



Large-scale land acquisitions and leases:

**A set of core principles and measures to address the human rights
challenge**

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Large-scale acquisitions and leases are one of the key new trends that emerged out of the 2008 global food crisis. Some major food importing capital exporting countries have indeed lost confidence in global markets as a stable and reliable source of food for their national food security. The Special Rapporteur analyses how these investments could have impacts on the right to food. He highlights how international human rights law could provide guidance to ensure that these investment agreements contribute to the realization of the human right to adequate food and proposes as a minimum a set of core principles and measures for host States and investors alike.

Introduction

Under Article 11 of the International Covenant on Economic, Social and Cultural Rights, every State is obliged to ensure for everyone under its jurisdiction access to the minimum essential food which is sufficient, nutritionally adequate and safe, to ensure their freedom from hunger.¹ The obligations of the State are threefold: to respect, protect and fulfil the human right to food. The State is obliged to refrain from infringing on individuals' and groups' ability to feed themselves where such an ability exists (respect), and to prevent others - in particular private actors such as firms - from encroaching on that ability (protect). Finally, the state is called upon to actively strengthen individuals' ability to feed themselves (fulfil).

The right to food framework contributes important lessons to the debate on large-scale land acquisitions or leases. There are opportunities in this development, but there are also important human rights challenges. States would be acting in violation of the human right to food if, by leasing or selling land to investors (whether domestic or foreign), they were depriving the local populations from access to productive resources indispensable to their livelihoods. They would also be violating the right to food if they negotiated such agreements without ensuring that this will not result in food insecurity, for instance because this would create a dependency on foreign aid or on increasingly volatile and unpredictable international markets, as large proportions of the food produced thanks to the foreign investment would be shipped to the country of origin of the investor or sold on the international markets. In concluding agreements on large-scale land acquisitions or leases, States should take into account the rights of current landusers in the areas where the investment is made, as well as the rights of workers employed on the farms. And they should be guided by the need to ensure the right to self-determination and the right to development of the local populations. These human rights challenges are explained below. They are put forward in order to inform current initiatives such as the adoption of guidelines on land policies and governance by international and regional organizations, such as the African Union. But neither host States nor investors should wait until such guidelines are adopted, to act in accordance with human rights.

¹ E/C.12/1999/5, para. 14.

1. The context

Over the past 3-4 years, private investors and governments have shown a growing interest in the acquisition or long-term lease of large portions of arable land in countries, mostly in the developing world. According to an estimate from IFPRI, between 15 and 20 million hectares of farmland in developing countries have been subject to transactions or negotiations involving foreign investors since 2006. Although this already represents the size of France's farmland and a fifth of all the farmland of the European Union, this figure does not take into account the most recent offer allegedly made to South African farmers to farm 10 million hectares in the Republic of Congo to grow maize, soya beans as well as poultry and dairy farming.² The land which has been highest in demand is the land which is close to water resources and therefore can be irrigated at a relatively low cost in infrastructures, and the land which is closest to markets and from which the produce can be exported easily. Among the main target countries in Sub-Saharan Africa are Cameroon, Ethiopia, the Democratic Republic of Congo,³ Madagascar,⁴ Mali,⁵ Somalia, Sudan,⁶ Tanzania⁷ and Zambia. But target countries are also in Central Europe, in Asia and in Latin America: among them are Brazil, Cambodia, Indonesia, Kazakhstan, Pakistan, Russia or Ukraine. Developing countries in general, and Sub-Saharan Africa, are particularly targeted, because of the perception that there is plenty of land available, because its climate is favorable to the production of crops, because the local labour is inexpensive and because the land is still relatively cheap. In 2003, the FAO estimated that an additional 120 million ha – an area twice the size of France or one-third that of India – will be needed to support the traditional growth in food production by 2030, without considering the compensation required for certain losses resulting from unsustainable forms of agricultural production.⁸ This expansion will occur mainly in developing countries. Since about 95% of the cropland in Asia has already been utilized, it is in Latin America and in Africa where most of the demand for increased arable land will concentrate. Indeed, it is in these regions that the Global Agro-ecological Assessment suggests that most of the world's reserve agricultural land (up to 80%) is located.⁹

Theoretical potential for cropland expansion, irrespective of conservation, water and other environmental issues

² Reuters, 15 April 2009.

³ China is alleged to have acquired 2.8 million hectares in the Democratic Republic of Congo to create the world's largest oil-palm plantation (New Zealand Herald, 14 May 2009).

⁴ 465,000ha of land in Madagascar have been leased to an Indian company, Varun International, to grow rice for consumption in India. The status of this deal is now unclear, however. A deal between the South Korean firm Daewoo Logistics for the 99-year lease of 1.3 million hectares in the country was negotiated but ultimately not confirmed.

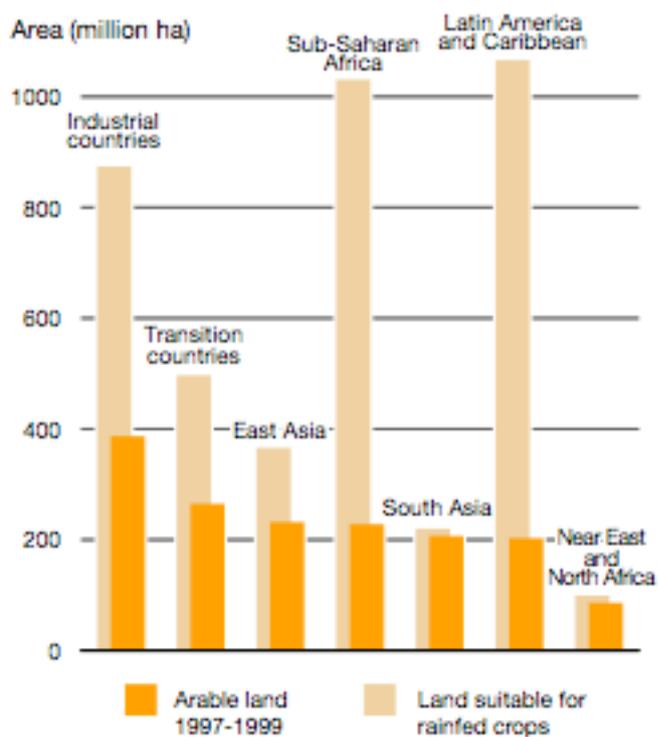
⁵ Libya has leased 100,000ha in Mali for rice production.

