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World Hunger, the ‘Global’ Food Crisis, and (International) Law

The global food crisis 2007 — 11 has been described by the UN Human Rights Committee as a failure of national and international policies to ensure access to food for all. Another influential camp attributes the crisis to another kind of failure—market failure. This article seeks to qualify these prevalent views on two principal grounds. First, the tendency to ascribe the predicament of hungry peoples to failure—of policy, markets, or both—distracts from the fact that commodity markets were working in this same period for the benefit of other actors in the global economy. Second, the focus on policy elides the equally important role that law has played in this context. Legal solutions are highly visible in debates on how to tackle hunger. Less visible are the ways in which legal regimes have entrenched the same conditions of poverty and precarity to which legal remedies are now offered in response. The article argues that not only must the global legal order be understood as a producer of hunger in the world, but that bodies of law that constitute the global food system may present the greatest obstacle to efforts by the international community to eradicate it.

1. Introduction

The global food crisis was precipitated by extreme levels of price volatility in international commodity markets. While many commodities were affected, the most prodigious inflation occurred in markets for grain. Between 2007 and 2008 the prices of maize, rice, and wheat underwent record levels of inflation, doubling, in some cases, in a matter of months.¹ The rising cost of food triggered food riots in more than 25 countries worldwide.² Approximately half of the calories consumed by the world’s poor are accounted for by these three staple grains.³ Consequently, the human cost of these market movements was very high. The UN Food and Agriculture Organisation (FAO) estimates that an additional 100 million people were pushed into hunger and poverty as a result of grain price volatility in 2008 alone.⁴ Although commodity prices plummeted rapidly in 2009, grain prices moved in a similar trajectory between the second half of 2010 and late 2011.⁵ Corn and

¹ David Mitchell, ‘A Note on Rising Food Prices.’ *World Bank Working Paper* (2008), at 3.

² Ray Bush, ‘Food riots: Poverty, Power and Protest.’ *Journal of Agrarian Change*, 2010, 10(1), at 121.

³ David Lobell et al, ‘Prioritizing climate change adaptation needs for food security in 2030.’ *Science*, 2008, vol. 39, at 608.

⁴ FAO, ‘1.02 billion people hungry.’ 19 June 2009, <http://www.fao.org/news/story/en/item/20568/icode/> accessed 26 June 2016.

⁵ FAO, ‘World food prices reach new historic peak.’ 3 February 2011, <http://www.fao.org/news/story/en/item/50519/icode/> accessed 26 June 2016.

wheat prices are currently a ten year low,⁶ generating optimism those who are net buyers of food will benefit.⁷ Nevertheless, it is thought that domestic food price fluctuations may still occur.⁸ In any case, the slump in commodity prices poses a serious threat to welfare in commodity-dependent countries in the global South.⁹

In response to these events, a UN High-Level Task Force on the Global Food Security Crisis (HLTF) was established in April 2008.¹⁰ Alongside efforts to scale up investment in food and nutrition security, the HLTF recommends an array of reforms to improve the structure and functioning of commodity markets.¹¹ The HLTF also endorses a renewed commitment to pre-existing approaches to tackling hunger, such as the Zero Hunger Challenge,¹² and a new commitment to principles-based agricultural development, based on the 2009 Rome Principles on Food Security.¹³ Emphasis on the use of legal tools to address food insecurity is prominent. A cornerstone of the post-crisis reform is renewed commitment to the progressive realization of the right to adequate food. The HLTF, the FAO, and the World Bank also advocate for an approach to tackling hunger based on human rights principles, namely those of participation, accountability, non-discrimination, transparency, human dignity, empowerment and the rule of law (PANTHER).¹⁴ Other recommendations for legal reforms include the strengthening of domestic labour law, adjustments to the trade regime, and the recognition of indigenous rights to land.¹⁵

⁶ Sybille De La Hamaide, 'Corn, wheat prices to hit 10-year lows in 2016.' 8 April 2016, <http://www.reuters.com/article/us-grains-prices-agresource-idUSKCN0X51QA>, accessed 26 June 2016.

⁷ World Bank, 'Global Food Prices Drop to a Five-Year Low.' 1 July 2015, <http://www.worldbank.org/en/news/press-release/2015/07/01/global-food-prices-drop-to-a-five-year-low> accessed 26 June 2016.

⁸ *Ibid.*

⁹ UNCTAD, 'Recent developments and new challenges in commodity markets, and policy options for commodity-based inclusive growth and sustainable development.' UNCTAD, 2016, TD/B/C.I/MEM.2/33, at 1.

¹⁰ HLTF on the Global Food Security Crisis, 'Updated Comprehensive Framework for Action.' 2010, <http://www.un-foodsecurity.org/node/842> accessed 26 June 2016, at xi.

¹¹ Particular emphasis is placed on support for smallholder farming and promoting ecological and sustainable agricultural development, as well as the need to strengthen social safety net and the multilateral trading system. *Ibid.*, at 3.

¹² The Zero Hunger Challenge is a global call to action, issued by UN Secretary General Ban Ki Moon in 2012, that sets a challenge to eliminate hunger 'in our lifetimes'. <http://www.un.org/en/zerohunger/challenge.shtml> accessed 26 June 2016.

¹³ 'Declaration of the World Summit on Food Security.' World Summit on Food Security, Rome, 16-18 November 2009. <http://www.mofa.go.jp/policy/economy/fishery/wfs0911-2.pdf> accessed 16 February 2017.

¹⁴ Olivier De Schutter, 'Countries tackling hunger with a right to food approach.' Briefing Note of the Special Rapporteur on the Right to Food 01, 2010.

¹⁵ *Supra* note 10, at 7, 19, 51.

That these actions represent a sincere effort by the international community to respond to the global food crisis is not in doubt. Nevertheless, this article asserts that there is an urgent need to challenge pervasive understandings of the causes of the crisis, which, being both inaccurate and misleading, are undermining efforts to improve the lives of hungry peoples. The first argument, made in Part Two, is that focusing on market failure and the failure of food security policy distracts from the benefits that the market status quo bestowed on other market actors during this same period. This analysis seeks to advance the call made by Margot Salomon and others, who have argued that matters of poverty and hunger have to be understood in relational terms.¹⁶ The argument developed in Part Three takes issue with the evident tendency to invoke poor policymaking by domestic governments in countries affected as an underlying cause of the crisis. As a growing body of critical scholarship has shown, the ability of these countries to make policy that could benefit the hungry has been constrained by dictates emanating from the international arena.¹⁷ This section of the article focuses explicitly on the contribution of law in this context. It will map the different ways in which legal rules, regimes, and discourse form part of a global legal order that has to be understood as a producer of hunger in the world. Part Four will conclude by drawing attention to a number of limitations to the use of legal tools to address world hunger, most notably, an unwillingness to acknowledge that it may precisely those bodies of law that constitute the global food system that are standing in the way of this goal.

2. The ‘Global’ Food Crisis: Rethinking the Rhetoric of Failure

An initial objection that can be raised to the language used to discuss the global food crisis is the somewhat casual use of the term ‘global’. The price volatility did affect international commodity markets and many countries registered some effects. However, this was in no sense a global crisis in terms of the magnitude of those effects. Levels of transmission of the volatility into the domestic economy varied significantly between

¹⁶ Margot Salomon, ‘Why should it matter that others have more? Poverty, inequality, and the potential of international human rights law.’ *LSE Working Paper*, 2010, <http://www.lse.ac.uk/humanRights/documents/2011/SalomonIRLS.pdf> accessed 16 February 2017.

¹⁷ Waldon Bello, Shea Cunningham and Bill Rau. *Dark Victory: The United States, Structural Adjustment and Global Poverty* (Chicago, Pluto Press, 1999); Arturo Escobar, *Encountering development: the making and unmaking of the Third World*. (Princeton: Princeton University Press, 2011); Richard Peet, *Unholy Trinity: the IMF, World Bank and WTO* (London: Zed Books, 2003).

different countries.¹⁸ Food price inflation was typically far greater in poorer countries in the global South than in many richer ones in Europe, or in the US.¹⁹ In terms of domestic food price inflation, increased poverty and malnutrition, and the duration of the impact, people living in low-income countries in the global South were overwhelmingly worst affected.²⁰ Nor was the impact of the price volatility within countries evenly distributed. While richer consumers were able to afford rising prices, or source their food elsewhere, the poor in countries both wealthy and impoverished suffered most. The groups impacted most severely were casual wage laborers (both rural and urban), land-poor farmers, petty traders, and producers of commodities—notably pastoralists in Kenya, cotton farmers in Benin and tea workers in Bangladesh.²¹

Moving on to consider why these populations suffered most acutely, this is commonly attributed to pre-existing ‘food insecurity’ in the countries affected.²² Yet, as a number of scholars have argued, the lens of food insecurity is a relatively weak one. It fails to bring into focus the deeper structural reasons animating the lack of access to food that publications like the State of Food Insecurity in the World (SOFI) document so meticulously.²³ In the HLTF’s Comprehensive Framework for Action ‘inadequacies’ in the structure and functioning of the global food system are acknowledged. Increasing inequalities in access to and control over productive resources, decades of under-investment in agriculture, and a lack of support for social safety nets are identified as key contributors to food insecurity.²⁴ Yet, there is little attempt to connect these phenomena in a meaningful way, or to explain the either the history or policy climate in which this pervasive disenfranchisement came about. Described without being explained, these problematic features of the environments in which the food insecure

¹⁸ Sharada Keats et al, ‘Food price transmission: rising international cereals prices and domestic markets,’ ODI Project Briefing no.48, October 2010, <https://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/6240.pdf> accessed 16 February 2017.

