republic of Tanzania's performance in the protection of its indigenous minorities (pastoralists and hunter gatherer communities) has been unfortunately barren in offering prospective hope for development. Increasing evidence shows a state policy orientation, from colonial times to the present day, which designs development options that are determined externally with little or no consultation with the subject communities. As a result, policy can be viewed as paternalistic in character on the one hand and critically flawed on the other, indicating a lack of understanding about the structure of traditional systems of livelihoods that support the survival of indigenous minorities (Mattee and Shem, 2006; Lane, 1996; Ndagala, 1998, Kaare, 1988).

A 'modernization paradigm' has underpinned all policy initiatives — from the Maasai Reserves policy of the colonial state to the Range Land Development initiatives of the post-independence period (begun in 1964) through the land reform initiatives of the liberalization era (starting from the Land Policy of 1995 to the Village Land Act 1999), up to the present day where we see the proposed Grazing Land Bill of 2007 underlined by the 'Rancher's Vision' of managing livestock as a form of business (Mattee and Shem, 2006). The legal framework that appears to provide a foundation for the protection of the indigenous minorities does not fulfil its mandate, either from a rights-based perspective or administrative dispensation (Peter, 2007).

The indigenous minorities have struggled to assert their rights in various ways, both locally and internationally (Ole Nangoro, 1998). In doing so, the protection of their land, as a focal point for their cultural identity and livelihood, has been central (Tenga, 2006). At the policy level, their exclusion has been long apparent and more recent policy analyses indicate only a lukewarm attempt to be inclusive (Mattee and Shem, 2006). In terms of legislative

reform, some gains have been made on land rights and local government reform: this may give greater organizational capacity to these communities and the ability to protect their lands legally (Alden Wily, 2003).

Nonetheless, the record of achievement has been almost invisible if assessed by cases that have gone to court for the protection of land. It has been shown that the courts have used a variety of technical justifications to avoid granting legal rights to indigenous minorities (Peter, 2006). A typology of these 'technical justifications' may point to a need to find alternative approaches in designing a rights-based strategy for claiming legal entitlements in court or elsewhere. There is a clear indication that claim rights that are collective in nature do not have an institutional space in Tanzanian jurisprudence, either procedurally or substantively. It could be argued that the "Representative Suit" procedure which aimed to cover a wide class of similarly positioned claimants has been made irrelevant with regard to collective claims as the courts have used many types of methods to exclude claimants who have not appeared in courts physically.[48] Substantive law, on the other hand, being more focused on individual rights rather than collective rights, has often failed to grant claims that originate from a livelihoods-protection paradigm, which would entail enforcement of communal rights covering wider groups.

Owing to this double handicap, developments in international institutions and instruments, where the United Republic of Tanzania is a party, may provide an alternative for the protection of the rights of indigenous minorities, despite scholarly caution (Kamanga, 2006). This chapter focuses on the right to food as articulated in international instruments, and explores the extent to which this right may be used as a tool for securing the resource access of pastoral groups.

According to a 2007 FAO report to the UN Permanent Forum on Indigenous Issues, the issue of securing access to productive resources for all individuals and groups (FAO, 2007) is crucial to the protection of vulnerable indigenous peoples. The report states that "fighting hunger and malnutrition requires tackling the problems of discrimination that characterize the situation of many groups that are politically or geographically marginalized or live in relatively remote areas. In this regard, [Right to Food Guideline 8.1] states, *inter alia*, that "[S]tates should respect and protect the rights of individuals with respect to resources such as land, water, forests, fisheries, and livestock without any discrimination" and that "special attention may be given to groups such as pastoralists and indigenous people and their relation to natural resources". Empowerment and participation are stressed in the Guidelines as key elements of a rights-based approach, and people's capacity-building is indicated as one way to enhance them" (FAO, 2007). In reference to indigenous peoples thus, there is a critical intersect between the hunger problem with that of discrimination. The report reiterates that recent developments in the areas of both indigenous issues and the right to food suggest a joint approach to the two areas, and it urges renewed attention to these themes that are becoming dominant in the human rights agenda.