⁶ South Korea has acquired 690,000ha of land in Sudan to grow wheat. The United Arab Emirates have invested in excess of 400,000ha to grow corn, alfalfa, wheat, potatoes and beans. Egypt has secured a similar surface to grow wheat. See New Zealand Herald, 14 May 2009 ; and The Economist, 23 May 2009, p. 60.

⁷ Saudi Arabia is seeking to lease 500,000ha in Tanzania, according to press reports (New Zealand Herald, 14 May 2009).

⁸ FAO (2003). World agriculture: towards 2015/2030. FAO, Rome.

⁹ G. Fischer, H. Velthuis, M. Shah, and F. Nachtergaele, *Global Agro-Ecological Assessment for Agriculture in the 21st Century*, Rome, Food and Agriculture Organization of the United Nations (FAO), and Laxenburg, International Institute for Applied Systems Analysis (IIASA), 2002.



Source : FAO (2003). World agriculture: towards 2015/2030.

The development of large-scale land leases or acquisitions can be explained by (i) the rush towards the production of agrofuels as an alternative to fossil fuels, a development encouraged by fiscal incentives and subsidies in developed countries ; (ii) the growth of population and urbanization, combined with the exhaustion of natural resources, in certain countries, who therefore see large-scale land acquisitions as a means to achieve long-term food security ; (iii) increased concerns of certain countries about the availability of freshwater, which in a number of regions is becoming a scarce commodity ; (iv) increased demand for certain raw commodities from tropical countries, particularly fiber and other wood products ; (v) expected subsidies for carbon storage through plantation and avoided deforestation¹⁰; (vi) particularly as far as private investors are concerned, speculation on future rises of the price of farmland. While this phenomenon is not entirely new, it has accelerated since the global food crisis of 2007-2008, because the markets for agricultural commodities were seen to be increasingly unstable and volatile, and therefore less reliable for net-food-importing countries, particularly following the decision by a number of large food exporting countries to ban exports or to raise export levies during the Spring of 2008. As a result, resource-poor but cash-rich countries have turned to large-scale acquisitions or rent of land in order to achieve food security.¹¹ This has also led private investors, including large investment funds, to acquire land for merely speculative motives, because of the conviction that the price of arable land will continue to raise in the future.

This development presents a number of opportunities. For many years, agriculture has been neglected

¹⁰ This is the case particularly under the Clean Development Mechanism (CDM) provided for in Article 12 of the Kyoto Protocol to the United Nations Framework Convention on Climate Change. The CDM allows a country with an emission-reduction or emission-limitation commitment under the Kyoto Protocol (Annex B Party) to implement an emission-reduction project in developing countries, in order to earn certified emission reduction (CER) credits, each equivalent to one tonne of CO₂. The CERs may be traded and can be counted towards meeting Kyoto targets.

¹¹ See Vera Songwe and Klaus Deininger, *Foreign Investment in Agricultural Production: Opportunities and Challenges*, World Bank, 2009 ; Reuters, *Factbox: Foreign forays into African farming*, 2 March 2009 ; GRAIN, *The 2008 land grab for food and financial security*, 18 October 2008, available at : <http://www.grain.org/go/landgrab> ; IFPRI Policy Brief 13, April 2009. Although it focuses on Ethiopia, Ghana, Madagascar and Mali, the joint study by IIED, FAO and IFAD, *Land Grab or Development Opportunity? Agricultural Investments and International Land Deals in Africa*, released on 26 May 2009, constitutes to this date the most in-depth study of this development.

both in domestic public policies and in development cooperation, and has failed to attract foreign direct investment, particularly in Sub-Saharan Africa. It is in principle welcome that this is changing. More investment in rural areas can be particularly effective in reducing poverty, where it is concentrated. The arrival of investment has the potential of creating employment, both on and off farm (in associated processing industries, for instance); leading to transfers of technologies; improving the access of the local producers to the markets, at domestic, regional and international level; increasing public revenues, through taxation and export duties. For countries purchasing or leasing land abroad in order to grow staple crops, this means increased food security, since they will be less dependent on the international markets to acquire the food they need to feed their populations. The risks of lower productivity in agriculture in sub-tropical regions entailed by climate change and, in the future, increase costs of freight, may partially offset this advantage.

But there are also important risks in this development. In setting out the human rights principles on which large-scale land acquisitions or leases should be based, the Special Rapporteur aims to provide guidance to States hosting such investments, in particular in their negotiations with foreign investors. States should be aware that, under certain conditions, foreign investors may seek to rely on existing investment agreements protecting them from expropriation and guaranteeing them a fair and equitable treatment, in order to seek compensation for any loss of revenues which would result from restrictions imposed on their freedom to operate, unless such restrictions are clearly provided for in the investment agreement at the time it is concluded. It is therefore crucial that such circumstances be fully anticipated.

2. The human right to food

Under Article 11 of the International Covenant on Economic, Social and Cultural Rights, every State is obliged to ensure for everyone under its jurisdiction access to the minimum essential food which is sufficient, nutritionally adequate and safe, to ensure their freedom from hunger.¹² A State would be acting in violation of this right if, by leasing or selling off land to investors (whether domestic or foreign), it were depriving local populations from access to productive resources indispensable to their livelihoods, unless appropriate alternatives are offered. It would also be violating the right to food if it negotiated such agreements without ensuring that this will not result in food insecurity, for instance because this would create a dependency on foreign aid, as large proportions of the food produced thanks to the foreign investment would be shipped to the country of origin of the investor or sold on the international markets. During the global food price crisis of 2007/2008, the impacts of high food prices on international markets were significantly larger in countries with fewer domestic alternatives to internationally traded grains, whose prices rose the most (maize, wheat, and rice).¹³ Governments should be aware of the increased vulnerability which may result from increasing their dependency on international markets to achieve food security : the volatility of prices on international markets will make them even less reliable in the future than they have been in the past.