¹⁹ Maros Ivanic and Will Martin, ‘Implications of higher global food prices for poverty in low-income countries.’ World Bank Working Paper, WPS 4594, 2008, http://www.fanrpan.org/documents/d00529/WB_food_prices_report_Apr2008.pdf accessed 16 February 2017.

²⁰ *Supra* Keats, note 18.

²¹ *Supra* Ivanic and Martin, note 19, at iii.

²² Food insecurity is defined by the FAO as ‘[a] situation that exists when people lack secure access to sufficient amounts of safe and nutritious food for normal growth and development and an active and healthy life’. FAO, ‘Basic definitions,’ <http://www.fao.org/hunger/en/> accessed 26 June 2016.

²³ For critical commentary on food insecurity see Erid Holt-Giménez, ‘Food security, food justice, or food sovereignty. Crises, food movements, and regime change.’ in Alison Hope Alkon, and Julian Agyeman (eds.) *Cultivating food justice: Race, class, and sustainability* (The MIT Press, 50644th edition, 2011), at 309-330; See further Raj Patel, ‘Food sovereignty.’ *The Journal of Peasant Studies*, 2009, 36(3).

²⁴ *Supra* HLTF, note 10, at 2.

are immersed read as natural characteristics of their surroundings.²⁵ For all of the apparent progress beyond attributing hunger to the ‘vagaries of nature’,²⁶ a tendency identified by Susan George in the 1980s, food insecurity continues to be largely attributed to domestic environments in which the food insecure are blighted by a lack of resources (natural and financial), inundated with diseases, uprooted by conflict, and in this latest episode, destabilised by volatile food prices. When concrete governments and policies do come into the frame of analysis, it is largely domestic policy making within food insecure states that is seen to be at fault. Repeated references to ‘Africa’s poor track record’ in agricultural production,²⁷ and ‘under-investment in agriculture’,²⁸ alongside observations that most poor households were ‘left to cope on their own with high price rises’ evince criticism of these states.²⁹ This is reinforced by a tendency to characterise institutions in the South as being ‘weak’ and governance as being ‘poor’ without an explanation of the criteria that have warranted such an assessment.³⁰ By contrast, governments of countries in the global North, even those that export large volumes of grain, such as the US, rarely figure at all in analysis of the causes of the global food crisis. They appear only after the fact, as leading members of the ‘international community’, acting in an ameliorative capacity. Links between the international community and responsibility for the global food crisis—if and when they are made—are typically framed in terms of failure.³¹

The vernacular of failure is prevalent throughout the literature on the causes of the crisis. Analysts continue to position ‘crop failure’ as a proximate cause of the price volatility,³² despite evidence that the spikes in 2007-8 and 2010-11 cannot convincingly be attributed to a lack of supply of the grains in question.³³ It is also common to read of the ‘failure of the

²⁵ *Ibid.*

²⁶ Susan George, *How the other half dies. The real reasons for world hunger.* (Washington DC, Rowman & Littlefield Publishers, 1989), at 46.

²⁷ Derek Heady and Shenggen Fan, ‘Reflections on the Global Food Crisis: How Did It Happen? How Has It Hurt? And How Can We Prevent the Next One?’, International Food Policy Research Institute, Research Monograph, 2010, no. 65, at 2.

²⁸ *Supra* HLTF, note 10, at 2.

²⁹ *Supra* Keats, note 18, at iv.

³⁰ FAO, ‘The State of Food Security in the World 2014: Strengthening the enabling environment for food security and nutrition’, 2014, <http://www.fao.org/3/a-i4030e.pdf> accessed 16 February 2017, at 14.

³¹ Committee on Economic Social and Cultural Rights, ‘Statement on the World Food Crisis’ (2008) UN Doc E/C.12/2008/1, para 9.

³² See Geoffrey Lean attributing the global food crisis almost entirely to failures in supply. Geoffrey Lean, ‘There’s a food crisis coming. Are we ready?’ *The Telegraph*, 14 August 2015.

³³ Analysts at the UK Department for Environment Food and Rural Affairs (Defra) have emphasised, there was ‘comfortably enough food globally’ when prices skyrocketed in 2007-08. DEFRA, ‘The 2007/08 Agricultural

global food system'.³⁴ Another prevalent trend is to posit the global food crisis as an instance of 'market failure'—the heuristic now widely employed by economists and policy makers to discuss when governmental intervention in the market is and isn't warranted.³⁵ In some respects, the invocation of market failure to explain the crisis is has critical bite as it acknowledges that the self-interested pursuit of profit in the global food system has resulted in sub-optimal social outcomes. The problem pertains in that the use of the term market failure creates the impression that the socially sub-optimal pursuit of profit was taking place in markets that operating beyond, or at a distance from, government supervision and regulation. This, as will be discussed in Part Two, is misleading. Rather than being brought about by 'free' markets operating inefficiently, as a market failure analysis would suggest, the operations of international commodity markets prior to the crisis were a function of active government interventions and market policies. It has been those policies and laws—and many of them orchestrated at the international level—that *actively enable and encourage* self-interested, profit-seeking market behaviour and not *the inadequate constraint of that behaviour* that can be seen to be at the root of the global food crisis.

Of significant import is the fact that the dominance of failure discourse also elides the extent to which other actors were experiencing what can only be understood as market success at this time. Large grain multinationals including Glencore and Cargill made record profits during the food crisis.³⁶ Cargill reported an approximate 70 per cent increase in its profits compared with 2007 and an increase of 157 per cent compared with 2006.³⁷ Other beneficiaries were financial and commercial actors speculating on volatile grain price via

Price Spikes: Causes and Policy Implications,' <http://archive.defra.gov.uk/foodfarm/food/pdf/ag—price100105.pdf> accessed 26 June 2016, at 9.

³⁴ Jim Harkness, *The 2050 challenge to our global food system*, 2011, <http://www.iatp.org/documents/the-2050-challenge-to-our-global-food-system> accessed 27 June 2016.

³⁵ In economics the concept of market failure refers to a situation in which resources cannot be allocated efficiently due to the breakdown of the price mechanism. This can be caused by factors such as information failure, missing or incomplete markets, monopoly power, and negative social externalities. See 'Economics Online', http://www.economicsonline.co.uk/Market_failures/Types_of_market_failure.html accessed 26 June 2016.

³⁶ Joachim Von Braun, 'Food and Financial Crises: Implications for Agriculture and the Poor,' International Food Policy Research Institute, 2008, <https://core.ac.uk/download/pdf/6289061.pdf> accessed 16 February 2017, at 7.

³⁷ GRAIN, 'Corporations are still making a killing from hunger', April 2009, <http://www.grain.org/seedling/?id=592> accessed 16 February 2017.

instruments such as commodity index funds.³⁸ Goldman Sachs made around \$5 billion from commodities trading in 2009,³⁹ and JP Morgan made \$2.8 billion from commodity transactions, which made up more than a quarter of the bank's principal transactions in 2011.⁴⁰ As NGOs like Global Justice Now and Oxfam emphasise, speculation in financial instruments linked to the price of grain made a significant contribution to commodity price volatility during this period.⁴¹

Writing on poverty and human rights law, Salomon has argued that it is essential for international lawyers to think of poverty in terms of the inequality that characterises our contemporary world order.⁴² Salomon's analysis of the position of the world's poor also applies to the world's hungry: it is not (just) that they cannot afford to participate in global markets to access food, but they are unable to participate *as others do*.⁴³ A 2002 study by Mike Davis speaks to the significance of this imbalance in market power. Davis's study demonstrated that a number of late 19th century famines that had been attributed to variations in temperature caused by the El Niño-Southern Oscillation, were, to a significant extent, produced by the incorporation of poorer countries into global market structures. The market power of richer consumers was behind the famine: 'Londoners were in fact eating India's bread',⁴⁴ he concludes. Similarly, behind the 'supply and demand' factors routinely named as causes of the global food crisis one finds a host of other human beings who were benefiting from the same market events.⁴⁵ The same grain that could have fed hungry people in 2007-11

³⁸ Terry Jones, 'The great hunger lottery: How bank speculation causes food crises,' World Development Movement Report, 2010, <http://www.globaljustice.org.uk/resources/great-hunger-lottery-how-banking-speculation-causes-food-crises> accessed 16 February 2017, at 9.

³⁹ Goldman Sachs, '2009 Annual Report' <http://www2.goldmansachs.com/our-firm/investors/financials/current/annual-reports/2009-complete-annual.pdf> accessed 25 June 2016.

⁴⁰ 'Challenges for Regulators Financial Players in the (Food) Commodity Derivatives Markets,' SOMO Briefing Paper, 2012, <https://www.somo.nl/wp-content/uploads/2012/11/Challenges-for-Regulators-web.pdf> accessed 16 February 2017, at 3.