Under Article 11 of the ICESCR, the United Republic of Tanzania as a state party recognizes the right of its citizens to an adequate standard of living, which includes adequate food, clothing and housing. The same article acknowledges the duty to take action in securing the "fundamental right to be free from hunger" (Art. 11:2). In

[48] See e.g. the *Yoke Gwaku v NAFCO* and *Lekengere Faru v Attorney General* cases, where the High Court of Tanzania granted relief only to those who appeared in Court, despite the representative or "class" character of the cases.

pursuance of this duty, states are required to adopt appropriate economic, environmental and social policies aimed at realizing the core content of the right to food, which covers two critical components — first, availability of food in sufficient quantities and quality; and, second, sustainable accessibility to food (General Comment 12; see above, chapter 1). Access to food has received more detailed interpretation to cover accessibility in economic terms and in physical terms. Here the Committee on Economic Social and Cultural Rights notes: "A particular vulnerability is that of many indigenous populations groups whose access to their ancestral lands may be threatened" (CESCR, 1999). The international obligation enjoins the United Republic of Tanzania to respect, to protect and to fulfil the right to adequate food in order to secure and ensure the right of freedom from hunger for its populations (see above, Chapter 1).

3.2. The case of pastoralists' rights in the United Republic of Tanzania

The Maasai population, whose livelihood is based on pastoralism, is estimated to be around 350,000 and is concentrated in north-east of the United Republic of Tanzania but it is present also in the central and southern part of the country. Natural resources are principally used on a collective basis — grazing/pasture land, water points and salt-licks. Transhumance and nomadism — livestock mobility and rotational use of pastureland — minimizes land over-use and allows vegetation to recover after grazing, thereby protecting marginal land from destruction.

Access to resources for the Maasai has, however, been eroded by land alienations that date back to the colonial period, and that have deepened and widened over time (Shivji and Kapinga, 1998). This includes loss of land to wildlife sanctuaries, to large-scale plantations, to peasant farmers under resettlement schemes, to urban centres, and to joint ventures between Maasai individuals and non-Maasai "investors" (Ole Nangoro, 1998).

Loss of land has resulted in a critical shrinkage of the resource base that is seriously threatening pastoral livelihoods. This has led to diverse livelihood alternatives, including movement to new areas. Relocating to other areas has fostered resource conflict or resource overuse — as illustrated for instance by the endemic conflict between Maasai pastoralists and farming communities in the Kilosa district.

Similar to the plight of the Maasai is that of the Barabaig (in Hanang District, in the north-east; see Lane, 1996). With their choice land alienated for agricultural use, displacement started from the early 1980s, and no remedial measures have been undertaken to date. Both Maasai and Barabaig groups have sought to resist loss of resource access through political mobilization and legal actions. However, both strategies have tended to be unsuccessful.

According to Peter (2007:36), courts have consistently engaged in technical gymnastics to belittle breaches of human rights when it comes to indigenous minority issues:

> *Interestingly, in all cases taken to Court by or on behalf of indigenous people, the events giving rise to claims are preceded by excessive use of force assault, harassment, brutality, torture, cruel and other inhuman and degrading treatment and punishment by state institutions such as the Police, Security and the infamous field force unit. These actions of state agents normally lead to displacement, loss of livestock and other personal articles as well as break-up and scattering of families. However, courts of law cleverly skirt around these serious violations of human rights and hardly address or even mention them.*

This perplexing and contradictory behaviour of the courts has been noted by other authors (e.g. Lobulu, 1999). The Barabaig have not managed to register a satisfactory success in courts (Mvungi, 2000). Neither have the Maasai pastoralists, as in the case of Mkomazi game reserve, where the Court of Appeal's treatment of issues at stake was awkward and, at times, outwardly wrong (Mchome, 2002; Juma, 2000). Table 3.1 outlines some of the most significant resource-access cases fought (and lost) by pastoral groups.

Similarly, it could be argued that successive waves of legal reforms have not been responsive to the needs of pastoral groups. For instance, the Range Development and Management Act 1964 (No. 51 of 1964) seemed to be underlined by a lack of understanding of pastoral systems. It provided for the establishment of ranching associations modelled on Western corporate bodies but unknown to the Maasai. No consultation of pastoral groups was held during the elaboration of the Act.

In practice, the Act was a resounding failure — only two ranching associations actually took off. More generally, legislative interventions have typically been inspired by efforts to "modernize" and sedentarize pastoralists, by preference for farming compared to pastoralism, and by little responsiveness to the needs of pastoral groups.