The need to preserve food security within the host country should be taken into account proactively, in the negotiation of the investment agreements concerned. It should be ensured that the revenues accruing from the investment will be at least sufficient to procure food in volumes equivalent to those which are produced for exports. Ideally, these agreements should include a clause providing that a certain minimum percentage of the crops produced shall be sold on local markets, and that this percentage may increase, in proportions to be agreed in advance, if the prices of food commodities on international markets reach certain levels.

In addition, the realization of the right to food may be pursued more effectively if host States and investors agree on a certain number of conditions according to which the investment will be made.

¹² E/C.12/1999/5, para. 14.

¹³ The World Bank, *Global Economic Prospects. Commodities at the Crossroads*, 2009 (based on evidence available until 30 November 2008), p. 96.

First, investors should be encouraged to establish and promote farming systems that are labour intensive rather than focused on achieving the highest productivity per hectare. This requirement will ensure that investment agreements contribute to the fullest extent possible to reinforcing local livelihood options and in particular provide access to a living wage for the local population involved. It is important in this respect to note that, contrary to a widespread myth, large-scale plantations are not necessarily more productive than smallscale, family-operated farms : although there are economies of scale in the processing and marketing of agricultural production, for most crops there are no economies of scale in agricultural production. Since, in addition, family farms are much more labor intensive, the interest of the local population may be better served, taking employment effects into account, by outgrower schemes than by the establishment of plantations operated by wage labor.¹⁴

A recent study based on large-scale land leases or acquisitions in four Sub-Saharan countries notes in this regard that ‘the vast majority of documented projects continue to be run as large plantations based on concessions or leases. As large areas of land are commonly offered on very favourable terms, an incentive is created for establishing company-managed plantations rather than promoting contract farming approaches. Even “local content” provisions requiring prioritisation of the local workforce in recruitment, common in extractive industry contracts, appear rare [...]. There is enormous scope here for governments to develop systems of incentives to promote more inclusive business models among large-scale investors’.¹⁵

Second, it is vital that high environmental standards are complied with. A number of UN agencies, including UNEP,¹⁶ FAO and UNCTAD, have underscored the potential of sustainable farming to meet the growth in demand.¹⁷ Recently, the 17th session of the UN Commission on Sustainable Development which met in New York, 4-15 May 2009, adopted a Declaration recognizing that ‘sustainable agricultural practices as well as sustainable forest management can contribute to meeting climate change concerns’, and that ‘sustainable soil, land, livestock, forest, biodiversity and water management practices, and resilient crops are essential’; and it called for the creation of an enabling environment for sustainable agriculture.¹⁸

The development of more sustainable farming approaches is directly linked to the right to food, because of the strong link between the state of the environment and food production.¹⁹ Crops are dependent on soil nutrient availability, on water (ground and surface water for irrigation), on climate and on weather (rainfall and growth season), on the availability of insects for pollination, and on the abundance and effects of certain pests, such as pathogens, insects and weeds, which have major

¹⁴ As noted by two authors of the World Bank, in situations in which “land is less abundant, labor costs are low, and the quality of the product is a practical priority, contracts that provide producers with technical assistance and access to markets, specialized inputs and financial instruments are often preferred. This type of contract can generate substantial employment and other local opportunities, and enable farmers to manage the risks involved in producing nontraditional crops” (Songwe and Deininger, cited above n. 11, referring to N. Key and D. Runsten, “Contract farming, smallholders, and rural development in Latin America: The Organization of Agro-Processing Firms and the Scale of Outgrower Production”, *World Development* 27(2): 381-401).

¹⁵ IIED, FAO and IFAD, *Land Grab or Development Opportunity?*, cited above, section 3.4.

¹⁶ UNEP, *The Environmental Food Crisis. The Environment's Role in Averting Future Food Crises*, February 2009.

¹⁷ See, e.g., the 2006 annual report of the Nairobi-based World Agroforestry Centre, or the 2008 FAO-UNEP report on Organic Agriculture and Food Security in Africa. This claim is also supported by a rapidly growing scientific literature (see, e.g., J. Pretty, ‘Resource-Conserving Agriculture Increases Yields in Developing Countries’, *Environmental science and technology* 40(4), 2006, or N. Uphoff, *Agroecological innovations. Increasing Food production with participatory development*, Earthscan, 2001).

¹⁸ In the Declaration adopted at their meeting of Cison di Valmarino (Italy), 18-20 April 2009, the Ministers of Agriculture of the G8 Countries also emphasized ‘the importance of increasing public and private investment in sustainable agriculture, rural development and environmental protection in cooperation with international organisations’, and on the need to ‘tackle climate change impacts and ensure sustainable management of water, forests and other natural resources, while considering demographic growth’.

¹⁹ See Guideline 8.13 of the FAO Voluntary Guidelines on the right to food (encouraging States to ‘protect ecological sustainability and the carrying capacity of ecosystems to ensure the possibility for increased, sustainable food production for present and future generations, prevent water pollution, protect the fertility of the soil, and promote the sustainable management of fisheries and forestry’).

impact on crops worldwide, particularly in Africa.²⁰ Agricultural productivity thus depends on the services rendered by the ecosystems. Unless it shifts from being one of the major causes of climate change and soil degradation to a net contributor to the maintenance of the environment, agricultural production will undergo significant declines in the future.²¹ Using relatively conservative estimates (assuming a 4.4° C increase in temperature and a 2.9% increase in precipitation), Cline concluded that by 2080, global agricultural output potential is likely to decrease by about 6% (or 16% without carbon fertilization, the impacts of which are disputed). The decline will vary between 10 and 25% across regions, but it is projected that by 2080, agricultural output potential may be reduced by up to 60% for several African countries, on average 16–27%, dependent upon the effect of carbon fertilization.²² It is therefore vital that, as agriculture intensifies in order to meet the growing demand for food, it does so in ways which are environmentally sustainable.²³

For these reasons, both investors and the host States should cooperate in identifying ways to ensure that the modes of agricultural production shall respect the environment, and shall not accelerate climate change, soil depletion, and the exhaustion of freshwater reserves. Depending on the circumstances and, particularly, on the local agro-ecological conditions, they may have to explore low external input farming practices as a means to meet this challenge.