⁴¹ Ben Lilliston and Andrew Ranallo (eds), 'Excessive Speculation in Agriculture Commodities: Selected Writings from 2008-2011' Institute for Agriculture and Trade Policy (IATP) Report, 2011, <http://www19.iadb.org/intal/intalcdi/PE/2011/08247.pdf> accessed 16 February 2017.

⁴² *Supra* Salomon, note 16.

⁴³ *Ibid*, at 13.

⁴⁴ Mike Davis, *Late Victorian holocausts: El Niño famines and the making of the third world* (New York: Verso, 2002) at 7, 26, and 299.

⁴⁵ The most commonly cited proximate causes of the global food crisis are poor harvests leading to low stock levels, increased consumption of meat by consumers in emerging economies, high oil prices, the imposition of export bans, a low US dollar, increased production of biofuels, and speculation in commodity derivative instruments linked to grain prices. FAO, 'Report on The State of Agricultural Commodity Markets: What happened to world food prices and why?', 2009, <ftp://ftp.fao.org/docrep/fao/012/i0854e/i0854e01.pdf> accessed 16 February 2017.

was being purchased by farmers to feed cattle to produce beef. Other grains, particularly maize, benefited those who fuel engines with biofuel, or profit from its sale. Speculators and agribusiness were able to profit by investing in both physical grain and in commodity derivatives, playing both sides of the market. If it follows that powerful actors who benefited from commodity market dynamics during this period are also likely to have exerted greater influence over both the operation of the markets, and over pertinent policymaking for those markets, is it really convincing to continue ascribing these events to policy and market ‘failures’?

Upon scrutiny, many of the strategies posited to tackle world hunger in the post-crisis period fall squarely into the trap discussed by Salomon, and also by Craven, which is to focus too much on scarcity to the detriment of questions of distribution.⁴⁶ The result is the propagation of solutions which attempt to elevate the market power of the hungry without providing an account of how this can be achieved without reducing the market power of other actors—an argument that will be developed in Part Three. The next section will focus on the role of the global legal order in constituting the market power of wealthy actors in the global economy, and in entrenching conditions of precariousness for hungry peoples.

3. The Global Legal Order as a Producer of Hunger in the World

The lens of food security has dominated analysis of the causes of hunger since the 1980s, when the development economist Amartya Sen revolutionised thinking on the causes of famine with his analytic of ‘entitlements’.⁴⁷ Sen demonstrated that, more often than not, hunger is suffered not because of a lack of available food, but due to the inability of people to command access to food in a market economy. His most valuable contribution is often said to be that it shifted attention away from a fixation on food supplies.⁴⁸ One of the greatest drawbacks of his approach is that it has helped to promote an almost obsessive focus on the various forms of ‘lack’ suffered by the ‘food insecure’ without prompting much

⁴⁶ *Supra* Salomon, note 16, at 18; Matthew Craven, ‘The Violence of Dispossession: Extraterritoriality and Economic, Social and Cultural Rights’ in Mashood Baderin and Robert McCorquodale (eds), *Economic, Social and Cultural Rights in Action* (Oxford, Oxford University Press, 2007), at 86.

⁴⁷ Entitlements can be defined as the socially determined rights and opportunities which enable people to legally command access to food. Amartya Sen, *Poverty and Famines: An Essay on Entitlement and Deprivation* (Oxford: Oxford University Press, 1981).

⁴⁸ *Ibid.*

consideration of the historical and political reasons for that lack.⁴⁹ This focus on lack—a lack of title to land, lack of resources, lack education, and, more broadly, of economic power and economic development—can mean that those that are more entitled remain outside of the frame of analysis, as discussed above. Others, including Edkins, are critical of Sen on the basis that his use of the word ‘entitlement’ ‘does not reflect in any sense a concept of the right to food or a concept of what people might be entitled to as a human right or as a question of justice’.⁵⁰ While Edkins may be correct on that score, an often overlooked merit of Sen’s work is that it can also be read as a subtle but nonetheless powerful critique of a society in which famine ‘reflects legality with a vengeance’—the final sentence of his acclaimed book.⁵¹ What his work also demonstrates is that hunger and famine are, more often than not, products of the legal system. It is not just *Sen’s use* of the word ‘entitlement’ that is insensitive to the human right to food or questions of justice—it is *the legal system itself that is unresponsive*. At least, this would appear to be the case in the type of legal system that typically underpins a market society—a legal system in which food is a commodity to be bought and sold for profit by those able to claim ownership of it.

The following sections will attempt to lend precision to how the interplay of legal concepts, legal discourse, legal institutions, and legal regimes—many of them part and parcel of public international law—has helped to produce and sustain the sufferance of hunger worldwide.

A. Colonialism, Developmentalism, and Public International Law

The civilising mission of nineteenth century international law was centred on the ‘dual mandate’—the belief that colonialism brought industrial benefit for Europeans, and progress for the native races of the colonies.⁵² Natives were to be helped to make productive use of the abundant raw materials in their territories that lay ‘wasted and ungarnered’ because they ‘did not know their use and value’.⁵³ Colonial practices advanced under this mandate had a

⁴⁹ For more critical analysis of Sen, see Ben Fine, ‘Entitlement failure?’ *Development and Change*, 1995, 28: 617-647 and Jenny Edkins, *Whose Hunger? Concepts of Famine and Practices of Aid*. (Minnesota: University of Minnesota Press, 2000).

⁵⁰ *Ibid*, Edkins, at 59.

⁵¹ *Supra* Sen, note 47, at 166.

⁵² Frederick. D. Lugard, *The Dual Mandate in Tropical Africa* (London: Frank Cass, 1965).

⁵³ *Ibid*, at 615.

profound impact on both present and future dynamics of agricultural production within colonised states. Enforced export specialisation meant that large tracts of prime agricultural land in India, Africa, and the Americas were shifted from food production to cash crop production.⁵⁴ Infrastructure, such as railways and roads, were built to carry products from the interior to the coast, and not to encourage or facilitate trade within the region.⁵⁵ This increased countries' reliance on imports for food staples, and particularly grain.⁵⁶ Furthermore, access to a new abundance of raw materials and cheap imports gave the colonising countries a huge economic advantage, enabling them to industrialise and develop their economies in the same period.⁵⁷ This put former colonies at a further structural disadvantage as they were incorporated into the 'global machinations of things'.⁵⁸

As Anthony Anghie has shown, colonial trespasses were advanced under legitimating framework of public international law that reconciled exploitative treatment of native populations on the basis that they were 'uncivilised' and therefore undeserving of the same rights as 'civilised' Europeans.⁵⁹ Beyond law's role as a legitimating framework, other legal transplants, including the sale of labour power and private property, contributed to the spread of European modes of legal consciousness during this period. Kennedy has related how new distinctions between the private and public realms were erected, and a culture of individualism and commitment to interpretive formalism was fostered through new legal institutions that were set up.⁶⁰ Thus, the transference of legal norms can also be understood to have contributed to a shift in the mind sets of many colonised peoples, who began to relate to their land, work, social and economic institutions, and to one another other in new ways. It was largely as a consequence of a Liberal legal inheritance, Kennedy maintains, that, post-decolonisation, many newly independent states simply ratified 'whatever schemes of economic and social hierarchy emerged out of the play of violence and culture on the

⁵⁴ Carmen Gonzalez, 'The Global Food Crisis: Law, Policy, and the Elusive Quest for Justice' *Yale Human Rights and Development Law Journal*, 2010, 13, at 435.

⁵⁵ Peter Robbins, *Stolen fruit: the tropical commodities disaster* (London: Zed Books, 2003).

⁵⁶ *Ibid.*

⁵⁷ Liz Young, *World Hunger* (London: Routledge, 1997), at 173.

⁵⁸ Michael Fakhri, *Sugar and the Making of International Trade Law* (Cambridge: Cambridge University Press, 2014), at 30.

⁵⁹ Anthony Anghie, 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law.' *Harvard International Law Journal*, 1999, 40(1), at 29.

⁶⁰ David Kennedy, 'Three Globalizations of Law and Legal Thought.' in David Trubek and Alvaros Santos (eds), *The New Law and Economic Development: A Critical Appraisal* (Cambridge: Cambridge University Press, 2006), at 28-29 and 36.

ground'.⁶¹ Land ownership in many places in the global South continues to be skewed in favour of traditional landholding elites, many of whom continue to effectively obstruct or dilute efforts at land reforms that could enhance food production for domestic populations.⁶²

A further set of legal constraints carried over from the colonial period have a private law character. During the colonial period, a system of international economic law was nascent, based on free trade, the gold standard and private international law. Newly independent nations seeking to trade had to join this game strictly on the terms proposed, that is, within the structure of legal rules already in place, or 'starve in the dark'.⁶³ While the legal status of colonies within the international legal order changed upon decolonisation, many of the terms and conditions of their engagement in global commerce remained in place. Yet, it was not only such colonial hangovers that ensured ongoing disadvantage for Southern populations. The prescripts of the new 'inclusive' international legal order, in particular, those emanating from the Bretton Woods economic institutions (BWIs), resulted in further interference in the domestic affairs of former colonies in line with the economic order of the day. Updating Anghie's analysis, Sundhya Pahuja explores the role of international law in the facilitation of such 'neo-colonial' development practices.⁶⁴ Nation-statehood and sovereignty, Pahuja reinforces, are not neutral legal categories but are shaped by their distinctively European lineage. It was in trying to obtain this political and legal status, she claims, that former colonies became vulnerable to development doctrine during the process of decolonisation. They positioned themselves in a historical continuum in which European states were to be emulated.⁶⁵ The treatment of development as a technical issue under international law further disguised the highly political nature of the trespasses made on state sovereignty by international institutions. As Pahuja emphasises throughout her book, while development practices have not always taken an overtly legal form, they have been extended under the broader structures of international law and its claim to legality.