TABLE 3.1: Pastoral Land Rights Cases — Tanzanian Examples

No.	Case Reference	Community	Claim	Final Court Decision
	Mulbadaw Village Council & 67 Others v NAFCO (HC -Arusha - CV# 10/1981 and CA - CVA # 3/1986)	Barabaig pastoralists in Hanang District	Claim over extensive pasture lands appropriated by NAFCO, a Parastatal, as Mulbadaw Farm, (about 10,000 acres) funded by CIDA, Canada.	Pastoralists lost: (1) Village Council failed to show legal allocation of land from prior land authorities. (2) Barabaig pastoralists failed to show the Court that they are natives of the United Republic of Tanzania. (Despite the public fact that Barabaig Pastoralists are found nowhere else on earth, and in Court some had to get a translator.)
	Yoke Gwaku & 5 Others v Gawal Farms Ltd & NAFCO (HC – Arusha – CV#52/1988)	Barabaig pastoralists in Hanang District	Claim Over extensive pasture lands appropriated by NAFCO, a Parastatal, as Gawal Farm (about 10,000 acres) funded by CIDA, Canada.	The High Courts award a nominal victory: (1) Yes the pastoralists have been illegally dispossessed. (2) But Representative Suit only covers those in Court and not the odd 780 others. (3) Claimants to be paid monetary compensations and not to be re-granted the land.

TABLE 3.1: Pastoral Land Rights Cases — Tanzanian Examples - CONT.

No.	Case Reference	Community	Claim	Final Court Decision
	Ako Gembul & 100 Others v Gidagamowd and Waret Farms Ltds &NAFCO (HC- Arusha – CV#12/1989)	Barabaig pastoralists in Hanang District	Claim over extensive pasture lands appropriated by NAFCO, a Parastatal, as Waret and Gidagamowd Farms (about 20,000 acres) funded by CIDA, Canada.	The High Court (per Nchalla, J.) dismisses the case: (1) That the Government has priority in food security and the acquisition of the barabaig land is proper, as national interest overrides all other interests. (2) That the suit is bad in law as it should have been consolidated with the **Yoke Gwaku** Case. The litigants were at fault and maybe guilty of abuse of the process of Court.
	Lekengere Faru & Ors v AG & Ors (HC-Moshi - CV#33/94 & CV#33/95 and CA – CVA # 53/1998)	Maasai pastoralists living in Mkomazi Game Reserve, North Eastern, the United Republic of Tanzania	Claim against evictions from ancestral lands within the Game Reserve.	The High Court (per Munuo, J.) finds that the evictions were illegal. Orders that alternative land be sought and claimants be compensated. Court of Appeal (per Nyalali, C.J.), in a hastily written Judgment (1999) "finds out"' that the Maasai are not Natives of Mkomazi but "recent" immigrants who only resided there under a licence. Orders paltry damages for only those who gave evidence in Court and also orders for alternative land to be sought. The last Order remains unimplemented to date.
	Ngotyaki, Oloruja & Others v Republic (HC – Arusha - Criminal Appeal # 8/1991)	Maasai pastoralists in Ngorongoro Conservation Area	Five pastoralists appeal against conviction by Monduli District Court for allegedly breach of Anti-Cultivation Regulations within the Conservation Area, the conviction covers 9 people jailed for 3 months and 649 fined.	Convictions quashed by the High Court as they were based on (1) Repealed law, and, (2) Section 9A of the Ordinance under which the accused were charged contained no punishment provisions

Particularly relevant to securing pastoralists' resource rights is the Village Land Act 1999. In some ways, this Act is a step forward in securing access to natural resources for pastoral groups. As Alden Wily (2003 : 48-9) notes:

i. A customary right may be issued for pastoral purposes (Section 29 (2) (a) (iii)).

ii. Land Markets are to be regulated to ensure that pastoralists are not disadvantaged (Section 3(1)(l)).

iii. Definition of the area of the village's land may include grazing land and land used for stock passage (Section 7(1)).

iv. Where the villagers are pastoralists, the certificate of Village Land will not only affirm the village area but related areas customarily used by those persons (Section 8(8)(d)).

v. The law makes provision for two or more villages to decide to jointly share the management of a certain area (Section 11); this may be useful for pastoralists in respect of seasonal shared grazing areas.

vi. Plenty of provision is made for communal village land to be identified and earmarked solely for communal use; this will help protect agricultural encroachment into pastures (Section 12(1)).

vii. Definition of communal village land must include all existing properties used as community or public village land (Section 13 (7)).

viii. A group of citizens are eligible to be allocated a customary right of occupancy, not just individual or families (Section 18 (1)); this is helpful to clans of pastoralists".