3. The rights of landusers, and indigenous peoples in particular

In many developing countries and particularly in Sub-Saharan Africa, the rights of landusers are not properly secured. Much of the land is formally owned by the government, and the landusers have no property titles on the land they cultivate; in many cases too, a complex combination of property rights and users' rights results in a situation in which those who cultivate the land do not own it, although they may or may not be paying rent in cash or kind or may or may not have a formal agreement with the nominal owner. This situation is the source of legal uncertainty. It also implies that landusers will not have access to legal remedies, and receive adequate compensation, if they are evicted from the land they cultivate, for instance after the government has agreed that foreign investors take possession of the land. It is also important to recognize other use rights on land such as grazing and gathering wood, which are often critical sources of livelihood especially for women. The rights of pastoralists in particular are generally neglected in public debates. Yet, as drylands constitute nearly half of the land area of sub-Saharan Africa, pastoralism is of particular importance for the continent: almost half of the total amount of about 120 million pastoralists/agro-pastoralists worldwide resides in sub-Saharan Africa, where the largest pastoral/agro-pastoral populations (of seven million each) are in Sudan and Somalia, followed by Ethiopia with four million.²⁴ In this context, there is a real risk that land considered 'empty' or 'idle' will be sold or leased to investors, including foreign investors, without taking into account the important services this land renders to the local population.

It is essential therefore that no eviction takes place which would not comply with the General Comment No. 7 (1997) of the Committee on Economic, Social and Cultural Rights on the right to adequate housing (article 11.1): forced evictions (E/1998/22, annex IV), and with the Basic Principles and Guidelines on Development-based Evictions and Displacement presented in 2007 by the former Special Rapporteur on the right to adequate housing (A/HRC/4/18, annex I). These guidelines provide a practical tool to assist States and agencies in developing policies, legislation, procedures and preventive measures to ensure that forced evictions do not take place, and to provide effective

²⁰ Pedro A. Sanchez, 'Soil Fertility and Hunger in Africa', *Science*, vol. 205 (5562) (2002): 2019-2020.

²¹ Yield reduction in Africa due to past soil erosion may already range from 2–40%, with a mean loss of 8.2% for the continent. See J. Henao and C. Baanante, *Agricultural Production and Soil Nutrient Mining in Africa. Summary of IFDC Technical Bulletin*, IFDC, Alabama, USA, 2006.

²² These effects are in addition to general water scarcity as a result of melting glaciers, change in rainfall patterns, or overuse.

²³ William R. Cline, *Global Warming and Agriculture: Impact Estimates by Country*, Center for Global Development and Peterson Institute for International Economics, Washington, D.C., 2007.

²⁴ Nikola Rass, Policies and Strategies to address the vulnerability of pastoralists in Sub-Saharan Africa. PPLPI (Pro-Poor Livestock Policy Initiative, FAO) Working Paper No. 37, 2006, available at : www.fao.org/ag/AGInfo/programmes/en/ppipi/docarc/execsumm_wp37.pdf.

remedies to those whose human rights have been violated, should prevention fail. They are based on the principle that no eviction shall take place unless ‘(a) authorized by law; (b) carried out in accordance with international human rights law; (c) undertaken solely for the purpose of promoting the general welfare; (d) reasonable and proportional; (e) regulated so as to ensure full and fair compensation and rehabilitation; and (f) carried out in accordance with the [Guidelines]’ (para. 21). They provide detailed guidance to States and agencies about which steps need to be taken prior to evictions, during evictions, and after evictions, in order to minimize the negative impacts of evictions on human rights.

According to the Guidelines, ‘In order to secure a maximum degree of effective legal protection against the practice of forced evictions for all persons under their jurisdiction, States should take immediate measures aimed at conferring legal security of tenure upon those persons, households and communities currently lacking such protection, including all those who do not have formal titles to home and land’ (para. 25).

Individual titling is certainly desirable in many circumstances, particularly in order to encourage land-related investment, to lower the cost of credit by allowing to use the land as collateral, and to encourage more sustainable farming, particularly by the planting of trees and more responsible use of the soils and water resources. Yet, individual titling may not offer adequate protection where the adequate macroeconomic conditions are not present, and when smallholders risk being priced out. The creation of markets for property rights on land may lead to distress sales by smallholder farmers facing debts, for instance after a bad harvest. They may also be expelled from their land when the land has been used as collateral to guarantee repayment of a loan. In addition, individual titling is not a solution for those landusers who do not cultivate the land, for instance pastoralists. It may increase the risk of conflicts rather than limiting it, if important gaps exist between customary and traditional usage rights on land and the formal rights guaranteed through titling. Individual titling may not protect adequately the access of local communities to common goods: as noted by the Commission on the Legal Empowerment of the Poor, ‘in some legal cultures community-based ownership in natural resources such as grazing lands, forests, water, fisheries, and surface minerals are traditional and effective ways to grant control and proprietary rights to persons who have little or no other property. These systems should be both recognised and fully protected against arbitrary seizure’.²⁵ An alternative to individual titling may therefore be collective registration, by local communities, of the land they use, in order to ensure that the land can only be converted to new uses with their free, prior and informed consent, and that they are fully involved in the negotiation with potential investors.