⁶¹ *Ibid*, at 36.

⁶² Carmen Gonzalez, 'Trade liberalization, food security and the environment: The neoliberal threat to sustainable rural development.' *Transnational Law and Contemporary Problems*, 2004, 14, at 437.

⁶³ *Supra* Kennedy, note 60, at 58.

⁶⁴ Sundhya Pahuja, *Decolonising International Law* (Cambridge, Cambridge University Press, 2011).

⁶⁵ *Ibid*, at 45.

1. *Development doctrine*

As Rist has noted, the main ingredients of development ‘doctrine’ in the post-war period have ‘hardly changed since’.⁶⁶ They comprise the promotion of economic development by exporting raw materials, the fostering of comparative advantage supposed to benefit all market traders, and making productive use of foreign investment and capital.⁶⁷ What has changed significantly, however, is accepted opinion on how the state should go about the ensuring the conditions for economic development. During the 1950s and 1960s, development policy focused on the role of the state in actively managing the economy and transforming traditional societies.⁶⁸ A radical shift in the 1980s postulated the contrary: the state should refrain from ‘interfering’ with the economy, and should, in effect, self-dismantle in order to focus on ‘getting prices right’ by promoting fiscal discipline, removing distortions created by state intervention, and promoting liberalised trade with as few barriers to entry and exit as possible. The impact of both state-mandated developmentalism and the latter era of ‘economics imperialism’⁶⁹ on agricultural production has much to with creating the vulnerabilities that led to the global food crisis in 2007-11.

In the post-war period, many former colonies embarked on a programme of import substitution industrialisation attempting to replicate the industrialisation model of developed states.⁷⁰ Many governments in former colonies taxed farmers and rural populations transferring income to urban dwellers.⁷¹ This impacted dramatically upon the livelihoods of small farmers and resulted in an increased dependence of low-income countries on food imports. Critically, however, developing countries seeking to gain access to still-protected Northern markets were prevented by the operations of the emerging international trade regime (discussed below). This meant that their efforts at industrialisation not only

⁶⁶ Gilbert Rist, *The history of development: From western origins to global faith* (London: Zed Books, 2002), at 113.

⁶⁷ *Ibid.*

⁶⁸ Anne-Marie Burley-Slaughter, ‘Regulating the world: multilateralism, international law, and the projection of the new deal regulatory state.’ in John Gerard Ruggie (ed.), *Multilateralism Matters: The Theory and Praxis of an Institutional Form* (New York: Columbia University Press, 1993), at 125.

⁶⁹ Ben Fine, ‘“Economic imperialism”: a view from the periphery,’ *Review of Radical Political Economics*, 2002, 34(2).

⁷⁰ Herbert Feis, ‘The Geneva Proposal for an International Trade Charter.’ *International Organizations*, 1948, 22(1), at 47.

⁷¹ W.A. Lewis, ‘Economic development with unlimited supplies of labour.’ *The Manchester School*, 1954, (24)2: 139-191.

impoverished rural communities, they also failed to deliver the much sought-after increase in revenue.⁷² In the 1960s, a new solution for developing economies was found in the application of science and technology to the task of boosting crop yields. While delivering record levels of grain production, the so-called ‘Green Revolution’ exacerbated and entrenched conditions of food insecurity. Access to prescribed technologies favoured already-wealthy farmers and prejudiced the interests of small farmers and local consumers.⁷³ The Green Revolution also promoted fossil-fuel-reliant industrialised agricultural production, fostered reliance on expensive inputs, displaced local populations, and destroyed ecosystems.⁷⁴ This also served to enhance the power of multinational companies and suppliers of these inputs. As George highlights, ‘any choice of technology automatically means also the choice of its supplier—the seller—and thus of a long-term partner’.⁷⁵ Agrifood, seed, fertiliser and pesticide companies expanded and became increasingly transnational in this period.⁷⁶

Recent scholarship has exposed the many flaws animating the ambitions of former colonies to industrialise. As Rist argues, economic strategies for industrialisation were pursued ‘as if the existence of industrial countries did not radically alter the context in which candidates for industrialization have to operate’.⁷⁷ The world was conceived ‘not as a structure in which each element depends upon the others, but as a collection of formally equal “individual” nations’.⁷⁸ Rist locates the tunnel vision of developing country governments in the power of economic ideology—that of the ‘self-made man’.⁷⁹ Whilst economic ideology was doubtless influential, the view of the world as a collection of ‘formally equal “individual” nations’ was also firmly impressed on countries in the South by the doctrines and categories of public international law.

⁷² *Supra* Gonzales, note 62.

⁷³ Vandana Shiva, *The Violence of the Green Revolution: Third World Agriculture, Ecology and Politics*. (London: Zed Books, 1991).

⁷⁴ Lori Ann Thrupp, *Cultivating Diversity: Agrobiodiversity and Food Security* (World Resources Institute 1999), 28-29.

⁷⁵ *Supra* George, note 26, at 97.

⁷⁶ *Ibid.*

⁷⁷ *Supra* Rist, note 66, at 75.

⁷⁸ *Ibid.*

⁷⁹ *Ibid.*

2. *Economics Imperialism*

The shift towards a more radical ‘free market’ agenda in the 1980s meant that market efficiency became the overriding objective of the development policy. Debt accumulated by developing countries as a result of dependence on oil and reliance on foreign capital to fund industrialisation was leveraged by the BWIs into strict conditions on the loans which it began extending to these countries, ostensibly to rescue them from this predicament. The philosophy behind ‘structural adjustment’ involved ‘putting exporters first, liberalising imports, privatisation and fiscal reform’.⁸⁰ In line with this thinking, many states in the South were instructed to expand agricultural commodity exports in order to maximise the revenues available to service the foreign debt.⁸¹ They were further instructed to devalue their currencies in order to make their exports more competitive. However, as many countries were urged into a similar strategy at the same time, this resulted in oversupply of exports in which they were specialising—cash crops and tropical commodities.⁸² Again, development prescriptions did not live up to their promise.

Another condition of the loans granted by the IMF and World Bank was the liberalisation of agriculture.⁸³ Government-controlled marketing boards that had acted as intermediaries between small farmers and multinational companies during the 1950s and 1960s were disbanded. Also discouraged and progressively dismantled were national grain reserves.⁸⁴ This left individual farmers with limited bargaining power to negotiate with large agribusiness, and resulted in declining terms of trade.⁸⁵ In the contemporary context, Peter Rosset is one among many to have argued that the failure to keep adequate public grain reserves significantly worsened the effects of the market volatility in 2007-11.⁸⁶ Financial liberalisation throughout the 1980s further opened up the economies of developing countries to destabilising flows of international capital. These changes divested governments of the ability to control the price of food domestically. A coercive relationship with the BWIs led to

⁸⁰ World Bank, ‘*Adjustment in Africa: reforms, results, and the road ahead.*’ World Bank Policy Research Report (1994), at 4.

⁸¹ *Supra* Gonzales, note 62, at 469.

⁸² *Supra* Robbins, note 55.

⁸³ Bill Winders, ‘The Food Crisis and the Deregulation of Agriculture.’ *Brown Journal of World Affairs*, 2011, 18, at 90.

⁸⁴ Sophia Murphy, ‘Grain Reserves: A Smart Climate Adaption Policy,’ in Ben Lilliston and Andrew Ranallo (eds), *supra* note 41, at 18.

⁸⁵ *Supra* Winders, note 83, at 31.

⁸⁶ Peter Rosset, ‘Food sovereignty and the contemporary food crisis.’ *Development*, 2008, 51(4).

an increasingly coercive relationship with global commodity markets. As George has argued, '[a] nation loses its freedom of decision when it gears its production to exports whose prices it does not control in exchange for imports of the vital foods whose prices it does not control either'.⁸⁷ More broadly, structural adjustment programmes impacted radically the ability of debt-burdened states to make social policy.⁸⁸ Thus, the mandates imposed by international economic institutions have thus been a critical factor in the now lamented 'absence' of social safety nets, 'lack' of investment in agriculture, and 'poor track record' in agricultural production now being laid at the feet of domestic governments.

Significantly, agricultural and financial liberalisation was only made possible by alternative legal arrangements facilitating market-based solutions to new currents of volatility, such as private insurance schemes. Contract-based 'market technologies'—commodity futures and derivatives—were touted as an improved tool for price (and risk) regulation.⁸⁹ However, many small farmers were unable to afford the minimum transaction required on futures markets—the minimum value for a contract for coffee in 2002 being \$18,000.⁹⁰ As Oxfam has underlined, where private traders have moved in to replace the state, they have sometimes done so on highly unfavourable terms for poor farmers.⁹¹ This assessment is only half correct. In fact, the state was not *replaced* by private traders, its role was reconfigured. Governments actively employed property and contract law, company law, bankruptcy and tax regimes, and competition law to constitute and operate markets in private law instruments —backed by national courts — to fulfil public goals of economic stability and financial risk management.⁹²

⁸⁷ *Supra* George, note 26, at 233.