While these aspects constitute a step forward compared to earlier legislation, the benefits they may bring depend on specific implementations of the Act. A closer scrutiny shows that pastoralists are still vulnerable. The structure of the Village Land Act allows the predominance of customary land law as the substantive rules for regulating tenure. This essentially means that customary rights and practices that pre-exist the Act are protected. The question is whether pastoral resource rights have sufficient recognition in customary law. Where pastoralists are predominant, this may be the case; but where they are not, the resource rights of pastoralists tend to be highly contested, and subjected to almost automatic pre-dominance of non-pastoral rights (Sanna Ojalammi, 2006).

In addition, tensions exist between the Village Land Act 1999 and the related Land Act of the same year — particularly with regard to the commons. The reference used is that of "general land", which includes undeveloped or unused village land. But the Village Land Act defines "general land" as public land that is not "reserved" or "village" land. This ambiguity between the two Acts could render grazing lands (typically held in common) subject to arbitrary control by public officials, as they may be perceived as "unused" or "unoccupied" lands (Shivji, 1999). In order to materialize the potential benefits of the Village Land Act, some communities have gone out to secure their resource rights through implementing the Act with support from non-governmental organizations (NGOs). A good example is the work carried out by Community Research and Development Services (CORDS), an NGO working in pastoral communities in northern Tanzania. CORDS has assisted some 72 pastoral villages in Monduli District to obtain Village Land Certificates. This is expected to secure grazing lands from outside encroachment. Similar projects are being carried out in Ngorongoro, Kiteto and Simanjiro Districts and being

undertaken by other NGOs — for example, by FarmAfrica in Hanang and Mbulu Districts; and by Ujamaa Community Resources Trust in Monduli, Hanang and Ngorongoro Districts.

3.3. The right to food as a tool to secure resource access

The previous section outlined the resource-access challenges faced by the pastoral groups in the United Republic of Tanzania, and the constraints embodied in the domestic legal framework. This section explores the extent to which right-to-food arguments and remedies can help pastoral groups in the United Republic of Tanzania secure their access to natural resources.Although the United Republic of Tanzania's domestic law — particularly the Constitution — requires the state to respect, protect and fulfil human rights, the right to food in particular remains constitutionally un-articulated. However, it can be considered as implicit in Article 14 of the Constitution which guarantees the right to life, in the right to work under Article 24, in the right to a just remuneration under Article 23 and in the right to own property under Article 24. The right to food is also closely linked to other rights such as the rights to health and to shelter, in addition to various civil and political rights.

A recent report by NorAgric made a review of the operationalization of the right to food in the United Republic of Tanzania (Haug and Rauan, 2001). A general analysis was made of the capability of the country to implement the right to food towards the Millennium Development Goals timeline. The report found that this capacity appeared questionable. The United Republic of Tanzania is one of the highly indebted poor countries (HIPIC), and it failed to meet international benchmarks at every point with regard to economic performance, whereby it was number 53 out of 90 poorest countries in the world, with per capita income of USD174 per year. The situation has not improved. The prevalence of under-nourishment in the United Republic of Tanzania is higher than the average for East Africa or sub-Saharan Africa according to FAO data (2006). According to the most recent FAO socio-economic statistical evaluation monitoring progress towards hunger reduction goals of the World Food Summit (WFS) the statistical outlook is still bleak (see **Table 3.2** below).

TABLE 3.2 - Statistics on food security in Tanzania

	1990—1992	1995—1997	2002—2004
Population (Millions)	27.0	32.07	37.0
Food aupply (Kcal/person/day)	2050	1880	1960
Number of undernourished (Millions)	9.9	15.7	16.4
Proportion of undernourished %			
The United Republic of Tanzania	37	50	44
East Africa	45	46	40
Sub-Saharan Africa	35	36	33

Source: FAO, Socio-Economic Statistics and Analysis Service, Update 03/09/2006

Although FAO notes that the food supply has improved in the past few years, it has not been enough to halt the critical decrease that preceded it.