Access to land for indigenous peoples has been given specific forms of protection under international law. Articles 13 to 19 of the 1989 ILO Convention (n° 169) concerning Indigenous and Tribal Peoples relate to land rights. Under Article 8 para. 2 b) of the United Nations Declaration on the Rights of Indigenous Peoples,²⁶ States shall provide effective mechanisms for prevention of, and redress for, any action which has the aim or effect of dispossessing indigenous peoples of their lands, territories or resources. Under Article 10 of the Declaration, they are guaranteed the right not be forcibly removed from their lands or territories, and no relocation shall take place without their free, prior and informed consent and after agreement on just and fair compensation and, where possible, with the option of return. Articles 25 and 26 of the Declaration, in addition, recognize the distinctive spiritual relationship of indigenous peoples with their traditionally owned or otherwise occupied and used lands, and that they have the right to own, use, develop and control these lands. States must therefore give legal recognition and protection to these lands, territories and resources, with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

Perhaps most relevant here, Article 32 embodies the principle of free, prior and informed consent: Article 32 para. 2 provides that ‘States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and

²⁵ Final Report, June 2008, p. 65.

²⁶ UNGA Res. 61/295 (13 September 2007).

informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources'. Indigenous peoples have often been victims of discrimination and marginalization ; they have been ignored in public policies and excluded from the State. When governments enter into negotiations with an outside entity, whether private or governmental, there is a real risk that their interests and rights will not be taken into account, unless procedural safeguards are scrupulously complied with.

4. The human rights of agricultural workers

Among the people who are most vulnerable to food insecurity are the nearly half a billion women and men who help produce the food we all depend on: waged agricultural workers. Ensuring an adequate protection of this category would constitute a major contribution to the alleviation of hunger. This is a challenge which is made more pressing by the increased investments in large-scale agricultural projects, in order to ensure food security and for the production of agrofuels. Although this can only be touched upon here, a few observations follow.

Fundamental rights at work are frequently violated in the agricultural sector. Those who organize and represent the rural poor are often repressed. About 70 per cent of child labour in the world is in agriculture, representing approximately 132 million girls and boys aged 5–14. Bonded labour practices are perpetuated from one generation to the next, maintained through the use of systems of advances on wages, stores located in camps which charge excessive rates compared to market prices, or compulsory deductions from wages for savings schemes. Since much of waged employment is in the informal sector, without any employment contract, national labour legislation is unable to ensure the right to a minimum wage or to protect women from discrimination. Even where the agricultural sector is not formally excluded from the scope of application of labour legislation, labour inspectorates are in practice unable to enforce this legislation effectively in rural areas. As to social dialogue, it is far too weak to constitute an adequate substitute enforcement mechanism. Despite the relatively high level of ratification of the Right of Association (Agriculture) Convention, 1921 (No. 11),²⁷ collective bargaining and social dialogue are often entirely absent, because of the difficulties waged agricultural workers face in organizing themselves. Yet, collective bargaining is crucially important for agricultural workers, both because knowledge and enforcement of the law tend to be weak in rural areas – something which collective agreements, which are better known to workers, may compensate for –, and second, because labour legislation frequently treats the agricultural sector differently from other sectors with regard to issues such as working time, overtime pay, of leave.²⁸

These factors are self-reinforcing. For instance, the importance of child labour can be explained in part by the fact that women, who produce most of the world's food and occupy much of the short-term and seasonal work on farms,²⁹ are often accompanied by children on the fields. Although the exercise of freedom of association should enable rural workers, especially in agriculture, to achieve terms and conditions of employment, the informal character of the employment relationship and the often total dependency on the employer who provides not only income but also housing and schooling, as well as the large number of women workers in agriculture and the often atypical employment relationships (such as migrant, seasonal or casual workers) are important practical obstacles to the exercise of this right. Poverty breeds poverty: when families in rural areas are too poor to be able to send their children to school, there are often no viable alternatives for children other than to work under harsh

²⁷ This convention provides that member States are “to secure to all those engaged in agriculture the same rights of association and combination as to industrial workers, and to repeal any statutory or other provisions restricting such rights in the case of those engaged in agriculture”. See also the Rural Workers' Organisations Convention, 1975 (No. 141).

²⁸ ILO, *Promotion of rural employment for poverty reduction*, International Labour Conference, 97th session, 2008, para. 295.

²⁹ In developing countries, rural women produce between 60–80 per cent of the food and are usually also the main producers of the world's principal staple crops, i.e. rice, wheat and maize – for example, they provide up to 90 per cent of rice cultivation in South-East Asia ; they are even more dominant in the production of vegetables on small plots, and the husbandry of small animals. They are especially present in export-oriented agriculture, such as cut flowers and fresh fruit and vegetables, although often in temporary or seasonal positions. See FAO–ILO–IUF: *Agriculture workers and their contribution to sustainable agriculture and rural development* (Geneva, 2005).

and exploitative conditions in agriculture, leading to educational deficits which carry on into adulthood as lack of literacy, poor educational levels, and low-skill levels block pathways out of rural poverty for many agricultural workers.

The weakness of occupational health and safety standards in agriculture, which is often excluded from coverage under national occupational safety and health regulations, and the weak enforcement of such standards when they do exist, result in a situation where agriculture is one of the three most dangerous occupations to work in, along with construction and mining.³⁰ This is a direct cause of poverty in rural areas, since families are without protection when the main breadwinner is killed or injured at work, and his or her salary is lost. The ILO Safety and Health in Agriculture Convention, 2001 (No. 184), and its accompanying Recommendation No. 192 formally recognize that agricultural workers are guaranteed the same rights and protection with regard to their health and safety as other categories of workers. It requires the adoption of a national policy on safety and health in agriculture and the setting up of an appropriate system of inspection for agricultural workplaces. It also prescribes, inter alia, the sound management of chemicals and protection against biological risks. But at the time of writing, this instrument has only been ratified by ten States, and the problems of practical enforcement should not be underestimated. Innovative solutions, such as that experimented in Sweden where unions have won the right to send safety representatives onto farms located in their region (while under normal occupational health and safety (OHS) legislation safety representatives only have the right to inspect premises where they work) and thus to inspect and help small scale employers with improving OHS, may have to be scaled up further.