⁸⁸ Anne Orford, 'Locating the International: Military and Monetary Interventions after the Cold War,' *Harvard International Law Journal*, 1997, 38, at 465.

⁸⁹ Graham Donaldson, 'Food Security and the Role of the Grain Trade,' *American Journal of Agricultural Economics*, 1984, 66(2), at 190.

⁹⁰ *Ibid.*

⁹¹ Oxfam, *Causing Hunger: An overview of the food crisis in Africa*, Oxfam Briefing Paper 91, (2006) <https://www.oxfam.org/sites/www.oxfam.org/files/Causing%20Hunger.pdf> accessed 16 February 2017.

⁹² For further discussion of the role of private law in governance and social ordering see Robert Wai, 'Transnational Private Law and Private Ordering in a Contested Global Society,' *Harvard International Law Journal*, 2005, 46.

B. Comparative Disadvantage and Disenfranchisement: International Trade and Investment Regimes

It is now well established that the ability of countries in the South to ‘develop’ as enjoined was seriously curtailed by their inability to ‘join the club’ of the international trade regime.⁹³ Agricultural products were almost entirely exempted from the most important General Agreement on Tariffs in Trade’s (GATT) market access obligations.⁹⁴ The ability of the US and the states of the EU to continue subsidising agriculture through policies like Common Agricultural Policy transformed many of rich countries from net food importers to net food exporters over this period.⁹⁵ Meanwhile, poorer countries, forced to lower barriers to entry for manufactured goods made in the North and encouraged to specialise in agricultural exports, were unable to gain access to Northern markets, leaving them in a highly precarious and disadvantaged position.⁹⁶ Gonzales has argued that even on an ideational level comparative advantage disadvantages the global South. By de-historicising the relative advantages of nations in the global North and South it ‘relegates these nations to economic specialization in their traditional exports—even if this specialization was imposed rather than chosen and even if it is disadvantageous under current market conditions’.⁹⁷

In reply to the complaints of developing countries, the Agreement on Agriculture (AoA), negotiated during the Uruguay Round of trade negotiations between 1986 and 1994, purported to mitigate inequities in international agricultural trade by gradually dismantling agricultural subsidies in the Northern economies. However, ambiguities in the agreement’s key provisions enabled developed countries to maintain high levels of agricultural protectionism. Notably, whilst the AoA’s market access provisions required WTO members to convert quantitative restrictions and other non-tariff barriers into tariffs, and to reduce these over time, the absence of specific guidelines on how to do so meant that the majority of developed countries engaged in ‘dirty tariffication’—the adoption of tariffs far more trade

⁹³ Stephen Humphreys, *Theatre of the rule of law: transnational legal intervention in theory and practice* (Cambridge: Cambridge University Press, 2010), at 213.

⁹⁴ Carmen Gonzalez, ‘Institutionalizing Inequality: The WTO Agreement on Agriculture, Food Security, and Developing Countries,’ *Columbia Journal of Environmental Law*, 2002, 27: 440-446.

⁹⁵ Between 1950 and 1997, the EU’s share of exports for wheat, rice and maize increased from 5 to 17.9 per cent. FAO, ‘Half a Century of Food and Agriculture,’ FAO Corporate Document Repository, 2000, ‘The 1980s’, <http://www.fao.org/docrep/x4400e/x4400e09.htm> accessed 26th June 2016.

⁹⁶ *Supra* Gonzales, note 94, at 434.

⁹⁷ Carmen Gonzalez, ‘Deconstructing the Mythology of Free Trade: Critical Reflections on Comparative Advantage,’ *Berkeley La Raza Law Journal*, 2006, 17: 65, at 72.

restrictive than the non-tariff barriers they replaced.⁹⁸ The highest tariffs were for sugar, tobacco, meat, milk products, cereals and, to a lesser degree, fruits and vegetables—precisely the products of particular interest to developing countries.⁹⁹ The agreement also allowed countries that subsidised at the time to keep doing so, subject to certain reduction obligations, while prohibiting the introduction of new subsidies. These measures effectively granted exclusive rights to subsidise to wealthy states in the North, entrenching existing levels of market distortion.¹⁰⁰ A 1999 study by the FAO on the impact of the AoA in sixteen developing countries found that the Agreement resulted in an increase in food imports and an accompanying decline in food production.¹⁰¹

The shift over the past decade away from the ad hoc approach characteristic of the GATT to the pursuit of what Ostry has called ‘detailed legalisms’¹⁰² is often celebrated as a triumph.¹⁰³ However, the harmonisation agreements negotiated under the auspices of the WTO has prejudiced developing countries by preventing them from enacting policies to improve their economic position globally. The reach of international influence over domestic policy has been extended by the designation policies that impact on trade indirectly as ‘behind the border’ measures equating to ‘trade distortions’. As both Rorden¹⁰⁴ and Lang¹⁰⁵ have explored, over time, a more radical free market agenda has been institutionalised at the WTO, and has been enforced and reinforced by a compulsory judicialised dispute-settlement regime.¹⁰⁶ Agriculture and food security continue to be highly politicised topic, resulting in the prolonged deadlock of negotiations at the Doha Development Round.¹⁰⁷ Nevertheless, the free trade agenda continues to be advanced through other regional arrangements relating to ‘behind the border’ measures, such as the Transatlantic Trade Partnership (TTIP) and the Trans-Pacific Partnership (TPP), currently under negotiation. The advent of Brexit and the

⁹⁸ *Supra* Gonzales, note 94, at 458.

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid.*, at 461.

¹⁰¹ FAO. ‘Experience with the implementation of the Uruguay Round Agreement on Agriculture’, Paper no. 3, FAO Symposium on Agriculture, Trade and Food Security, Geneva, 23rd-24th September 1999, available at <http://www.fao.org/docrep/meeting/x3065e.htm> Last accessed 26th June 2016.

¹⁰² Sylvia Ostry, *The Post-Cold War Trading System* (Chicago: University of Chicago Press 1997), at 89.

¹⁰³ *Ibid.*, at 101.

¹⁰⁴ Rorden Wilkinson, *Multilateralism and the World Trade Organisation: the architecture and extension of international trade regulation* (London: Routledge, 2006).

¹⁰⁵ Andrew Lang, *World trade law after neoliberalism: Reimagining the global economic order* (Cambridge, Cambridge University Press, 2011).

¹⁰⁶ *Ibid.*, at 18.

¹⁰⁷ Jennifer Clapp, ‘WTO Agriculture Negotiations: Implications for the Global South.’ *Third World Quarterly* 2006, 27.

election of Donald Trump in the US have been suggested by some to herald the return to a more protectionist era.¹⁰⁸ However, international institutions such as the Organisation for Economic Development (OECD) continue to push hard for the advancement of trade liberalisation, and many expect the TPP agenda to advance with or without the US.¹⁰⁹ As concerns the European context, critics point to a new agreement that looks set to continue the advances made towards further liberalisation on a regional basis. As George Monbiot writes of the proposed Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada, ‘TTIP has been booed off the stage but another treaty, whose probable impacts are almost identical, is waiting in the wings’.¹¹⁰ An emerging consensus is that this sidestep into regionalism is likely to mean that low-income countries in the South are left with even less power over the elaboration of international trade rules than under the WTO regime.¹¹¹ In a throw-back to the origin of the GATT, one again, powerful states appear to be in the business of creating trading clubs in which weaker countries are not offered a seat at the table, but are nonetheless forced to eat—or to not eat—as a consequence of their rules.

Turning to international investment law (and returning to the period following decolonisation), the attempts of nationalist movements global South to use international law to advance their rights epitomise Pahuja’s thesis regarding the ‘false promise’ of international law.¹¹² Attempting to contest the claims of former colonists to their resources, new nations drew on the right of peoples and nations to self-determination to make a claim for ‘permanent sovereignty’ over their natural resources (PSNR). Attempts to articulate these rights as rights of ‘sovereignty’, however, developing countries conspired in the propertisation of natural resources which came to be discussed almost exclusively as commodities to be exploited.¹¹³ Once propertised, the nationalisation of natural resources implicitly raised the question of compensation.¹¹⁴ Attempts to adjudicate these matters stalled, however, between 1959 and

¹⁰⁸ Kate Allen, ‘Protectionism and trade disputes threaten world growth, says OECD’. *The Guardian*, 28 November 2016.

¹⁰⁹ Jeffrey Schott, ‘TPP Could Go Forward without the United States’ Peterson Institute for International Economics, 15 November 2016, <https://piie.com/blogs/trade-investment-policy-watch/tpp-could-go-forward-without-united-states> Last accessed 16 February 2016.

¹¹⁰ George Monbiot, ‘The transatlantic trade deal TTIP may be dead, but something even worse is coming.’ *The Guardian*, 8 September 2016.

¹¹¹ This was the consensus among a number of interlocutors at a workshop convened at the European University Institute (EUI) in June 2016. ‘Normative Reflections on the Transatlantic Trade and Investment Partnership (TTIP): Free Trade, Justice, Democracy, and State Sovereignty,’ Workshop organized by the journal *Global Justice: Theory Practice Rhetoric*, EUI, Fiesole, 22nd June 2016.

¹¹² ‘Introduction’, *supra* Pahuja, note 64.