A recent study undertaken by the World Food Programme (WFP) in non-pastoral areas found that the country is highly vulnerable and easily exposable to natural shocks such as drought. The study states that "food insecurity and vulnerability is highly prevalent in Tanzania. 15% of households are food insecure and 15% are highly vulnerable" (McKinney, 2006). It also found that food insecurity and vulnerability is present everywhere in the United Republic of Tanzania although it varies regionally. The study is significant in the sense that although pastoral livelihoods were not the subject of the study one may hazard the conclusion that pastoralists may not fare well either, as the prevalence of drought would affect pastoralists the most.

Given this context, can right-to-food arguments and remedies be used to secure resource access for pastoral groups? Chapter 1 above outlined some of the ways in which this is conceptually possible — for instance, by identifying the circumstances under which arbitrary deprivation of resource access may constitute a violation of the right to food. Assessing the extent to which this can be applied usefully in the specific context of the United Republic of Tanzania, however, is not straightforward.

There does not seem to be a clear experience in the United Republic of Tanzania with using right to food arguments and remedies to secure resource access. For instance, right to food arguments have not yet been tested in court cases concerning natural resource rights. In this context, answers to that question can only be tentative.

Some insights can be drawn, however, from the case *Ako Gembul and Others v NAFCO*. The case concerned the loss of resource access for Barabaig pastoralists in order to allocate some 20,000 acres of land to wheat cultivation by a parastatal company, National Agriculture and Food Corporation (NAFCO). The land allocation was challenged by the Barabaig on the grounds that the alienated lands were ancestral lands of the pastoral Barabaig; and that customary rights are recognized legally under Tanzanian land law. Therefore, it was argued, the state could not alienate the land without due process that included following the Land Acquisition Act requirements providing for consultation and justification that there are public interest grounds that would justify the acquisition.

The High Court dismissed the legal challenge. The Court held that pastoralists' rights had been taken into account, as the proposed project aimed to improve food security at the national level and was therefore in the public interest. In other words, food-security arguments were used to justify the taking of pastoral lands through fulfilling the public purpose requirement embodied in Tanzanian policies. This suggests that paradoxically food security arguments may be used not only to secure pastoral resource rights, but also to undermine them.

However, even where food security is used as a public purpose to justify loss of resource access for some, relying on right to food arguments may enable those who lose out to gain for fair means to compensate their loss, and enjoy continued access to food. For example, in a case concerning evictions from the Mkomazi Game Reserve, although the Maasai pastoralists lost their lands due to allocation to a game reserve, the Courts ordered that alternative land be sought out for the claimants. To date, the authorities have failed to source such lands. One may conclude however that a livelihood concern

was basic to the Court's order for alternative land. This concern may further be pursued through better articulated rights-based arguments to promote a right to food basis for defending livelihoods.

Another reason for caution is the experience with court cases concerning pastoral resource rights in the United Republic of Tanzania. In the past, courts have gone to great lengths to dismiss such cases and this does not bode well for the likelihood of them being prepared to use innovative arguments based on the right to food to secure pastoral rights. A key issue is therefore the extent to which international remedies may be available.

The United Republic of Tanzania is a signatory to many human rights treaties but in critical cases has failed to be signatory to protocols that would assure justiciability of those rights in international forums (LHRC, 2007; Kamanga, 2006). The main exception is the United Republic of Tanzania's ratification of the human rights instrument related to the African Charter on Human and People's Rights: the 1998 Protocol for the Establishment of an African Court of Human and Peoples' Rights. This allows the Court to look into disputes that arise on the interpretation and application of the African Charter. As discussed in Chapter 1, the African Commission has interpreted the African Charter as recognizing implicitly the right to food in the case *SERAC* v *Nigeria*. There is an opportunity therefore to pursue this issue before African human rights bodies.

Further, as a Member of the United Nations and a signatory of several UN human rights treaties, the United Republic of Tanzania has reporting obligations that require it to show progress with the realization of the right to food of vulnerable populations.

3.4 Conclusion

Overall, the arguments and remedies concerning the right to food have the potential to support efforts to secure pastoral resource rights. Past experience with court litigation in the United Republic of Tanzania suggests that this potential may be limited as far as domestic law remedies are concerned. However, the implicit recognition of the right to food in the African Charter opens opportunities for recourse to the African Commission and the African Court after domestic remedies are exhausted.