The combination of the circumstances described above leads to the fact that ‘earnings from agricultural wage labour are low and volatile and opportunities for regular employment appear to be in decline as workers are increasingly engaged on a casual or temporary basis’³¹ This contributes to the fact that poverty in the rural areas remains significantly more important than in cities and undermines therefore the ability of agricultural workers to procure sufficient and adequate food.³² As I stated in my address to the ILO Tripartite Technical Workshop on the Global Food Price Crisis and Its Impact on Decent Work held on 6 March 2009, this gap needs to be addressed urgently. The rural population in developing countries will continue to grow, in absolute terms, for another generation, and large-scale plantations will further expand. A large number of ILO instruments are addressed specifically to the situation of rural workers, particularly in agriculture. The ratification of these instruments needs to be accelerated, and remaining exclusions and exemptions in national labour laws for agricultural workers need to be eliminated. No sustainable solution to the global food price crisis can be found without strengthening the entitlements of this category of workers.

The role of international labour legislation in protecting the entitlements of agricultural workers

The capacity of labour inspectorates to monitor employment conditions in the agricultural sector must be strengthened. Although ILO notices that some progress has been made on this front in recent years,³³ more political will is needed in this respect : it is an indicator of the resistance of States to make progress in this direction that the ILO Labour Inspection (Agriculture) Convention, 1969 (No. 129), which requires governments to establish a system of labour inspection in agriculture and describes the main functions of labour inspection – including playing a proactive role by bringing to the attention of the competent authorities gaps in protection and make proposals as to how to bridge

³⁰ P. Hurst et al., *Agricultural workers and their contribution to sustainable agriculture and rural development*. (ILO, FAO, IUF, 2007), section 2.8, p. 51.

³¹ ILO, *Promotion of rural employment for poverty reduction*, cited above, paras. 87-91 and 220-221.

³² M. Ataman Aksoy, ‘The Evolution of Agricultural Trade Flows’, in M. Ataman Aksoy and John C. Beghin (eds), *Global Agricultural Trade and Developing Countries*, The World Bank, Washington, D.C., 2005, 17, at 19 (noting that ‘[i]n all developing countries, rural households have lower average incomes than nonrural households. The ratio of rural incomes to nonrural incomes ranges from 40 to 75 percent, a relationship that remains consistent across groups of developing countries’).

³³ ILO General Survey: *Labour inspection*, Report III(1B), International Labour Conference, 95th Session, Geneva, 2006, para. 13.

those gaps – has been ratified by significantly fewer States than the Labour Inspection Convention, 1947 (No. 81). Even where labor inspectorates exist and are competent to monitor employment in rural areas, they may not have the resources to function effectively.

Wage-setting in the agricultural sector should be in conformity with the ILO Minimum Wage Fixing Machinery (Agriculture) Convention, 1951 (No. 99), which calls for the creation or maintenance of adequate machinery to fix minimum wage rates, in the operation of which employers and workers concerned should be able to participate in, or be consulted about, on a basis of complete equality. Consistent with the standard set by this instrument workers are to be guaranteed a minimum wage sufficient to meet their needs, but also to preserve the purchasing power of the wage.³⁴ Important problems remain, however, including the non-payment or deferred payment of wages; exclusion of agricultural workers from national legislation; non-respect of periodic readjustment of minimum wage rates; the lack of adequate sanctions to deter abuse of the minimum wage system, where it exists; and the lack of statistics and data on workers covered by minimum wages in this sector.

Agricultural workers should be protected by the social security schemes applicable to the industrial and commercial sectors, consistent with the Social Insurance (Agriculture) Recommendation, 1921 (No. 17), and with the Social Security (Minimum Standards) Convention, 1952 (No. 102). Although the former convention requires coverage of at least 50 per cent of the total number of employees in the country, allowing for the possibility that workers in the agricultural sector will be excluded, and although other ILO instruments allow for the exclusion of agricultural workers,³⁵ States should be encouraged to extend these protections to agricultural workers, since their wages are generally lower and they therefore deserve protection most. A first step towards achieving this would be to establish a scheme making the registration of agricultural workers compulsory, as has been done in Argentina under pressure of the Argentine Union of Rural Workers and Stevedores (UATRE). The National Registry of Rural Workers and Employers (RENATRE) now has over 400,000 rural workers registered (including 1 percent of migrant workers), giving them access to social security benefits, whether they are engaged on a permanent, temporary or transitory basis. Rural employers contribute 1.5 per cent of the worker's total monthly salary to the RENATRE fund, which serves to ensure rural workers unemployment insurance, family allowance payments, access to health insurance and from age 65 onwards to a pension.

The ILO Plantations Convention, 1958 (No. 110), is particularly relevant to the development of large-scale investments in agriculture. Plantations include 'any agricultural undertaking regularly employing hired workers which is situated in tropical or subtropical regions and which is mainly concerned with the cultivation or production for commercial purposes of coffee, tea, sugarcane, rubber, bananas, cocoa, coconuts, groundnuts, cotton, tobacco, fibres (sisal, jute and hemp), citrus, palm oil, cinchona or pineapple; it does not include family or small-scale holdings producing for local consumption and not regularly employing hired workers' (Art. 1 § 1). Convention No. 110, supplemented by its Protocol of 1982, seek to strengthen the protection of workers employed on plantations in areas such as conditions of work, contracts of employment, collective bargaining, methods of wage payment, holidays with pay, weekly rest, maternity protection, accident compensation, freedom of association, labour inspection, housing and medical care. Its accompanying Recommendation No. 110 proposes a number of measures that governments should take to improve the conditions of plantation workers.

The Tenants and Share-croppers Recommendation, 1968 (No. 132), provides guidance to member States with respect to tenants (who pay a fixed rent in cash, in kind, in labour, or in a combination of these), sharecroppers (who pay rent in kind consisting of an agreed share of the produce) and similar categories of agricultural workers (who are remunerated by a share of the produce, in so far as they are not covered by laws or regulations applicable to wage earners, when they work the land themselves or with the help of their family, or when they engage outside help within limits prescribed by national

³⁴ See also the accompanying Minimum Wage-Fixing Machinery (Agriculture) Recommendation, 1951 (No. 89).