¹¹³ *Ibid*, at 125.

¹¹⁴ *Ibid*, at 128.

1991, over 400 Bilateral Investment Treaties (BITs) were signed worldwide.¹¹⁵ Typical provisions of BITs included terms governing compensation for expropriation, the repatriation of profits, dispute settlement procedures, national treatment requirements, and ‘most favoured nation’ requirements.¹¹⁶ All of these provisions served to simultaneously to protect the rights of foreign investors and to limit the ability of developing countries to redistribute land, renationalise industries, or carry out reform that could strengthen the ability of local communities to access land and resources to grow food. In the Sahel and East Africa, pastoralists have suffered acutely from the privatisation and fencing of common land, and the alienation of pastures for non-pastoral uses.¹¹⁷ Many of the unexplained ‘constraints’ now seen to impinge on the ability of small farmers to access land and resources stem directly from the protected rights of international investors.

C. Making Market Power: Property, Contract, and Commodification

That the food grains so essential to the diets of people throughout the global South were instead purchased by other market actors during the food crisis is now seen to be an inevitable, if unfortunate, part of the order of things. Yet, as Polanyi has demonstrated, there is nothing particularly natural about a society based on individually self-interested market exchange.¹¹⁸ Existing social ties, both in pre-Industrial Europe and in Europe’s colonies, had to be torn down before they could be replaced with the legal relationships which are the pre-conditions for a market economy.¹¹⁹ It may now seem futile to challenge the pre-eminence of these widely accepted social constructs. Nevertheless, it has to be acknowledged that norms of property and contract are the basis upon which the poor continue to be excluded, marginalised, and made dependent on inequitable market structures to access the most basic means of survival. Those who have lost out in the push for an industrial revolution, or in the march towards ‘civilisation’ and modernity, continue to lose out as a result of the legal rights that entrench the distribution of resources forged through these ‘advances’. Rights to exclude others from using land and resources, along with contractual relationships positioning the

¹¹⁵ Michael Geist, ‘Toward a General Agreement on the Regulation of Foreign Direct Investment,’ *Law and Policy in International Business*, 1995, 26, 3, at 673 and 684.

¹¹⁶ A.T. Guzmán, ‘Explaining The Popularity of Bilateral Investment Treaties: Why LDCs Sign Treaties That Hurt Them,’ *Jean Monnet Archive Papers*, 1997, “iv. The Paradoxical Behavior of Developing States”.

¹¹⁷ Oxfam, ‘Causing a food crisis, supra note 91 , at 18.

¹¹⁸ Karl Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time* (London, Beacon Press, 2002).

¹¹⁹ Max Weber, *Economy and society: An outline of interpretive sociology* (University of California Press, 1922).

interests of the contracting parties as paramount, are also the basis for contemporary conflicts over the creation of a global market in land and water rights. Often designated the ‘global land grab’, wealthy states and private actors are buying up farmland in the South to ensure future access to fertile soil. In 2011, Saudi Star PLC acquired 25,000 acres of fertile farmland over a sixty-year lease from the government of Ethiopia for rice export to the Middle East.¹²⁰ While the Ethiopian government claimed that no farmers were displaced as a result of the transaction, investigations reveal that government actors actively worked to remove communities from land prime for commercial agriculture, resulting in the displacement of approximately 135,000 households.¹²¹ As of 2012, private companies were estimated to be contracting for an area eight times the size of the UK.¹²²

As well as colonisation of farmland in the South, webs of contractual relationships allow for the domination of global commodity markets by agribusiness firms. The emergence of what some are calling a ‘Third Food Regime’—differentiated from the post-war global food order by a dominant role for global corporations profiting from agri-food chains¹²³—has only been possible by virtue of property and contract law. ‘Global value chains’ are now presided over by companies who have expanded both vertically and horizontally into new markets growing wheat, harvesting wheat, selling wheat, manufacturing bread, sourcing and refining fuel, modifying and patenting seeds, and selling agricultural insurance. Commodity buyers are now larger and more concentrated than previously, with the five largest traders in grains controlling seventy-five percent of the international trade in grains. They seek both vertical and horizontal consolidation by buying production units, and using explicit contracts that create long-term arrangements with producers, and preferred supplier lists.¹²⁴

A creative alchemy of contractual rights and financial formulae has added another layer of market entitlement that privileges the interests of the wealthy into the mix. Basic future

¹²⁰ Oakland Institute, *Understanding Land Investment Deals in Africa: Saudi Star In Ethiopia*, 2011, http://www.oaklandinstitute.org/sites/oaklandinstitute.org/files/OI_SaudiStar_Brief.pdf accessed 27 June 2016.

¹²¹ *Ibid.*

¹²² Oxfam, ‘Our Land, Our Lives: Time out on the global land rush.’ Oxfam Briefing Note (2012), http://www.oxfam.org/sites/www.oxfam.org/files/bn-land-lives-freeze-041012-en_1.pdf accessed 3rd July 2016.

¹²³ David Burch and Geoffrey Lawrence, ‘Towards a third food regime: behind the transformation,’ *Agriculture and Human Values*, 2009, 26(4).

¹²⁴ ‘The Changing Nature of Food Supply Chains’ in Olivier De Schutter and Kaitlin Cordes, *Accounting for Hunger: The Right to Food in the Era of Globalisation* (London: Hart Publishing, 2011),

contracts have been developed into commodity derivatives allowing financial traders an elective engagement with grain markets via ‘commodity options’,¹²⁵ and channelling non-professional investors into the market via instruments known as ‘commodity index funds’.¹²⁶ Until the food crisis, activity in commodity derivative markets was believed not to have any impact on the underlying price of tangible grains. What is more, law firms continue to develop derivatives, assigning new claims over underlying assets based on the assumption that each individual claim is separate and distinct. However, as Alessandrini has countered, it is precisely through the repetitive processes of enshrining the financial formulae in legal instruments that asset prices are ‘discovered’, or, more accurately, produced.¹²⁷ In commodity markets, this serves as a pricing signal that can impact upon a far broader range of people: farmers, merchants, supermarkets, and consumers. Encouraged by property and contract regimes, parties are trading as if it were only their rights and interests that were relevant; as if the market in commodity derivatives and the market for underlying commodities were unconnected. Yet, as the events of the global food crisis clearly attest, unconnected is precisely what these two markets are not.

The fact that the exercise of property rights and the use of contract is now pervasively normalised does not mean that these bodies of rules are either consistent, or wholly uncontested. There are both points of tension within and questions relating to their normative aspect. As Gorman stresses, large-scale land acquisitions are negotiated only in theory; investors have such leverage in choosing whether to purchase or lease the land, the time period of the lease, the conditions of the contract, and the amount of land to be acquired that there is rarely any bargaining on behalf of local populations.¹²⁸ Transactions between large multinationals and poor farmers who have very low production substitutability, few

¹²⁵ The buyer of an option contract gives the holder the right, but not the obligation, to buy or sell the good. No longer having to go through the rigmarole of ‘offsetting’ futures contracts to avoid physical delivery, options enabled parties to transact more cheaply and with less commitment. ‘Futures and Options Markets’, *The Concise Encyclopedia of Economics*, <http://www.econlib.org/library/Enc/FuturesandOptionsMarkets.html> accessed 27 June 2016.

¹²⁶ Commodity indices are advertised as an asset class that can ‘deliver “equity-like returns” while reducing overall portfolio risk’. As well as making it cheaper and easier to speculate in commodity future markets, these instruments also make trading less risky, and thereby enrol a broader array of market actors — those who are not financial traders by profession — in the speculative trade in commodity futures. Michael Masters and Adam White, ‘How Institutional Investors Are Driving Up Food and Energy Prices.’ in Ben Lilliston and Andrew Ranallo (Eds), *supra* note 41.

¹²⁷ Donatella Alessandrini, ‘Financial Derivatives and the challenge of performance.’ in Emile Cloatre and Martyn Pickersgill, *Knowledge, Technology and Law* (London: Routledge, 2014), at 154.

¹²⁸ Elizabeth R. Gorman, ‘When the Poor Have Nothing Left to Eat: The United States’ Obligation to Regulate American Investment in the African Land Grab,’ *Ohio State Law Journal*, 2014, 75:1, at 215.

resources, and can't afford to exit the market could raise questions of unconscionability—even duress—in contract law. While futures-trading is now long established, there is a query as to how some of the foundational principles of the law of contract seem to have been brushed aside in the trading of futures instruments. How did it come to be that offering to buy a bushel of wheat and then failing to pay for it, or offering to sell a bushel of corn, and then failing to deliver it, is no longer considered a breach? Such concerns have prompted calls for governments to intervene and regulate derivatives trading and investments in land-grabbing. This is a call for legal intervention; yet, as this analysis has sought to highlight, the problem may be not the law that is not yet come, but the law that is already there.