Photo by R. Faiduttri

Conclusion

Lorenzo Cotula

This study has examined the extent to which human rights arguments and mechanisms can help improve access to natural resources for disadvantaged groups. It has focused on the resource-access implications of the right to adequate food, considering both their conceptual dimension (Chapter 1) and two case studies from Mali (Chapter 2) and the United Republic of Tanzania (Chapter 3). While the conceptual linkages between the right to food and resources access are of global relevance, the study has focused on sub-Saharan Africa.

Overall, the findings of this study suggest that the right to food has important implications for resource-access policies, laws and programmes. The right to food is realized where individuals and groups have access to adequate (i.e., sufficient, safe and nutritious) food. Such access depends on using diverse combinations of different livelihood assets, such as human, social, physical, natural and financial capital. Access to natural resources like land, water and forests is therefore a key element of livelihood strategies ("natural capital"), together with other elements such as access to employment and/or credit ("financial capital").

The progressive realization of the right to food requires supporting livelihood strategies based on combinations of livelihood assets that enable individuals and groups to have access to adequate food. The right to food does not automatically translate into a "right to land". This is because access to food for all may be achieved through other means — such as formal employment or off-farm business activities.

Nonetheless, in contexts where much of the population depends on access to resources, improving access to natural resources is likely to be the focus of strategies to realize the right to food. This is the case in many parts of rural Africa, where access to resources is the main source of food availability and accessibility, where off-farm livelihood opportunities are limited, and where the ability of markets to ensure access to food may be constrained.

Other human rights reinforce the resource-access implications of the right to food — including the rights to property, to housing, to a legal remedy as well as rights of public participation. Trade-offs may exist between different human rights and between different right holders. As the right to property protects existing resource rights from interference by the state or third parties, it is only relevant for those resource users who already enjoy some form of resource rights (rather than for the landless), and may be relied on to constrain redistributive reform efforts (although the realization of the right to food constitutes a "public purpose" justifying the taking of property). On the other hand,

resource-access arguments based on the right to food apply both to holders of resource rights (requiring states to improve the security of those rights) and to those without legally backed resource claims (e.g. providing a basis for programmes to increase access to land for the landless, including through redistribution). Trade-offs may also arise with regard to the realization of the right to food of different people — for instance, where overlapping resource claims oppose indigenous people and agricultural settlers, who may also be poor and marginalized.

Thus, under international law, the right to food and other related human rights have important implications for access to natural resources. These implications do not offer a specific blueprint for resource-access policies and programmes. Rather, they require diverse policy options to comply with some basic principles. For instance, states cannot arbitrarily deprive individuals or groups of their existing resource access, must protect such resource access from interference of third parties and must take appropriate steps to increase access to resources if not doing so would jeopardize food access for more vulnerable groups. In addition, states cannot discriminate in resource access, including for instance in agrarian reform programmes; and local resource users must have a say in decisions affecting their access to natural resources. But states retain a considerable margin of discretion in designing and implementing resource-access policies that are tailored to local contexts.

This "openness" of the right-to-food approach to resource access may be seen as a weakness — in the sense that, apart from compliance with the basic principles outlined above, it would be difficult for individuals and groups to rely on the right to food in order to support claims for specific resource-access policies. The comparison between Mali's LOA, which recognizes the right to food (and the concept of food sovereignty) explicitly, and its Senegalese counterpart, which does not (Chapter 2), shows that, apart from differences in the overriding principles and nuances in emphasis, many of the practical policy interventions envisaged to implement the two laws are actually similar — although the Senegalese LOASP does place greater emphasis on international trade agreements and on private investment than the Malian LOA.

On the other hand, the "openness" of the resource-access implications of the right to food may also be seen as a strength. Too specific resource-access implications would result in an idealistic but top-down and one-size-fits-all approach being imposed on very different local contexts. This would not enable the proper addressing of the context-specific concerns of local people. Past experience shows that top-down and one-size-fits-all approaches are likely to fail. However, human rights arguments define key principles that provide a framework for supporting diverse, context-specific processes to improve access to resources and/or to food. Such support includes for instance paving the way to legal remedies against adverse action, and providing "ammunition" for resource-access claims within political negotiations on policy formulation or implementation.