³⁵ This is the case for the Medical Care and Sickness Benefits Convention, 1969 (No. 130), and the Invalidity, Old-Age and Survivors' Benefits Convention, 1967 (No. 128).

laws or regulations). This Recommendation states that it is an objective of social and economic policy to ‘promote a progressive and continuing increase in the well-being of tenants, share-croppers and similar categories of agricultural workers and to assure them the greatest possible degree of stability and security of work and livelihood’. It provides that tenants, share-croppers and similar categories of agricultural workers should themselves have the main responsibility for managing their holding, but that they should give them necessary assistance to that end while ensuring that the resources are used to the greatest advantage and are properly maintained.

5. The negotiation of large-scale leases or acquisitions of land and the rights of local populations

5.1. The right to self-determination and the exploitation of natural resources

Both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights recognize the right to self-determination, defined as the right of all peoples to freely dispose of their natural wealth and resources ; and both stipulate that no people may be deprived of its own means of subsistence.³⁶ As regards indigenous peoples, this principle is further reaffirmed by Article 3 of the 2007 Declaration on the Rights of Indigenous Peoples. As recognized by the African Commission on Human and Peoples’ Rights, the right to self-determination imposes on governments an obligation to protect individuals under their jurisdiction from being deprived of their access to productive resources, for instance as a result of the arrival of domestic and foreign investors.³⁷ This corresponds to what the Committee on the Elimination of Racial Discrimination refers to as the internal aspect of the right to self-determination, understood as the rights of all peoples to pursue freely their economic, social and cultural development without outside interference. This right presents clear links with the right of every citizen to take part in the conduct of public affairs at any level, as referred to in article 5 (c) of the International Convention on the Elimination of All Forms of Racial Discrimination³⁸ and in Article 25 of the International Covenant on Civil and Political Rights, as well as with the right of minorities, which Article 27 of the Covenant recognizes.³⁹ This further strengthens the principle already referred to above in section 3 according to which that no people’s land, including in particular indigenous peoples, can have its use changed without prior consultation.⁴⁰

5.2. The right to development: transparency and accountability in the use of revenues

It is essential that land leases or purchases are fully transparent, and that the revenues are used for the benefit of the local population. It would appear that, in some cases, land is leased at very low rents, or sold below market prices, or even given away against vague promises of employment creation or transfers of technology. However, while States have a right to engage in economic affairs, it is a corollary under the Declaration on the right to development (UNGA resolution 41/128 of 4 December 1986) that they should ‘formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals, on the basis of their active, free and meaningful participation in development and in the fair distribution of the benefits resulting therefrom’ (Art. 2.3.). Development should be seen as a process which should benefit ‘the entire population and [...] all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom’ (PP 2). This requires that States ensure the adequate participation of the local communities concerned by land leases or purchases, and that the decision-making process is fully transparent (see also Art. 6.3. and 8.2.). Participation is key to ensuring long-term sustainability and success of investments.⁴¹

³⁶ Art. 1 § 2, ICCPR, and Article 1 § 2, ICESCR.

³⁷ *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*, African Commission on Human and Peoples’ Rights, Comm. No. 155/96 (2001) (para. 58).

³⁸ CERD General Recommendation XXI (1996), para. 4.

³⁹ See, e.g., Human Rights Committee, *Chief Ominayak and the Lubicon Lake Band v. Canada*, communication no. 167/84 (CCPR/C/38/D/167/1984), final views of 26 March 1990.

⁴⁰ Human Rights Committee, Concluding Observations : Sweden, 7 May 2009 (CCPR/C/SWE/CO/6), para. 20.

⁴¹ See IIED, FAO and IFAD, *Land Grab or Development Opportunity?*, cited above.

The revenues gained from these agreements should serve to fulfil the rights of the population, consistent with the duty of States to ‘ensure, inter alia, equality of opportunity for all in their access to basic resources, education, health services, food, housing, employment and the fair distribution of income’ (Art. 8.1.).⁴² Indeed, referring to the link between foreign direct investment and the fulfillment of the 8th Millennium Development Goal to develop a global partnership for development, the Working Group on the Right to Development noted that the right to development ‘implies that foreign direct investment (FDI) should contribute to local and national development in a responsible manner, that is, in ways that are conducive to social development, protect the environment, and respect the rule of law and fiscal obligations in the host countries. The principles underlying the right to development, as mentioned above, further imply that all parties involved, i.e. investors and recipient countries, have responsibilities to ensure that profit considerations do not result in crowding out human rights protection. The impact of FDI should, therefore, be taken into account when evaluating progress in Goal 8 in the context of the right to development’.⁴³ This argument is further strengthened by the obligation of all States to ensure the progressive realization of the right to adequate food, to the maximum of all available resources, as stated in Article 2(1) of the International Covenant on Economic, Social and Cultural Rights. In addition, the State must proactively engage in activities intended to strengthen people’s access to and utilization of resources and means to ensure their livelihood, including food security : it would be acting in violation of this obligation if it did not use the revenues made available to move as expeditiously as possible towards that goal.⁴⁴

6. Recommendations

None of the above is to suggest that large-scale land leases or purchases cannot be beneficial for all parties – the investor, the host State, and the local population concerned. Large-scale investments in farmland can work for the benefit of all parties concerned. But that presupposes that an appropriate institutional framework is in place – and if it is not at the time of the investment, the arrival of large investors may in fact make it less likely, not more, that it will be set up in the future. It is therefore vital that the negotiations leading to such agreements comply with a number of procedural requirements ensuring informed participation of the local communities and therefore adequate benefit-sharing, and that the agreements themselves take into account the human rights which could be negatively impacted by such investment. Agreements to lease or cede large areas of land in no circumstance should be allowed to trump the human rights obligations of the States concerned. It is a joint responsibility of both the host State and the investor to respect the human rights involved. Where the investor is a private entity, it is the responsibility of its home State to ensure that these obligations are complied with.