D. *(International) Law and the Global Food System*

As with any market, law is constitutive of the international market in food commodities. On both the domestic and international planes, critical elements of economic exchange—capital, labour, credit, money, liquidity—are creatures of law.¹²⁹ Legal rights, principles, institutions, documents, regulations, customs and actors are integral to the operation of the trade in any foodstuff. This is uncontested. The point that the above analysis has sought to impress is that what is typically overlooked as the constitutive law in the market *also serves a regulatory function*. Laws that constitute markets also inform how people act within markets, create permissions and prohibitions, and offer incentives and disincentives for behaviour. Since the period of European colonialism, legal doctrines that legitimate intervention in the domestic policymaking of only some states, alongside legal discourse that positions 'nationhood' as status that countries must mimic European industrialisation to obtain, have paved the way for damaging interventions in the affairs of countries of the South by countries in the North. This has persisted, post-decolonisation, thanks to institutions at the heart of the international legal system that postulate a separation of the economic from the political, and that continue to prescribe policy for 'developing' countries in the guise of 'technical advice'. Legal regimes relating to trade and investment have further circumscribed the policy space in which domestic governments operate, exacerbating disadvantage as a result of 'equal treatment' applied in conditions of considerable material inequality. Finally, legal constructs that make food first and foremost a commodity, and therefore available to the highest bidder,

¹²⁹ David Kennedy, 'Law and the Political Economy of the World.' *Leiden Journal of International Law*, 2013, 26, at 8.

and that direct social interactions into self-serving market transactions, actively prevent populations in the global South from exercising meaningful control over the production, price, and politics of food.

Taken together, these constitutive elements of the global legal order have created and regulated the operations of a global food system in which the advantages of Northern consumers and Northern companies predominate at the expense of the poor and vulnerable. The market ‘phenomena’ that international institutions are seeking to remedy through the application of law have to be recognised as being products of the global legal order. The significance of this for the viability of legal remedies to hunger and food insecurity will now be considered.

4. Standing in the Way: What is Obstructing the Eradication of World Hunger?

Publications such as the HLTF’s CFA and the FAO’s SOFI testify to the considerable sources and targeted interventions being marshalled to eradicate world hunger. Reading them, it is hard to imagine that these efforts will not meet with success in the near future. Millennium Development Goal 1C, which aimed to halve the proportion of people suffering from hunger by 2015, was narrowly missed. Although concerns have been raised over the credibility of the data used to monitor progress towards meeting the goals, progress has been made.¹³⁰ This being the case, it also remains true that the numbers of people suffering hunger in the world today remain unacceptably high: 1 in 6, or 1 in 9, people are hungry globally, depending on which metrics are used to count them.¹³¹ Over 10 per cent of the population in countries classified as ‘developing’ continue to suffer from hunger.¹³² The final sections will discuss three limitations of present efforts to eradicate world hunger by the international community: institutional disavowal of responsibility for world hunger; the ongoing

¹³⁰ Gaps in data gathering have cast doubts on the credibility of the UN’s figures in eradicating hunger and poverty. It has been claimed that more than 40 developing countries lack sufficient data to track performance in these areas. Mark Anderson, What is the millennium development goal on poverty and hunger all about?, *The Guardian*, 19 February 2015.

¹³¹ In 2015, the World Food Programme (WFP) put the statistic of people who ‘do not have enough to eat to live an active lifestyle’ at 1 in 9, whilst the FAO estimated the number of ‘undernourished’ people at 1 in 6. World Food Programme, *Hunger Statistics*, <https://www.wfp.org/hunger/stats>; FAO, *World Agriculture: Towards 2015/2030*, <http://www.fao.org/docrep/004/y3557e/y3557e03.htm>, both accessed 29 June 2016.

¹³² *Ibid.*

prioritisation of market imperatives over the needs of hungry peoples; and the operations of existing bodies of law.

A. Institutional disavowal

In academic circles, recognition that Northern governments operating through international institutions have played an active role in producing hunger in the global South is growing. A number of scholars have been explicit about the role that law has played in this context. As Salomon writes, '[t]he rules that regulate the global economy, and their application, may not set out to exclude them from accessing goods that others with sufficient resources can secure, such as an adequate standard of living, food, clothing and housing, but they do.'¹³³ This, as Chauvier has claimed, has to be recognized as a 'negative externality' of a global system set up to create profit rather than alleviate poverty.¹³⁴ Gonzales is even more forthright in arguing that the WTO trade regime has 'institutionalized inequality' —a system which Lerner has gone so far as to claim amounts to 'legalised theft'.¹³⁵ One could reply to Salomon that some of the rules that regulate the global economy *do set out to exclude others from accessing resources*, most notably property rights. However, the issue under discussion is the cleavage between academic and institutional stances on the underlying reasons for the persistence of hunger. Nowhere in the HLTF's extensive discussion of the global food crisis, or in the FAO's many editions of SOFI, is there an acknowledgement of the roles that international institutions, policies, and legal regimes have played in worsening the position of the world's vulnerable. The tension between academic scholarship that clearly attributes the prevalence of food insecurity to the laws and policies of Northern governments, and the reluctance of international institutions to explicitly acknowledge this fact is notable in the work of Olivier De Schutter, former Special Rapporteur on the right to food. When wearing his academic robes and co-authoring works with others, De Schutter has boldly intervened to point out the complicity of international policymakers in creating the disabling environment in which national governments attempt to make food security policy.¹³⁶ Yet, in the reports produced in his role as Special Rapporteur, the blameworthy international is notably absent. Mistakes of the past are acknowledged, but it is uncommon to find mention of who made

¹³³ *Supra* Salomon, note 16, at 16.

¹³⁴ Stephanie Chauvier, 'The Right to Basic Resources' in Thomas Pogge (ed), *Freedom from Poverty as a Human Right: Who Owes What to the Very Poor?* (Oxford, Oxford University Press, 2007), at 306.

¹³⁵ Leif Wenar, 'Property Rights and the Resource Curse.' *Philosophy and Public Affairs*, 2008, 36(1), at 1-2.

¹³⁶ *Supra* De Schutter and Cordes, note 121.

them.¹³⁷ When such mention is made, the governments of food insecure states are more typically put in the spotlight than the governments of wealthier states in the North.¹³⁸ It might seem like a lot to ask to demand that any individual shake off the constraints of their office, and start pointing fingers. Nevertheless, the fact remains that the absent international is a big problem for efforts to tackle world hunger. Tacitly exonerating international institutions and ignoring the deep conflicts of interest between the South and the North with respect to agricultural production enables government officials to generously promise ‘food aid’ when they could be talking about reparations, or a wholesale revision of the international trade regime. The widespread institutional disavowal that international institutions have had anything to do with creating the conditions of hunger further undermines the current criteria on which solutions are sought. Accountability is, after all, one of the principles upon which food security solutions are now supposed to be based.¹³⁹

B. *To market, to market*

Another limitation of contemporary efforts to respond to world hunger is the ongoing prioritisation of market imperatives over the needs of hungry people. This is evident in a number of ways. First, key objectives of the HLTF are to ‘[e]nsure sustained access to competitive, transparent and private-sector-led markets for food produce and quality inputs’, and to ‘build capacity for international financial markets to better meet needs of lower-income countries’.¹⁴⁰ Equally evident is a focus on legal reforms that facilitate markets and investment, such as the promotion of land ownership, transparent business regulations, contract enforcement, and the use of financial instruments as insurance.¹⁴¹ Despite the fact that markets have been shown to be adept at producing hunger and famine ‘with a vengeance’,¹⁴² the market continues to be positioned as the primary means by which the food insecure should access food. Second, and, perhaps, more worryingly, many of the same pre-crisis prescriptions as to the role of markets in international trade persist. Additional

¹³⁷ See, for example, the following passage in one of De Schutter’s reports: ‘the promotion in the past of export-led agriculture, often based on the exploitation of a largely disempowered workforce, operated at the expense of family farms producing food crops for local consumption.’ No further mention is made of the actors responsible for pursuing these policies. Olivier De Schutter, ‘The transformative potential of the right to food,’ Report of the Special Rapporteur on the Right to Food, A/HRC/25/57, 2014, at 24.

¹³⁸ See the repeated references to national governments *ibid*.

¹³⁹ *Supra* De Schutter, note 14.

¹⁴⁰ *Supra* HLTF, note 10, at 7.

¹⁴¹ *Ibid*, at 23.

¹⁴² *Supra* Sen, note 47.

recommendations in the HLTF's CFA include enrolling small farmers in national plans for industrial agricultural production, strengthening and liberalising the multilateral trading system, minimising the use of export restrictions, and reducing constraints to an enabling environment that encourages private sector involvement in food markets.¹⁴³ These solutions are being advanced under the banner of using agriculture as an 'engine for economic development'.¹⁴⁴ Again, the fact that the pursuit of market-based economic growth and development has historically worsened, rather than improved, the situation of many vulnerable communities is being underweighted. Uncritical endorsement of market solutions to hunger can also be found in the writings of prominent legal academics. Trebilcock and Pue claim that '[s]tudies suggest that import capacity is best assured through pursuit of policies that advance the income of poor citizens through economic growth, for which trade can be a tool'.¹⁴⁵ These authors also appear to advocate faith that markets will self-correct if further trade liberalisation is pursued. As they write, '[w]hile acknowledging legitimate concerns over the impact of recent price spikes on poor consumers, especially in developing countries, these impacts need to be put into a longer-term perspective... Prices that go up tend often to come down'.¹⁴⁶ While this may be a fair macro assessment of historical trends in commodity markets, it does less justice to those who suffer hunger and are forced to sell vital resources to survive in the interim.