Access to legal remedies may open up new opportunities for protecting and improving resource access. The effectiveness of such remedies may be constrained by legal and non-legal factors. At the international level, monitoring and enforcement of human rights under the ACHPR system has proven weak, although the recent establishment of the African Court of Human and Peoples' Rights raises hopes for improvement. At the national level, monitoring and enforcement vary substantially across countries — but are

often faced with problems linked to limited independence and/or effectiveness of courts and human rights institutions (as illustrated by the experience with court litigation on pastoral resource access in the United Republic of Tanzania), and to limited access to such institutions for the majority of the rural population.

However, some of the national and international cases referred to in this study show that, where appropriate conditions exist, human rights-based litigation can help poorer and more vulnerable groups improve their access to natural resources. A challenge ahead lies in identifying what the conditions that make this possible are (e.g. with regard to the role of legal services organizations in accompanying local resource users through legal processes), and in working to spread the existence of those conditions.

The support that right to food arguments can provide to poorer and more vulnerable groups in their efforts to improve resource access are not limited to use of legal remedies, however. "Negotiations in the shadow of the law" can also result in better resource access — whether within the context of policy formulation, law making or government action. Where the right to food is entrenched in the national constitution, legislation or government action cannot overrule it. The entrenchment of human rights in the national legal framework and the vulnerability of adverse legislation/government action to legal challenge can strengthen the negotiating position of local resource users in their day-to-day negotiations with other social groups, and possibly affect the outcome of those negotiations. The extent to which this happens varies substantially from case to case, depending on a wide range of extralegal factors — including for instance the importance that decision makers attach to complying (or to being seen as complying) with international treaties, national constitution and domestic legislation.

Besides the issue of "justiciability", which has long occupied centre stage in debates on the realization of the right to food, the broader notion of "invokability", proposed by Moussa Djiré in his Mali case study (Chapter 2), is therefore a useful concept. "Invokability" refers to the ability to invoke or rely on the right to food, whether in judicial form or in political negotiations, in order to pursue specific interests such as those concerning access to natural resources for the rural poor.

At this less legalistic level, right to food arguments may usefully be combined with other non-legal arguments which also support efforts to improve resource access. The concept of food sovereignty, briefly touched upon in this study, is a case in point. At this stage of development of international law, food sovereignty is a political rather than legal concept. Its integration in domestic legislation, notably in Mali (Chapter 2), has implications in relevant national legal systems but does not alter that situation. Yet food sovereignty does have significant implications for resource-access policies, laws and programmes, as it promotes a set of models of agricultural development centred on local production and smallholder agriculture. As such, it is a concept that may be used in conjunction with right to food arguments in order to advocate policy interventions that promote access to natural resources for more vulnerable groups. The experience of Mali's LOA illustrates how synergies may be created between right to food and food sovereignty approaches.

Finally, making the right to food approach to resource-access work requires addressing key challenges concerning the role of the state. In the human rights literature, the state is at the centre of emancipatory processes. It is the main "duty bearer" for taking the steps to "respect", "protect" and "fulfil". Human rights are set to constrain state

action (especially through the "respect" element) — but also require the state to act as a regulator and guarantor of human rights (particularly "protect" and "fulfil"). This view of the state contrasts with the "political economy" of the state in Africa and in other parts of the world, whereby the action of state agents and agencies is shaped by strategies of accumulation and rent-seeking, by in-built biases against certain forms of resource use (see e.g. the attitude towards pastoralism in many African countries, including the United Republic of Tanzania), and by other factors that are not fully in line with pursuit of human rights goals.

Because of these challenges, the formal recognition of the right to food (e.g. its integration into national legislation such as Mali's LOA) can only be the beginning, not the end of the emancipatory process. Translating that formal recognition into practice is what can make a difference for improving people's access to resources. Such processes cannot rely on state action alone. Ultimately, human rights arguments to resource access can only work where resource users themselves are able to appropriate those arguments and make use of them. In addition to — and more than — legal reform, this requires sustained investment in building local capacity to engage with the law, for instance through legal literacy training, legal awareness raising through rural radios, and accessible legal advice, assistance and representation. In many parts of the world, legal services organizations have developed innovative ways to provide these types of support. Building on and accompanying these efforts is key to making the right to food a reality.

Photo by R. Lemoyne

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