The Special Rapporteur wishes to make the following recommendations:

1. The negotiations leading to investment agreements should be conducted in full transparency, and with the participation of the local communities whose access to land and other productive resources may be affected as a result of the arrival of an investor. In considering whether or not to conclude an agreement with an investor, the host government should always balance the advantages of entering into such an agreement against the opportunity costs involved, in particular when other uses could be made of the land available, which could be better conducive of the long-term needs of the local population concerned and with the full realization of their human rights.
2. In principle, any shifts in land use can only take place with the free, prior and informed

⁴² On the human rights-based economic development which is prescribed by the Declaration on the Right to Development, see M.E. Salomon, *Global Responsibility for Human Rights, World Poverty and the Development of International Law* (OUP, 2007), pp. 129-132.

⁴³ Report of the Working Group on the Right to Development. 7th session (conclusions) E/CN.4/2006/26, para. 59.

⁴⁴ Committee on Economic, Social and Cultural Rights, General Comment No. 12 (1999) : The right to adequate food, E/C.12/1999/5, paras. 15-16.

consent of the local communities concerned. This is particularly important for indigenous communities, in view of the discrimination and marginalization they have been historically subjected to. Forced evictions should only be allowed to occur in the most exceptional circumstances. They are only allowable under international law when they are in accordance with the locally applicable legislation, when they are justified as necessary for the general welfare, and when they are accompanied by adequate compensation and alternative resettlement or access to productive land. States should ensure, prior to carrying out any evictions or shifts in land use which could result in depriving individuals from access to their productive resources, that all feasible alternatives are explored in consultation with the affected persons, with a view to avoiding, or at least minimizing, the need to resort to forced evictions. In all cases, effective legal remedies or procedures should be provided to those who are affected by eviction orders.

3. In order to ensure that the rights of the local communities will be safeguarded at all times, States should adopt legislation protecting these and specifying in detail the conditions according to which shifts in land use, or evictions, may take place, as well as the procedure to be followed. Moreover, States should assist local communities in obtaining collective registration of the land they use, in order to ensure that their rights will be enjoy full judicial protection. Such legislation should be designed in accordance with the Basic Principles and Guidelines on Development-based Evictions and Displacement presented in 2007 by the former Special Rapporteur on the right to adequate housing (A/HRC/4/18, annex I), as well as with General Comment No. 7 (1997) of the Committee on Economic, Social and Cultural Rights on the right to adequate housing (article 11.1): forced evictions (E/1998/22, annex IV).
4. Investment agreement revenues should be used for the benefit of the local population. Investment contracts should prioritize the development needs of the local population and seek to achieve solutions which represent an adequate balance between the interests of all parties. Depending on the circumstances, arrangements under which the foreign investor provides access to credit and to improved technologies for contract farming, or against the possibility to buy at predefined prices a portion of the crops produced, may be preferable to long-term leases of land or land purchases.
5. Host States and investors should establish and promote farming systems that are sufficiently labour intensive to contribute to employment creation. Labor-intensive modes of production can be highly productive per hectare. Investment agreements should contribute to the fullest extent possible to reinforcing local livelihood options and in particular provide access to a living wage for the local population involved, which is a key component of the human right to food.
6. Host States and investors should cooperate in identifying ways to ensure that the modes of agricultural production shall respect the environment, and shall not accelerate climate change, soil depletion, and the exhaustion of freshwater reserves. Depending on the local conditions, they may have to explore low external input farming practices as a means to meet this challenge.
7. Whichever the content of the arrangement, it is essential that the obligations of the investor be defined in clear terms, and that these obligations are enforceable, for instance by the inclusion of pre-defined sanctions in cases of non-compliance. For this mechanism to be effective, independent and participatory *ex post* impact assessments should be made at pre-defined intervals. The obligations of the investor should not be limited to the payment of rents, or – in the case of land purchases – to a monetary sum. They should include clear and verifiable commitments related to a number of issues which are relevant to the long-term sustainability of the investment and to its compliance with human rights. In particular, such commitments may relate to the generation of local employment and compliance with labor

rights, including living wages, as far as waged employment is concerned, or to the inclusion of smallholders through properly negotiated outgrower schemes, joint ventures or other forms of collaborative production models ; and to the need to make investments in order to ensure that a larger portion of the value chain can be captured by the local communities, for instance by the building of local processing plants.

8. In order to ensure that they will not result increase food insecurity for the local population, particularly as the result of increased dependence on international markets or food aid in a context of higher prices for agricultural commodities, investment agreements should include a clause providing that a certain minimum percentage of the crops produced shall be sold on local markets, and that this percentage may increase, in proportions to be agreed in advance, if the prices of food commodities on international markets reach certain levels.
9. Impact assessments should be conducted prior to the completion of the negotiations, in order to highlight the consequences of the investment on the enjoyment of the right to food through (a) local employment and incomes, disaggregated by gender and, where applicable, by ethnic group ; (b) access to productive resources of the local communities, including pastoralists or itinerant farmers ; (c) the arrival of new technologies and investments in infrastructure ; (d) the environment, including soil depletion, the use of water resources and genetic erosion; (e) access, availability and adequacy of food. Only through such impact assessments, which should include a participatory dimension, can it be ensured that the contracts providing for the lease or sale of land will distribute their benefits equitably between the local communities, the host State, and the investor.
10. Indigenous peoples have been granted specific forms of protection of their rights on land under international law. States shall consult and cooperate in good faith with the indigenous peoples concerned in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.
11. Agricultural waged workers should be provided with adequate protection and their fundamental human and labour rights should be stipulated in legislation and enforced in practice, consistent with the applicable ILO instruments. Increasing protection of this category of workers would contribute to enhancing their ability and that of their families to procure access to sufficient and adequate food.

The debate on large-scale land acquisitions or leases, which this statement seeks to inform, should not distract us from acknowledging that, to a large extent, the rush towards farmland in developing countries is the result of our own failures. We have failed in the past to adequately invest into agriculture and rural development in developing countries, particularly sub-Saharan Africa. We have failed to promote means of agricultural production which do not deplete the soils and exhaust groundwater reserves. And we are failing today to establish well-functioning and more reliable global markets for agricultural commodities. It would be unjustifiable to seek to better regulate agreements on large-scale land acquisitions or leases, without addressing also, as a matter of urgency, these circumstances which make such agreements look like a desirable option.