The HLTF and FAO do recommend some changes to the operations of markets that could benefit poor and marginalized rural communities. On close consideration, however, many of those recommendations prescribe courses of action that would seem to be in tension with one another. Governments of food insecure states are urged to '[b]alance the need to ensure effective coverage of the vulnerable with the need to maintain efficient use of resources',¹⁴⁷ and to simultaneously '[s]timulate private investment in agriculture' whilst 'enhancing secure and equitable access to natural resources'.¹⁴⁸ According to scholars writing on food sovereignty, however, it has been this very fixation on market efficiency and creating the enabling conditions for private investment—access to land and resources, strong property rights, favourable labour conditions, and non-interventionist governments who won't

¹⁴³ *Supra* HLTF, note 10, at 2, 3, 5, 6, 7.

¹⁴⁴ *Ibid.*, at 3.

¹⁴⁵ Michael Trebilcock and Kristen Pue, 'The Puzzle of Agricultural Exceptionalism in International Trade Policy,' *Journal of International Economic Law*, 2015, 18(2), at 249.

¹⁴⁶ *Ibid.*, at 250.

¹⁴⁷ *Supra* HLTF, note 10, at 7

¹⁴⁸ *Ibid.*

nationalise or redistribute resources—that has been a leading factor in limiting the ability of many people in Southern regions to access the means to produce sufficient food in the first instance. The movement for ‘food sovereignty’—connoting people’s democratic control of the food system—asserts that nothing less than the fundamental restructuring of the global food system will address the persistence of hunger. Originating with the peasant organisation, La Via Campesina, proponents advocate restructuring control over land and food in order to restructure market power.¹⁴⁹ Its advocates acknowledge that there is an argument that markets organised by local communities to meet the needs of local consumers could improve the lives of hungry peoples. However, concerning those proposals that would continue to expose poor communities to the machinations of liberalised global commodity markets, and that would continue to advance the power of agribusiness firms—on the basis that increased agricultural production and access to markets will improve matters—the weight of the evidence stands clearly for the contrary. In the main, scholars who have sought to test out proposals for the ‘inclusion’ of poor rural communities in market structures—be it through global value chains in the commodities trade or for access to finance—and who have investigated into the benefits of private investment for food production reach the same conclusion: more often than not including the poor and hungry in existing regimes of trade and finance serves to their distinct material disadvantage.¹⁵⁰

C. Law versus Law?!

International legal solutions to challenges of food security come in four main guises: the proliferation of soft-law principles and guidelines, such as principles to promote responsible investment in agriculture;¹⁵¹ a call for the harmonisation of international trade law with human rights obligations;¹⁵² the promotion of the rule of law as a means by which domestic

¹⁴⁹ Raj Patel, ‘What Does Food Sovereignty Look Like?’ *The Journal of Peasant Studies*, 2009, 36.

¹⁵⁰ S. Ryan Isakson, ‘The Financialization of Food: A Political Economy of the Transformation of Agro-Food Supply Chains. ICAS Review Paper Series, 2013, 5, <https://www.scribd.com/document/210878346/ICAS-Review-Paper-5-Isakson> accessed 16 February 2-17; Nora McKeon, *Food Security Governance: empowering communities, regulating corporations* (London: Routledge, 2015), Chapter 2; Sophia Murphy, David Burch, and Jennifer Clapp, *Cereal secrets: The world’s largest grain traders and global agriculture*. [ebook] (Oxford: Oxfam GB for Oxfam International <https://www.oxfam.org/sites/www.oxfam.org/files/rr-cereal-secrets-grain-traders-agriculture-30082012-en.pdf> accessed 16 February 2017; Marcus Taylor, ‘The Antinomies of ‘Financial Inclusion’: Debt, Distress and the Workings of Indian Microfinance.’ *Journal of Agrarian Change*, 2012, 12(4): 601–610.

¹⁵¹ FAO, ‘Principles for Responsible Agricultural Investment’, http://www.fao.org/economic/est/issues/investments/prai/en/#.VZEpt_NwbGg accessed 28 June 2015.

¹⁵² *Ibid*, at 91.

laws in developing countries can be strengthened;¹⁵³ and the empowering of the food insecure via the fulfilment of a human right to adequate food.¹⁵⁴ This section will not attempt an exhaustive analysis of each of these proposals. Only one principal argument will be made on this issue, which is that many legal solutions to the challenge of world hunger are unlikely to work due to the simple fact that they fail to adequately account for the operation of other legal regimes that constitute the global food system. A couple of examples are illustrative. First, the evident limitation of soft-law guidelines and principles seeking to make markets more responsive to the needs of the hungry is that they lack any binding force. By contrast, no matter what the social stakes, property and contractual rights that exclude other people from accessing land and resources continue to be respected, protected, and fulfilled by governments and by courts. There is little question about which laws actually prevail here. Second, a similar clash of legal regimes is evident in the call to realign trade law with human rights law. While governments have committed to the ‘progressive’ realisation of the right to adequate food,¹⁵⁵ they are *already bound* by commitments to enable and further liberalise trade (based, as discussed, on comparative disadvantage) to which they are signed up. Again, while a trade regime that complements instead of compromising human rights enjoyment is highly desirable, without fundamental revisions of the frameworks on which that regime currently operates, is it, in fact, possible? The stalling of the Doha development round and the side-step into mega- regional pacts such as TTIP and TPP would suggest not.

The case of the rule of law promotion is somewhat different. In this instance, the issue is not the advancement of soft law principles that would appear to efface the existence of hard legal rights, or the proposal to progressively realise rights that may not be realisable without the significant readjustment of other regimes of right. Instead, as a growing number of critics have argued, advocating respect for the rule of law appears to the new means by which the rights of influential market actors and investors are further entrenched. Pahuja,¹⁵⁶ Humphreys,¹⁵⁷ and Trubek and Santos,¹⁵⁸ are a few among many who have argued that the ‘imperialism of economics’ has given way to the ‘rule of law’ as the primary vehicle for the

¹⁵³ World Bank, ‘Worldwide Governance Indicators’, <http://info.worldbank.org/governance/wgi/index.aspx#home> accessed 1 July 2016.

¹⁵⁴ *Supra* HLTf, note 10, at 4.

¹⁵⁵ UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No 12: The Right to Adequate Food (art. 11), 12 May 1999.

¹⁵⁶ *Supra* Pahuja, note 64.

¹⁵⁷ *Supra* Humphreys, note 93.

¹⁵⁸ David Trubek, ‘The ‘Rule of Law’ in Development Assistance: Past, Present, and Future,’ *supra* Trubek and Santos note 60, at 74-93.

dissemination of development doctrine. In the place of conditionality, or sometimes supplementing it, Humphreys argues, rule of law indicators are being operationalised to promote ‘the deliberate re-engineering, at a legal-structural level, of the economic, political and social basics of countries throughout the world’.¹⁵⁹ The analysis he makes in support of this claim is persuasive. Whether one accepts the arguments of critical scholars or not, there is much that is questionable about asking governments and citizens in the South to ensure ‘the protection of property rights’ and ‘the quality of contract enforcement’¹⁶⁰—instruments that have historically served to their disadvantage—and to put them beyond the reach of democratic renegotiation. As the analysis above would suggest, and as the growing movement for food sovereignty would insist, precisely what is needed to mitigate against hunger and vulnerability is democratic control of the food system by the people who have historically been disenfranchised by that system.

The case of human rights, and, most relevantly, the right to adequate food is also a special one. It cannot be doubted that the human rights community has done much to specify the particular needs of the hungry and to offer them a powerful vocabulary for articulating their claims for a more equitable global food system. Nevertheless, there continues to be hesitancy to accept that the realisation of the right to adequate food might not depend only on the elaboration of that right, but also on the revision of other legal rights that grant more market power to others. Is it possible to strengthen economic access to food for poor populations without weakening the entitlements of others—multinational companies, financial speculators? Can improvements to infrastructure, agricultural production techniques and social protections translate into food security when the price of basic staples can double in a day and drop a month later? Can a right to adequate food ‘trump’ a contract for the sale of one hundred tonnes of wheat to make a profitable price an affordable one? Human rights laws does not, as yet, seem to have come up with an answer that can resolve these serious conflicts of legal interest. As long as these questions continue to go unaddressed, further elaboration of the law seeking to ground a human right to adequate food would seem of limited practical use for the hungry.

¹⁵⁹ *Supra* Humphreys, note 93, at 8.

¹⁶⁰ Millennium Challenge Corporation, *Rule of law indicators*, available at <https://www.mcc.gov/who-we-fund/indicator/rule-of-law-indicator> accessed 3 July 2016.

5. Conclusion

This article has argued that existing suppositions about the causes of ‘food insecurity’ must be challenged if another global food crisis is to be prevented, and if the goal of eradicating world hunger is to be met. Hunger, poverty and vulnerability to food price volatility are not merely the consequence of policy or market ‘failures’; these conditions are being actively produced through the legal constitution, regulation, and maintenance of an inequitable global food system. Until the legal rights and regimes that grant wealthier countries and consumers disproportionate market power over the poor are made explicit and adjusted, the proffering of soft law principles, regime harmonisation, and progressive human rights realisation by the international community have limited potential for success. The further extension, elaboration, and ratification of more poor-friendly legal rights may not be the solution to the plight of hungry peoples if they are unable to challenge existing laws that help to make them hungry, poor, and vulnerable in the first instance.